IN THE SUPREME COURT OF THE STATE OF NEVADA

AVERY ALLEN CHURCH, JR. A/K/A AVERY CHURCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48741

FILED

FEB 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery, two counts of robbery with the use of a deadly weapon, and two counts of impersonating a police officer. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. Appellant Avery Church, Jr., was adjudicated a habitual criminal and sentenced to serve a term of life in prison with the possibility of parole after 10 years for robbery and to serve two consecutive terms of life in prison with the possibility of parole after 10 years for robbery with the use of a deadly weapon, to run consecutively to the robbery count. Finally, he was sentenced to 12 months in prison for impersonating a police officer, to run consecutively to the other counts.

The pertinent facts are as follows: On December 22, 2004, Church and an unidentified male "arrested" Jason DeMasi and Adam Caputo and entered the home of Shirleen DeMasi, under the guise of being police officers, in order to take money and drugs from Jason DeMasi. On

March 8, 2005, Church and Roderick Gibson entered the home of Nicholas and Dominick Tardive under the guise of being police officers with a search warrant. During this incident, Church took drugs, money, and cell phones from Nicholas and Dominick Tardive and Justin Minix, a Tardive family friend.

Church raises three issues on appeal. First, Church argues that the State committed prosecutorial misconduct which forced him to testify at trial in violation of his Fifth Amendment right to remain silent. Specifically, Church contends that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing to him copies of a state witness's police records regarding a bribery scheme. Church also argues that the State failed to provide him with the phone records of a possible witness, which would have shown that the State suborned perjury at trial.

Determining whether the State adequately disclosed information under Brady involves both questions of fact and law; therefore this court will conduct a de novo review. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). A Brady violation has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the [S]tate, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Id. at 599, 81 P.3d at 8. Absent a specific request for the evidence, "evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). "Furthermore, Brady does not require the State to disclose evidence which is available to the defendant from other sources, including

diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

We conclude that Church's Brady claim lacks merit. This case involved two incidents of Church impersonating a police officer and robbing victims of money and marijuana. The first incident involved Jason DeMasi, his grandmother, and his friend, Adam. After Church was arrested and while Church was in custody, Robby Reiger, DeMasi's uncle allegedly attempted to solicit $15,000 from Church and, in exchange, the DeMasis and Adam would not testify against Church. Church argues that he should have received a copy of Reiger's arrest record in discovery because it was Brady material. According to the record, Church did not request Reiger's police records until the second day of trial. In addition, since Church was the target of the bribery scheme, he knew that these records existed and could have requested them through diligent investigation. Reiger did not testify at trial. Church failed to show that the result of the trial would have been different had the records been disclosed to him. Therefore, we conclude that Church's claim lacks merit.

Similarly, the phone records were not Brady material. Church argues that the State should have provided the phone records for Dustin Gibson, the brother of Roderick Gibson, who was involved in the incident at the Tardive residence, because these records would show that all of the victims knew Dustin Gibson. Church claims that the State received these records from the phone company and should have provided them to him. However, the records were not exclusively in the State's possession but were within the control of a third party, and Church could have

subpoenaed the records, as he did on the second of day of trial. Moreover, Church has not shown that the phone records were material. On appeal, Church provided a record of phone calls received or placed by Dustin Gibson, but he failed to explain to whom the phone numbers belonged. In addition, Church has not shown that had the telephone records been disclosed by the State, the result of the trial would have been different. Dustin Gibson was not involved in the incidents in question, and therefore, telephone records showing that he might have known the victims was not material.

Further, Church's claim that the State suborned perjury lacks merit. It is well established that a conviction secured by the knowing use of perjured "testimony is 'fundamentally unfair' and 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the [jury's] judgment.'" Jimenez v. State, 112 Nev. 610, 622, 918 P.2d 687, 694 (1996) (quoting United States v. Agurs, 427 U.S. 97 (1976)); Riley v. State, 93 Nev. 461, 567 P.2d 475 (1977). In rare cases where the "character of material evidence is false," a defendant is denied due process regardless of whether the State knew the evidence was false. Riley, 93 Nev. at 462, 567 P.2d at 476 (emphasis added).

Church has failed to show that the State knowingly allowed witnesses to perjure themselves at trial. Church has only shown that the police subpoenaed Dustin Gibson's phone records; he has not shown that the police actually received the phone records or that the State reviewed them in preparing for trial. Further, Church has failed to show that the alleged perjured testimony related to material evidence. As noted above,

Dustin Gibson was not involved in these incidents and it does not necessarily follow that because the witnesses knew Dustin Gibson, they also knew his brother Roderick Gibson. Accordingly, Church has failed to show that the State suborned perjury or violated his due process rights.

Second, Church contends that the restrictions on his visitation with counsel amounted to a denial of counsel. In particular, he argues that only allowing visitation on the second and fourth Mondays of the month and not allowing him contact visits with counsel deprived him of counsel. Church argues that he was prejudiced by these restrictions because counsel was unable to timely subpoena phone records, "metro records," United States Attorney records, ambulance records, and other unspecified pieces of evidence.[1]

The Sixth Amendment guarantees the right to counsel at all critical stages of the prosecution. "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11 (1983).

We conclude that Church was not denied counsel at any critical stage. The restrictions placed on visitations may have made it

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[1]Church also argues that the "prison should have been put to proof" by the district court pursuant to Turner v. Safley, 482 U.S. 78 (1987), because he was denied contact visits with counsel. Turner created a framework for considering 42 U.S.C. § 1983 claims and has not been extended to claims of denial of counsel in criminal cases. Therefore, Turner is unpersuasive here.

more difficult to communicate with counsel, but Church was not denied the opportunity to discuss his case with counsel. In addition, by Church's own admission, he could have requested more visits with counsel through the warden. Church had written the warden to inquire about extra visitation and was told that "video conferences, telephone conferences, or visits can be applied for through the [the warden's] office for any time of the week." Moreover, according to the record, Church's counsel visited him in prison. Church's first counsel visited him twice and both times Church refused to talk about the particulars of his case. Church's second counsel, or counsel's staff, visited Church twice as well. Additionally, many of the items of evidence that Church claims he was not able to investigate were items that could be gleaned from the discovery provided to Church. Therefore, we conclude that Church's claim that he was denied counsel lacks merit.

Third, Church argues that he should not have been adjudicated a habitual criminal. Church argues that the district court erred by reviewing "records" outside of the court record. It appears that the district court obtained the court records pertaining to all of Church's prior convictions. The district court, at sentencing, specifically stated that he reviewed the "records" of Church's prior convictions but did not elaborate on what "records" meant. Church now alleges that the district court may have reviewed district attorney files, since the judge previously had been the district attorney, rather than reviewing court files. Church also argues that prejudice should be presumed because the records that the district court reviewed should not have been considered in

adjudicating the habitual criminal allegation. Church failed to object to the district court's examination of the records of his prior convictions. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). Generally, an appellant must show that he was prejudiced by a particular error in order to show that it affected his substantial rights. Id. Church has failed to show that the district court's actions were error or that any error prejudiced him. He merely states that prejudice should be presumed, but he does not provide any authority for that statement. Moreover, the State alleged a sufficient number of prior convictions to qualify Church for habitual criminal status. Church did not object to the sufficiency of any prior convictions. Accordingly, Church's claim lacks merit.

Church also contends that the district court erred by determining that he should be adjudicated a habitual criminal based only on his prior convictions and the district court did not review any other information in making that decision. This claim is belied by the record. The district court has the discretion to dismiss a count of habitual criminality, and "[t]he decision to adjudicate a person as a habitual criminal is not an automatic one." Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). See also NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 153 (2007). "[A] district court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the

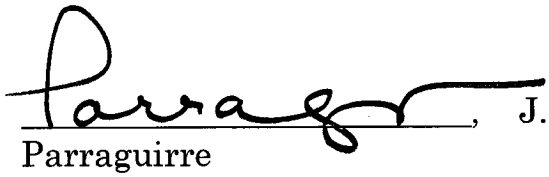
like in determining whether to dismiss such a count." O'Neill, 123 Nev. at 16, 153 P.3d at 43. It is not required that the district court "utter specific phrases or make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal." Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000). "'Thus, as long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law.'" O'Neill, 123 Nev. at 16, 153 P.3d at 43 (quoting Hughes, 116 Nev. at 333, 996 P.2d at 893-94).

Here, the district court considered several pieces of mitigating information, including Church's "Memorandum in Mitigation of Habitual Criminal." The district court also allowed Church and his cousin to speak at the hearing. Church has not identified what additional information the district court should have considered. We conclude that the record demonstrates that the district court did not abuse its discretion in sentencing Church as a habitual criminal.

Additionally, Church claims that district courts always impose habitual criminal status every time the State asks for it. This claim lacks merit. Church has not provided any evidence to substantiate this bald assertion. Because Church has not provided authority or cogent argument, we conclude that he failed to demonstrate that the district court abused its discretion in adjudicating him a habitual criminal on this basis.

Having considered Church's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[2]



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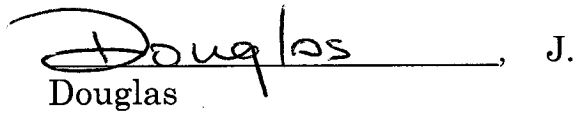

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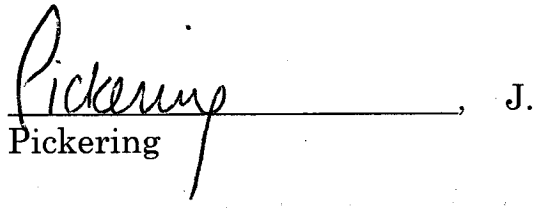

_____, J.
Pickering

cc: Hon. Stewart L. Bell, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[2]We have determined that this appeal should be submitted for a decision on the briefs without oral argument. See NRAP 34(f)(1).