

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER BENITO-VICTORIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58866

FILED

NOV 29 2012

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Handwritten Signature
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of multiple charges of sexual assault and lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant Javier Benito-Victoria appeals his conviction, arguing that the district court abused its discretion by denying his motion for a new trial based upon newly discovered evidence. Because we conclude that no error occurred in this case, we affirm the judgment of conviction. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

This court will not set aside the district court's denial of a motion for a new trial absent an abuse of discretion. See State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993).

"Evidence qualifies as newly discovered if 'it could not have been discovered and produced for trial even with the exercise of reasonable diligence.'" Servin v. State, 117 Nev. 775, 791, 32 P.3d 1277, 1289 (2001) (quoting Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995)). Javier contends that the conversation between S.B. and her sister G.B.,

the victim, described in S.B.'s affidavit was "not discoverable with reasonable diligence" based on the reasoning in Mortensen v. State, 115 Nev. 273, 288, 986 P.2d 1105, 1115 (1999), and thus S.B.'s affidavit is newly discovered evidence¹.

The conversation between S.B. and G.B. was never disclosed to the defense or the State, despite their multiple interviews with S.B. prior to the trial and examination of her at trial. Similar to the evidence at issue in Mortensen, this conversation was "not discoverable with reasonable diligence" because both parties made several attempts to obtain this, or similar information, and were unable to do so. Id. at 288, 986 P.2d at 1115. However, our inquiry does not end there.

Javier claims that the evidence produced by S.B. in her letter and affidavit impeaches G.B. and, if presented to a jury, may render a different result on retrial. The district court held that S.B. lacked

¹In Mortensen, the defendant, a police officer, was convicted of first-degree murder and filed a motion for a new trial based on newly discovered evidence. 115 Nev. at 279, 286-87, 986 P.2d at 1109, 1113-14. One piece of the claimed evidence involved an anonymous tip received by the defense that a man other than the defendant had implicated himself in the murder by making statements to another police officer. Id. at 288, 986 P.2d at 1115. This court stated "this evidence was not discoverable with reasonable diligence" because the other police officer "denied knowledge of any such statements when [he was] contacted" by both the district attorney and an investigator retained by the defense. Id. Contacting the police officer was an exercise of reasonable diligence. Id. However, this court concluded that the testimony would not render a different result on guilt or innocence upon retrial, and ultimately the testimony was "insufficient to satisfy the requirements for a new trial." See id. at 288-89, 986 P.2d at 1115-16.

credibility as a witness; therefore, a different result would not be reached on retrial if her affidavit were presented to a jury.


Because the district court is in a better position to assess the credibility of a material witness, this court has held that “[m]atters of credibility . . . remain . . . within the district court’s discretion.” Ybarra v. State, 127 Nev. ___, ___, 247 P.3d 269, 276 (2011). Additionally, other jurisdictions have determined that the trial court can assess witness credibility or proffered new evidence when ruling on a motion for a new trial based on newly discovered evidence. See, e.g., Shabazz v. State, 792 A.2d 797, 806 (Conn. 2002); Webster v. State, 699 N.E.2d 266, 269 (Ind. 1998).

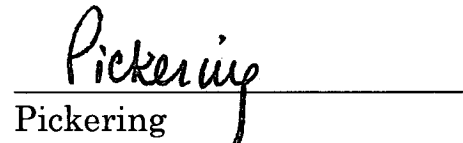
Here, the district court found that S.B. lacked credibility. Before and during trial, she and G.B. were excommunicated from their extended paternal family because of the allegations against Javier. Following Javier’s conviction, G.B. refused her father’s requests for leniency at Javier’s sentencing. Then, less than two months after the conviction, S.B. provided an affidavit in which she claimed G.B. fabricated the charges against Javier. Prior to this affidavit, the sisters were close. After the affidavit was received, the sisters barely spoke. At the evidentiary hearing on the motion for a new trial, S.B. testified for the defense, which she had not done during the trial. Additionally, she was speaking and sitting with her extended paternal family during the hearing, demonstrating she had been accepted back into the family. Thus, the district court properly determined that S.B. was not a credible witness and that her affidavit would not render a different result probable on retrial. See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (setting forth standard for granting motion for new trial based

on newly discovered evidence, including that the newly discovered evidence must be “such as to render a different result probable upon retrial”).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Saitta

 _____, J.
Pickering

 _____, J.
Hardesty

cc: Hon. Linda Marie Bell, District Judge
Robert M. Draskovich, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk