IN THE SUPREME COURT OF THE STATE OF NEVADA

NATASHA BARKER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 43995
NATASHA BARKER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44263

FILED

NOV 2 8 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a judgment of conviction and an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On November 16, 2004, the district court convicted appellant Natasha Barker, pursuant to a jury verdict, of murder with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon. The district court sentenced Barker to a life term in prison with the possibility of parole after 20 years for the murder, plus an equal and consecutive term for the deadly weapon enhancement. Barker also received a sentence of 28 to 72 months for the conspiracy to commit robbery and a term of 72 to 180 months for the robbery, plus an equal and consecutive term for the deadly weapon enhancement. The district court also sentenced Barker to a life term with the possibility of parole after 5

years for the kidnapping, plus an equal and consecutive term for the deadly weapon enhancement. Finally, the district court ordered all the counts to run concurrently.

Barker raises four issues on appeal. First, she argues that the evidence is insufficient to support her convictions because the State failed to prove the corpus delicti of the crimes independent of her extrajudicial admissions. Specifically, Barker complains that after setting aside her extrajudicial admissions, "sufficient independent evidence was not presented to indicate that [she] knew about or was willfully involved in the apparent plan to rob Anthony Limongello and later murder him."

Barker's argument misapprehends the corpus delicti rule. She labors under the misapprehension that identity of the perpetrator is an element of the corpus delicti and that setting aside her extrajudicial admissions, the independent evidence must in itself demonstrate that she committed the crimes charged. "The corpus delicti of a crime means the body or the substance of the crime charged" and consists of an act and the criminal agency of the act.[1] Nevada jurisprudence firmly holds that the corpus delicti of a crime must be established independently before a defendant's extrajudicial admissions can be considered.[2] However,

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[1]State v. Teeter, 65 Nev. 584, 618, 200 P.2d 657, 674 (1948) (internal citation omitted), overruled in part on other grounds by Application of Wheeler, 81 Nev. 495, 406 P.2d 713 (1965).

[2]See West v. State, 119 Nev. 410, 417, 75 P.3d 808, 813 (2003); Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004); Hooker v. Sheriff, 89 Nev. 89, 92, 506 P.2d 1262, 1263 (1973).

identity of the perpetrator is not an element of the corpus delicti.[3] In Doyle v. State, we explained the scope of the independent evidence necessary to corroborate a defendant's admissions:

> "The independent proof may be circumstantial evidence . . ., and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. If the independent proof meets this threshold requirement, the accused's admissions may then be considered to strengthen the case on all issues."[4]

Here, the evidence independent of Barker's extrajudicial admissions more than satisfies the minimal showing required to permit a reasonable inference that the crimes charged were committed. Therefore, we conclude that the State sufficiently established the corpus delicti of the crimes charged.

Barker further claims that no evidence, independent of her admissions, establishes that she entered into an agreement to commit an unlawful act. "[T]o sustain a conviction of conspiracy, the prosecution is required to present proof, independent of the defendant's own admissions, that the defendant entered into an agreement with at least one other person."[5] "[P]roof of even a single overt act may be sufficient to

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[3]See State v. Fouquette, 67 Nev. 505, 531, 221 P.2d 404, 418 (1950).

[4]112 Nev. at 892, 921 P.2d at 910 (quoting People v. Alcala, 685 P.2d 1126, 1136 (Cal. 1984)); see Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985).

[5]Doyle, 112 Nev. at 894, 921 P.2d at 911.

corroborate a defendant's statement and support a conspiracy conviction."[6] Based on the record, we conclude that there was sufficient independent evidence to corroborate Barker's admissions and support her involvement in a conspiracy to commit crimes against Limongello.

Barker next claims that the district court violated her right of confrontation by admitting Joanna De Los Reyes's preliminary hearing testimony. Specifically, she contends that she was deprived of an adequate opportunity to effectively cross-examine De Los Reyes because "[c]ross-examination at a preliminary hearing is rarely as vigorous or productive as it is at trial." However, although counsel objected to the State's pretrial "conditional" motion to use the former testimony, counsel did not object to the admission of De Los Reyes's preliminary hearing testimony at trial. "Generally, failure to object will preclude appellate review of an issue."[7] Nonetheless, this court may review issues not preserved for appeal if there is plain error affecting a defendant's substantial rights.[8]

In Grant v. State, this court stated that the admission of prior testimony comports with the Sixth Amendment when a defendant had the opportunity to, and in fact did, thoroughly cross-examine a witness and

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[6]Id. (internal citations omitted).

[7]Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

[8]Id. at 63, 17 P.3d at 403-04; see NRS 178.602.

the witness is actually unavailable for trial.[9] Also, counsel must have represented a defendant at the preliminary hearing.[10] Based on the record, we conclude that the prerequisites set forth in Grant were met in this case, and the district court did not err in admitting De Los Reyes's preliminary hearing testimony.

Barker also argues that the district court erred in denying her motion to suppress. Specifically, she contends that after LVMPD Detective Phillip Ramos advised her of the charges against her but before he advised her of her rights, he told her she was facing life without the possibility of parole if she was convicted of Limongello's murder. She also asserts that Ramos told her that if she cooperated and gave a statement, she could face far less time. Apparently, a videotape recording of the interview began prior to the initiation of the audio recording. Therefore no sound recording accompanied the portion of videotape in which Barker contends she was threatened with imprisonment.

Barker argues that Ramos's alleged threats prior to her rights advisement rendered her statement involuntary. She points to no evidence other than the videotape to support her allegation. She asserts that her counsel was not made aware of the videotape's existence until after trial. As will be discussed below, this claim formed the basis of her

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[9]117 Nev. 427, 432, 24 P.3d 761, 764 (2001); see Crawford v. Washington, 541 US. 36, 68 (2004) ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[10]See NRS 171.198(6)(b).

motion for a new trial. Nonetheless, we conclude that even if Barker had had the videotape at the time she filed her motion to suppress, it would have been of little assistance in substantiating her claim. According to Barker, at most, the videotape showed Ramos and Barker conversing for some period of time before the audio recording of the interrogation began. The trial record is devoid of any evidence indicating that Barker's statement was coerced, and apart from her allegation, nothing in the trial record suggests that Ramos threatened her in any way. Therefore, we conclude that the district court did not err in denying her motion to suppress.

Additionally, to the extent that Barker may be arguing that statements made during the second interrogation were inadmissible because she had requested counsel during the first interrogation, we conclude that this claim lacks merit. A suspect's Fifth Amendment right to counsel only attaches in a custodial interrogation setting.[11] The test for whether one is in custody is if a reasonable person would believe she was free to leave.[12] In her motion to suppress, Barker conceded that she was not in custody when police officers questioned her at her home. Therefore, Barker had no Fifth Amendment right to counsel during the first interrogation. And she gave informed consent before she was interrogated again after her arrest; consequently, she suffered no violation of her right

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[11]See Silva v. State, 113 Nev. 1365, 1370, 951 P.2d 591, 594 (1997).

[12]Id.; see Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 695 (2005) (citing Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

to counsel. Accordingly, the district court did not err in denying her motion to suppress on this basis.

Finally, Barker argues that the district court erred in denying her motion for a new trial. She contends that she did not discover the existence of a videotape of her interview with the police until after the trial concluded and that the videotape constitutes new evidence. The State disputes Barker's allegations, asserting that it made its files and evidence, including the videotape, available to counsel on two occasions and that counsel reviewed the files and evidence.

"The grant or denial of a new trial on the ground of newly discovered evidence is within the discretion of the trial court."[13] To secure a new trial based on newly discovered evidence:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[14]

However, even assuming Barker met all other factors necessary to secure a new trial, we conclude that she has failed to demonstrate that a different result is probable on retrial. By Barker's own

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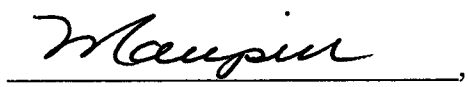
[13]Hennie v. State, 114 Nev. 1285, 1289, 968 P.2d 761, 764 (1998).

[14]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

admission, at most, the videotape would have shown Ramos and Barker talking, but without sound it would not have substantiated her allegation that her statement was coerced. And the record is devoid of any evidence that Barker's statement was involuntary. Therefore, we conclude that the district court did not err in denying her motion for a new trial.

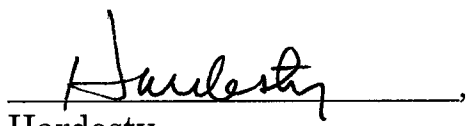
Having considered Barker's claims and concluded that they lack merit, we

ORDER the judgment and the order of the district court AFFIRMED.



_____, J.
Maupin

_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge
Kirk T. Kennedy
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk