IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCKY NEIL BOICE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48672

FILED

SEP 21 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant Rocky Neil Boice, Jr. was convicted, pursuant to a jury verdict, of second-degree felony murder with the use of a deadly weapon, battery with the use of a deadly weapon, and conspiracy to commit battery with the use of a deadly weapon. The district court sentenced him to serve concurrent and consecutive terms totaling 20 to 50 years in prison. This court affirmed the judgment of conviction and sentence on direct appeal.[1]

Boice filed a timely post-conviction petition for a writ of habeas corpus in the district court. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

In his petition, Boice contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must

[1]Boice v. State, Docket No. 40799 (Order of Affirmance, July 1, 2004).

demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced him.[2] Petitioner must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[3]

First, Boice argues that trial counsel was ineffective for unreasonably pursuing a self-defense theory. He contends that our affirmance in his direct appeal establishes that self-defense is not available in a felony murder prosecution, and that counsel was thus per se ineffective for pursuing it. Aside from this reference to our unpublished order resolving his direct appeal, Boice cites no authority for this argument, and we are not aware of any. In addition, self-defense was an available defense to battery with the use of a deadly weapon, which was a separate charge as well as the basis for the felony murder and conspiracy charges. These charges could have been defeated had counsel convinced the jury that Boice should be absolved of battery with the use of a deadly weapon based on self-defense. Accordingly, we conclude that the district court did not err in rejecting this claim.

Second, Boice argues that trial counsel was ineffective for failing to request a jury instruction on duress pursuant to NRS 194.010(7). Boice concedes in his opening brief that the common law jurisprudence on duress would not support an instruction. Our review of the record reveals

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[2]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

that there was little evidence that Boice acted "under threats or menaces sufficient to show that [he] had reasonable cause to believe, and did believe, [his] [life] would be endangered if [he] refused, or that [he] would suffer great bodily harm."[4] The statement of facts in Boice's opening brief (which he notes is taken from the evidence at trial and this court's order in his direct appeal) indicates that Boice learned a female acquaintance had been assaulted, he and a number of friends armed themselves—Boice with a large wooden stick—and went to the location where the assault of the female acquaintance took place, the female acquaintance got the room's occupants to open the door, Boice proceeded inside and struck the murder victim in the head with the stick three times, and Boice's friends also beat the murder victim and another man. Boice argues that the rule of lenity militates against denying this claim, but the rule of lenity is only at issue when a statute is ambiguous.[5] Boice does not argue that NRS 194.010(7) is ambiguous, and no ambiguity is apparent to us. We therefore conclude that the district court did not err in rejecting this claim.

Third, Boice argues that trial counsel was ineffective for failing to request a jury instruction on misdemeanor battery as a lesser-included offense of felony battery with the use of a deadly weapon. "A lesser offense is included in a greater offense 'when all of the elements of the lesser offense are included in the elements of the greater offense.'"[6] NRS 200.481, the battery statute, makes clear that misdemeanor battery

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[4]See NRS 194.010(7).

[5]See Moore v. State, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006).

[6]Rosas v. State, 122 Nev. ___, ___ 147 P.3d 1101, 1105 (2006) (quoting Barton v. State, 117 Nev. 686, 690, 30 P.3d 1103, 1106 (2001)).

is a lesser-included offense of felony battery. Boice would have been entitled to a misdemeanor battery instruction "as long as there [was] some evidence to support it."[7] Our review of the record indicates there was no evidence reasonably supporting misdemeanor battery in this case. Boice used an allegedly deadly weapon in the battery, which under NRS 200.481(2)(e) is a category B felony. Even if Boice's stick could not be considered a deadly weapon,[8] the battery victim clearly suffered substantial bodily harm in the attack, including a number of skull fractures that led to his death. Where no deadly weapon is used but the battery causes substantial bodily harm, NRS 200.481(2)(b) makes the offense a category C felony. Because Boice used a deadly weapon and/or the battery caused substantial bodily harm, there was no evidence that Boice only committed a misdemeanor battery. We therefore conclude that the district court did not err in rejecting this claim.

Fourth, Boice argues that trial counsel was ineffective for failing to object to jury instructions 19 and 36 because they did not properly instruct the jury on aiding and abetting.[9] In Sharma v. State, we

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[7]Id. at ___, 147 P.3d at 1109.

[8]See NRS 193.165(5).

[9]Instruction 19 read as follows:

> Every person concerned in the commission of a felony, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, commands, induces or otherwise procures another to commit a felony is a principal, and is subject to be proceeded against and

continued on next page . . .

held that "in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person

. . . *continued*

> punished as such. Liability for aiding and abetting must be based on more than mere presence at the scene and prior association with a perpetrator. However, the defendant's presence, companionship and conduct before, during and after a crime are circumstances from which you may infer his participation. In Counts I, II, III, and IV the defendant is charged as a principal to the underlying charge contained in the respective count.
>
> One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime or crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.

Instruction 36 provided as follows:

> If a human being is killed by any one of several persons engaged in the commission or attempted commission of a felony inherently dangerous to human life, all persons, who either directly and actively commit the act constituting such felony inherently dangerous to human life, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage or instigate by act of advice its commission, are guilty of second degree murder, whether the killing was intentional, unintentional, or accidental.

with the intent that the other person commit the charged crime."[10] Of the three charges Boice was convicted of, only murder is a specific intent crime.[11] Thus, the instruction was proper for the general intent charges against Boice. Further, because Sharma was not decided until after Boice's trial, the instructions were proper at the time of trial, and counsel was not deficient for failing to object to them based on Sharma.

Boice can raise this issue as a stand-alone claim, however, because his conviction was not final when Sharma was decided.[12] Nevertheless, Sharma does not entitle Boice to relief. Boice was charged with murder as a direct actor and alternatively as an aider or abettor. As described above, there was sufficient evidence from which the jury could conclude that Boice directly participated in killing or seriously injuring the victim. Even had the jury concluded Boice was liable as an aider or abettor, the evidence described above was sufficient for the jury to conclude that Boice specifically intended that others kill or seriously

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[10]118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

[11]See NRS 200.030; McConnell v. State, 120 Nev. 1043, 1065-66, 102 P.3d 606, 622 (2004) (noting that felony murder in Nevada does not require intent to kill, only the intent to commit the underlying felony); NRS 200.481; NRS 199.480; NRS 199.490; Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (defining conspiracy as "an agreement between two or more persons for an unlawful purpose") (quoting Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998)), overruled in part on other grounds by Sharma, 118 Nev. 648, 56 P.3d 868.

[12]Sharma was decided on October 31, 2002. Boice's conviction was not final until August 3, 2004.

injure the victim. Thus, the error in the instructions was harmless beyond a reasonable doubt.[13]

Boice argues that appellate counsel was ineffective for failing to properly argue that imposition of the deadly weapon enhancement constituted double jeopardy. He claims counsel should have argued that double jeopardy was violated because the weapon use elevated a misdemeanor battery to a felony, supporting second-degree felony murder treatment, and then enhanced the felony murder conviction. In other words, the weapon use enabled the State to both charge felony murder and to obtain a deadly weapon enhancement. In resolving Boice's direct appeal, we held that the enhancement was proper. That ruling is now the law of the case.[14] The law of the case doctrine cannot be avoided by a more detailed and precisely focused argument made after reflection on the previous proceedings.[15] "We will depart from our prior holdings only where we determine that they are so clearly erroneous that continued adherence to them would work a manifest injustice."[16]

Boice argues that we should revisit our prior holding on this issue because Cordova v. State,[17] on which we relied in resolving this issue

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[13]Compare with Sharma, 118 Nev. at 658, 56 P.3d at 874-75 and Mitchell v. State, 122 Nev. ___, ___, 149 P.3d 33, 38 (2006).

[14]See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

[15]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[16]Clem v. State, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003).

[17]116 Nev. 664, 6 P.3d 481 (2000) (affirming the deadly weapon enhancement in a conviction for second-degree murder based on shooting into an occupied dwelling).

in his direct appeal, was wrongly decided. The cases Boice points us to,[18] however, do not persuade us that we incorrectly interpreted legislative intent in Cordova when he held that "the Nevada Legislature did not intend to exclude felony murder whenever an element of the predicate felony was use of a deadly weapon."[19] We see no reason to depart from the law of the case doctrine in this regard, and we conclude that the district court did not err in rejecting this claim.

Boice also argues that the district court erred by rejecting the request in his petition for a new trial based on newly discovered evidence. This court reviews a district court's decision to grant or deny a new trial request based on newly discovered evidence for abuse of discretion.[20] A defendant seeking a new trial based on newly discovered evidence must show that the evidence is

> "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a

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[18]State v. Lacey, 41 P.3d 952 (N.M. Ct. App. 2002) (disallowing use of a prior trafficking conviction to elevate conspiracy to commit trafficking conviction to a second degree felony and then be used to enhance defendant's sentence under the habitual offender statute); U.S. v. Calozza, 125 F.3d 687, 691 (9th Cir. 1997) ("Impermissible double counting of an enhancement occurs if a guideline provision is used to increase punishment on account of a kind of harm already fully accounted for, though not when the same course of conduct results in two different types of harm or wrongs at two different times.").

[19]Cordova, 116 Nev. at 668, 6 P.3d at 484.

[20]Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001).

> former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits."[21]

Even assuming Boice could successfully meet the other elements of this test, we are not persuaded that the evidence Boice now raises would render a different result probable. Boice's alleged newly discovered evidence consists of the evidentiary hearing testimony of Lew Dutchy, Clint Malone, and Jessica Evans, each of whom Boice asserts was subpoenaed by defense counsel for Boice's trial, invoked their Fifth Amendment rights and refused to testify, and subsequently pleaded guilty to various charges in relation to these crimes.

In most relevant part, Boice asserts that Dutchy would testify that he saw Julian Contreras strike the allegedly fatal blows to the victim's head and that Dutchy and Boice were outside the room when Dutchy heard the victim scream as if he were hurt badly; that Malone would testify that he saw Contreras striking the victim but could not tell if Boice struck the victim as well; and that Evans' testimony would establish that Boice could not have been in the room where the victim was beaten for very long.

While these statements suggest that Boice may not have struck the fatal blows, there is no reasonable probability that the testimony of Dutchy, Malone, and Evans would produce a different result at trial. We note that, according to Boice's briefs, the medical examiner

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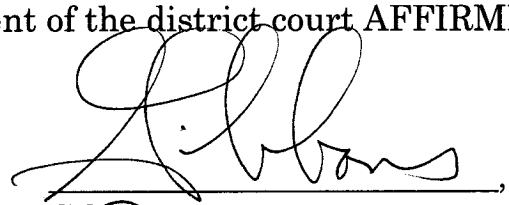
[21]Mortensen v. State, 115 Nev. 273, 286, 986 P.2d 1105, 1114 (1999) (quoting Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (footnote omitted)).

testified that the weapon Boice claimed he struck the victim with probably did not cause the fatal blows. Even if Boice did not testify at a new trial that he struck the victim three times in the head with a wooden stick, Dutchy's testimony at the hearing established that Boice was armed with a wooden stick and that he "handled up" the victim; Malone testified that he was not paying attention and so could not tell whether Boice struck the victim; Evans' testimony still placed Boice in the room. None of this testimony persuades us that a different result would be probable if Boice were retried for murder based on the theory that Boice directly caused the victim's death or serious injury or aided or abetted it. Therefore, we conclude the district court did not abuse its discretion in denying Boice's request for a new trial.

Having reviewed Boice's arguments and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



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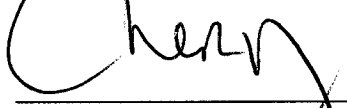

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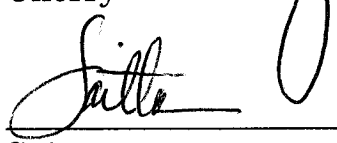

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cc: First Judicial District Court Dept. 1, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk