

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48673

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49329

FILED

MAR 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 48673 is a proper person appeal from an order of the district court denying appellant Brian O'Keefe's motion for a new trial based on newly discovered evidence. Docket No. 49329 is a proper person appeal from an order of the district court denying O'Keefe's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. We elect to consolidate these appeals for disposition.¹

¹See NRAP 3(b). We have considered the record on appeal filed in Docket No. 48673 when resolving the appeal in Docket No. 49329.

On January 3, 2005, the district court convicted O'Keefe, pursuant to a jury verdict, of one count of battery (misdemeanor) and one count of burglary. The district court sentenced him to time served for the battery conviction and to a term of 24 to 120 months in the Nevada State Prison for the burglary conviction. The sentence was suspended and O'Keefe was placed on probation for a term not to exceed five years. This court affirmed the judgment of conviction and sentence on direct appeal.² The remittitur issued on February 17, 2006.

Docket No. 48673

O'Keefe filed a motion for a new trial based on newly discovered evidence in the district court.³ The State opposed the motion, and O'Keefe filed a supplement to the motion. The district court denied the motion, and this appeal followed.

In his motion and supplement, O'Keefe claimed that he was entitled to a new trial for the following reasons: (1) the State improperly introduced a prior misdemeanor conviction for battery, and the introduction of the prior conviction prejudiced him; (2) the results of DNA analyses were withheld from him, and his counsel did not use the DNA results to impeach the victim; (3) the victim was untruthful about her use of alcohol and drugs and her promiscuity; (4) the jury was not instructed on trespass as a lesser-included offense of burglary; (5) the district court

²O'Keefe v. State, Docket No. 44644 (Order of Affirmance, January 23, 2006).

³See NRS 176.515(1).

judge acted with bias and prejudice when she overruled an objection during closing argument; and (6) letters written by the victim to O'Keefe after the trial demonstrated that the victim was untruthful about being promiscuous.

To warrant a new trial based on newly discovered evidence, the evidence must be

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 former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.⁴

The decision to grant or deny a new trial is within the district court's discretion, and this court will not reverse absent an abuse of that discretion.⁵

Claims 1 through 5 above were not based upon newly discovered evidence. Therefore, the district court did not err in denying these claims.

As to claim 6, O'Keefe asserted that the victim sent him the letters after his trial, and the letters indicated that the victim was untruthful about being promiscuous. O'Keefe claimed that the

⁴Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).

⁵Id. at 923, 944 P.2d at 779.

introduction of the letters at a new trial would have undermined the victim's credibility. The record reveals that additional evidence challenging the victim's credibility would not have likely altered the outcome at a retrial. Although the victim testified about three instances of alleged sexual assault and one instance of alleged attempted sexual assault, the jury acquitted O'Keefe of all of these charges. Further, at trial, O'Keefe admitted to slapping the victim, which was sufficient to support his conviction for misdemeanor battery. Finally, because the jury could have reasonably found that O'Keefe entered the apartment with the intent of committing a battery, it does not appear that additional evidence challenging the victim's credibility would have induced the jury to find him not guilty of the burglary. Because O'Keefe failed to demonstrate that the introduction of the letters upon retrial would have made a different result probable, the district court did not err in denying this claim. We, therefore, affirm the district court's denial of the motion for a new trial.

Docket No. 49329

O'Keefe filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. He subsequently filed a supplement to the petition. The State opposed the petition and supplement. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent O'Keefe or to conduct an evidentiary hearing. The district court denied the petition, and this appeal followed.

In his petition, O'Keefe claimed 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

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 they rendered the jury's verdict unreliable.⁶ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁷

First, O'Keefe claimed that counsel was ineffective for failing to move to dismiss his conviction for burglary after he was acquitted of all felony charges. He asserted that his conviction for misdemeanor battery could not support the conviction for burglary.

O'Keefe failed to demonstrate that counsel was deficient. NRS 205.060(1) provides that any person who enters a room with the intent to commit battery on any person is guilty of burglary.⁸ This statute does not differentiate between misdemeanor and felony battery. O'Keefe admitted at trial that he slapped the victim, thereby committing a battery upon the victim. Sufficient evidence was presented at trial for the jury to find that O'Keefe entered the apartment with the intent to commit a battery. Because a motion to dismiss the burglary conviction would not have been successful, O'Keefe failed to demonstrate that he was prejudiced by counsel's failure to file such a motion. Therefore, we conclude that the district court did not err by denying this claim.

⁶Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁷Strickland, 466 U.S. at 697.

⁸See 1995 Nev. Stat., ch. 443, § 124 at 1215.

Second, O'Keefe claimed that counsel was ineffective for failing to argue that a district court comment made during closing argument prejudiced his right to a fair trial. Specifically, he argued that when overruling a defense objection during closing argument the district court essentially told the jury that O'Keefe was guilty, thereby stripping him of his presumption of innocence.

O'Keefe failed to demonstrate that counsel was deficient. The record reveals that during closing argument the prosecution argued that O'Keefe's presumption of innocence had been removed by the evidence brought forth by the State during the trial. O'Keefe's counsel objected to the State's argument. The district court overruled the objection stating: "the State is allowed to discuss how the evidence has stripped [O'Keefe] of that cloak of innocence." Contrary to O'Keefe's assertion, the district court's statement when overruling his objection was not an implied or direct statement to the jury by the judge that he was guilty. Further, O'Keefe failed to demonstrate that he was prejudiced. Jury instruction 22 clearly informed the jurors that O'Keefe was presumed innocent until proven guilty, and the jury acquitted him of four charges after reviewing all of the evidence. Because O'Keefe failed to demonstrate that counsel was ineffective, we conclude the district court did not err by denying this claim.

Third, O'Keefe claimed that counsel was ineffective for failing to argue trespass as a lesser-included offense of burglary. He failed to demonstrate that counsel was deficient. Trespass is not a lesser-included

offense of burglary.⁹ Therefore, we conclude the district court did not err by denying this claim.

Fourth, O'Keefe claimed that counsel was ineffective for failing to argue that double jeopardy prevented a conviction for both battery and burglary because battery is a lesser-included offense of burglary. He failed to demonstrate that counsel was deficient. To be a lesser-included offense of burglary, the elements of battery must be completely included within the elements of burglary.¹⁰ The elements of battery are not completely included within the elements of burglary.¹¹ Because battery is not a lesser-included offense of burglary, O'Keefe's counsel was not ineffective for failing to raise a double jeopardy claim. Thus, we conclude the district court did not err by denying this claim.

Fifth, O'Keefe argued that counsel was ineffective for failing to object to the State discussing a prior dismissed misdemeanor charge and prior misdemeanor conviction in its opening statement. He asserted that although Judge Glass initially granted the State permission to present evidence of the prior misdemeanor conviction, when the case was transferred to Judge Loehrer, she ruled that NRS 50.095(1) prohibited the introduction of that evidence.

⁹Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004).

¹⁰See id.

¹¹Compare 2003 Nev. Stat., ch. 23, § 2 at 355 (NRS 200.481) with 1995 Nev. Stat., ch. 443, § 124 at 1215 (NRS 205.060).

O'Keefe failed to demonstrate that counsel was deficient or that he was prejudiced by counsel's actions. The record reveals that Judge Loehrer agreed that the one prior misdemeanor conviction would be admissible. Further, on direct appeal this court determined that the evidence of O'Keefe's prior bad acts was admissible pursuant to NRS 48.045(1) and the district court did not commit manifest error in admitting the prior bad acts.¹² O'Keefe failed to demonstrate that an objection to the State's discussion of the prior bad acts during the opening statement would have been successful, and he failed to demonstrate that counsel was ineffective for failing to object. Therefore, we conclude the district court did not err by denying this claim.

Sixth, O'Keefe claimed that counsel was ineffective for failing to subpoena or call witnesses. Specifically, he claimed counsel should have called a man named Ali to testify on his behalf. O'Keefe asserted that Ali would have testified that Ali was the individual who was in the apartment and had sex with the victim.

O'Keefe failed to demonstrate that he was prejudiced by counsel's actions. O'Keefe's defense at trial was that he and the victim engaged in consensual intercourse. He admitted at trial that he slapped the victim. Although the jury convicted O'Keefe of misdemeanor battery and burglary, the jury acquitted him of three counts of sexual assault and one count of attempted sexual assault. O'Keefe failed to demonstrate that

¹²O'Keefe v. State, Docket No. 44644 (Order of Affirmance, January 23, 2006).

Ali's testimony would have altered the outcome of the trial. Therefore, we conclude the district court did not err by denying this claim.¹³

Seventh, O'Keefe claimed that counsel was ineffective for failing to subpoena or call an expert to disclose the true results of the DNA test results. He failed to demonstrate that expert testimony regarding the DNA test results would have altered the outcome of the trial. The DNA test results were admitted at trial and indicated that O'Keefe could not be excluded as a source of the semen collected from fecal stains present on the victim's dress and a piece of toilet paper. The test results further indicated that a DNA mixture was indicated on the vaginal swab taken from the victim, and O'Keefe could not be excluded as a minor source of the DNA. O'Keefe testified that he engaged in consensual intercourse with the victim, and the jury acquitted him of all counts of sexual assault and attempted sexual assault. The DNA test results were not relevant to a determination of whether O'Keefe committed battery or burglary. Because O'Keefe failed to demonstrate that he was prejudiced by counsel's failure to call an expert to testify regarding the DNA evidence, we conclude the district court did not err by denying this claim.

Eighth, O'Keefe claimed that counsel was ineffective for failing to argue that the victim was not credible because she was under

¹³To the extent that O'Keefe raised this claim in the context of an ineffective assistance of appellate counsel claim, O'Keefe failed to demonstrate prejudice because the claim had no reasonable probability of success on appeal. See *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). We therefore affirm the denial of the claim.

the influence of drugs and alcohol when she made the allegations against him. This claim is belied by the record.¹⁴ The record reveals that O'Keefe's counsel questioned the victim about her use of drugs and alcohol on the date of the incident and questioned the other witnesses about whether the victim appeared to be under the influence when she made the allegations against O'Keefe. The victim admitted to using drugs and drinking alcohol prior to making the allegations against O'Keefe. When questioning the victim and arguing to the jury, counsel implied that the victim's credibility should be questioned due her use of drugs and alcohol. Therefore, O'Keefe failed to demonstrate that counsel was deficient, and we conclude the district court did not err by denying this claim.

Ninth, O'Keefe claimed that counsel was ineffective for failing to present a defense to burglary based on the fact that O'Keefe was a cohabitant of the apartment. He failed to demonstrate that counsel was deficient. Because unlawful entry of the apartment was not a necessary element of burglary,¹⁵ cohabitation of the apartment or lawful entry of the apartment was not a viable defense to the charge of burglary. Therefore, we conclude the district court did not err by denying this claim.

Tenth, O'Keefe claimed that counsel was ineffective for failing to argue that O'Keefe had to be found guilty of a felony in order to be guilty of burglary. He failed to demonstrate that counsel was deficient or that he was prejudiced by counsel's actions. To be found guilty of

¹⁴Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

¹⁵See 1995 Nev. Stat., ch. 443, § 124 at 1215 (NRS 205.060).

burglary, the jury had to find that O'Keefe entered the apartment with the intent to commit a battery or felony.¹⁶ Under the statute, completion of the battery or felony was not necessary to find O'Keefe guilty of burglary. Therefore, any argument that O'Keefe could not be convicted of burglary if he was not convicted of a felony would have been improper. Further, sufficient evidence supported the jury's finding that O'Keefe committed burglary. Because O'Keefe failed to demonstrate that counsel was ineffective, we conclude the district court did not err by denying this claim.

Eleventh, O'Keefe claimed that counsel was ineffective for being "impatient" during the jury voir dire. He failed to demonstrate that he was prejudiced by counsel's actions because he failed to demonstrate that the seated jury was biased. Therefore, we conclude the district court did not err by denying this claim.

Twelfth, O'Keefe claimed that counsel was ineffective for failing to move to dismiss the information as fatally defective. He asserted that he was arraigned in district court case number C202969, which was later closed. O'Keefe further asserted that he was never arraigned in the instant case, district court case number C202793, and he never entered a plea in this case. O'Keefe pointed out that district court case number C202969 was initially printed on the cover page of his preliminary hearing transcript but the number was later crossed out and the number C202793 was handwritten in.

¹⁶See id.

O'Keefe failed to demonstrate that counsel was ineffective. The record reveals that O'Keefe was arraigned in district court case number C202793 and entered his plea of not guilty in that case on July 13, 2004. Nothing in the record indicates that O'Keefe was ever arraigned in district court case number C202969. The entry of case number C202969 on the title page of the preliminary hearing transcript appears to have been a typographical error that was corrected when the transcript was filed with the district court. Because O'Keefe failed to demonstrate that a motion to dismiss the information would have been successful, O'Keefe failed to demonstrate that counsel was ineffective. Therefore, we conclude the district court did not err by denying this claim.

In his petition, O'Keefe also claimed: (1) jury instruction 13 improperly instructed the jury on the elements of burglary; (2) the district court erred by failing to instruct the jury that trespass is a lesser-included offense of burglary; (3) the State violated Brady¹⁷ by failing to disclose DNA test results; and (4) Judge Bell should not have sentenced him because Judge Bell was the District Attorney while O'Keefe was preparing the defense for his case. These claims could have been raised on direct appeal, and O'Keefe failed to demonstrate good cause for his failure to do so and actual prejudice.¹⁸ Therefore, we conclude the district court did not err by denying these claims.

¹⁷Brady v. Maryland, 373 U.S. 83 (1963).


¹⁸See NRS 34.810(1)(b)(2).

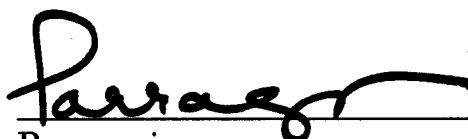
Because O'Keefe's claims either lacked merit or were not properly raised, we conclude the district court did not err in denying his petition.


Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that O'Keefe is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

ORDER the judgments of the district court AFFIRMED.²⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We have reviewed all documents that O'Keefe has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that O'Keefe 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.

cc: Hon. Sally L. Loehrer, District Judge
Brian Kerry O'Keefe
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk