IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY J. WARD,
Appellant,
vs.
WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, DAVID MELIGAN,
Respondent.

No. 42970

FILED

SEP 15 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Henry J. Ward's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On September 5, 2002, Ward was convicted, pursuant to a jury verdict, of one count of battery with a deadly weapon. The district court sentenced Ward to serve a prison term of 24-80 months and ordered him to pay $5,278.00 in restitution. Ward subsequently filed an untimely notice of appeal from the judgment of conviction; accordingly, this court dismissed his direct appeal for lack of jurisdiction.[1]

On April 16, 2003, Ward filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Ward, and counsel filed a supplement to the petition. At a hearing on November 20, 2003, respective counsel stipulated and the district court agreed that trial counsel should have filed a timely direct appeal, and therefore pursuant to Lozada v. State, Ward

[1]Ward v. State, Docket No. 40391 (Order Dismissing Appeal, January 6, 2003).

would be permitted to raise direct appeal issues in his post-conviction petition.[2] Ward filed a second supplemental petition raising direct appeal issues. The State opposed both the petition and supplemental petition. The district court conducted an evidentiary hearing, and on February 26, 2004, entered an order denying Ward's petition. This timely appeal followed.

First, Ward contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, Ward argues that the State never conclusively established that a deadly weapon was used in the battery. Ward points out that the victim testified at trial to never having seen a weapon, and that the State failed to locate and produce the weapon at trial. We disagree with Ward's contention.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[3] In particular, we note that a witness to the battery testified that she saw Ward stab the victim, and that she "saw a silhouette of the knife." The victim testified that although he did not see a weapon, Ward lunged at him twice, and after the second time, the victim felt sharp pain in his abdomen and was suddenly "leaking blood and fluid." Additionally, a nurse at the Washoe Medical Center testified at trial that she treated the victim and was present during his surgery, and that the injury to the

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[2]110 Nev. 349, 871 P.2d 944 (1994).

[3]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

victim's abdomen was consistent with stabbing knife wounds. The victim's injury was diagnosed as a perforated bowel and required a 10-day stay in the hospital. In its order denying Ward's habeas petition, the district court stated: "There is absolutely no question in the court's mind that Ward used a 'deadly weapon' . . . . There is absolutely no question that the weapon used by Ward, whatever it was, was readily capable of causing substantial bodily harm, that is, create a substantial risk of death or prolonged pain."

Based on all of the above, we conclude that the jury could reasonably infer from the evidence presented that Ward committed the crime of battery with a deadly weapon.[4] 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, sufficient evidence supports the verdict.[5] We also note that circumstantial evidence alone may sustain a conviction.[6] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction, and that the district court did not err in concluding that Ward's claim was without merit.

Second, Ward contends that the district court erred in instructing the jury on flight. At trial, defense counsel objected to the proposed instruction on flight, and the district court, instead, provided the following modified flight instruction based on Ward's arguments:

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[4]See NRS 200.481(1)(a), (2)(e).

[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[6]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

> The flight of a person immediately after the commission of a crime is not sufficient in itself to establish his guilt, but is a fact which tends to show a consciousness of guilt, if proved, and may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
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> Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest.

Ward concedes that he left the scene of the crime, but argues that he "did not flee the scene for the purpose of avoiding arrest. [And] in fact, he returned to the scene and met with police investigating the matter." We conclude that Ward's contention is without merit.

An instruction may be given regarding flight if evidence of flight has been admitted.[7] "Flight is more than merely leaving the scene of the crime."[8] This court has held that a "plan to flee" is relevant when the evidence shows a plan and the plan was undertaken with a consciousness of guilt.[9] Finally, "[f]light instructions are valid only if there is evidence sufficient to support a claim of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged."[10]

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[7]Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980); see also Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992).

[8]Potter, 96 Nev. at 876, 619 P.2d at 1222.

[9]Tavares v State, 117 Nev. 725, 734, 30 P.3d 1128, 1134 (2001).

[10]Jackson v. State, 117 Nev. 116, 121, 17 P.3d 998, 1001 (2001).

In the instant case, our review of the record discloses that there was sufficient evidence to support the inference that Ward fled with a consciousness of guilt and for the purpose of avoiding arrest. As noted above, Ward did, in fact, leave the scene of the crime. When Ward returned to the scene approximately 20 minutes after the police arrived, he was not in possession of the weapon and, according to one witness, he had changed his clothes. In denying Ward's claim, the district court concluded that "the State presented legally sufficient evidence to support a reasonable chain of unbroken inferences from Ward's behavior," and thus, the giving of the modified flight instruction was not error. The district court specifically found that Ward fled from the scene of the crime, "in order to, and in fact did, discard, hide or otherwise ensure that he would not be in possession of the weapon he used to stab the victim when arrested." The district court also found that even if the instruction was given in error, it was harmless due to the overwhelming evidence of Ward's guilt. We agree and conclude that Ward did not establish that the jury instruction regarding flight was inappropriate in light of the facts of his case, and that the district court did not err in denying this claim.

Third, Ward contends that his trial counsel was ineffective for failing to request a jury instruction on simple battery as a lesser-included offense of battery with a deadly weapon. We disagree.

A defendant is entitled to a jury instruction on a lesser-included offense where: (1) a conviction for the lesser offense is consistent with the defense theory of the case; and (2) there is some evidence, "no matter how weak or incredible," to support a conviction for the lesser

offense.[11] "If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error."[12] And finally, to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[13]

In this case, even assuming that simple battery is a lesser-included offense of battery with a deadly weapon,[14] Ward was not entitled to the instruction, and therefore, counsel was not ineffective for failing to request such an instruction. At the evidentiary hearing on Ward's petition, Ward's counsel testified that the defense theory at trial was that Ward did not commit the crime and that the victim was the aggressor. According to trial counsel, Ward informed him that "he had done nothing." Counsel testified that a lesser-included instruction, though discussed by both counsel and Ward, was therefore not requested because it was

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[11]Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1106 (1990) (quoting Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983)); Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 649 (1994).

[12]Williams, 99 Nev. at 531, 665 P.2d at 261; see also Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 473 (2000).

[13]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[14]See Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (holding that a lesser offense is lesser-included when "the elements of the lesser offense are an entirely included subset of the elements of the charged offense"); see also NRS 200.481(1)(a) (defining battery).

inconsistent with the defense theory of the case. The district court found that "[c]ounsel's failure to request an instruction on simple battery was not unreasonable under prevailing professional norms." We agree and conclude that Ward did not receive ineffective assistance of counsel.

Therefore, having considered Ward's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

, J.
Agosti

, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk