IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL CU,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84862

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial based on newly discovered evidence. Eighth Judicial District Court, Clark County; Michael Villani, Judge. Appellant Michael Cu argues that the district court abused its discretion in denying the motion because genetic marker analysis results were exculpatory. We disagree and affirm.[1]

Following a jury trial in 2000, Cu was convicted of murder with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, conspiracy to commit kidnapping, conspiracy to commit robbery, and robbery with the use of a deadly weapon. The charges arose from the kidnapping and murder of Fernando Moreno, who was kidnapped from a gas station, transported to a remote road near the interstate, robbed of his car, and fatally shot. This court affirmed the judgment of conviction on direct appeal, *Cu v. State*, Docket No. 35927 (Order of Affirmance, May 22, 2001), and the two orders denying postconviction habeas relief, *Cu v. State*, Docket No. 52158 (Order of Affirmance, May 5, 2009); *Cu v. State*, Docket No. 46568 (Order of Affirmance, June 30, 2006).

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Cu subsequently petitioned for genetic marker analysis of certain evidence recovered from the vicinity of the crime scene, arguing that the results would show a reasonable probability that he would not have been convicted had this evidence been tested for DNA at the time of the trial. The district court granted the petition, ordering the testing of seven 7.62x39 cartridge cases and a bullet jacket fragment, thirteen .25 auto cartridge cases, three 7.62x39 live cartridges, one .22 caliber bullet, several jacket fragments, and one cigarette butt. Four of the items—jacket fragments that were collected near the victim's body—contained DNA matching the victim's DNA profile. Two of the items yielded unknown male DNA profiles, two yielded inconclusive DNA profiles, and the remainder yielded no DNA profiles. Cu was excluded as a contributor to either of the unknown male DNA profiles. The items containing unknown male DNA profiles were a .25 auto cartridge case that was recovered approximately 77 feet from the victim's body and a cigarette butt recovered approximately 153 feet from the victim's body. At trial, crime scene analysts testified that the .25 auto cartridge cases appeared to be older, not related to the crime scene, and of a different type than used to kill the victim. A crime scene analyst testified that the cigarette butt was collected to be tested for latent fingerprints, of which none were found.

Cu argues that the genetic marker analysis results constitute newly discovered evidence that are reasonably probable to render a different result on retrial and thus that the district court should have granted his motion for a new trial. Favorable DNA testing results may justify a new trial. *See* NRS 176.515(1); NRS 176.09187(1). To warrant a new trial, Cu must present evidence that is

> newly discovered; material to the defense; such that even with the exercise of reasonable diligence it

> could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.

State v. Seka, 137 Nev. 305, 313, 490 P.3d 1272, 1278 (2021) (quoting *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)). A new trial will not be ordered if any one of these factors has not been shown. *Id.* Where new DNA evidence is at issue, it must be sufficiently significant "that had it been introduced at trial, a different result would have been reasonably probable." *Id.* We review the district court's order granting or denying a new trial for an abuse of discretion. *Sanborn*, 107 Nev. at 406, 812 P.2d at 1284.

The genetic marker evidence does not warrant a new trial. Contrary to Cu's claim that it is exculpatory, nothing in the record suggests that the .25 auto cartridge casing or the cigarette butt were connected to the circumstances of the crime at issue. *See Seka*, 137 Nev. at 314, 490 P.3d at 1279 ("Newly discovered evidence is also not favorable where it has no relevance to the circumstances of the crime."). The State argued at trial that the victim was killed by a weapon firing 7.62x39 cartridges, which is consistent with the tested jacket fragments that matched the victim's DNA profile. And a witness testified at trial that he disposed of a weapon capable of firing such cartridges at Cu's behest. No evidence was proffered at trial to suggest that the perpetrators either smoked cigarettes or fired a weapon that uses .25 auto cartridges. *Cf. id.* at 315, 490 P.3d at 1280 (observing that the tested items that did not match the petitioner may well have been trash discarded along the road where they were found, at increasing distances from the victim's body, and that the State did not argue that the

petitioner touched those items). That Cu did not match unknown DNA profiles associated with evidence recovered some distance from where the victim was found does not establish that he was not present at the crime scene, particularly where several witnesses testified that Cu admitted to them that he shot the victim. Accordingly, Cu has not shown a reasonable probability of a different outcome on retrial were this new DNA evidence to be presented. The district court therefore did not abuse its discretion in denying Cu's motion for a new trial.[2]

Having considered Cu's contentions and concluded that relief is not warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Stiglich

_____, J.
Lee

_____, J.
Bell

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[2]The State argues that the district court should have required Cu to pay the costs of the genetic marker analysis. *Cf.* NRS 176.09187(3) (providing that a petitioner bears the costs of genetic marker analysis unless the petitioner is incarcerated at the time of filing and indigent and the analysis results are favorable to the petitioner). The State, however, did not file a cross-appeal, and therefore we lack jurisdiction to consider this claim. *See Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) ("[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal."); *Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 331, 741 P.2d 432, 433 (1987) (recognizing that timely filing of an appeal is a jurisdictional requirement).

cc: Chief Judge, Eighth Judicial District Court
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