IN THE SUPREME COURT OF THE STATE OF NEVADA

TENECA WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49591

FILED

JAN 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a petition for a writ of habeas corpus filed pursuant to Lozada v. State.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On April 6, 2005, the district court convicted appellant, pursuant to a jury verdict, of burglary while in possession of a firearm, robbery with the use of a deadly weapon, and conspiracy to commit robbery. The district court sentenced appellant to serve terms totaling 48 to 120 months in the Nevada State Prison. This court dismissed appellant's direct appeal as untimely.[2]

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[1]110 Nev. 349, 871 P.2d 944 (1994).

[2]Sneteca v. State, Docket No. 45682 (Order Dismissing Appeal, September 14, 2005). Appellant's direct appeal was filed under the name "Kelly Sneteca" and noted "Teneca Wilson" as an alias.

09-01508

On March 22, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 9, 2006, the district court granted appellant's appeal deprivation claim after conducting an evidentiary hearing. Subsequently, the district court appointed counsel and ordered supplemental briefing. On January 26, 2007, appellant filed a supplemental brief through counsel. On May 31, 2007, the district court denied appellant's petition. This appeal followed.

Direct Appeal Claims

First, appellant argues that the information was defective because it failed to specifically allege that appellant aided and abetted in the burglary and robbery. She asserts that the information was defective because it did not cite to NRS 195.020. Further, it failed to specify that the State was proceeding under the theory of constructive possession with regard to the deadly weapon and firearm enhancements.

Where a challenge to the sufficiency of the information is raised after the verdict, the verdict cures any technical defects unless the defendant has been prejudiced by the defective charging document.[3] If a charging document alleges a theory of aiding and abetting, it "should specifically allege the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the

[3]Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669-70 (1970).

aiding and abetting so as to afford the defendant adequate notice to prepare his defense."[4] However, the omission of a statutory citation from an information is not grounds for dismissal of the indictment if the "omission did not mislead the defendant to [her] prejudice."[5]

In this case, appellant fails to demonstrate that she was prejudiced by any deficiency in the amended information. The amended information contained the elements of the charged offenses and provided appellant with adequate notice of the State's theory of the case to allow her to prepare a defense.[6] It informed appellant that, with regards to the charge of robbery with a deadly weapon, the State alleged that appellant acted as a lookout and prevented customers from entering or leaving the business during the robbery, while Bruce Howard took money from the victim by means of force or violence with a firearm.[7] Regarding the

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[4]Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983).

[5]NRS 173.075(3).

[6]See NRS 173.075(1); Sanders v. Sheriff, 85 Nev. 179, 182, 451 P.2d 718, 720 (1969) (holding that a charging document "may simply be drawn in the words of the statute so long as the essential elements of the crime are stated"); see also Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985) (recognizing that the purpose of NRS 173.075 is to put the defendant on notice of the charges he is facing and to allow him to prepare a defense).

[7]See Ewish v. State, 110 Nev. 221, 236, 871 P.2d 306, 316 (1994) (providing that an indictment that did not specifically list aiding and abetting was sufficient to inform the defendant of the State's theory of

continued on next page . . .

burglary charge, the information also sufficiently informed appellant of the State's theory that she entered the business with the intent to commit the aforementioned robbery as it was set forth in the information. Therefore, we conclude that this claim lacks merit.

Second, appellant argues that there was insufficient evidence that appellant had actual or constructive possession of the firearm during the crime. She asserts that the State failed to put forth evidence that she possessed the weapon, knew Howard possessed the weapon, or had the ability to exercise control over the weapon.

When determining whether a verdict was based on sufficient evidence this court inquires "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[8] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where it is supported by substantial evidence.[9]

. . . continued

aiding and abetting by alleging that the defendant acted as a lookout while another committed the acts constituting arson).

[8]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[9]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

"Constructive or joint possession may occur only where the unarmed participant has knowledge of the other offender's being armed, and where the unarmed offender has . . . the ability to exercise control over the firearm."[10]

The jury heard testimony that appellant and Howard entered a payday loan store in Las Vegas, Nevada. Once inside, Howard jumped over the counter, brandished a firearm, and forced the employee into the back office where Howard bound the employee's feet with plastic ties, took money and a wallet from the employee's pockets, and demanded the code to open the safe. Howard then forced the employee at gunpoint to empty the cash drawer and retrieve the videotape from the security system in full view of appellant. During this time, appellant directed a customer and her son to sit down and intercepted other customers as they approached the door. Further, appellant tossed a backpack to Howard that contained plastic ties and duct tape. She even told Howard to "hurry up, stupid," and informed him that "she's in the back waiting, she's gonna leave us." Finally, appellant exited the back door with Howard when police closed in on the front door of the business.

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[10]Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979), abrogated by Brooks v. State, 124 Nev. ___, 180 P.3d 657 (2008). Because Brooks was decided after appellant's trial, we have applied the standard that was in effect act the time of appellant's trial. Even applying Brooks, the result is the same.

Based on this evidence, we conclude that a rational juror could reasonably conclude that appellant had the requisite knowledge and control necessary for constructive possession of a weapon. Therefore, we conclude that this claim lacks merit.

Third, appellant argues that the district court erred in failing to instruct the jury that it needed to find that appellant had actual or constructive possession of a firearm to commit burglary while in possession of a firearm and robbery with the use of a deadly weapon.

Because appellant did not object to the district court's failure to instruct the jury on the definition of possession, plain error review is appropriate.[11] "'In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights.'"[12] To establish that his substantial rights were affected, the appellant bears the burden of showing that the error was prejudicial.[13]

The district court erred in failing to provide an instruction on the definition of constructive possession. However, appellant fails to demonstrate that she was prejudiced by the error. Constructive

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[11]Ford v. State, 122 Nev. 796, 804, 138 P.3d 500, 506 (2006) (citing Bridges v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000)).

[12]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

[13]Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

possession is a theory of criminal liability, particularly for proving the guilt of an individual that did not personally possess a firearm during the burglary.[14] As noted above, there was sufficient evidence that a rational juror could reasonably conclude that appellant had the requisite knowledge and control necessary for constructive possession of a weapon during the course of the burglary. Thus, as the jury apparently applied the theory of constructive possession, appellant failed to demonstrate that the failure to instruct the jury on this theory prejudiced her substantial rights. Therefore, we conclude that this claim lacks merit.

Fourth, appellant argues that the district court erred in failing to instruct the jury on the specific intent elements of aiding and abetting and coconspirator liability consistent with Sharma v. State[15] and Bolden v. State.[16] She asserts that the burden of proving specific intent was lessened for the charges of burglary, conspiracy, and the deadly weapon enhancement. She further argues that the separate instructions for each crime did not cure the defect.

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[14]See Anderson, 95 Nev. at 630, 600 P.2d at 244, abrogated by Brooks, 124 Nev. ___, 180 P.3d 657.

[15]118 Nev. 648, 56 P.3d 868 (2002).

[16]121 Nev. 908, 124 P.3d 191 (2005), receded from by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008).

Because appellant did not object to the failure of the district court to instruct the jury pursuant to Sharma and Bolden, plain error review is appropriate.[17]

In Sharma, this court 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 with the intent that the other person commit the charged crime."[18] Similarly, in Bolden, we held that to convict a defendant of a specific intent crime under the theory of vicarious coconspirator liability, the State is required to prove that she had the specific intent to commit that offense.[19]

Regarding the deadly weapon enhancement, robbery is a general intent crime and it is not transformed into a specific intent crime merely by the addition of the deadly weapon enhancement.[20] Thus,

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[17]Ford, 122 Nev. at 804, 138 P.3d at 506 (citing Bridges, 116 Nev. at 761, 6 P.3d at 1007).

[18]118 Nev. at 655, 56 P.3d at 872.

[19]121 Nev. at 921, 124 P.3d at 200, receded from by Cortinas, 124 Nev. ___, 195 P.3d 315.

[20]See Coats v. State, 98 Nev. 179, 180, 643 P.2d 1225, 1225-26 (1982) (concluding that the district court did not plainly err in failing to instruct on specific intent for the crime of robbery with the use of a deadly weapon).

Sharma and Bolden are inapplicable to the jury instructions for that charge.[21] Although conspiracy and burglary are specific intent crimes, the State charged appellant as a principal for these crimes. Thus it was not necessary to instruct the jury consistent with Sharma and Bolden for these crimes. Moreover, to the extent that appellant was charged with a specific intent crime under an aider and abettor theory of liability, the district court accurately instructed the jury on aiding and abetting theory pursuant to Sharma. Therefore, we conclude that this claim lacks merit.

Fifth, appellant argues that the district court improperly instructed the jury that only slight evidence was required to prove a conspiracy. Specifically, appellant contends that the instruction concerning the admission of coconspirator statements misled the jury on the standard of proof because no extra-judicial statements of the alleged coconspirator were offered. She claims that other instructions did not cure the error.

Because appellant did not object to the instruction regarding coconspirator statements, plain error review is appropriate.[22]

The district court instructed the jury that

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[21]Bolden, 121 Nev. at 914, 124 P.3d at 195, receded from by Cortinas, 124 Nev. ___, 195 P.3d 315.

[22]Ford, 122 Nev. 804, 138 P.3d at 506 (citing Bridges, 116 Nev. at 761, 6 P.3d at 1007).

> [w]henever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

This instruction was a correct statement of Nevada law,[23] and was not inconsistent with or contradictory to other instructions. The jury was instructed that to be guilty of conspiracy, "a defendant must intend to commit, or to aid in the commission of, the specific crime agreed to" and the State bore the burden of proving beyond a reasonable doubt every element of the offense. We conclude that appellant did not demonstrate plain error affecting her substantial rights.

Sixth, appellant argues that in Instruction 10 the district court improperly instructed the jury that appellant's presence during the crime was sufficient to find her guilty of aiding and abetting. Appellant asserts that Instruction 10 confused and misled the jury and did not properly instruct the jury on the mens rea element for aiding and abetting.

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[23]See McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987).

Because appellant did not object to Instruction 10, plain error review is appropriate.[24]

The challenged portion of Instruction 10 provided:

> The presence of one at the commission of a crime of another is evidence to be considered in determining whether or not he is guilty of aiding or abetting; furthermore, the defendant's presence, companionship, and conduct before, during and after the crime are circumstances from which you may infer his participation in the criminal act.

This is a correct statement of Nevada law.[25] The instruction does not state that an individual's presence alone is conclusive evidence of guilt, merely that it may be considered. Further, Instruction 10 also instructed the jury that criminal liability based on a theory of aiding and abetting requires a defendant to willfully associate and participate in a criminal venture with the intent that the crime be committed. Thus, appellant did not demonstrate plain error affecting her substantial rights.

Seventh, appellant argues that the State committed prosecutorial misconduct. Appellant contends the prosecutor interjected her personal beliefs into the closing argument and suggested the only

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[24]Ford, 122 Nev. at 804, 138 P.3d at 506 (citing Bridges, 116 Nev. at 761, 6 P.3d at 1007).

[25]Robertson v. Sheriff, 85 Nev. 681, 683, 462 P.2d 528, 529 (1969).

explanation for the inconsistencies in witness testimony was that appellant was lying.

Because appellant did not object to the prosecutor's statements, plain error review is appropriate.[26]

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[27] Additionally, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[28]

> A prosecutor's use of the words "lying" or "truth" should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a "liar" should be considered prosecutorial misconduct. For those situations that fall in between these two examples, we must look to the attorney for the defendant to object and the district judge to make his or her ruling on a case-by-case basis.[29]

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[26]Ford, 122 Nev. at 804, 138 P.3d at 506 (citing Bridges, 116 Nev. at 761, 6 P.3d at 1007).

[27]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

[28]Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[29]Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 119 (2002).

Further, prosecutors must not inject their personal beliefs and opinions in their arguments to the jury.[30]

In the instant case, the prosecutor made the following remarks:

> And ladies and gentlemen, when you go back into that deliberation room and your [sic] look at [Wilson's] story and think about what she said, I want you to think of one question. One specific question. And that's what? This is crazy. This is insane. Under her version, think of what would have had to have happened here. Some guy who she's never met who she's had one phone conversation with gets her on the phone and decided, you know what, I have to make her meet with me so that I can go commit a robbery in front of her.
>
> That's insane. Who would do that?
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> ...
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> Well, we agree on this point with [appellant's counsel], no one does this with anybody that they've just met for the first time that morning. Nobody thinks that's what happened here.
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> I think these two knew each other, they planned this, they escaped together. An [sic] then she told whatever story she thought would help her out.
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> What she told you makes no sense. Bruce Howard didn't pick her out of thin air with one phone call

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[30]Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986).

> so he could commit a robbery in front of her. That's absurd. Absurd.

These statements did not amount to prosecutorial misconduct. The prosecutor argued that appellant's version of events was far-fetched, but did not state that she was lying or was a liar. The comments responded to appellant's counsel's closing argument that it was not plausible that appellant would engage in a crime with someone she had just met and Howard had in fact led appellant into the Loan Mart under false pretenses and committed the robbery at that time. Therefore, we conclude that this claim lacks merit.

<u>Ineffective Assistance of Counsel claims</u>

Next, appellant contends that the district court erred in denying her claims of 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 that they rendered the

jury's verdict unreliable.[31] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[32]

First, appellant argues that trial counsel was ineffective for failing to object to the defective information that did not charge her under a theory of aiding and abetting. Counsel was not ineffective for failing to object to the sufficiency of the information. As noted above, the information was sufficient and provided appellant with adequate notice of the State's theory of the case to allow her to prepare a defense. Therefore, the district court did not err in denying this claim.

Second, appellant argues that trial counsel was ineffective for not objecting and more strenuously arguing for an instruction that "one did not join in conspiracy [sic] cannot be guilty simply because their actions if any helped to advance the commission of a [sic] offense." Further, she asserted that her counsel failed to argue that appellant was not charged with aiding and abetting. Appellant fails to demonstrate that her counsel was deficient or that she was prejudiced. The district court instructed the jury that

> Conspiracy is an agreement or mutual understanding between two or more persons to

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[31]Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland).

[32]Strickland, 466 U.S. at 697.

> commit a crime. To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of, the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not.

The instruction correctly stated Nevada law.[33] Appellant was not entitled to a redundant jury instruction.[34] Therefore, the district court did not err in denying this claim.

Third, appellant argues that her counsel was ineffective for failing to request an instruction on "possession of a firearm" in connection with the burglary charge and on "possession of a deadly weapon" in connection with the robbery charge. She claims that in light of the fact that the jury was instructed on aiding and abetting, it would not have considered that she did not possess a firearm or a deadly weapon. Appellant fails to demonstrate that she was prejudiced. As discussed above, the evidence that indicated that appellant knew Howard was using a weapon, and her comments and role in the incident implied she had some control over the use of the weapon. Thus, appellant did not demonstrate that there was a reasonable probability of a different result. Therefore, the district court did not err in denying this claim.

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[33]See Moore v. State, 117 Nev. 659, 662, 27 P.3d 447, 450 (2001).

[34]Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Fourth, appellant argues that her counsel was ineffective for failing to object to the erroneous jury instruction on coconspirator liability in violation of Sharma and Bolden. Appellant contends that Instruction 11 lessened the State's burden of proof for the charges of burglary, conspiracy, and use of a deadly weapon. Appellant fails to demonstrate that her counsel was deficient. As discussed above, robbery with the use of a deadly weapon is a general intent crime, thus the holdings in Sharma and Bolden are inapplicable to the instruction for that crime.[35] Further, because appellant was charged as a principal for burglary and conspiracy, Sharma and Bolden were also inapplicable to the instruction for those crimes.[36] Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that her counsel was ineffective for failing to object to the jury instruction that the jury need only find slight evidence of guilt to consider the statements of one conspirator against another conspirator. Appellant fails to demonstrate that her counsel was deficient or that she was prejudiced. As previously discussed, the district court correctly instructed the jury on the admissibility of statements and actions of coconspirators. Therefore, the district court did not err in denying this claim.

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[35]Bolden, 121 Nev. at 914, 124 P.3d at 195, receded from by Cortinas, 124 Nev. ___, 195 P.3d 315.

[36]See id.; Sharma, 118 Nev. at 655, 56 P.3d at 872.

Sixth, appellant argues that her counsel was ineffective for failing to object to Instruction 10. Appellant fails to demonstrate that her counsel was deficient or that she was prejudiced. As noted above, Instruction 10 correctly instructed the jury on the relevance of appellant's presence at the scene of the crime. Therefore, the district court did not err in denying this claim.

Seventh, appellant argues that her trial counsel was ineffective for not understanding how to admit a photograph into evidence. She claims that the district court's admonishment made counsel appear inexperienced in front of the jury. Appellant failed to demonstrate that she was prejudiced. Appellant did not demonstrate that a better understanding of the process for admitting a photograph by counsel would have affected the outcome of the trial.[37] Therefore the district court did not err in denying this claim.

Eighth, appellant argues that her trial counsel was ineffective for eliciting harmful evidence by stating that appellant was in handcuffs in photographs that were introduced at trial when counsel objected to the introduction of the photographs. Appellant fails to demonstrate that she was prejudiced. During the trial, the State introduced photographs of appellant standing behind a police car with her hands behind her back. Further, witnesses testified that appellant had been detained and

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[37]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

handcuffed prior to the photograph being taken. Moreover, the jury was properly instructed that the arguments of counsel were not evidence. Thus, appellant fails to demonstrate that there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Ninth, appellant argues that her trial counsel was ineffective for inviting the district court to elicit harmful testimony from a police officer that he was unable to discover any evidence supporting appellant's claim of innocence. Appellant fails to demonstrate that she was prejudiced. As discussed previously, there was overwhelming evidence of appellant's guilt. Thus, appellant failed to demonstrate that there was a reasonable probability of a different result had counsel refrained from eliciting this testimony. Therefore, the district court did not err in denying this claim.

Tenth, appellant argues that her trial counsel's closing argument that appellant did not receive anything of value for the conspiracy was not a defense to the conspiracy charge. Appellant fails to demonstrate that her counsel was deficient or that she was prejudiced. While motive is not an element of the offense of conspiracy, the presence or absence of a motive is relevant to the issue of guilt. Trial counsel's argument was therefore a proper comment on the evidence. Moreover, appellant failed to demonstrate that but for counsel's argument, the outcome of the trial would have been different. Therefore, the district court did not err in denying this claim.

Eleventh, appellant argues that her trial counsel was ineffective for contradicting appellant's testimony during closing arguments. Specifically, she argues that counsel erred in the closing argument by stating

> [Wilson] meets [Howard] for an hour. Again, unrefuted testify [sic] that he said, he asked her about getting some money, getting some Western Union money.
>
> Odd? Yeah. Something that maybe should raise, raise red flags about the possibility of a relationship? Maybe.

She contends that this statement contradicted appellant's testimony that she had not met Howard before the day of the robbery. Appellant fails to demonstrate that she was prejudiced. Appellant testified at trial that she had no prior relationship with Howard prior to the day of the robbery. While counsel's argument appears to contradict that statement, it does not concede appellant's guilt.[38] Further, counsel's argument responded to the State's argument that the testimony was wholly incredible, by stating that even if the jury did not believe appellant's testimony with regard to her prior testimony about a relationship, it did not automatically mean that

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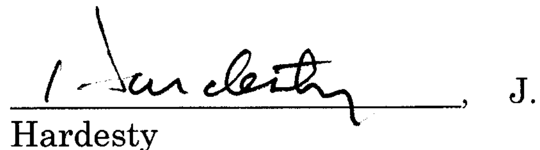
[38]See Jones v. State, 110 Nev. 730, 736-39, 877 P.2d 1052, 1056-57 (1994) (stating that counsel was ineffective where counsel conceded defendant's guilt without consent and where concession of guilt contradicted defendant's earlier testimony denying the charges and rendered that testimony incredible).

she was involved in the conspiracy. Moreover, the jury was instructed that the arguments of counsel were not evidence. Thus, appellant failed to demonstrate that there was a reasonable probability of a different result had counsel refrained from making this argument. Therefore, the district court did not err in denying this claim.

Twelfth, appellant argues that the cumulative errors of counsel prejudiced her. We conclude that because appellant's ineffective assistance of counsel claims are without merit, she failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis. Therefore, the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.



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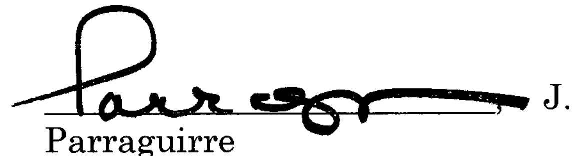

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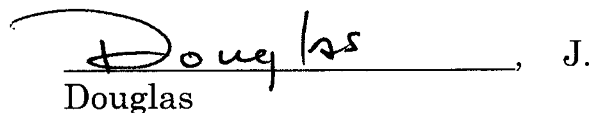

____________________, J.
Douglas

cc: Hon. Valerie Adair, District Judge
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk