

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN DEANDRE RICHARD A/K/A  
MARVIN BLACK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56647

**FILED**

**JUN 08 2011**

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

First, appellant Marvin Deandre Richard contends that his due process rights were violated when the State failed to provide timely discovery of the video recording of his police interview. He argues that this untimely discovery violates Brady v. Maryland, 373 U.S. 83 (1963), and its progeny and asserts that the district court should have dismissed the charges or granted his motion for a continuance. We conclude that the untimely discovery did not violate Brady because the evidence was provided before the start of trial, it was not favorable, and it was not material. See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (identifying the components of a Brady violation). Further, the district court did not abuse its discretion by denying Richard's motions for dismissal or continuance because Richard failed to show that the State acted in bad faith or that he was prejudiced by the untimely discovery of

the video recording of the interview. See NRS 174.295(2); Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001).

Second, Richard contends that “[t]he State failed to preserve key evidence by not testing [his] blood-alcohol content on the night of the incident” and thereby deprived him of due process by preventing him from presenting an adequate defense at his trial. We construe this claim of error as a claim that the State failed to collect evidence, see Daniels v. State, 114 Nev. 261, 266, 956 P.2d 111, 114 (1998), and, because Richard failed to present this claim in the court below, 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 Richard has failed to make a threshold showing that the blood evidence was material and the State’s failure to gather this evidence was the result of negligence, gross negligence, or bad faith, see Daniels, 114 Nev. at 267-68, 956 P.2d at 115 (establishing two-part test for assessing claims that the State failed to gather evidence), and therefore he has not demonstrated plain error.

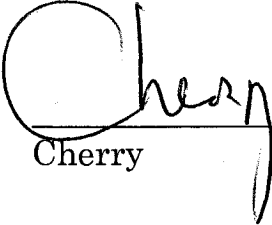
Third, Richard contends that the district court erred by admitting the testimonial statements of the deceased victim in violation of the Confrontation Clause. See U.S. Const. amend. VI. He specifically claims that the district court erred by admitting a recording of the victim’s 911 call, the victim’s statements to the responding police officers, and the victim’s statements to the attending emergency medical technicians. We review Confrontation Clause questions de novo. Chavez v. State, 125 Nev. \_\_\_, \_\_\_, 213 P.3d 476, 484 (2009). We conclude that the deceased victim’s statements were admissible and not subject to the Confrontation Clause for two reasons: the totality of the circumstances demonstrate that they were nontestimonial statements made during an ongoing emergency, see

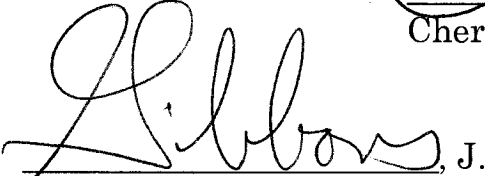
Davis v. Washington, 547 U.S. 813, 822 (2006); Harkins v. State, 122 Nev. 974, 983-87, 143 P.3d 706, 712-14 (2006), and they plainly fell within the dying declaration exception to the Confrontation Clause, see NRS 51.335; Harkins, 122 Nev. at 980-82, 143 P.3d at 709-11. Accordingly, the district court did not err by admitting these statements into evidence.

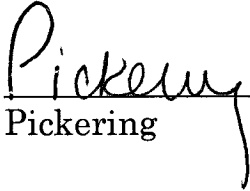
Fourth, Richard contends that the cumulative effect of the State's failure to comply with discovery obligations, the State's failure to collect blood alcohol evidence, and the district court's admission of prejudicial evidence deprived him of a fair trial and due process of law. Because Richard has failed to demonstrate any error, we conclude that his contention is without merit. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

Having considered Richard's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Kenneth C. Cory, District Judge  
Justice Law Center  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk