IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANNY REYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68019

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of: count 1, conspiracy to commit robbery; count 2, burglary while in possession of a firearm; counts 3, 4, and 5, robbery with the use of a deadly weapon; count 6, battery with the use of a deadly weapon; and count 7, carrying a concealed firearm or other deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Danny Reyes raises four contentions in this appeal, each related to the events at trial. First, Reyes contends that the State committed a *Brady*[1] violation by not disclosing a comment Reyes made before using the comment at trial. Second, Reyes argues his due process right to fair trial was also violated when the district court allowed the State to amend its information. Third, Reyes asserts insufficient evidence exists to support the convictions based on (a) inconsistencies in the witnesses' testimonies, and (b) the victims' inability to identify Reyes at trial. Fourth, Reyes argues that the State committed prosecutorial

[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

misconduct by arguing to the jury regarding the meaning of the beyond a reasonable doubt standard.

On July 17, 2013, Mark Castillo was visiting Nick Blumm and Steve Zanin at Blumm and Zanin's apartment.[2] Reyes, and his friend Benny Montanez and Montanez's girlfriend, visited the apartment in an attempt to buy heroin. After Zanin secured heroin, he returned to the apartment and showed it to Reyes. After some conversation about the amount, Reyes pulled out a gun, put it to the back of Zanin's head and informed Blumm, Zanin, and Castillo that he was robbing them. Reyes then made the three victims lay face-down on the floor.

While Reyes held the three victims on the floor at gunpoint, Montanez went through the victims' pockets, taking some cash and possibly an apartment key. Before leaving, Reyes commented that he felt like "smoking somebody," i.e., killing somebody, and then Reyes, Montanez, and Montanez's girlfriend left the apartment. Blumm, Zanin and Castillo then used heroin and called the police to report the crime; however, they told the police that Reyes had taken marijuana instead of heroin so as to avoid any criminal charges themselves.

On July 20, 2013, Richard Nelson, a Las Vegas Metropolitan Police Department Patrol Officer, stopped Reyes for speeding. Nelson ran a check on Reyes' identification and learned that Reyes was a suspect in connection with the July 17, 2013, incident. Nelson performed a consent search of Reyes' vehicle and found the same gun Reyes used during the

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[2]On appeal, Reyes' statement of facts coincides with the facts presented by the State at trial.

earlier incident. Reyes made the comment to Nelson that he used the gun for playing video games. The gun was an air gun described as looking like an actual revolver.

On August 13, 2013, the State filed its first information. On January 20, 2015, the first day of trial, the State filed a fourth-amended information and, two days later, a fifth-amended information. The fifth amended information was filed after all evidence was in, but before the jury deliberated. Importantly, the State removed the dollar amounts for the value of the currency Reyes was alleged to have taken, as well as the apartment key, from the information. Additionally, the State removed the co-conspirator theory it sought under the battery with use of a deadly weapon charge.

During opening statements, the State used Reyes' statement to Nelson that the gun Nelson found was used to play video games. Reyes objected to this and the court held a conference at the bench. Counsel for Reyes argued that the State had not disclosed Reyes' statement to him. The State replied that it had sent Reyes' counsel a text or email message the day before trial indicating it would use the statement. The court commented it believed that the State had sent the text or email and it overruled the objection.

The jury returned a verdict of guilty on all seven counts and the district court sentenced Reyes to serve concurrent sentences in the Nevada Department of Corrections on all counts totaling 72-256 months. Reyes now appeals.

Reyes first argues that the State failed to meet its obligation to disclose information pursuant to *Brady*. Reyes does not dispute that

the State sent a text or email regarding the statement the day before trial; rather, at trial, counsel for Reyes claimed that, due to his phone buzzing all of the time, he was unsure whether he actually received it. This court reviews de novo the claim of whether the State adequately disclosed information. *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Pursuant to *Brady*, the State is required to disclose material information favorable to the defendant. *Id.* Evidence is favorable if helps the defense present its case. *See Mazzan*, 116 Nev. at 71-72, 993 P.2d at 39-40 (holding evidence does not have to be exculpatory, but if it strengthens a defendant's case, it is favorable and material under *Brady*).

Here, Reyes contends that the State did not disclose his statement made to Nelson that the gun found in his car during the traffic stop was used to play video games. Reyes claims the statement was particularly damaging to his case because it was not believable, and by not disclosing it, the State prevented him from adequately preparing a defense. As Reyes indicates, however, the statement was not favorable to his defense as required by *Brady*; thus, there was no disclosure obligation. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("The evidence at issue must be favorable to the accused...").

Further, a *Brady* violation does not occur if the defendant could have obtained the information by exercising reasonable diligence. *Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997); *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983) (holding there was no suppression of evidence where the government provided the defense with a list of potential witnesses from which the allegedly exculpatory information could have been extracted). Here, Reyes does not allege the

State failed to disclose Nelson as a witness as required pursuant to NRS 174.234(1); thus, Reyes may have obtained the information by conducting an interview of Nelson. But even if, assuming arguendo, the State was required to disclose the statement to Reyes, it satisfied this obligation by sending a text or email to Reyes the day before trial began indicating that it intended to use the statement. Therefore, we conclude there was no *Brady* violation.

Second, Reyes argues the district court abused its discretion by allowing the State to amend the information for a fifth time. We review a district court's decision to allow an amendment of an information for abuse of discretion. *Green v. State*, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978). A district court may allow an information to be amended at any time before verdict or finding so long as no additional or different offenses are charged and the defendant's substantial rights are not prejudiced. NRS 173.095; *Green*, 94 Nev. at 177, 576 P.2d at 1123 (1978). A defendant's substantial rights are prejudiced when the amendment negates the defendant's method of defense. *Green* at 177, 576 P.2d at 1123. Reyes cites only to NRS 173.095 to support his argument, and only argues that his substantial rights were prejudiced by the amendment.

Here, the State amended the information by removing the dollar amounts of the money taken, the apartment key, and removing an alternative theory for count 6; a conspiracy to commit battery with a deadly weapon. Reyes contends that by removing the dollar amounts and the apartment key, the State made its job proving its case easier. The State, however, was not required to prove a certain dollar amount to

support the robbery charges. *See* NRS 200.380. Thus, removing the dollar amounts and the apartment key was not prejudicial.

Reyes provides no authority for the proposition that removing an alternate theory of liability prejudices a defendant. Removing an alternate theory of liability did not expose Reyes to additional liability, or negate any defense theory. *Cf. Alford v. State*, 111 Nev. 1409, 1413, 906 P.2d 714, 716 (1995) (concluding a defendant's substantial rights were prejudiced where the State offered jury instructions containing a felony-murder theory, which was not in the information, and which the defendant had no opportunity to defend against such a theory and no reason to believe the State would pursue that theory). Reyes has otherwise failed to support his argument with authority or to provide any cogent argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). We therefore conclude that the district court did not abuse its discretion in allowing the State to amend the information.

Third, Reyes argues that insufficient evidence supports the convictions because the victims' testimonies contained falsehoods and inconsistencies and because the victims had difficulty identifying Reyes at trial. A jury verdict supported by substantial evidence will not be disturbed on appeal. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). "The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (internal quotation marks omitted). "It is the jury's function, not

that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Id.* (internal quotation marks omitted).

Reyes claims the victims' testimonies contained falsehoods about whether they were using drugs on the day they reported the robbery because of their contrary pretrial statements. Reyes also claims the victims' testimonies concerning some of the dates, times, and details of the events were inconsistent. Here, in addition to the portions of the testimonies Reyes calls into question, the record contains explanations why the victims felt compelled to lie to the police about having used drugs, fearing they would face charges if they admitted to the heroin use. A rational factfinder could have found the victims' testimonies believable even though their testimonies revealed some discrepancies. *See id.* The remaining inconsistent statements go to the credibility of the witnesses which is purely a function of the jury to determine. *See id.* Therefore, we conclude there was sufficient evidence presented upon which the jury could have convicted Reyes of the charged crimes.

Reyes also claims the victims were unable to identify him at trial. Any weakness in the victims' identification of Reyes goes to the weight to be afforded the testimonies. *See Burnside v. State*, 131 Nev. ___, ___, 352 P.3d 627, 641 (2015); *Collins v. State*, 88 Nev. 9, 13, 492 P.2d 991, 993 (1972); *Page v. State*, 88 Nev. 188, 193, 495 P.2d 356, 359 (1972).

Both Zanin and Blumm, however, identified Reyes as the person who committed the robberies during a police photo lineup of possible suspects. In addition, both Zanin and Blumm made in-court identifications of Reyes as the person who robbed him. Although Castillo was unable to make an in-court identification of Reyes, he testified to

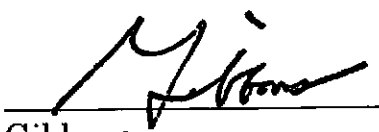
previously being able to positively identify Reyes based on police-provided photo lineup of possible suspects. Because the victims were subject to cross examination, the jury was aware of any discrepancies in the identification testimonies, and it was for the jury to determine the proper weight to give the evidence. *See Burnside*, 131 at ___, 352 P.3d at 641. Thus, we conclude a rational jury could have found the victims adequately identified Reyes. *See Bolden*, 97 Nev. at 73, 624 P.2d at 20.

Fourth, Reyes argues the State improperly described the reasonable doubt standard as the jury's perception and that the State's description was confusing and improper and constituted prosecutorial misconduct; however, Reyes did not object to this statement at trial. This court applies a two-step review when considering a claim of prosecutorial misconduct: (1) whether the prosecutor's misconduct was improper; and if so (2) whether the misconduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). When a defendant fails to preserve a prosecutorial misconduct claim, this court applies a plain error review to determine whether reversal is warranted. *Id.* at 1190, 196 P.3d at 477. The defendant must demonstrate "that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *Id.* (internal quotation marks omitted).

In describing the reasonable doubt standard during its closing arguments, *see Evans v. State*, 117 Nev. 609, 631-32, 28 P.3d 498, 514 (2001), the State told the jury: "[i]t is your perception, and it's not every doubt." The jury instruction, however, contained the statutory definition of reasonable doubt provided in NRS 175.211. Thus, any suggested impropriety was cured by a proper written jury instruction regarding

reasonable doubt. *See Quillen v. State*, 112 Nev. 1369, 1382-83, 929 P.2d 893, 902 (1996) (citing *Lord v. State*, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991) (concluding an improper reasonable doubt explanation was cured by proper written instruction of the reasonable doubt standard)). Moreover, Reyes failed to allege how his substantial rights were affected by asserting any prejudice or miscarriage of justice. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Therefore, we conclude there was no prosecutorial misconduct. Having reviewed each of Reyes' assignments of error and concluding they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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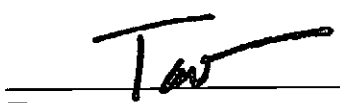

_____, J.
Tao

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