

IN THE SUPREME COURT OF THE STATE OF NEVADA

TITO BARRON-AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66899

FILED

NOV 13 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of unlawful sale of a controlled substance, three counts of trafficking in a controlled substance, and one count of conspiracy to violate the uniform controlled substances act. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.


First, appellant contends that the district court erred by giving an "incomplete" instruction regarding his procuring agent defense, which did not explain when a person was "associated in selling methamphetamine." However, appellant did not object to the instruction below or propose a more complete instruction, and under the circumstances, he fails to demonstrate plain error affecting his substantial rights. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unobjected-to error for plain error).

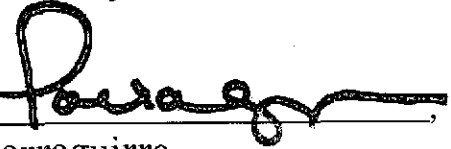
Second, appellant contends that the district court abused its discretion by denying his request for a mistrial on the grounds that the State failed to disclose that drugs were found on the informant during an administrative search. On appeal, appellant contends that this evidence should have been disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), because it raised the possibility that someone other than appellant

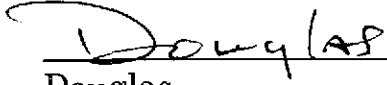
was the source of the drugs. But below, appellant only argued that the evidence was *Brady* material because it was useful for impeaching the informant regarding his drug addiction, which had been established. An appellant cannot change his theory underlining an assignment of error on appeal. *Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Moreover, as appellant himself points out, the theory he advances on appeal is inconsistent with his testimony at trial, and given that testimony, he cannot complain that the evidence was withheld, see *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) (concluding that *Brady* was not violated where evidence at issue was within the defendant's knowledge), or that it was material, see *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Scott N. Freeman, District Judge
Law Office of David R. Houston
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk