IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC PAUL SCHACHTER, No. 67673

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Joseph R. Plater, Deputy District Attorney, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issues: None.

5. Procedural history: The State accepts appellant's account.

6. Statement of facts:

Eyewitness testimony and videotape evidence proved that Schachter entered a Walmart store in Reno, Nevada, on June 9, 2014, and, at various places in the store, put a backpack, two electric heating pads, and two boxes of hair dye into a shopping cart (Joint Appendix, Volume 3, 407-08, 413, 422-24; 451-54) ("JA"; "Vol."). He later put the heating pads and one of the boxes of hair dye into the backpack. *Id*. at 426. Schachter paid for one of the boxes of hair dye, but left the store without paying for the other items. *Id*. at 429-30, 541-42. A security officer stopped Schachter, who grabbed the officer's throat and pushed the officer a number of times to get past the officer. *Id*. at 430-32, 457, 541-42. Police eventually arrived. *Id*. at 542. The value of the items Schachter took was $99.61. *Id*. at 548.

A jury convicted Schachter of attempted robbery (JA, Vol. 4, 777-78). This appeal follows.

7. Issues on appeal:

Whether the district court correctly denied Schachter's motions to dismiss based on his argument that (1) the justice and district courts failed to expeditiously permit him to represent himself and rule on his motion for investigative resources; and (2) police failed to collect the backpack as

evidence.

8. Legal argument:

Schachter argues the district court erred by sentencing him on both the attempted robbery offense and as a habitual criminal. The State agrees.

Schachter also argues the district court erred by denying his motions to dismiss based on (1) the justice and the district court's delays in permitting him to represent himself and in granting his request for investigative services; and (2) the State's failure to collect and preserve the backpack that Schachter had when he was arrested because it was exculpatory evidence. Those claims lack merit.

A. The district court improperly sentenced Schachter on the underlying felony and as a habitual criminal.

The district court sentenced Schachter to 12 to 48 months in prison for the attempted robbery offense and a concurrent sentence of 5 to 20 years in prison for being a habitual criminal (JA, Vol. 4, 777-78). This was error. *Cohen v. State*, 97 Nev. 166, 169, 625 P.2d 1170, 1172 (1981) (holding that sentencing the defendant as a habitual criminal and on the underlying offenses of burglary, attempted grand larceny and possession of stolen property was error because the purpose of the habitual criminal statute is not to charge a separate substantive crime

but to allege a fact that may enhance the punishment). Accordingly, this Court should vacate the attempted robbery sentence but otherwise affirm the judgment of conviction, including Schachter's sentence as a habitual criminal, or order the district court to do the same. *Lisby v. State*, 82 Nev. 183, 414 P.2d 592 (1966) (when the habitual criminal statute has been invoked and proved, the district court has a mandatory duty to impose the sentence prescribed in the habitual criminal statute, unless the minimum term under the habitual criminal statute is less than the minimum term of the crime charged).

B. The justice and district courts acted expeditiously in permitting Schachter to represent himself and ensuring he had investigative resources. If there was delay, Schachter can show no prejudice.

Schachter argues that "the court system's repeated delay in granting . . . [his] ability to represent himself and failure to timely rule on his request for investigative services operated to deny him the means of developing and presenting an adequate defense." (Fast Track Statement, 16). The claim lacks merit.

1. Standard of review

The Court "review[s] a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124

Nev. 546, 550, 188 P.3d 51, 54 (2008).

2. Discussion

Schachter moved the district court to dismiss the amended information because of "prejudicial delay causing loss of exculpatory material evidence." (JA, Vol. 1, 161-66). He argued that delays in his request to represent himself (and to obtain an investigator) caused the loss of videotape that would have exonerated him, specifically, Walmart videotape showing that he entered Walmart with the backpack that the State accused him of stealing from within Walmart. *Id*.

The district court denied the motion to dismiss. It ruled that Schachter was responsible for the delay because of his request to represent himself and his refusal to accept the public defender who provided an investigator (JA, Vol. 3, 382).

The district court's ruling is correct. First, Schachter never showed that there was videotape showing him entering Walmart with a backpack. While it appears that videotape of the day when Schachter entered the store was destroyed pursuant to store policy, Schachter has never shown that an investigator would have actually been able to procure such videotape before it was destroyed or that there was any actual video showing Schachter

outside of Walmart. *Id*. at 484. For example, one of Walmart's employees testified that she reviewed the videotape within several days after Schachter was in Walmart, and she could not find any video of him entering the store. *Id*. at 550-52, 555-56.

Schachter also failed to show there was any reasonable possibility that when he left Walmart he was carrying the same backpack as when he entered Walmart. The backpack Schachter had was new, as if it had never been used. *Id*. at 446, 592 ("It was still like the feel of it was still very crispy like it hadn't had any use. It was still very compressed, flat. There wasn't any tags or anything on it. It didn't have any mark, stains, tears anything like that."). An eyewitness testified that Schachter did not have a backpack when he observed Schachter in the store. *Id*. at 411, 469. Schachter never testified either at trial or in any pretrial proceeding that he carried the backpack into the store. And there is no evidence that the videotape was of such quality that someone could have identified the peculiar characteristics Schachter said his backpack had (JA Vol. 1, 133-37). In other words, Schachter has never shown that the videotape or any other evidence would have shown that he entered Walmart with the same backpack as he was arrested with. The fact is that overwhelming evidence shows Schachter

attempted to steal the backpack and other items from Walmart.

The record also shows that the justice and the district court moved expeditiously in granting Schachter's request to represent himself. *Id*. at 72-73, 92-93. The district court granted his request at his first arraignment in district court. *Id*. The Public Defender's Office was appointed as standby counsel, and that office allowed Schachter to use its investigative resources. *Id*. at 89; Vol. 2, 346-49.

Schachter also argues he was deprived of discovery to prepare for a preliminary hearing. But Schachter fails to tell this Court that the district court offered to remand the case to justice court so that Schachter could have a preliminary hearing, after it was discovered that the first preliminary hearing was not properly recorded (JA, Vol. 2, 331). Schachter told the district court he did not want another preliminary hearing. *Id*.

Schachter received all of the discovery in this case (JA, Vol. 3, 522). He never argued otherwise during trial. Thus, even if he had not received all the discovery he was entitled to at the preliminary hearing, he can show no prejudice. The district court did not abuse its discretion in denying the motion to dismiss.

C. The district court correctly denied Schachter's motion to dismiss based on the State's failure to preserve the backpack as evidence because the jury verdict would have been the same had

the backpack been preserved; and even if police were under a duty to collect the backpack, they were merely negligent in failing to collect it, which does not require dismissal, only an opportunity for Schachter to question police at trial about the issue.

Schachter argues the district court erred in denying his motion to dismiss based on police failure to collect the backpack as evidence. The State disagrees.

1. Standard of review

The Court "review[s] a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008).

2. Discussion

"'[P]olice officers generally have no duty to collect all potential evidence from a crime scene. . . . '" *Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (quoting *State v. Ware*, 881 P.2d 679, 684 (N.M.1994)). The rule is not absolute. *Id*. The Court uses a two-part test to determine whether the failure to collect evidence has resulted in an injustice. A defendant must first show that the evidence at issue was material, that is, "there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different" and second, if the evidence was material, that failure to collect it was due to mere

negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. *Id*. at 267, 956 P.2d at 115. Gross negligence entitles the defense to a presumption that the evidence would have been unfavorable to the prosecution; bad faith may result in dismissal of the charges. *Id*. When detectives negligently fail to collect evidence, a defendant's remedy is limited to cross-examination of the detectives regarding investigative deficiencies. *Id*.

Here, Officer West explained that the police department does not take items stolen from stores when the store recovers the item or when the item can be returned to the store for sale (JA, Vol. 3, 593, 603, 604). Instead, a photograph of the backpack was taken (JA, Vol. 3, 447, 545). Thus, the district court correctly found that the failure to collect the backpack was not a result of bad faith or gross negligence. And there is overwhelming evidence that Schachter attempted to steal the backpack. He cannot show that the jury verdict would have been different had the police collected the backpack. His assertion that the backpack would have been favorable is simply a "'hoped-for conclusion.'" *Orfield v. State*, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989) (quoting *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

Accordingly, the Court should affirm the judgment of conviction.[1]

9. Preservation of issues: The State concurs with appellant.

DATED: July 20, 2015.
CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

[1]Schachter argues police had a duty to collect the backpack under NRS 205.295. The State disagrees. That statute requires police to "use reasonable diligence to secure the property alleged to have been stolen" for the benefit of the owner of the property. Since Walmart recovered its property the police had no duty to take the property as evidence under the statute.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Constantia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

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response is true and complete to the best of my knowledge, information and belief.

DATED: July 20, 2015.

JOSEPH R. PLATER
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 20, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jarrod T. Hickman, Esq.

Destinee Allen
Washoe County District Attorney's Office