

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK CHARLES ZANINI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55604

**FILED**

**FEB 24 2012**

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a minor under 16 years of age and one count of sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Frank Zanini was convicted of sexually assaulting a minor, J.Z., over the course of several years. On appeal, Zanini argues that (1) the district court erred in denying his motion to dismiss based on the State's failure to disclose exculpatory evidence until the eve of trial in violation of Brady v. Maryland, 373 U.S. 83 (1963); (2) the district court erred in denying his motions for mistrial based on the erroneous admission of evidence of pretrial plea negotiations; (3) the State presented insufficient evidence to support the jury's verdict; and (4) cumulative error warrants reversal of the judgment of conviction. We conclude that Zanini's contentions lack merit, and we affirm the judgment of conviction.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Exculpatory evidence

Zanini argues that the State withheld exculpatory evidence until the eve of trial in violation of Brady v. Maryland. Zanini contends that the most important of this exculpatory evidence was a recording of a

welfare check interview with J.Z. that was conducted by the police after J.Z. attempted to recant her story. Zanini asserts that this interview was intended to intimidate J.Z. into taking back her recantation, which amounts to witness tampering, and that J.Z.'s failure to give in to this pressure constitutes exculpatory evidence. Zanini argues that the State's failure to produce this recording until the eve of trial prejudiced his trial preparation; therefore, dismissal based on a Brady violation was warranted, and the district court abused its discretion in denying his motion to dismiss.<sup>1</sup> We conclude these arguments are without merit.<sup>2</sup>

This court reviews alleged Brady violations de novo. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). In Brady v. Maryland, the United States Supreme Court held that the State violates due process if it withholds exculpatory evidence. Wallace v. State, 88 Nev. 549, 551-52, 501 P.2d 1036, 1037 (1972) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). "Exculpatory evidence is defined as evidence that will explain away the charge." King v. State, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000); see NRS 172.145. "[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Browning v. State, 120

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<sup>1</sup>The district court denied Zanini's motion because the evidence at issue was provided to him before trial. We note that Zanini failed to request a continuance.

<sup>2</sup>Zanini similarly fails to meet the criteria for a Brady violation in his claim based on the State's late production of jail records, impound sheets, search warrants, and convictions for two men convicted of sexual abusing J.Z.

Nev. 347, 369, 91 P.3d 39, 54 (2004) (quoting Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)). Brady violations cannot be based on speculation. Strickler v. Greene, 527 U.S. 263, 286 (1999).

Zanini has failed show that the State violated Brady. First, the evidence at issue is not favorable to Zanini. There is no indication from our review of the transcript that the police detectives were attempting to intimidate J.Z. It is clear that the detectives were trying to determine if J.Z. was being pressured and if she felt safe in her environment. The recorded conversation did not explain away the charges against Zanini; it was not exculpatory. See King, 116 Nev. at 359, 998 P.2d at 1178. Second, the State did not withhold the evidence. Although it was produced late, the State turned the evidence over to Zanini before the trial began and as soon as the State was aware the evidence existed. Third, Zanini has failed to show that any prejudice ensued. Zanini's main argument is that knowledge of the evidence "could have entirely changed [his] trial strategy." If this were the case, his attorneys should have immediately filed for a continuance; however, they did not. Moreover, Zanini was still able to use the information received from the interview to cross-examine witnesses.

The district court properly determined that there was no witness tampering that would justify dismissal based on the detectives' interview with J.Z. Accordingly, we conclude that there was no Brady violation warranting dismissal below or reversal upon appeal.

#### Pretrial plea negotiations

Zanini argues that the district court abused its discretion in denying his motions for a mistrial on the grounds that the State violated a pretrial order and elicited evidence and testimony regarding pretrial plea negotiations. He asserts that the State referenced these negotiations

during redirect examination of J.Z. and by failing to redact their mention in the recordings of jail calls played at trial.<sup>3</sup> Zanini contends that he rejected the district court's offer of a curative instruction to avoid drawing further attention to the statements. Zanini argues that this court must find reversible error and remand this case for a new trial because the district court permitted multiple damaging references to aborted plea negotiations in violation of his rights to due process, a fair trial, and the presumption of innocence.

“Denial of a motion for mistrial is within the district court's sound discretion, and this court will not overturn a denial absent a clear showing of abuse.” Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). During his trial, Zanini moved for a mistrial based on NRS 48.125(1), which states that evidence of a plea of guilty or an offer to plead guilty is not admissible in a criminal proceeding. To determine if a discussion should be characterized as a plea negotiation, this court considers whether the accused had a subjective expectation of negotiating a plea at the time of discussion and whether that expectation was reasonable. McKenna v. State, 101 Nev. 338, 344, 705 P.2d 614, 618 (1985), abrogated on other grounds by Nunnery v. State, 127 Nev. \_\_\_, 263 P.3d 235 (2011).

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<sup>3</sup>Zanini further asserts that the State improperly referenced plea negotiations during closing arguments, when it argued that Zanini attempted to manipulate J.Z. into either recanting, not showing up, or “say[ing] this is the punishment I want him to get.” However, this passing reference to punishment was not “evidence of a plea of guilty or an offer to plead guilty” within the meaning of NRS 48.125(1).



Here, two mentions of plea negotiations are at issue. The first occurred when the State was questioning J.Z. about what Zanini's attorney said to her when she discussed recanting. The State asked "[d]id [defense counsel] tell you that based upon what was going on . . . we'll try to do what we can to prevent the trial from going forward to work out a negotiation, but the truth of the matter is they're not going to simply dismiss the charges." The second mention of a plea occurred when the State played a recording of a jail call wherein Zanini stated that he was hoping to get everything straightened out and taken care of and put in a plea to something smaller, without the word "life" in it; if there was no charge or one charge, he hoped that the judge would release him on his own recognizance, on house arrest, or on bail.<sup>4</sup>

The district court found that the mentions of pleas were not unduly prejudicial. It found that the question that the State asked J.Z. did not violate NRS 48.125 by offering evidence of a plea negotiation because there were no plea negotiations taking place at that time. The district court found that the jail call recordings were not about negotiations, but about what result Zanini was hoping for and when he was getting out of custody. In both instances, the district court offered curative instructions, which Zanini rejected.

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<sup>4</sup>Zanini also claims that the State played a different CD in court than the one that his defense counsel listened to and approved. However, a review of the record reveals that there was only one CD. We additionally note that Zanini's defense counsel admitted that she may have fallen asleep while listening to the CD; therefore, defense counsel would have partially responsible for any ensuing error.

We agree with the district court's findings that NRS 48.125 was not violated.<sup>5</sup> The fact that the jury acquitted or hung on most of the counts evidences that it carefully considered each count and was not unduly inflamed by the passing mention of a plea. We further note that there is no per se reversal rule when there is a passing mention of a plea negotiation. Accordingly, we conclude that the district court did not abuse its discretion in denying Zanini's motions for mistrial.

#### Sufficiency of the evidence

Zanini argues that the State failed to prove the crime "beyond all reasonable doubt" and that his convictions were based solely upon the unreliable testimony of J.Z. We conclude that this argument is without merit. The State did not have to prove the crime beyond all reasonable doubt, as Zanini contends.

"The standard of review in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Here, as in all criminal cases, "a verdict supported by substantial evidence will not be disturbed by a reviewing court." Id. (citing Nix v. State, 91

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<sup>5</sup>We further note that any harm resulting from these minor mentions of negotiation during J.Z.'s testimony and the jail calls was insubstantial; therefore, even if we had found that the statements that Zanini complains of were evidence of plea negotiations, he has failed to show that those statements were "so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury." See Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983).

Nev. 613, 614, 541 P.2d 1, 2 (1975)). The weight and credibility given to various testimony is a determination for the jury. Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

Although Zanini claims that the jury relied solely on J.Z.'s testimony, there was testimony by several other witnesses—including J.Z.'s friends, her aunt, and a forensics analyst—that supported J.Z.'s allegations. Notably, the forensics analyst testified that an analysis of carpet fibers and a throw blanket taken from J.Z.'s room showed semen and sperm with a DNA profile that conclusively matched Zanini's. The forensics analyst further testified that this DNA profile was rarer than one in 650 billion. Accordingly, we conclude that there was sufficient evidence to support Zanini's convictions, and reversal is not warranted.

#### Cumulative error

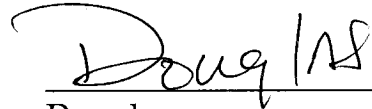
Zanini argues that cumulative error warrants reversal of his conviction.<sup>6</sup> “The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.” Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004) (quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115

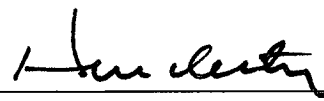
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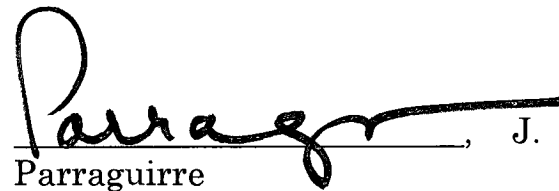
<sup>6</sup>Zanini additionally argues that the district court erred in allowing the State to file a second amended information; rejecting his for-cause challenges to two jurors; making improper evidentiary rulings regarding hearsay, expert testimony, incomplete and misleading testimony, and inflammatory and prejudicial testimony; and by restricting his defense by limiting his cross-examination of J.Z., failing to let him play a recording of an interview in its entirety, limiting the scope of voir dire, and denying his request to adjourn to discuss whether to testify. We have carefully considered each of Zanini's remaining arguments, and we conclude that they are without merit.

(2002)). As discussed above, Zanini's claims of error have no merit. Therefore, there was no cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk