

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRANDON TEKARIO GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81563-COA

FILED

JUL 21 2021

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

ORDER OF AFFIRMANCE

Trandon Tekario Green appeals a judgment of conviction, pursuant to a jury verdict, of battery with intent to commit sexual assault; battery constituting domestic violence; child abuse, neglect, or endangerment; and preventing or dissuading a witness from testifying or producing evidence. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Green and Samantha Weston were dating in early 2017.¹ At the time, Weston was living in an apartment with her six-year-old daughter. Green lived with his parents, but often spent the night at Weston's apartment. Around May 2017, Green invited another woman to Weston's apartment. When Weston objected to Green doing so, Green told Weston to leave. Weston refused, and Green hit Weston on the leg, arm, and face. Weston called the police. Police responded, took her statement, and took pictures of her injuries. Weston attempted to end her relationship with Green following this incident.

In June 2017, Green broke into Weston's apartment through the bedroom window where Weston's daughter slept. Green confronted Weston in the living room, told her they needed to talk, and then took

¹We recount the facts only as necessary for our disposition.

Weston into her bedroom. Green and Weston began arguing about continuing their relationship. Weston's daughter came into the room multiple times while Weston and Green argued. At one point, when Weston's daughter entered the bedroom, Green became annoyed and put a pair of kitchen scissors² to her throat. Green then placed the blades of the scissors in her mouth.

During the argument, Green broke a piece of wood off the doorframe and beat Weston with it. Weston claimed Green also forced her to have sex with him despite Weston repeatedly saying "no." Following the alleged sexual assault, Weston went to her bathroom to clean up because Green told her to "wash off any evidence." Weston texted her friend, Leroy Denten, to call 9-1-1 before returning to her room. When Weston returned, Green cut her finger with a Swiss Army type knife, causing significant bleeding. Green assisted Weston with applying pressure to the wound.

Green eventually went to the kitchen and started cooking. Police arrived and arrested Green shortly thereafter. Weston was transported to the hospital where staff treated her finger, took pictures of her cuts and bruises, and performed an examination using a rape kit. A DNA sample was not obtained from Weston's daughter.

The State charged Green with two counts of battery constituting domestic violence; burglary; two counts of first degree kidnapping; battery with intent to commit sexual assault; sexual assault; battery with use of a deadly weapon resulting in substantial bodily harm constituting domestic violence; assault with a deadly weapon; child abuse,

²Weston testified that the scissors were the type that comes with a kitchen knife set.

neglect, or endangerment with use of a deadly weapon; and preventing or dissuading a witness from testifying or producing evidence.

At trial, Las Vegas Metropolitan Police Department forensic scientist Brianne Huseby testified as an expert for the State. Huseby performed tests on Weston's rape kit and the scissors recovered from Weston's apartment. Huseby testified that three DNA profiles were found on the blade of the scissors, measuring 78 percent, 19 percent, and 2 percent. Huseby testified that the 2 percent profile was "[t]oo little data to be able to draw a conclusion," the 19 percent profile belonged to Weston, and she could not identify the contributor of the 78 percent profile. Huseby further testified that, based on a visual comparison of the alleles in the DNA of the 78 percent profile with Weston's DNA, the 78 percent profile likely belonged to a relative of Weston. Green's counsel did not object to the visual comparison observation during direct examination.

On cross-examination, Huseby testified that she did not include her observation that the 78 percent contributor is likely a relative of Weston in her expert report that she submitted to Green. Green then requested a sidebar, explaining to the court that Huseby's direct examination was the first he had heard of Huseby's observation about the 78 percent profile. During the sidebar, the State explained that it did not learn of Huseby's observation about the 78 percent contributor until the morning before the previous day of trial. Green requested a mistrial, arguing that the State's failure to disclose Huseby's observation when the State first learned of it violated *Brady v. Maryland*, 373 U.S. 83 (1963), and NRS 174.234. The district court denied Green's request for a mistrial, finding that the State did not act in bad faith and that Green did not suffer prejudice as a result of the delayed disclosure. Following the district court's ruling, Green

resumed cross-examining Huseby on her observation and did not seek a continuance.

Green was ultimately convicted of battery with intent to commit sexual assault; battery constituting domestic violence; child abuse, neglect, or endangerment with a deadly weapon; and preventing or dissuading a witness from testifying or producing evidence. Green was acquitted of all the remaining counts. This appeal followed.

Green now argues that the district court abused its discretion when it denied his request for a mistrial because the State's delay in disclosing Huseby's observation constituted a *Brady* violation. Green further claims that the State made comments in closing arguments that were prosecutorial misconduct, and that the comments and the State's *Brady* violation amount to cumulative error.³ We conclude the State did not violate *Brady*, the State did not engage in prosecutorial misconduct, and there was no cumulative error.

³Green also claims that the State violated NRS 174.234, governing reciprocal discovery, and asks this court to consider this error in our cumulative error analysis. However, Green forfeited the right to argue the State violated NRS 174.234 on appeal because he failed to lodge a contemporaneous objection on this ground when Huseby testified to her observation on direct examination. Nor does Green argue plain error on appeal. Therefore, we decline to consider it. *See Jeremias v. State*, 134 Nev. 46, 54, 412 P.3d 43, 51 (2018) (concluding that a defendant's failure to "lodge objections to the specific portions of . . . testimony" precluded appellate review). Instead of objecting, Green chose to cross-examine Huseby on her observation, request a sidebar during cross-examination, and then move for a mistrial. Thus, NRS 174.234 cannot be grounds for reversal independently or cumulatively. *See Rogers v. State*, 127 Nev. 323, 325 n.1, 255 P.3d 1264, 1265 n.1 (2011) (refusing to consider errors in cumulative error analysis to which appellant did not timely object during trial and for which appellant provided no plain error argument).

Green argues the State violated *Brady* by failing to disclose Huseby's observation⁴ that the 78-percent contributor's DNA profile on the blade of the scissors likely belonged to a relative of Weston. Green contends the State suppressed Huseby's observation because it did not disclose the observation until Huseby's direction examination, the day after the State became aware of it. Green argues Huseby's observation was favorable because, due to the State's delayed disclosure, he "lost the opportunity to properly cross examine police officers and forensic technicians regarding why a DNA sample wasn't collected from [Weston's daughter]." Green adds that he would have cross-examined Weston differently had he known Huseby's observation. This is because, as Green explains, he intended to argue in closing that if he placed scissors in Weston's daughter's mouth, there would be DNA evidence showing he did. Green contends Huseby's observation was material because there is a reasonable possibility that disclosure would have led to a different result. Green explains there was no evidence corroborating Weston's testimony regarding the scissors besides Huseby's observation, and he was only convicted of counts that had the support of corroborating evidence, *in addition to* Weston's testimony.

The State contends that the evidence was not favorable to Green because it only corroborated the State's theory that Green put the scissors in Weston's daughter's mouth. The State acknowledges that *Brady* requires disclosure of impeachment evidence as well, but explains that Green does not present valid bases for using the observation as impeachment evidence. The State claims Green could have questioned

⁴Green refers to Huseby's observation as a "new conclusion"; however, we refer to it as an "observation" because Huseby described it as such and testified it would not be the type of information she would include in a report.

police regarding why they did not obtain a DNA sample from Weston's daughter because the lead detective who investigated Green's case testified *after* Huseby. The State further claims that Green would not have been able to use Huseby's conclusion to impeach Weston because Weston could not comment on Huseby's findings. The State maintains it did not have control over Huseby's observation and thus did not have constructive possession such that it could have suppressed it. Lastly, the State argues Green could have obtained the observation through diligent discovery.

"*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material to either guilt or to punishment." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). "Failure to do so is a violation of due process regardless of the prosecutor's motive." *Id.* "Determining whether the State adequately disclosed information under *Brady v. Maryland* . . . requires consideration of both factual circumstances and legal issues; thus, this court reviews de novo the district court's decision." *Id.* (internal citation omitted). "[O]nce a reviewing court applying [*Brady* and its progeny] has found constitutional error there is no need for further harmless-error review." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).⁵ "There are three components of a true *Brady* violation:

⁵This is because, if "a harmless-error enquiry were to apply, a [*Brady*] error could not be treated as harmless, since" the third element of a *Brady* claim, materiality, requires consideration of whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 435 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In other words, satisfaction of the materiality element implies that the *Brady* violation could not meet the constitutional harmless error standard. See *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued[;]" that is, "the evidence was material." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Mazzan*, 116 Nev. at 67, 993 P.2d at 37. We need not consider whether the State suppressed Huseby's observation or whether it was favorable to Green because we agree with the district court that it was not material (i.e., prejudicial).

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "Where disclosure was made but made late, the defendant must show a reasonable probability that an earlier disclosure would have changed the trial's result and not just that the evidence was material." *United States v. Bell*, 795 F.3d 88, 101 (D.C. Cir. 2015) (quoting *United States v. Andrews*, 532 F.3d 900, 907 (D.C. Cir. 2008)).⁶

Earlier disclosure would not have changed the result of Green's trial. Huseby's observation was not exculpatory; it only corroborated the

⁶*See also United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978) ("[D]elay in disclosing [*Brady* material] only requires reversal if 'the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.'" (quoting *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976))); *Shelton v. State*, Docket No. 50001, at 3 (Order of Affirmance, January 30, 2009) (stating impeachment evidence disclosed for the first time during trial is not material under *Brady* where the defendant was still "fully capable of impeaching [the witness's] testimony").

State's theory underlying its child abuse charge. During cross-examination, Green solicited Huseby's admission that her observation did not alter her overall conclusion that she could not definitively name Weston's daughter as the 78 percent contributor.⁷ Thus, Green was able to impeach Huseby regarding her observation despite the State's delayed disclosure, and the delay did not detract from how Green could have used the evidence had no delay occurred.⁸ Accordingly, Green failed to "show a reasonable probability that an earlier disclosure would have changed the trial's result and not just that the evidence was material." *Bell*, 795 F.3d at 101 (quoting *Andrews*, 532 F.3d at 907). Thus, Green's *Brady* claim fails. Consequently, we conclude the district court did not abuse its discretion when it denied Green's request for a mistrial at sidebar. *See Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004) ("The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned

⁷Green also pointed out during cross-examination that Weston had another daughter who might have been the 78 percent contributor, Huseby could not discern the source of the DNA (whether it was saliva, skin, etc.), that the presence of DNA does not definitively show how someone handles or touches an item, and that one would expect to see someone's DNA on items in their home that they routinely handle.

⁸Additionally, Green's arguments that the delayed disclosure undermined the manner in which he presented his case, examined other witnesses such as Weston, or otherwise impacted his ability to prepare for trial are unavailing. Although Green was inconvenienced, the United States Supreme Court has specifically rejected the view that "the [materiality] standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence." *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976). *Brady*, furthermore, did not entitle Green to disclosure of Huseby's conclusion merely because it was unfavorable to his case. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

absent an abuse of discretion.”); *id.* at 144, 86 P.3d at 587 (“A defendant’s request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial.”).

Green next argues the State committed prosecutorial misconduct by repeatedly misstating facts in closing. First, Green claims the State mischaracterized his mother’s testimony by commenting in closing that she testified to Green and Weston being at her house all day and night on June 17, when her actual testimony was that she took Weston home around noon. Second, Green alleges the State claimed that Leroy Denton testified that he was at Weston’s home on June 17, when he actually testified that he did not remember the exact date on which he was at Weston’s apartment. Third, Green claims the State stated in closing that his counsel argued about blood on the stick that Green used to hit Weston; however, Green’s counsel said that it only looked like there was blood on the stick. Lastly, Green claims the State commented that his counsel argued Weston did not explain how the sexual assault occurred, but Green’s counsel actually argued that Weston was unable to provide details about the altercation.

Green recognizes that “this [c]ourt does not typically reverse appellants’ convictions on the basis of individual instances of prosecutorial misconduct,” but asks this court to consider the instances cumulatively and in light of the State’s alleged *Brady* error. Green argues the issue of guilt was close, “especially for the [c]hild [a]buse count,” reiterating that the jury acquitted Green on multiple counts.

The State answers that none of the instances Green describes meet the standard for prosecutorial misconduct. The State explains at length that none of the four instances of alleged misconduct that Green describes were actually misrepresentations of witnesses’ or his counsel’s


statements. The State further argues that a singular, brief misstatement does not warrant reversal; that the statements did not so infect the proceedings with unfairness as to result in a denial of due process; and, that criminal convictions are not lightly overturned. The State adds that both the State and district court admonished the jury that attorneys' statements are not evidence. In particular, the State emphasizes that, after each of Green's objections to the alleged misconduct, the court instructed the jury to rely on its own recollection.


"When considering claims of prosecutorial misconduct, this court engages in a two-step analysis." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Id.* (footnote omitted). Regarding step two, we will not reverse where the misconduct was harmless error. *Id.* Where the error is not of a constitutional dimension, "we will reverse only if the error substantially affects the jury's verdict." *Id.* at 1189, 196 P.3d at 476; *see* NRS 178.598. The State is permitted to invite jurors to draw reasonable inferences from the evidence. *See Butler v. State*, 120 Nev. 879, 897, 102 P.3d 71, 84 (2004). "When evaluating a claim of cumulative error, we consider the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

The State's comments did not substantially affect the jury's verdicts. Green does not argue that the State's comments were sufficient by themselves to warrant reversal; instead, he cumulates the comments' alleged prejudice with the prejudice that flowed from the State's alleged

Brady violation. As stated, the State did not violate *Brady*, so there is no *Brady* prejudice to cumulate. Because Green does not argue that the statements allegedly amounting to prosecutorial misconduct independently warrant reversal, or that the district court's admonitions to the jury were insufficient, his claims for prosecutorial misconduct and cumulative error fail in the absence of a *Brady* violation. See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (“[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.”).

Accordingly, we ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District
Department VI, Eighth Judicial District
Jeannie N. Hua
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk