

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
JOHN EDWARD BUTLER,
Respondent/Cross-Appellant.

No. 37591

FILED

MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal and a cross-appeal from a district court order granting in part and denying in part a motion for a new trial.

After his conviction on two counts of open murder with use of a deadly weapon, appellant John Edward Butler moved for a new trial based on newly discovered evidence. The district court granted the motion in part and ordered a new penalty phase. We conclude that the newly discovered evidence was not material and that the district court abused its discretion in ordering a new penalty phase.

Butler and his girlfriend, Melissa Hack, were members of a racist skinhead group. The murder victims were two young men who were members of a rival, antiracist skinhead group. The State presented evidence at trial that on the night of the murders, Hack and another young woman lured the two victims on an ostensible date into the desert outside of Las Vegas, where Butler and at least one other man ambushed the victims and shot them dead. Carolyn Trotti testified for the State and identified Hack as one of the two women seen with one victim a few hours before the murders. Near the end of the guilt phase of Butler's trial, Trotti informed prosecutors that she had seen the second woman involved in the

murders. The woman she identified was Katie Wilson. Wilson had testified for the defense as an alibi witness.

The jury found Butler guilty and returned sentences of death. Butler moved for a new trial after learning about Trotti's identification of Wilson. Butler asserted that the State had been obligated to provide him with this information and that if he had known that Trotti had identified Wilson as the second woman, he would have been able to impeach Trotti's credibility. The district court concluded that there was no reasonable probability that the withheld evidence would have made a difference in the guilt phase of the trial. However, the court ordered a new penalty hearing "[b]ecause of the failure of the District Attorney's office to provide that information to the defense and giv[e] them the opportunity to use it, for whatever purpose they might be able to use it."

Butler alleges that the defense interviewed several witnesses before trial who confirmed the whereabouts of Wilson on the night of the murders. He states that if the defense had known of the identification made by Trotti, these witnesses would have been called to show that Trotti was mistaken. According to Butler, Trotti was the only witness for the State who did not receive some kind of benefit for her testimony. He contends that if her credibility had been undermined, it is unlikely the jury would have convicted him. He concludes therefore that the district court should have granted him a complete new trial.

We disagree. First, Butler's argument is based on unsound premises. Trotti was not the only disinterested witness for the State. Butler ignores the ATV riders who testified that he was at the crime scene just hours after the murders occurred and the witness who corroborated Trotti's identification of Hack. Butler also assumes that his witnesses

would have convinced the jury not to believe Trotti's testimony. This assumption is dubious. Our reading of the record indicates that it is much more likely the jury would have believed Trotti, not the defense witnesses, and concluded that Wilson was involved in the crimes. Second, even assuming that the jury would have found that Trotti misidentified Wilson, we conclude that there were insufficient grounds for a new trial, either guilt or penalty phase.

A district court may grant a new trial on the ground of newly discovered evidence.¹ To warrant a new trial on this ground, 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.²

The decision to grant or deny a new trial is within the district court's discretion, and this court will not reverse absent abuse of that discretion.³

The evidence in question here does not establish grounds for a new trial. It does appear to be newly discovered, undiscoverable even with reasonable diligence, noncumulative, and the best the case admits. However, it does not satisfy the three remaining factors, which require it

¹NRS 176.515(1).

²Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).

³Id. at 923, 944 P.2d at 779.

to be material to the defense, to render a different result probable upon retrial, or to impeach a witness who is so important that a different result is reasonably probable. (These three factors are aspects of a single tenet: newly discovered evidence, including impeachment evidence, is material if it renders a different result reasonably probable.)

Even if Trotti misidentified Wilson, the evidence would still show the following: Butler was at the remote scene of the murders within hours after they were committed; he was walking well off the road in the desert in the vicinity of one victim's body; Butler admitted to a friend that he committed the murders with the help of others, including Hack; consistent with that admission, Hack was with one of the victims just hours before the murders (Hack was identified not only by Trotti but another witness); because of their violent racist views, Butler and Hack had a motive to commit the murders; Butler attempted to flee when approached by police ten days after the murders; he dropped one of the murder weapons as he fled; and he admitted to three fellow inmates that he committed the murders. This is overwhelming evidence of Butler's guilt.

Therefore, the newly discovered evidence did not make a different result in the guilt phase reasonably probable. Nor can we discern how the evidence would make a different result reasonably probable in the penalty phase. Trotti's alleged misidentification of Wilson in no way mitigates Butler's crimes.⁴

⁴The State also argues that the district court erred because the evidence in question is relevant only to residual doubt and a capital defendant has no right to revisit issues of guilt during the penalty phase. This argument misses the mark. To the extent that the evidence creates

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In ordering the new penalty phase, the district court cited our opinion in Lay v. State,⁵ but did not explain how Lay applied. In Lay, the State violated Brady v. Maryland⁶ by failing to provide the defense with evidence that a witness for the State had made earlier statements that directly contradicted her trial testimony, which identified the defendant as the killer. This court reversed and remanded for a new trial, concluding there was a reasonable probability of a different result if the defense had been able to impeach the witness with her prior inconsistent statements.⁷ By contrast, as discussed above, impeachment of Trotti in this case, even if successful, would have had essentially no effect on the result, particularly in the penalty phase.

The district court appears to have acted out of an excess of caution in ordering the new penalty phase and out of concern with the prosecutors' failure to divulge the evidence in question to the defense. We share this concern. Because the evidence was not exculpatory or material, the failure to reveal the information did not violate Butler's due process rights under Brady. Nevertheless, the prosecutors' conduct is troubling. NRS 174.295(1) provides that if a party discovers additional material during trial which is subject to discovery, it shall promptly notify the other

... continued

any doubt as to Butler's guilt, the doubt is not residual because it stems from newly discovered evidence, not evidence already presented in the guilt phase.

⁵116 Nev. 1185, 14 P.3d 1256 (2000).

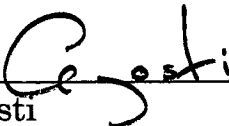
⁶373 U.S. 83 (1963).

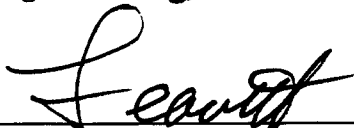
⁷See 116 Nev. at 1196-200, 14 P.3d 1263-66.

party or the court of the existence of the material. Before trial, the district court ordered the State to provide the defense with information on other possible suspects. In disregarding this ruling, the prosecutors unnecessarily gave rise to the issue and litigation disposed of here.

We ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Sciscento & Montgomery
Clark County Clerk