

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIDGET LYNN PASCUA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47557

FILED

MAR 02 2007

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On June 3, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count each of burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, coercion and conspiracy to commit coercion. The district court sentenced appellant to serve a term of 26 to 120 months in the Nevada State Prison for burglary; 26 to 120 months for robbery, plus an equal and consecutive term for the deadly weapon enhancement; 12 to 48 months for coercion and 12 months for conspiracy to commit coercion. All sentences were imposed to run concurrent with each other. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on April 12, 2005.

¹Pascua v. State, Docket No. 41548 (Order of Affirmance, March 17, 2005).

On March 8, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply to the State's opposition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court denied appellant's petition on July 5, 2006, after conducting an evidentiary hearing. This appeal followed.

In her petition, appellant claimed that she received ineffective assistance of standby counsel.² Specifically, appellant claimed that her standby counsel was ineffective for advising her against impeaching or challenging a juror for being a former tenant at the senior community where appellant was once a site manager. We conclude that the district court did not err in denying this claim. Because appellant waived her right to counsel and chose to represent herself, she did not have a constitutional right to standby counsel.³ Because appellant had no constitutional right to standby counsel, she had no right to the effective assistance of standby counsel.⁴ Moreover, appellant failed to demonstrate

²Appellant invoked her right to self-representation a few days prior to trial. At that time, appointed counsel was then designated as standby counsel for appellant.

³See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that a defendant does not have a right to advisory counsel).

⁴See generally McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) (holding that a post-conviction petitioner who has no constitutional or statutory right to the appointment of counsel has no right to the effective assistance of post-conviction counsel); see also Faretta v. California, 422 U.S. 806, 835 (1975) ("When an accused manages his own

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that her right to self-representation was compromised by standby counsel's assistance during the trial.⁵ Accordingly, we affirm the denial of this claim.

Appellant also contended that she received ineffective assistance of trial counsel.⁶ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁷ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁸ "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."⁹

... continued

defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel").

⁵See McKaskle v. Wiggins, 465 U.S. 168 (1984).

⁶Although appellant represented herself for the first two days of trial, at appellant's request, standby counsel took over representation of appellant for the third day of the three day trial. Therefore, we conclude that under these facts, appellant relinquished her right to represent herself on the third day and was entitled to the effective assistance of counsel on that day.

⁷Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁸Strickland, 466 U.S. at 697.

⁹Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.¹⁰

First, appellant claimed that her trial counsel was ineffective for failing to object to the admission of a shotgun during the trial and the State's use of the shotgun during closing arguments for demonstration purposes. Appellant asserted that the shotgun was unrelated to the case and was inadmissible because there was no direct evidence linking her to the shotgun.

Appellant failed to demonstrate that her counsel's failure to object to the admission of a shotgun during the trial and the State's use of the shotgun during closing arguments for demonstration purposes prejudiced her. To be admissible, evidence must be relevant and its prejudicial nature must not substantially outweigh the probative value.¹¹ Admissibility of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.¹²

At the evidentiary hearing, the district court stated that the shotgun was admissible and would have been admitted even if counsel had objected to its admission. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. One victim testified that a shotgun was used during the commission of the crimes. Evidence was adduced at trial that both victims

¹⁰Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

¹¹NRS 48.035(1).

¹²See Bishop v. State, 92 Nev. 510, 521, 554 P.2d 266, 273 (1976).

described the weapon as a shotgun immediately following the incident. An officer testified that while he was questioning appellant, appellant informed him that she brought the shotgun and two friends with her to regain her possessions because she was afraid of one of the victims. Further, another officer testified that the gun admitted as evidence was found as a result of conversations officers had with appellant's two co-defendants and a woman who resided with one of the co-defendants. The shotgun was relevant and the prejudicial nature of the shotgun did not outweigh its probative value. Therefore, the shotgun was properly admitted as evidence. Any issues relating to the lack of direct evidence linking appellant to the shotgun that was admitted at trial would go to the weight of the evidence, not its admissibility. Because the shotgun was properly admitted, the State's reference to the shotgun and use of the shotgun for demonstration purposes during closing arguments was not improper. Accordingly, we conclude the district court did not err in denying these claims.

Second, appellant claimed that her trial counsel was ineffective for failing to adequately review and investigate the case prior to trial.¹³ Appellant asserted that had her trial counsel adequately investigated the case prior to trial, counsel would have objected to the

¹³To the extent that appellant challenges standby counsel's failure to investigate, appellant did not have a constitutional right to standby counsel, and therefore did not have the right to the effective assistance of standby counsel. See Harris, 113 Nev. at 804, 942 P.2d at 155; see generally McKague, 112 Nev. at 164-65, 912 P.2d at 258; see also Faretta, 422 U.S. at 835. Accordingly, the district court did not err in denying this claim.

admission of the shotgun. Appellant failed to demonstrate prejudice. As noted above, the shotgun was properly admitted. Appellant failed to demonstrate that additional investigation would have resulted in the exclusion of the shotgun from evidence. At the evidentiary hearing, the district court determined that an objection to the admission of the shotgun would not have been successful. The district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we conclude the district court did not err in denying this claim.

Appellant next claimed that she received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁵ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁶

Appellant claimed that her appellate counsel was ineffective for failing to clearly argue why the district court's answer to a jury question was not harmless error. Specifically, appellant asserted that her

¹⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

¹⁵Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

appellate counsel should have argued that the district court's answer of "yes" was not a correct answer because it implied that the personal property of appellant that was located within the home constituted personal property under the robbery statute.¹⁷ The district court denied this claim on the basis that this court had already addressed the merits of the claim on direct appeal and appellant was barred by the law of the case from reraising the claim.¹⁸ Because appellant raised the claim in the context of challenging the effective assistance of appellate counsel and this court had never addressed the effectiveness of appellate counsel, the district court erred by denying the claim on the basis that the claim was barred by the law of the case. Nevertheless, because the district court reached the correct result, we conclude the district court did not err in denying the claim.¹⁹

Appellant failed to demonstrate that her argument relating to the definition of personal property would have had a reasonable probability of success on appeal. Appellant was not charged with robbery for taking her own personal property from the home. Rather, appellant

¹⁷The record indicates that the jury posed the question "Definition of personal property, does it mean any property in the house?" to the district court during jury deliberations. On direct appeal, this court concluded that although the district court erred in instructing the bailiff to inform the jury the answer was "yes" the error was harmless because the answer was correct. Pascua v. State, Docket No. 41548 (Order of Affirmance, March 17, 2005, at 2).

¹⁸See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹⁹See Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong decision).

was charged with and the State argued that appellant committed robbery when she took one of the victims' purse from the home while the other victim was held at gunpoint. Sufficient evidence was adduced at trial to support a conviction for the charge of robbery for taking the victim's purse. Even assuming that the jury interpreted the district court's answer of "yes" to include appellant's own personal property within the home, because appellant was only charged with robbery for taking the purse, the district court's answer of "yes" was harmless. Accordingly, we affirm the denial of this claim.

Finally, appellant claimed that her conviction and sentence are invalid because of the presence of a biased juror and because she was only given four peremptory challenges, which she claimed was not sufficient. Appellant waived these claims by failing to present them to the trial court or raise them on direct appeal and appellant failed to demonstrate good cause for her failure to raise the claims earlier.²⁰ Accordingly, we conclude the district court did not err in denying these claims.


As an independent and separate ground for denying relief, these claims lacked merit. Appellant failed to demonstrate that any of the jurors were biased. Further, appellant was allowed the statutory number of peremptory challenges²¹ and appellant failed to demonstrate that four peremptory challenges were insufficient.

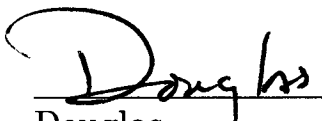
²⁰See NRS 34.810(1)(b).

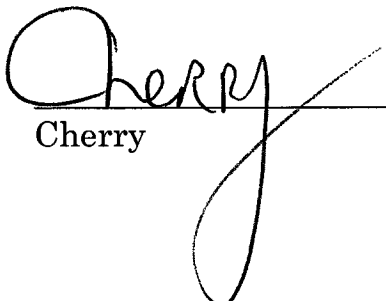
²¹See NRS 175.051(2).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.²² Accordingly, we

ORDER the judgment of the district court AFFIRMED.²³


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Bridget Lynn Pascua
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²³We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.