

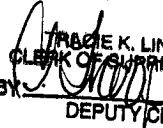
IN THE SUPREME COURT OF THE STATE OF NEVADA

NATASHA LEE BARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48318

FILED

APR 14 2008

BY:  MARIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Natasha Lee Barker was convicted, 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. This court affirmed the judgment of conviction and sentence.¹ Barker filed a timely post-conviction petition for a writ of habeas corpus, which the district court denied. This appeal followed.

In her post-conviction habeas petition, Barker argued that her convictions for the specific intent offenses of murder with the use of a deadly weapon and first-degree kidnapping with the use of a deadly

¹Barker v. State, Docket Nos. 43995/44263 (Order of Affirmance, November 28, 2005).

weapon must be reversed pursuant to Bolden v. State.² She contended that the jury instructions respecting vicarious coconspirator liability did not comport with Bolden and that the error was not harmless. As Barker's case was not final at the time this court decided Bolden, its holding applies to her case.³

In Bolden, we held that to convict a defendant of a specific intent crime under the theory of vicarious coconspirator liability, the State must prove that the defendant had the statutory intent to commit that offense.⁴ Here, the prosecution pursued the murder and first-degree kidnapping charges on multiple theories of culpability, including vicarious coconspirator liability. However, the vicarious coconspirator liability instructions in this case failed to inform the jury of the requisite intent necessary to hold Barker criminally liable under this theory and thus did not comport with Bolden.

²121 Nev. 908, 124 P.3d 191 (2005).

³Barker's direct appeal was decided on November 28, 2005. Barker v. State, Docket Nos. 43995/44263 (Order of Affirmance, November 28, 2005). As the time for filing a petition for a writ of certiorari to the United States Supreme Court had not expired by the time Bolden was decided on December 15, 2005, Barker's conviction was not yet final when Bolden was decided. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (stating that "[a] conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired"); Sup. Ct. R. 13 (stating that a petition for a writ of certiorari to the United States Supreme Court must be filed within 90 days after entry of the judgment or order sought to be reviewed).

⁴Bolden, 121 Nev. at 922, 124 P.3d at 200.

Because the jury returned general verdicts, the theory upon which it relied to convict Barker of murder and first-degree kidnapping is unknown.⁵ Although the prosecution argued that the evidence supported other alleged theories of culpability, it forcefully argued that Barker was guilty of murder and first-degree kidnapping as a coconspirator.

Respecting the murder conviction, there was no evidence of Barker's precise role, if any, in the victim's murder. This circumstance coupled with the prosecution's focus during closing argument on vicarious coconspirator liability as a theory upon which to find Barker guilty rendered it likely that the jurors relied on this theory to convict her of murder. However, there was no evidence supporting a finding that Barker had the requisite specific intent to kill the victim. Therefore, we cannot conclude that the instructional error was harmless in this case. Accordingly, we conclude that Barker's conviction for murder must be reversed.

Similarly, we cannot conclude that the instructional error was harmless respecting Barker's first-degree kidnapping conviction. Although the evidence adduced at trial overwhelmingly established her participation in a conspiracy to rob the victim and the actual robbery, there was essentially no evidence supporting a finding that Barker had the specific intent to kidnap the victim under a theory of vicarious

⁵*Id.* at 915, 124 P.3d at 196 (stating that "if any one of the theories of criminal liability alleged by the State is legally erroneous, reversal of a verdict that fails to specify the precise theory upon which the verdict is based is generally required regardless of the legal and factual sufficiency of the other theories").


coconspirator liability. Consequently, we conclude that Barker's conviction for first-degree kidnapping must also be reversed.

Accordingly, we

REVERSE the district court's order denying post-conviction relief and REMAND this matter to the district court to vacate Barker's murder and first-degree kidnapping convictions and to conduct proceedings consistent with this order.⁶

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Eighth Judicial District Court Dept. 6, District Judge
Kirk T. Kennedy
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁶We are confident that if the State seeks retrial in this matter, the instructions respecting aiding and abetting will comport with current law. See Sharma v. State, 118 Nev. 648, 56 P.2d 868 (2002).