

IN THE SUPREME COURT OF THE STATE OF NEVADA

LENORA DENISE NEWMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49971

FILED

AUG 05 2008

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

ORDER OF AFFIRMANCE

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

On October 11, 2005, the district court convicted Newman, pursuant to a jury verdict, of one count of burglary (count one), one count of conspiracy to commit robbery (count two), and one count of robbery with the use of a deadly weapon (count three). The district court sentenced Newman to serve the following terms in the Nevada State Prison: one to six years on count one; two to six years on count two, to run concurrently with count one; and two consecutive terms of two to ten years on count three, to run concurrently with counts one and two, for the primary

offense and the deadly weapon enhancement. On appeal, this court affirmed Newman's judgment of conviction.¹

On March 8, 2007, Newman and codefendant Lawana Williams filed a joint proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel. On May 18, 2007, the district court conducted an evidentiary hearing. The district court permitted Newman, Williams, and the State to submit closing arguments. On July 30, 2007, the district court denied Newman's petition. This appeal followed.

Ineffective assistance of trial counsel

In her petition, Newman claimed that she received ineffective assistance of trial 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 fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.²

First, Newman claimed that her trial counsel was ineffective for failing to request a voice line-up during the pretrial evidentiary

¹Newman v. State, Docket No. 46221 (Order of Affirmance, March 24, 2006).

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

hearings or any time during the trial proceeding. Newman failed to demonstrate that trial counsel was deficient or that she was prejudiced. Newman failed to demonstrate that a voice line-up would have altered the outcome of her trial. The veracity of the victim's voice identification was fully litigated at trial. On direct examination, the victim testified that during the robbery he recognized the voice of his attacker as Newman's voice. The victim testified that he knew Newman as a regular customer and friend and that he had spoken with her on several occasions. Both the victim and Officer Steven Reese, who responded to the scene of the robbery, testified that immediately following the robbery the victim told the police that he recognized the voice of his attacker as that of "Nise," which is apparently Newman's nickname. On cross-examination, Newman's counsel extensively attacked the victim's ability to recognize Newman's voice during the attack, given the fact that he had sustained serious injuries. Given this testimony, it is unlikely that a voice identification line-up would have altered the outcome of trial. Therefore, the district court did not err in denying this claim.

Second, Newman claimed that her trial counsel was ineffective for failing to have the videotape of the robbery enhanced to prove her innocence. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. At the evidentiary hearing, Newman's counsel testified that he attempted to have the video surveillance tape enhanced but was unable to do so because of the quality of the original videotape. Moreover, at trial, counsel rigorously attacked the quality of the tape and the fact that Newman could not be identified as

the attacker on the tape. Thus, the quality of the videotape was fully litigated at trial. As a result, Newman failed to demonstrate that her trial counsel was deficient. Therefore, the district court did not err in denying her claim.

Third, Newman claimed that trial counsel was ineffective for failing to review evidence seized during the search conducted at Newman's home. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. At trial, Detective Spiotto testified that no evidence was found during the search directly linking Newman or Williams to the crime. In addition, both Officer Reese and the victim testified extensively regarding the victim's voluntary statement, and during cross-examination, Newman's counsel rigorously questioned the victim regarding his failure to indicate that he could identify Newman and William in his voluntary statement. Because this evidence was discussed extensively at trial, trial counsel was not deficient for failing to engage in further investigation. Therefore, the district court did not err in denying Newman's claim.

Fourth, Newman claimed that trial counsel was ineffective for failing to review the victim's voluntary statement. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. At trial, both Officer Reese and the victim testified extensively regarding the victim's voluntary statement and during cross-examination, Newman's counsel rigorously questioned the victim regarding his failure to indicate that he could identify Newman and Williams in his voluntary statement. Because this evidence was discussed

extensively at trial, trial counsel was not deficient for failing to engage in further investigation. Therefore, the district court did not err in denying Newman's claim.

Fifth, Newman claimed that trial counsel was ineffective for failing to review transcripts or the recorded audio tape of the 911 call that the victim made right after the robbery occurred. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. The record reveals that the tape of the 911 call was admitted into evidence. The victim was also extensively questioned about the call on cross-examination and his failure to identify Newman and Williams as the perpetrators during the call. Because this evidence was discussed extensively at trial, trial counsel was not deficient for failing to engage in further investigation. Therefore, the district court did not err in denying Newman's claim.

Sixth, Newman claimed that trial counsel was ineffective for failing to object to Detective Spiotto's testimony that the robber wore a large winter coat during the robbery. Newman argued that this testimony was objectionable because the video surveillance tape of the robbery showed that the perpetrator wore a sweatshirt with a hood. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. The record reveals that the objectionable testimony was elicited by Newman's counsel during his cross-examination of Detective Spiotto. Detective Spiotto was questioned about a statement in his arrest report that the attacker was wearing a winter coat with a hood over it. This questioning by Newman's counsel was intended to show

that Detective Spiotto's report was based on his viewing of the surveillance videotape rather than the victim's description of his attacker. Thus, it is apparent from the record that Newman's counsel elicited this testimony to ensure that the jury understood that the victim had not provided the description set forth in Detective Spiotto's report. As a result, it is unclear how such testimony was objectionable, and Newman failed to elucidate a basis for this objection.³ Therefore, the district court did not err in denying Newman's claim.

Seventh, Newman claimed that trial counsel was ineffective for failing to object to the victim's testimony that Newman and Williams were in a same sex relationship. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Newman failed to demonstrate that such an objection would have been successful. She failed to offer any evidence demonstrating that the jury was biased by this testimony. Moreover, a review of the record revealed that the victim's testimony was not offensive or derogatory. Therefore, the district court did not err in denying Newman's claim.

Eighth, Newman claimed that trial counsel was ineffective for failing to object when the prosecutor mentioned that Newman and Williams were involved in a dating relationship and therefore knew each other's thoughts. Specifically, Newman claimed that the prosecutor's

³Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (noting that trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims).

statement created bias in the jury which resulted in an unfair trial. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. She failed to offer any evidence demonstrating that the jury was biased by the prosecutor's remarks or demonstrate that such an objection would have been successful. Moreover, the prosecutor's statements were not offensive or derogatory and were based on the victim's testimony. Therefore, the district court did not err in denying Newman's claim.

Ninth, Newman claimed that trial counsel was ineffective for failing to conduct jury voir dire on the issue of whether the jury members were biased against same-sex relationships. Specifically, Newman contended that trial counsel's purported failure to question possible jurors about their opinions about same-sex relationships resulted in the empaneling of a biased jury. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Newman failed to offer any evidence demonstrating that the jury was biased.⁴ Therefore, the district court did not err in denying Newman's claim.

⁴At the evidentiary hearing, Newman's counsel testified that his client did not inform him that she and Williams were involved in a dating relationship. Further, Newman's counsel testified that he had had no idea that this evidence would be introduced at trial. Therefore, Newman's counsel had no reason to inquire about sexual orientation bias during voir dire. In their petition, Newman and Williams vehemently denied the existence of such a relationship. Newman and Williams further asserted that even if they were involved in a dating relationship it would be irrelevant to a determination of guilt in this case. We disagree. Whether

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Tenth, Newman claimed that trial counsel was ineffective for failing to utilize the assistance of any expert witnesses. In particular, Newman claimed that her trial counsel should have utilized "post indictment identification procedures, preparatory steps such as systemized or scientific analyzing of the accused, finger prints, blood samples, clothing, hair and the like." Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. In her petition and at the evidentiary hearing, Newman failed to indicate what testimony such experts would have offered if called to testify and how that testimony would have altered the outcome of her trial.⁵ Therefore, the district court did not err in denying Newman's claim.

Eleventh, Newman claimed that trial counsel was ineffective for failing to obtain an expert to testify regarding the reliability of eye-witness testimony. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. In her petition and at the evidentiary hearing, Newman failed to indicate what testimony such an expert would have offered if called to testify.⁶ Thus, Newman's

... continued

the defendants were involved in an intimate relationship is certainly relevant to the question of whether they engaged in a conspiracy to commit a crime.

⁵Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984).

⁶Id.

suggestion that expert testimony regarding the reliability of eye-witness testimony would have altered the outcome of the proceeding is purely speculative. Therefore, the district court did not err in denying Newman's claim.

Twelfth, Newman claimed that trial counsel was ineffective for failing to obtain and review the entire videotape in order to compare the build and height of the robber to that of Newman. Newman failed to demonstrate that her trial counsel was ineffective or that she was prejudiced. Because Newman was present during the trial and the video surveillance tape was entered into evidence, the jury was able to review the tape and compare the build and height of the attacker on the videotape with that of Newman. As a result, it is entirely unclear how further review of the videotape would have altered the outcome of the proceedings.⁷ Therefore, the district court did not err in denying Newman's claim.

Thirteenth, Newman claimed that trial counsel was ineffective for not objecting to the "use of peremptory [sic] challenges in an intentional, facially discriminatory and gender discriminatory manner," which Newman claims could have prejudiced the jury. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Newman failed to set forth any specific factual allegations supporting her claim that the State used peremptory challenges in a

⁷Id.

discriminatory manner.⁸ Therefore, the district court did not err in denying Newman's claim.

Fourteenth, Newman claimed that her trial counsel was ineffective for failing to investigate the victim or question the victim's credibility. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Newman failed to allege what information such an investigation would have yielded or how that information would have affected the outcome of the trial.⁹ Therefore, the district court did not err in denying Newman's claim.

Fifteenth, Newman claimed that her trial counsel was ineffective for failing to allow her to testify in her own defense. Newman's claim is patently without merit and is belied by the record. The record demonstrates that the district court appropriately canvassed Newman concerning her right to testify at trial and that Newman affirmatively waived that right. Therefore, the district court did not err in denying Newman's claim.

Sixteenth, Newman claimed that her trial counsel was ineffective for failing to seek admission of the evidence seized by the police department during the search of her residence. Specifically, Newman claimed that this evidence, a large winter coat and a .22 caliber rifle, should have been submitted to the jury because the items were depicted in

⁸Id.

⁹Id.

the police reports as the clothes she wore during the robbery and the weapon that she used to commit the robbery. Newman appeared to claim that the jury should have been able to compare these items with what was shown on the video surveillance tape. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. In her petition and at the evidentiary hearing, Newman failed to elucidate how the admission of this evidence would have altered the outcome of the trial. The State never introduced these items into evidence nor did the jury see any of the police reports of which Newman complains. Thus, as Newman's counsel testified at the evidentiary hearing, there was no reason to admit these items into evidence. Therefore, the district court did not err in denying Newman's claim.

Seventeenth, Newman claimed that her trial counsel was ineffective for failing to bring a motion to suppress "identification evidence." Newman appeared to claim that this evidence should be suppressed because the victim testified that he was hit over the head so hard that he could see stars and therefore his identification of Newman was faulty. Newman claimed that this was especially true in light of the fact that the police did not find any physical evidence linking her to the crime at her home or at the scene. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Newman failed to demonstrate that such a motion would have been meritorious in light of the fact that the victim's identification was relevant and based on his percipient knowledge. Therefore, the district court did not err in denying Newman's claim.

Eighteenth, Newman claimed that her trial counsel was ineffective for failing to investigate possible alibi witnesses. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. At the evidentiary hearing, Newman's counsel testified that Newman did not provide him with the information he needed to contact the alleged alibi witnesses. Moreover, at the evidentiary hearing, Newman's counsel testified that he went to the crime scene twice to see if there were any witnesses who remembered the incident or who could offer mitigating testimony. Thus, Newman failed to demonstrate that her trial counsel failed to appropriately investigate possible alibi witnesses. Therefore, the district court did not err in denying Newman's claim.

Nineteenth, Newman claimed her trial counsel was ineffective for failing to ensure that the district court properly instructed the jury regarding the deadly weapon enhancement. Specifically, Newman claims that the district court should have given an instruction indicating that the jury was required to find that she had actual or constructive possession beyond a reasonable doubt. Newman failed to demonstrate that she was prejudiced. While the district court failed to give a complete jury instruction concerning the use of a deadly weapon and the need for actual or constructive possession, we conclude that this did not prejudice Newman because there was ample evidence that she used a weapon in the commission of the offense. The victim testified that he sustained serious injuries during the crime because Newman hit him repeatedly with a

metal object. Thus, in Newman's case, we conclude the result would have been the same even if the jury had been properly instructed.¹⁰

Ineffective assistance of appellate counsel

In her petition, Newman contended 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 resulted in prejudice such that the omitted issue would have a reasonable probability of success on appeal.¹¹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹² This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹³

¹⁰Newman argued that "the defendant has to have a certain mental state before she can be found guilty of a specific offense." It appears that Newman contended that trial counsel was ineffective for failing to instruct the jury pursuant to this court's decisions in Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005) and Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). However, neither of these cases apply because Newman was not charged as an aider and abettor or under a theory of vicarious coconspirator liability respecting the robbery and burglary. Moreover, Bolden and Sharma do not apply to specific intent offenses. Bolden, 121 Nev. at 923, 124 P.3d at 195; Sharma, 118 Nev. at 654-55, 56 P.3d at 872. Robbery is a general intent offense.

¹¹Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹²Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹³Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Newman contended that her appellate counsel was ineffective for failing to communicate with her regarding her appeal. Specifically, Newman claimed that she made several attempts to contact her appellate counsel but all of her calls went unanswered. Newman failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. At the evidentiary hearing, Newman's counsel testified that he never received any voice messages from Newman and that if he had he would have returned her calls. Moreover, Newman's appellate counsel testified that he met with Newman regarding her appeal after she was sentenced and that he exchanged letters with Newman regarding the appeal. Thus, Newman's claim that her appellate counsel failed to communicate with her regarding her appeal is without merit. Therefore, the district court did not err in denying her claim.

Next, Newman raised the following claims, which should have been raised on direct appeal: (1) prosecutorial misconduct premised upon the prosecutor's statement that she and Williams had a dating relationship, (2) prosecutorial misconduct premised upon the prosecutor's statement that Newman put on layers and layers of clothing, (3) there was insufficient evidence to demonstrate that she used a firearm in the commission of a crime, (4) the district court improperly instructed the jury regarding the necessity of the State to prove beyond a reasonable that Newman had actual or constructive possession of a firearm, and (5) the district court improperly instructed the jury that the State was not required to have recovered a deadly weapon or produce a deadly weapon in court to prove the use of a deadly weapon in the commission of a crime.

Newman failed to demonstrate good cause for her failure to raise these claims on direct appeal, and they were therefore waived.¹⁴ To the extent Newman claimed that her appellate counsel was ineffective for failing to present these claims on appeal, we will address each of these claims, in turn, below.

First, Newman's claim that her appellate counsel was ineffective for failing to make a claim that the prosecutor's statements concerning her relationship with Williams constituted prosecutorial misconduct is without merit. These statements were based upon evidence presented at trial, through the victim's testimony that she and Williams had a dating relationship. Moreover, the prosecutor's brief reference to the nature of the relationship between Newman and Williams was not demeaning or disrespectful and was offered to prove that the two women engaged in a conspiracy to commit a robbery. Finally, as discussed above, Newman failed to demonstrate that the admission of this evidence resulted in any jury bias. Thus, Newman failed to demonstrate that this issue would have had a reasonable probability of success on appeal.

Second, Newman's claim that her appellate counsel should have raised a claim of prosecutorial misconduct premised upon the prosecutor's statement regarding the amount of clothing worn by Newman when she committed the robbery is without merit. The videotape offered

¹⁴NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

into evidence at trial showed the robber entering the bar dressed in a sweatshirt or heavy clothing even though it was a warm August night. Therefore, the statement was based upon evidence admitted at trial. Moreover, there was nothing prejudicial about this statement, and therefore, Newman's trial counsel was not required to make a futile objection.¹⁵ Thus, we conclude that appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Third, we conclude that Newman's contention that her appellate counsel was ineffective for failing to argue on appeal that there was insufficient evidence that she used a firearm in the commission of the crime is patently without merit. First, we note that the deadly weapon enhancement does not require proof that a firearm was used, only that a deadly weapon was used to commit a crime. Based upon our review of the record, we conclude that there was sufficient evidence to establish guilt beyond a reasonable doubt as determined by any rational trier of fact that Newman used a deadly weapon in the commission of a crime.¹⁶ Here, given the victim's testimony that his attacker beat him with a hard metal object causing him to sustain serious injuries and bleed profusely during

¹⁵Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (noting that trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims).

¹⁶Wilkins v. State, 96 Nev. 367, 374-75 609 P.2d 309, 313-14 (1980).

the robbery, we find that there was sufficient proof that Newman used a deadly weapon in the commission of a robbery. Thus, we conclude that appellant failed to demonstrate that this issue had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Fourth, we conclude that Newman's contention that her appellate counsel was ineffective for failing to argue that the district court erroneously failed to instruct the jury that the State was required to prove, beyond a reasonable doubt, that Newman had actual or constructive possession of a weapon is without merit. While we acknowledge that the district court's instructions regarding the deadly weapon enhancement were deficient, we conclude that Newman failed to demonstrate that the claim had a reasonable probability of success on appeal. As discussed above, there was ample evidence that Newman possessed a weapon during the commission of the crime, which she used to injure the victim. Therefore, Newman was not prejudiced. Moreover, to the extent that Newman complains that it is necessary that the jury find a firearm was used, we note, once again, that the State is only required to prove that she used a deadly weapon. Therefore, the district court did not err in denying this claim.

Fifth, we reject Newman's contention that her appellate counsel was ineffective for failing to argue on appeal that the jury was improperly instructed that the State was not required to have recovered a deadly weapon or produce a deadly weapon in court in order to prove the use of a deadly weapon in the commission of a crime. The State is not

required to produce the actual weapon at trial in order to enhance a defendant's sentence for the use of a deadly weapon.¹⁷ Instead, a victim's testimony regarding a defendant's possession of a weapon is sufficient.¹⁸ Here, the victim testified that Newman hit him several times with a hard metal object. Thus, we conclude that Newman failed to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Direct appeal claims

Finally, Newman raised the following claims, which were previously litigated in her direct appeal: (1) the State engaged in prosecutorial misconduct and improperly shifted the burden of proof to the defense by questioning why the defense had not requested a voice line-up and (2) insufficient evidence supported her conviction. These claims are barred by the doctrine of law of the case. Newman cannot avoid the doctrine of law of the case by presenting a more detailed and focused argument.¹⁹ Therefore, the district court did not err in denying these claims.

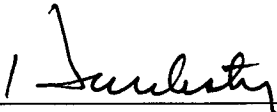
¹⁷Harrison v. State, 96 Nev. 347, 351, 608 P.2d 1107, 1109-10 (1980).

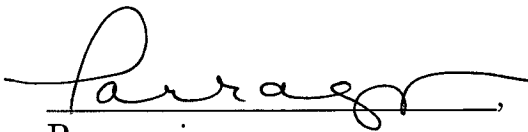
¹⁸Id.

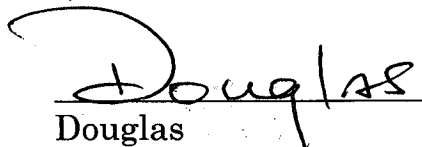
¹⁹Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Newman is not entitled to relief and that briefing and oral argument are unwarranted.²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²¹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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

²⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²¹We 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.