

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

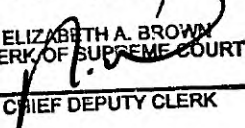
ANDREAS GABRIEL YESCAS, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87334-COA

FILED

JUN 20 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Andreas Gabriel Yescas, Sr. (Yescas) appeals from a judgment of conviction, pursuant to a jury verdict, of ownership or possession of a firearm by a prohibited person. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

In November 2021, Alex Yescas (Alex) called law enforcement officers to his apartment because his brother, Yescas—a convicted felon who did not live at the apartment—was allegedly walking around with a firearm.¹ Upon law enforcement’s arrival, Alex confirmed that Yescas possessed a “ghost gun.”² Before the officers entered Alex’s apartment, Yescas walked out with his hands up, and the officers immediately detained him. No weapon was found on Yescas’ person.

While Yescas was detained outside, an officer followed Alex and his mother, Donna Wyrens, into the apartment. Wyrens, who did not live in the apartment, pointed at a red footstool, and indicated that the firearm was

¹We do not recount the facts except as necessary for our disposition.

²Ghost guns are “unmarked, untraceable guns” that can be built at home and are “not subject to any form of background check under federal guidelines.” *Sisolak v. Polymer80, Inc.*, 140 Nev., Adv. Op. 30, 546 P.3d 819, 823 (2024).

inside.³ The officer grabbed the firearm with her bare hands before passing it to a colleague, who also handled the firearm without gloves. A third officer, with gloves, placed the firearm into an evidence bag.

Both Wyrens and Alex provided written statements indicating that Yescas possessed the firearm and was walking around the apartment with it. They also gave consistent oral statements, captured on the officer's body camera. Yescas was thereafter arrested and charged with one count of owning or possessing a firearm by a prohibited person. That same day, the officers submitted an examination request to test fire the "ghost gun" to ensure it was a working firearm. The "ghost gun" was tested three days later and confirmed to be a working firearm.

Prior to his bail hearing, Yescas called Wyrens from jail. During the recorded phone call Yescas stated "I got caught with a gun, yeah I'm wrong, but I didn't hurt anybody . . . I just, I shouldn't have had it, right?" Further, when Wyrens told Yescas that she showed the officers where the firearm was located he responded, "you shouldn't have d[one] that. Cause you made a charge on me by doing that."

In March 2022, before the preliminary hearing but after the test-firing was completed, the State submitted a second examination request to test the firearm for latent fingerprints and DNA. The Washoe County Sheriff's Crime Laboratory responded that the firearm could not be processed for latent fingerprints or DNA because it had already been test fired.

At the preliminary hearing, Wyrens testified that she previously lied to law enforcement regarding Yescas' possession of the firearm. She

³We note that the terms "footstool" and "tote" are used interchangeably throughout the record to indicate where the firearm was found. For clarity and consistency, we use footstool.

stated that Yescas insisted on talking when Wyrens was very tired, so she told Alex that Yescas had a firearm so that Alex would call law enforcement. Wyrens testified that she was the true owner of the firearm, and that she placed it in the footstool prior to law enforcement's arrival. Despite her testimony, the justice court found probable cause to support the charge against Yescas and bound Yescas over to the district court.

Before trial, Yescas moved for dismissal of the charge, or in the alternative a jury instruction based on the State's failure to preserve the latent fingerprints and DNA evidence on the firearm. Yescas argued that the evidence was material to his defense that he was not in possession of the firearm and that he was unduly prejudiced by the State's bad faith conduct in failing to preserve the evidence. Following a hearing on the motion, the district court focused on the element of materiality. The court found that any potential latent fingerprints and DNA evidence were not material, in part, because the firearm was collected from the scene where two eyewitnesses stated Yescas was in possession of the firearm. The district court further noted that any latent fingerprints and DNA evidence likely would not be exculpatory based on Yescas' recorded phone call where he admitted to possessing "a gun." Thus, the district court denied his motion to dismiss and requested jury instruction.

During the two-day jury trial, Wyrens again testified that she lied to the officers on the day Yescas was arrested when she stated that Yescas possessed the firearm, because the firearm was hers and she had placed it in the stool. Wyrens further testified that there was an airgun in the apartment, in addition to the firearm found. Alex also testified that he did not have any personal knowledge that Yescas was in possession of a firearm and only called law enforcement based on his mother's statement that Yescas possessed a firearm—contrary to his initial written and oral

statements. The State also called an expert from the Washoe County Crime Lab, who testified that if the State had requested testing for latent fingerprints and DNA at the same time it requested the test firing, the lab personnel would have first tested the firearm for latent fingerprints and DNA to preserve that evidence before they performed the test fire. The expert confirmed that once the firearm was test fired, it could no longer be processed for latent fingerprints and DNA.

Yescas testified in his defense at trial. He stated that during his phone call with Wyrens he was not discussing the firearm placed into evidence by law enforcement at Alex's apartment but instead was referring to an airgun that he had at Alex's apartment. Yescas testified that he did not know there was any other firearm in Alex's apartment, nor was he aware that the officers impounded the firearm. Further, Yescas testified that although he had purchased materials to create a "ghost gun" online, he did not purchase the materials for himself, but rather for his brother in California who made the firearm and gave it to Wyrens.

During his closing argument, Yescas argued that the State could not prove that he possessed the firearm beyond a reasonable doubt because the State did not have fingerprint or DNA evidence. Following closing, the jury deliberated for just under two hours before returning a guilty verdict, and Yescas was sentenced to 15 to 38 months in prison. This appeal followed.

On appeal, Yescas argues that the district court erred in denying his motion to dismiss based on the State's failure to preserve evidence, or, in the alternative, abused its discretion in failing to instruct the jury regarding the presumption that the missing evidence would have been unfavorable to the State. Yescas argues that because the eyewitness statements are contradictory, any latent fingerprints or DNA evidence on the firearm are

material to his defense. Further, he argues that he was prejudiced by the responding officers' failure in initially handling the firearm without gloves. In response, the State argues that the responding officers did not act in bad faith, nor was Yescas prejudiced because, given his admission on the recorded phone call, any results from testing for latent fingerprints or DNA would not have been exculpatory.

At the threshold, we recognize that Nevada law distinguishes the failure to *collect* evidence from the failure to *preserve* evidence. See *Daniels v. State*, 114 Nev. 261, 266-67, 956 P.2d 111, 114-15 (1998). However, because such standards are so closely related, the Supreme Court of Nevada has reviewed similar factual scenarios as that presented here under a failure-to-collect standard. See, e.g., *Sanborn v. State*, 107 Nev. 399, 407-08, 812 P.2d 1279 1285-86 (1991) (considering the defendant's argument that the State failed to collect and preserve evidence under the failure-to-collect standard when it failed to test a firearm for blood and latent fingerprints). Nevertheless, because both parties argue that the facts reflect a failure to preserve (versus collect), we address the State's alleged failure to preserve the latent fingerprints and DNA evidence based on party presentation. See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts generally follow the "principle of party presentation" on appeal).

This court reviews an order denying a criminal defendant's motion to dismiss and the denial of jury instructions for abuse of discretion. See *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (motions to dismiss); *Higgs v. State*, 126 Nev. 1, 21, 222 P.3d 648, 661 (2010) (jury instructions). To establish a valid failure-to-preserve evidence claim, a defendant must demonstrate "either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the

evidence was apparent before it was lost or destroyed.”⁴ *Daniel v. State*, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)). “To establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense,” and it is not sufficient that the showing disclosed “merely a hoped-for conclusion from examination of the destroyed evidence.” *Id.*

Here, the State did not act in bad faith when it requested the firearm be test fired before requesting testing for latent fingerprints and DNA evidence because the responding officers were following their policies and procedures. *See State v. Hall*, 105 Nev. 7, 8-9, 768 P.2d 349, 350 (1989) (holding that the State does not act in bad faith when law enforcement officers act in conformance with their policies and procedures). Notably, responding officer Taylor Rose testified that because the firearm was an unregistered “ghost gun” the department’s policies and procedures required it to be test fired.⁵ Additionally, the policies and procedures in the record on

⁴Compare the failure to preserve with the failure to collect, in which dismissal is appropriate when the uncollected evidence is material and the State’s failure to collect is attributed to bad faith. *Daniels*, 114 Nev. at 268, 956 P.2d at 115.

⁵Yescas also argues on appeal that the officers mishandled the firearm at the scene by touching it without gloves. We note that while the policies and procedures state that a major task of the officers is to prevent the touching of items that are likely to yield latent fingerprints, those same policies and procedures also provide that in order to maintain the safety and wellbeing of the public, officers must approach the scene in a way that will *minimize* contamination, thereby recognizing that the requirement to prevent contamination is not absolute. And, here, Officer Rose testified that she was concerned with “rendering the scene safe,” rather than whether the firearm “should be treated as evidence.” *See Hall*, 105 Nev. at 8-9, 768 P.2d at 350. Further, there is no indication that latent fingerprints and DNA

appeal do not state that testing for latent fingerprints or DNA evidence is required. In this case, because the written and oral statements from Wyrens and Alex supported that Yescas was in possession of a “ghost gun,” the State followed its policies and procedures when it requested that the firearm be test fired without first testing for latent fingerprints and DNA evidence.

Moreover, Yescas has not established that he was prejudiced by the State’s failure to preserve any potential latent fingerprints and DNA evidence on the firearm. Instead, Yescas only asserts that the latent fingerprints and DNA test results *could have* shown that the firearm belonged to someone other than him, which is insufficient to demonstrate that Yescas is entitled to relief.⁶ See *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979) (requiring more than a “merely hoped-for conclusion”). However, ownership is only part of the charge, and even if the firearm belonged to someone else, such as Wyrens, the witness statements provided the day of his arrest and his admission during the jail phone call support that he had possession of the firearm—which satisfies the element of the crime.

Although we recognize that the jury *may* have entered a different verdict if Yescas’ fingerprints or DNA were not found on the firearm, Yescas has not demonstrated a reasonable probability that testing would have yielded this result. *Daniel*, 119 Nev. at 520, 78 P.3d at 905.

evidence could not have been retrieved after the firearm had been handled by the officers, if the State had tested for them prior to test firing the ghost gun.

⁶Yescas’s argument that he was prejudiced is undermined by his closing argument that the State cannot prove he possessed the firearm beyond a reasonable doubt because the State does not have fingerprint or DNA evidence.

Similarly, Yescas cannot demonstrate prejudice here because the State also did not benefit from its failure to preserve potential latent fingerprints and DNA evidence—since it could not unequivocally prove that Yescas’ fingerprints or DNA evidence were on the firearm. *See Higgs*, 125 Nev. at 21, 222 P.3d at 661 (stating that a defendant is not prejudiced where the State does “not benefit from its failure to preserve the evidence”).

In addition, our review of the record reveals that overwhelming evidence of Yescas’ guilt was presented at trial. First, both Wyrens and Alex provided written statements at the time of Yescas’ arrest stating that he was in possession of the firearm. We note that although Wyrens and Alex testified at trial that Yescas did not have a firearm, their trial testimony was contrary to their prior written statements and body camera-captured oral statements on the day Yescas was arrested, which were also admitted into evidence at trial. *See Allen v. State*, 99 Nev. 485, 487, 665 P.2d 238, 240 (1983) (“It is a well settled rule . . . that whenever conflicting testimony is presented, it is for the jury to determine what weight and credibility to give that testimony.”). Thus, in this case, the jury was able to weigh the evidence and determine that Wyrens’ and Alex’s initial written and oral statements were more credible than their trial testimony. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (“[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.”).

Second, during the recorded phone call Yescas stated that he was “caught with a gun.” Yescas did not explain in the phone call that he was referring to an airgun, nor did he deny possessing a firearm. Again, it was for the jury to weigh the evidence and determine the credibility of Yescas’ testimony at trial. *Id.*

For these reasons, Yescas fails to demonstrate that the State either acted in bad faith when failing to preserve evidence of latent fingerprints or DNA evidence on the firearm, or that this failure prejudiced his ability to present a defense. *See Daniel*, 119 Nev. at 520, 78 P.3d at 905. Further, Yescas failed to demonstrate how such evidence would have been exculpatory based on his own admission that he was “caught with a gun” as well as Wyrens’ and Alex’s initial written and oral statements. Accordingly, we conclude that the district court did not abuse its discretion in denying Yescas’ motion to dismiss due to the failure to preserve evidence or by declining to issue a jury instruction that an adverse inference could be drawn from the State’s failure to preserve.⁷ Therefore, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁷Insofar as Yescas raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.