IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY W. HARLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83552

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial based on newly discovered evidence. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge. Appellant Kody W. Harlan argues that newly discovered evidence warrants a new trial. We disagree and affirm.[1]

Following a jury trial, Harlan was convicted of first-degree murder with use of a deadly weapon, robbery with use of a deadly weapon, and accessory to murder with use of a deadly weapon. At trial, one witness testified that there was a discussion about "doing a lick" (committing a robbery), where only codefendant Jaiden Caruso made comments about intending to commit robbery. The witness did not mention a robbery in his initial police statement and first reported that discussion in a pretrial interview with the prosecutor. The defense cross-examined the witness on the inconsistency, and the witness testified that the police did not ask him about the robbery, that his testimony was accurate, and that the prosecutor did not direct him to testify in any particular way or to any particular facts that were not accurate. After trial, Harlan learned that the witness did not

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

volunteer that he heard a plan to commit a robbery, but rather reported that part of his account in response to the prosecutor's question that other witnesses reported hearing about a robbery discussion.

Harlan first argues that the fact of the witness's first reporting the robbery discussion in response to a question by the prosecutor in their pretrial interview constitutes newly discovered evidence, meriting a new trial under NRS 176.515. To warrant a new trial on this basis, Harlan must present evidence that is "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); *cf. Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 110 (1988) (observing that "courts have uniformly held that the moving party bears a heavy burden" on a motion for a new trial on newly discovered evidence). A new trial will not be ordered where the movant has failed to show any one of these factors. *State v. Seka*, 137 Nev. 305, 313, 490 P.3d 1272, 1278 (2021). We review the district court's order granting or denying a new trial for an abuse of discretion. *Sanborn*, 107 Nev. at 406, 812 P.2d at 1284.

The evidence identified here does not warrant a new trial. First, the evidence was not material nor was it likely to render a different result reasonably probable on retrial. That the witness first described the robbery discussion in response to the prosecutor's question does not render his account not credible, and Harlan's suggestion that the witness's

testimony regarding the robbery discussion was at the prosecutor's behest and thus inaccurate is repelled by the record, given that the witness attested that his trial testimony accurately reflected his recollection. Further, the evidence was readily available with the exercise of reasonable diligence, given that the witness was cross-examined about first reporting the robbery discussion in his pretrial interview with the prosecutor.

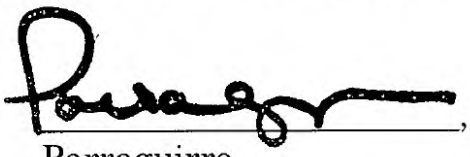
Harlan next argues that the State withheld information about the prosecutor's question in the pretrial interview and thus violated *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* claim requires a showing that the evidence is favorable to the claimant, the State withheld the evidence, and the evidence was material. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012). Where the defense has not specifically requested the evidence at issue, as here, it is material "when there is a reasonable probability that the result would have been different if the evidence had been disclosed." *Id.* at 202 & n.7, 275 P.3d at 98 & n.7 (internal quotation marks omitted). Just as the evidence was not material or likely to bring about a different result for purposes of NRS 176.515, it was not material for purposes of Harlan's *Brady* claim.

Lastly, Harlan argues that the State violated NRS 174.235 by not memorializing the witness's pretrial interview and providing it to the defense. NRS 174.235(1)(a) saliently requires the State to produce copies of "any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State." Even if an alleged violation of this statute may be raised on appeal from an order denying a motion for a new trial, the statute does not affirmatively require the State to record any and all interactions it has with witnesses it may call to testify. We decline Harlan's invitation to expand its scope and rewrite

the statute from the bench. *Cf. Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

For the reasons set forth in this order, we conclude that Harlan is not entitled to relief.[2] We therefore

ORDER the judgment of the district court AFFIRMED.[3]



_____, C.J.
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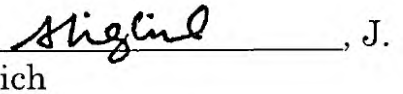

_____, J.
Stiglich

_____, Sr.J.
Gibbons

cc: Hon. Tierra Danielle Jones, District Judge
Jean J. Schwartzer
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]Harlan also argues that cumulative error warrants relief. Even if an order denying a motion for a new trial could be challenged by arguing cumulative error at trial, Harlan has not shown any instances of error to cumulate.

[3]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.