IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEX PHILLIP YANKO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84963

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with use of a deadly weapon and attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Appellant Alex Phillip Yanko's convictions stem from an incident in which he shot Kenneth Miller and Edward Budd. Miller survived, but Budd died from his injuries. Yanko argued the shooting was in self-defense. At trial, part of the evidence presented by the State involved converted home surveillance videos from a neighbor's residence that had been disclosed pre-trial and unconverted videos that were disclosed during the trial. A juror was also dismissed during the trial after recognizing a witness. After deliberations, the jury found Yanko guilty of first-degree murder with use of a deadly weapon and attempted murder with use of a deadly weapon. Yanko now appeals, arguing that (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely disclose the unconverted video files; and (2) the district court erred by dismissing the juror.

The State did not violate Brady because the unconverted videos did not contain material or exculpatory evidence

There were ten unconverted video files collected from a home security camera at a residence across the street from the crime scene.

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Ultimately, a detective identified three unconverted video files which depicted events at or around the time of the shooting. Because of issues with how the security camera operated at nighttime or in low-light conditions, the video and audio tracks on the unconverted video files did not match up, leaving the unconverted video files unwatchable in real time. Therefore, the detective converted the three unconverted video files to adjust and synchronize the speed of the video tracks so that they played at the same speed as the audio tracks. Once watchable, these three converted videos were provided to the homicide detectives and, ultimately, to the prosecution and defense; none received or were aware of the existence of any of the original ten unconverted video files before trial.

Yanko first argues that the State violated *Brady* by failing to timely produce the unconverted video files because the converted video files were altered, modified, and manipulated. The district court granted a short continuance to review the unconverted videos files. Yanko acknowledges that he failed to object to the unconverted videos files below, the videos were played for the jury and provided to them for review, and that he did not raise any *Brady* concerns below. Yanko also utilized the unconverted video files in his defense during his closing arguments. But Yanko now contends that turning over the unconverted videos during the trial was untimely and prejudicial, because it hindered his investigation and cross-examination of witnesses.

"[W]hether the state adequately disclosed information under *Brady* . . . requires consideration of both factual circumstances and legal issues [which] this court reviews *de novo*." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). However, when a defendant raises an issue on appeal that was not raised before the district court, the appellate

court may review for plain error. *See* NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (explaining that this court reviews unpreserved or forfeited errors for plain error). Under the plain error standard, such an error "does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez*, 124 Nev.at 1190, 196 P.3d at 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Under *Brady*, a prosecutor is required "to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." *Mazzan*, 116 Nev. at 66, 993 P.2d at 36. The three components of a *Brady* violation are (1) the evidence must be favorable to the defendant; (2) the State must have withheld the evidence, either intentionally or inadvertently; and (3) the evidence was material such that the defendant was prejudiced by the State's act of withholding the evidence. *Id.* at 67, 993 P.2d at 37. "[E]vidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." *Id.* at 66, 993 P.2d at 36. There must be "a reasonable possibility that the omitted evidence would have affected" and undermined the outcome of the trial. *Id.* (citing *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996)); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

There were two categories of videos involved in the trial. The first category involved the three converted videos that were disclosed prior to trial. The second category involved the unconverted videos that were disclosed during the trial. To better address Yanko's arguments, it is easier to address the unconverted video evidence in two parts. First, there were

three unconverted video files (hereinafter, Set 1) that were not disclosed until trial and they were related to the three converted video files that were disclosed before trial. Second, there are the seven unconverted video files that were never converted and also were not disclosed to either Yanko or the State until trial (hereinafter, Set 2).

The State did not violate Brady by failing to disclose the Set 1 video files until trial

We first conclude that the State did not violate *Brady* by disclosing the Set 1 video files at trial because those files are not favorable to Yanko. A comparison of the converted and unconverted versions of the three Set 1 videos reveals that the only modification, alteration, or manipulation in the converted files is synchronizing the video frames per second to the audio speed: there are no changes to the actual video or audio footage in any of those files. Moreover, although the State inadvertently withheld the Set 1 videos, Yanko does not allege that any prejudice resulted from this omission. Because Yanko received the exact same video footage before the trial, and he does not allege that the unconverted video files were more favorable to him, there was no material evidence withheld. Thus, we conclude that the State did not violate *Brady* by failing to timely disclose the Set 1 unconverted videos.

The State did not violate Brady by failing to disclose the Set 2 video files until trial

The Set 2 videos, likewise, are also not favorable to Yanko. Two of the video files were not relevant as there is no footage related to either the shooting or the individuals present at the crime scene. Another two of the video files only depict the aftermath of the shooting, including the police and ambulance response. Because Yanko does not allege any misconduct

by the first responders or anything else of value in these videos, this footage does not contain anything favorable to him and is not a *Brady* violation.

At best, there are two video files which could have provided Yanko with more information, as they show Miller, Budd, and a few other individuals drive up to the crime scene and begin unloading their truck. However, Yanko fails to explain how he was prejudiced by not having this footage previously. For example, on cross-examination, Yanko was questioned about the video where he agreed that the items being unloaded from the truck were not the items he was attempting to retrieve at the time of the encounter. Without a showing of actual prejudice, we conclude that Yanko has failed to establish that the State violated *Brady* by disclosing these videos at trial.

Lastly, Yanko argues that one of the video files surprised him by depicting a person with a backpack leaving the scene; Yanko claims that the video could have aided his theory of self-defense because the person could have taken away the gun or other related evidence in the backpack. Yet, on cross-examination, Yanko testified neither Miller nor Budd grabbed him, attacked him, or pointed a gun at him, nor did he allege any other weapons were used. Rather, Yanko testified that Budd had "crazy eyes and [was] snarling" at him and that was what caused him to fear for his life. Equally important, the unconverted videos show that the person with the backpack does not actually leave the scene; rather, the videos show him exiting the house after the police arrive and then interacting with the police. Moreover, in reviewing all the videos, it is clear that the person's interactions in the videos are only with the police. There is no footage of that person leaving the scene or at any time interacting with the area around where the shooting occurred or picking up items from Miller's or

Budd's body. Thus, Yanko's characterization of this person's presence and actions are belied by the video evidence. There was no new surprise evidence Yanko was not aware of and he has not established how such evidence is favorable to him.

Further, all but one of the Set 2 videos was played to the jury and every file was admitted as evidence for the jury to review. Additionally, Yanko relied on the unconverted video footage in his closing argument, including by alleging that the police had manipulated the evidence. Yanko has failed to show how the State's act of withholding the Set 2 videos "undermines confidence in the outcome of the trial." *Mazzan*, 116 Nev. at 66, 993 P.2d at 36. Therefore, we conclude that the State did not violate *Brady* by disclosing the Set 2 videos at trial.[1]

The district court did not err in dismissing the juror

Yanko argues that the district court improperly dismissed the juror pursuant to NRCrP 17(6)(D) because the juror stated she was able to return a verdict free of favoritism. Yanko contends that the juror was not certain that she knew the witness and even stated that she never met the witness, let alone spoke with her. The State contends that the juror was appropriately dismissed because she recognized the witness and even raised it as an issue to the district court herself. The State further points out that the juror did have biases as she stated that her knowledge of the lifestyle her cousin was living at the time she dated the witness had a bearing on her assessment of the witness's credibility.

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[1]Similarly, because Yanko fails to identify how he was prejudiced by the late disclosure of the unconverted video files, we conclude that his claim that he did not have an adequate opportunity to review those files is not a basis for relief.

"District courts have broad discretion in deciding whether to remove prospective jurors for cause." *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (internal quotation marks omitted), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). "The test for evaluating whether a juror should have been removed for cause is whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* (internal quotation marks omitted).

"A challenge for cause is an objection to a particular juror and shall be heard and determined by the court." NRCrP 17(6). Grounds for a challenge for cause include "[t]he existence of any social . . . or other relationship between the prospective juror and any . . . witness . . . which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict that would be free of favoritism." NRCrP 17(6)(D).

Yanko mischaracterizes the juror's showing of bias and lack of impartiality by minimizing the questioning which revealed that although she was unsure if she knew the witness, she did have biases about the witness's lifestyle based on her connection to her cousin, even though she stated that she could be fair and impartial. Yanko's framing of the juror's assertion that she would be fair and impartial overlooks the content of her actual answers. The juror recognized the witness from a quick glance while passing her in the hallway and she immediately raised her concerns with the marshal. It must also be noted that the State confirmed with the witness that the witness had in fact dated the juror's cousin. Additionally, the juror stated that she had submitted a question for the witness "trying to kind of see what her background was because [her] cousin's in that same

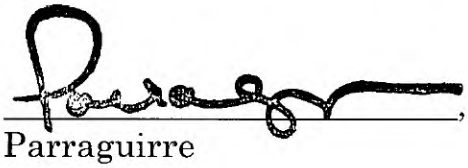
lifestyle." The witness had just testified about her lifestyle of partying and drug usage. It was reasonable for the district court to be concerned that the juror would be biased and troubled by her acting on her independent knowledge and those biases by asking the witness a question. *See also* NRCrP 17(6)(N) (a juror may be removed due to "[c]onduct, responses, state of mind, or other circumstances that reasonably lead the court to conclude the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instruction and oath"). These comments, coupled with the juror's explicit comment about the witness's lifestyle, were valid grounds for the district court to grant the State's challenge as it indicated her potential lack of impartiality.

Thus, we conclude that the district court did not err in finding that the "juror's views would prevent or substantially impair the performance of his [or her] duties as a juror" and in dismissing the juror for cause. *See Weber*, 121 Nev. at 580, 119 P.3d at 125 (internal quotation marks omitted). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

cc: Hon. Jacqueline M. Bluth, District Judge
Leventhal & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk