

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT BERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76999-COA

FILED

JUL 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Berman appeals under NRAP 4(c) from a judgment of conviction entered pursuant to a jury verdict of prohibited acts by a sex offender. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, Berman contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The jury received evidence that Berman initially registered his address at an apartment building. The apartment manager and maintenance worker testified that Berman was later evicted and neither saw him residing at the apartment building after the eviction. Berman did not register a new address or notify the authorities he no longer resided at the apartment building. Given this testimony and evidence, the jury could reasonably infer from the evidence presented that Berman committed prohibited acts by a sex offender. *See NRS 179D.550(1)*. It is for the jury

to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Therefore, we conclude Berman is not entitled to relief.

Second, Berman argues he was prevented from knowingly and intelligently waiving his right to testify. During the advisement of his right to testify and in a later-filed motion for a new trial, Berman asserted the State should be required to disclose if it had judgments of convictions for Berman's prior felonies, but the district court denied Berman's claims. Berman contends the district court erred by declining to require the State to inform him if it had the ability to impeach his testimony with his prior convictions because, without this information, he was unable to make an intelligent decision as to whether he should testify.

A criminal defendant has the right to testify on his own behalf. *Phillips v. State*, 105 Nev. 631, 632, 782 P.2d 381, 382 (1989). However, a defendant may waive that right and, if the district court advises the defendant of his right to testify on the record, the advisement "will eliminate any question about the defendant knowing that he has such a constitutional right and that the decision is ultimately his to make." *Id.* at 633, 782 P.2d at 382.

The record reveals the district court advised Berman of his right to testify and explained that the State may use his prior felonies to impeach his credibility. Berman informed the district court he understood and he declined to exercise his right to testify. Moreover, Berman does not cite any authority supporting his claim, and thus, does not demonstrate the State is required to disclose whether it has evidence of the prior felony convictions in its possession at the time of trial. Given the record in this matter, we

conclude Berman failed to demonstrate he was prevented from making a knowing and intelligent waiver of his right to testify. Therefore, we conclude Berman is not entitled to relief.

Third, Berman appears to assert the State committed misconduct by failing to disclose whether it had the ability to impeach his testimony with his prior convictions. Berman contends failure to disclose this information violated a district court order concerning discovery and *Brady v. Maryland*, 373 U.S. 83 (1963). We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Based on our review of the record, we conclude Berman fails to demonstrate the State committed misconduct. The district court's order regarding discovery required the State disclose the criminal histories of witnesses it intended to call to testify at trial and did not apply to Berman's criminal history. In addition, Berman fails to demonstrate the State was required to disclose this information by *Brady* because he does not demonstrate it was evidence favorable to the defense and that it was material to his defense. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Therefore, Berman is not entitled to relief for this claim.


Fourth, Berman argues the district court erred by denying a claim raised in his motion for new trial. In his motion, Berman argued the district court improperly disclosed the defense trial strategy to the State when the parties were settling jury instructions. The district court has discretion in granting or denying motions for new trials and this court will not set aside a district court's ruling absent an abuse of discretion. *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). The district court found it had not improperly disclosed the defense strategy as the defense


had revealed the defense strategy during its opening statement. The record supports the district court's finding and Berman fails to demonstrate the district court abused its discretion by denying the motion for new trial. Therefore, Berman is not entitled to relief.

Fifth, Berman argues he is entitled to relief due to cumulative error. However, Berman has not demonstrated there were any errors. Therefore, he is not entitled to relief, and we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carolyn Ellsworth, District Judge
Coyer Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk