IN THE SUPREME COURT OF THE STATE OF NEVADA

GERARDO ABDUL CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60480

FILED

DEC 12 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On appeal from the denial of his June 24, 2008, petition, appellant argues that the district court erred in denying his request for a new trial based on newly discovered evidence that the State's key witness, Richard W. Hartley, perjured himself at trial.[1] This court has never analyzed whether a claim of newly discovered evidence is within the scope of a post-conviction petition for a writ of habeas corpus as delineated by NRS 34.724. *See, e.g., Snow v. State*, 105 Nev. 521, 523, 779 P.2d 96, 97 (1989) (relying ultimately only on cases decided prior to the creation of the

[1]In his petition below, appellant also raised a variety of claims regarding the ineffective assistance of his counsel, all of which the district court denied. Appellant does not challenge these rulings on appeal and has thus abandoned the claims.

post-conviction relief scheme under which the instant petition was filed). Assuming without deciding that such a claim is cognizable, to be entitled to relief, appellant needed to demonstrate that the evidence was

> 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.

Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (footnote omitted). We review the district court's ruling for an abuse of discretion. *Id.*

Appellant has failed to demonstrate that all of the evidence was newly discovered or that a different result was probable upon retrial. Hartley testified at trial that appellant, a passenger in the vehicle that Hartley was driving, suddenly fired shots out the window at one or more pedestrians while Hartley was stopped at a red light. At his evidentiary hearing, appellant presented three witnesses who each testified that Hartley told them either implicitly or explicitly that he had intentionally identified an innocent person as the shooter in order to protect himself and/or others.

First, the district court found that the testimony of two of the witnesses, Hartley's uncle and aunt, was not credible and, accordingly, that it would not render a different result probable upon retrial. Appellant's argument on appeal that they were credible because they were

family fails to demonstrate that the district court's finding to the contrary was an abuse of discretion. Further, appellant has only provided this court with brief excerpts of the trial transcripts—the testimony of two witnesses—such that we could not review the district court's findings regarding the probability of a different result upon retrial even had appellant successfully challenged the district court's credibility determination. *See* NRAP 30(b)(1); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

Second, the district found that the testimony of the third witness, an acquaintance of both Hartley and appellant, was not "newly discovered" because appellant had mentioned her first name at his August 10, 2005, sentencing hearing when one of his friends testified that Hartley was telling people that he had "got off," an apparent reference to his escaping punishment for the instant murder. Appellant argues on appeal that this was because Hartley had spoken with the "new" witness in August 2005, well after the trial. However, the testimony at the evidentiary hearing indicated that Hartley and the witness spoke on August 27, 2005. Appellant does not explain how he knew of the "newly discovered" conversation on August 10, more than two weeks before it occurred. Accordingly, he did not demonstrate that the district court abused its discretion in finding that the evidence was not newly discovered.

Finally, appellant also argues that the district court erred in denying his request for a new trial based on newly discovered evidence

that DNA evidence collected from the two guns excludes both him and Hartley. As the State argues, and appellant does not dispute, this argument was not raised below. We therefore decline to consider it on appeal in the first instance. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Connie J. Steinheimer, District Judge
Eric W. Lerude
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk