

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD LAWRENCE MORTENSEN,

No. 35316

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 05 2001

HALETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's motion for a new trial. Appellant, Ronald Lawrence Mortensen, is serving two consecutive terms of life in prison without the possibility of parole for first-degree murder with the use of a deadly weapon.

Daniel Mendoza was shot and killed on December 28, 1996. Mortensen and Chris Brady, off-duty police officers, were in Brady's Dodge pickup at the time of the shooting. At trial, Mortensen claimed Brady was the shooter and Brady claimed Mortensen was the shooter. On May 14, 1997, Mortensen was convicted by a jury of first-degree murder with the use of a deadly weapon and sentenced to life without the possibility of parole.

This court previously rejected appellant's direct appeal from the judgment of conviction and motions for a new trial.¹ On May 6, 1999, Mortensen filed an additional motion for a new trial based on allegations of newly discovered evidence. The alleged new evidence consists of information relating to drug activity and criminal behavior of Ruben Ramirez, a witness from trial. On December 3, 1999, the trial court denied Mortensen's motion. Mortensen now appeals, challenging the trial court's denial of his motion for a new trial. We conclude that the district court did not abuse its discretion by denying Mortensen's latest motion for a new trial.

¹See Mortensen v. State, 115 Nev. 273, 986 P.2d 1105 (1999).

The decision to grant or deny a new trial on the ground of newly-discovered evidence is within the discretion of the trial court.² In order for a trial court to grant a new trial based on newly-discovered evidence,

The evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.³

Mortensen must satisfy each and every prong of the test set forth above.⁴

The evidence Mortensen proposes as newly discovered is the following: On September 9, 1998, Ramirez was charged with drug distribution for an alleged buy from an undercover agent on March 10, 1997. Ramirez was arrested on this charge in January 1999. Ramirez later pleaded guilty in August 1999. In addition, Mortensen alleges that he has now learned that Ramirez was arrested on September 29, 1996, for possession of an unregistered firearm; arrested on March 31, 1997, for robbery; arrested on April 17, 1997, for domestic violence; and cited on April 25, 1997, for possession of a dangerous weapon.

Mortensen argues that the evidence of Ramirez's drug activity is strong circumstantial proof that Ramirez lied and that the group of men gathered in the alley on the night of Mendoza's shooting were there to distribute methamphetamine. Mortensen further asserts that one can logically assume that the men gathered in the alley were armed. Mortensen asserts that the newly-discovered information supports

²See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

³Id. at 406, 812 P.2d at 1284-85 (citing McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978)).

⁴See Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997); Sanborn, 107 Nev. at 406, 812 P.2d at 1284.

Mortensen's testimony that Brady, at the time he started firing, did so because of the approach of another armed man.

For the trial court to properly grant a motion for a new trial, first the evidence must be newly discovered.⁵ We conclude that only the evidence of the 1997 drug buy was newly discovered. The 1997 drug buy was an undercover investigation that did not result in Ramirez's arrest until after trial. However, the other evidence proposed by Mortensen was not newly discovered because it occurred prior to trial and could have, with the exercise of reasonable diligence, been discovered and produced for trial. Therefore, the remainder of our discussion focuses only on the 1997 undercover drug buy.

Second, the evidence must be material to the defense.⁶ At trial, Mortensen testified that it was Brady who shot Mendoza. Mortensen further testified that he asked Brady why he shot Mendoza and that Brady said, "the son-of-a-bitch had a gun." Mortensen's defense at trial included the assertion that Brady shot the victim because "someone" had a gun. While relevant, this newly-discovered evidence is not direct evidence that someone possessed a gun on the night in question. The evidence is too speculative and tenuous to be material in the context of a motion for a new trial.

Moreover, we conclude that the fourth prong, requiring that the evidence be non-cumulative, is not satisfied. The trial court, in its order denying Mortensen's motion for a new trial, found that the evidence that Ramirez was involved with drugs was cumulative. The jury was fully aware that Ramirez was a member of the 18th Street gang and that the gang was involved in drug-related activities. We conclude that the district court's determination is supported by the trial record and does not constitute an abuse of discretion.

Furthermore, evidence of Ramirez's drug activities would not have rendered a different result probable upon retrial since it was highly speculative. The jury was fully aware at trial of the dispute between Mortensen and Brady. We conclude that the introduction of Ramirez's background does not make Brady's testimony any more or less credible.

⁵See Sanborn at 406, 812 P.2d at 1284-85.

⁶Id.

Finally, the evidence must be "not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable."⁷ The evidence relating to Ramirez' background is being used in such an attempt and, while Ramirez is an important witness, we conclude that this information about his background would not make a different result more reasonably probable upon retrial.

At trial, Ramirez testified that he was about thirty-five to forty feet from Brady's truck at the time of the shooting. He also testified that he was standing outside smoking a cigarette less than fifteen feet from the victim. Ramirez further testified that the shooter was laughing and described him as "more than six feet tall." In addition, Ramirez testified that he got a good look at the passenger, that it was not possible that the driver had fired the gun and there was no question in his mind who had fired the gun. Ramirez identified Mortensen as the shooter.

The State called several eyewitnesses at trial. Five witnesses gave similar descriptions of the shooter, describing him as a large, white male who wore glasses and was the passenger in the truck.⁸ Another witness, Eduardo Rodriguez, identified Mortensen as the shooter. In summary,

It was established that Mortensen was six feet, two inches tall and weighed 220 pounds, while Brady was five feet, nine inches tall and weighed 165 pounds. It was also established that Mortensen wore glasses on the night of the shooting. No witnesses identified Brady or anyone else as the shooter.⁹

Furthermore, forensic evidence also implicated the defendant. A forensic expert delivered expert testimony that was consistent with the testimony of five eyewitness. Thus, the jury considered evidence in addition to Ramirez's testimony regarding whether Brady or Mortensen was the shooter.

⁷Sanborn, 107 Nev. at 406, 812 P.2d at 1284.

⁸See Mortensen, 115 Nev. at 278, 986 P.2d at 1108.

⁹Id., ev. at 278, 986 P.2d at 1109.

The introduction of evidence that Ramirez was involved in drug activity or other criminal behavior does not change the fact that Ramirez saw the shooting and identified Mortensen as the shooter. Furthermore, Ramirez was not the only witness who identified Mortensen as the shooter. The jury was aware of Ramirez's gang affiliation, and the additional evidence concerning his background does not make it more probable that the jury would find that Ramirez and the other witnesses were mistaken in identifying Mortensen as the shooter.

For these reasons, evidence of Ramirez's drug activity and criminal behavior is unlikely to lead to a different result on retrial. Therefore, we conclude that the district court did not abuse its discretion when it denied Mortensen's motion for a new trial based on newly discovered evidence. Accordingly we,

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Cremen Law Office
Attorney General
Clark County District Attorney
Clark County Clerk