

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBIN DEMARIO HARDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54785

FILED

JUN 21 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 robbery. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

The district court sentenced appellant Rubin DeMario Harden to 156 months in prison with the possibility of parole after 60 months.¹ Harden appeals his conviction on multiple grounds: (1) failure to gather evidence; (2) failure to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); and (3) improper admission of prior bad act evidence. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction.

Failure to gather evidence

Harden argues that the State failed to gather evidence by not obtaining the surveillance recording that allegedly captured the robbery. We have previously adopted a two-part test to determine the prejudicial effect and appropriate remedy for failing to gather evidence. Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). First, the defense

¹The State also charged Harden with burglary; however, he was acquitted by the jury of that count.

must “show that the evidence was ‘material,’ meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different.” Id. If we determine that the evidence was material, we must then determine whether the failure to gather evidence “was attributable to negligence, gross negligence, or bad faith” and the appropriate sanctions applicable to that failure. Id. at 267-68, 956 P.2d at 115.

Here, although the surveillance recording from cameras within the store allegedly captured the robbery as it took place, we conclude that it is immaterial because the store clerk’s testimony adequately described the events of the robbery, and the defendant’s own admissions confirm the clerk’s testimony. The clerk testified that Harden entered the store and proceeded to the secured liquor aisle. The clerk opened the gate allowing Harden to enter the liquor aisle wherein he picked up two bottles of liquor and exited the secured aisle. The clerk then offered to assist with executing the transaction when Harden, while still holding the liquor bottles, pushed the clerk to the ground and left the store. Confirming the clerk’s version of the robbery, Harden admitted to the investigating police officer that he had gone to the store without any money, taken the liquor bottles, pushed the clerk to the ground, and left the store intending to sell the stolen liquor and use the proceeds to buy drugs.

While the surveillance recording may have captured the robbery, in light of the clerk’s testimony and Harden’s admissions, it is not reasonably probable that the results of the trial would have been different had the surveillance recording been presented as evidence. Moreover, Harden does not suggest, either in the district court or on appeal, that the

surveillance recording would depict the events of the crime differently than as testified to by the clerk. Therefore, we conclude that the surveillance recording is immaterial and no further analysis is required.

Brady violation

Next, Harden contends that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when it failed to produce the clerk's 911 call reporting the robbery with the other trial evidence. Determining whether the State adequately complied with Brady involves both questions of law and fact; therefore, this court will conduct a de novo review. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). "[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the [S]tate, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

If a defendant makes no request or only a general request for information, the evidence is material when a reasonable probability exists that the result would have been different had it been disclosed. However, if the defense request is specific, the evidence is material upon the lesser showing that a reasonable possibility exists of a different result had there been disclosure.

Bennett, 119 Nev. at 600, 81 P.3d at 8 (citations omitted). Additionally, if the evidence is available to the defendant through his own diligent investigation, the State has no specific duty to disclose the evidence. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

Harden argues that the day before trial he requested that the State produce the 911 call reporting the robbery. The State contends that it had no intention of introducing the call as evidence, had not subpoenaed it, and that Harden had prior knowledge of the call and could have

subpoenaed it himself. Nevertheless, prior to the commencement of trial, the State produced the 911 call. During the call, the clerk reported that the suspect was wearing a black shirt; however, on direct examination during trial, the clerk testified that the suspect was wearing a white shirt. On cross-examination, defense counsel questioned the clerk about the 911 call and, specifically, the discrepancy between the reported shirt colors.

We determine that the delay, if any, in producing the 911 call was not prejudicial to Harden. The State immediately responded to defense counsel's request to produce the 911 call, even though the defense had the ability to subpoena the same information at any time prior to trial. After receiving the recording of the 911 call, Harden's counsel had sufficient time to review it and was able to effectively cross-examine the clerk regarding the discrepancies between her 911 call and her trial testimony. Because Harden has failed to demonstrate prejudice, we conclude that there was no Brady violation.

Prior bad act evidence

Harden argues that his admission that he was under the influence of cocaine at the time of the robbery was improper evidence of a prior bad act that should not have been admitted at trial. The admission or exclusion of prior bad act evidence is reviewed for an abuse of discretion and will not be overturned absent manifest error. Fields v. State, 125 Nev. ___, ___, 220 P.3d 709, 721 (2009). NRS 48.045(1) states that "[e]vidence of a person's character or a trait of his . . . character is not admissible for the purpose of proving that [he] acted in conformity therewith on a particular occasion." However, evidence of other crimes, wrongs or acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Prior to admitting

evidence of a prior bad act, the district court must consider, outside the presence of the jury, whether “(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.” Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

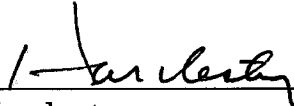
On the first day of trial just prior to opening arguments, Harden’s counsel requested to make a record outside the presence of the jury on a few matters related to trial evidence. After excusing the jury, the district court allowed counsel to proceed to construct a record wherein Harden argued that the State should not be permitted to reference Harden’s admission to police that he was under the influence of cocaine at the time of the robbery. The State represented that it was not attempting to prove that Harden was, in fact, under the influence of cocaine but, rather, that this fact was part of Harden’s admission of the crime to police and that it demonstrated his state of mind. The district court determined that the State was not attempting to prove prior bad acts through Harden’s admission and therefore allowed the State to reference Harden’s admission to police that he was under the influence of cocaine at the time of the robbery.

We agree and conclude that the State’s reference to Harden’s admission that he was under the influence of cocaine was relevant only to establish Harden’s state of mind during the commission of the crime and to offer a possible motive for the crime since Harden admitted that his intent was to sell the stolen liquor in order to purchase more drugs. The State did not offer any additional evidence or attempt to prove that Harden was, in fact, under the influence of cocaine at the time of the

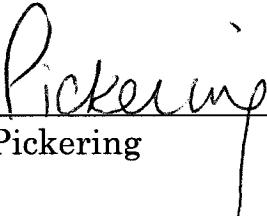
crime. Furthermore, the reference to Harden's drug use was not prejudicial and may have benefitted him by establishing that he did not have the requisite intent to be convicted of burglary—a specific intent crime for which he was acquitted. Accordingly, we conclude that the district court did not abuse its discretion in permitting the State to reference Harden's admission to police that he was under the influence of cocaine at the time of the robbery.

Having considered Harden's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk