

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LEWIS ATKINS A/K/A JAMES  
LEWIS ATKINS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53292

**FILED**

**JUN 09 2010**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of assault with a deadly weapon and battery with a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant James Lewis Atkins claims that his due process rights were violated because the State failed to gather, preserve and test evidence that would have supported his defense of accident. Atkins contends that the State should have measured the length of his vehicle, calculated its turn radius, and photographed the road surface to establish the absence or presence of skid marks. Because Atkins failed to preserve this issue for appeal, we review for plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). We conclude that Atkins has not demonstrated plain error warranting relief. First, the State did not fail to preserve evidence relating to Atkins' vehicle because the vehicle was impounded and available had the defense wished to take measurements or conduct testing. Second, Atkins has failed to make a threshold showing that evidence relating to the road surface was material because even if photographs of the heavily-traveled road surface had been

available to the defense, there was no reasonable probability of a different outcome at trial. See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (establishing two-part test for assessing claims based on the State's failure to gather evidence). Third, even assuming the evidence was material and the State was negligent in failing to gather it, Atkins would not be entitled to any additional relief because he thoroughly examined the State's witness regarding the alleged investigative deficiencies. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) (stating remedy for defendant who meets burden to show State negligently failed to gather material evidence).

Atkins next challenges two jury instructions. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We review de novo the question of whether an instruction was an accurate statement of the law. See Funderburk v. State, 125 Nev. \_\_\_, \_\_\_, 212 P.3d 337, 339 (2009). First, Atkins claims that the district court erred by instructing the jury on the statutory definition of a deadly weapon for purposes of sentencing enhancement, see NRS 193.165(6), and refusing his proffered instruction incorporating the narrower "inherently dangerous" definition of a deadly weapon because use of a deadly weapon is an element of the offenses of assault and battery, see NRS 200.471(2)(b); NRS 200.481(2)(e). We conclude that the district court did not abuse its discretion or commit judicial error because its instruction to the jury was an accurate statement of the law. See Funderburk, 125 Nev. at \_\_\_, 212 P.3d at 340 (concluding that the definition in NRS 193.165(6) is instructive in determining what constitutes a deadly weapon in connection to a prosecution for burglary, which includes a deadly weapon element).

Second, Atkins claims that the district court erred by instructing the jury on flight. This claim lacks merit because the State presented evidence from which the jury could reasonably infer that Atkins' departure immediately after the crime signified "something more than a mere going away." Weber v. State, 121 Nev. 554, 582, 119 P.2d 107, 126 (2005) (internal quotation marks omitted); see also Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

Finally, Atkins makes two claims of error regarding the district court's admission of evidence. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). On appeal, this court will not reverse the district court's decision to admit evidence "unless it is manifestly wrong." Id.

First, Atkins claims that the district court erred by admitting the injured victim's voluminous medical records in their entirety because the extent of the victim's injuries was irrelevant, prejudicial and violated his right to confront witnesses. Here, after considering Atkins' arguments, the district court ruled the medical records were relevant to show the extent of the victim's injuries to support the charge of attempted murder and had no prejudicial impact. Although the district court indicated its willingness to reconsider its ruling and redact any prejudicial material, counsel failed to identify any particular item in the records that was allegedly prejudicial. See NRS 48.025 (generally, all relevant evidence is admissible); NRS 48.035 (relevant evidence is not admissible if probative value is substantially outweighed by danger of unfair prejudice); see also Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (the Confrontation Clause bars use of testimonial statements); Flores v. State, 121 Nev. 706, 718 n.33, 120 P.3d 1170, 1178 n.33 (2005) (noting that Crawford does not

appear to affect admissibility of nonaccusatory statements in medical records admitted under NRS 51.115). We conclude that Atkins has failed to demonstrate that the district court abused its broad discretion by admitting the injured victim's medical records because he has not provided this court with any of the medical records. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) (appellant is ultimately responsible for providing this court with portions of the record necessary to resolve his claims on appeal).

Second, Atkins claims the admission of his statement to a 911 dispatcher that he wanted to speak to an attorney violated his Fifth Amendment rights. The district court denied Atkins' motion to redact this statement from the 911 call but prohibited the State from commenting on or referring to this statement at trial. We conclude that Atkins has failed to show that the district court's decision to admit the entire 911 call was manifestly wrong because references at trial to a defendant's pre-arrest, pre-Miranda invocation of his Fifth Amendment rights are not improper. See Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1236-37 (2005).

Having considered Atkins' claims and determined that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Douglas W. Herndon, District Judge  
Bailus Cook & Kelesis  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk