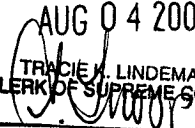


IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWANA WILLIAMS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49972

**FILED**

AUG 04 2008  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING  
THE DEADLY WEAPON ENHANCEMENT, AND REMANDING

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

On October 4, 2005, the district court convicted Williams pursuant to a jury verdict, of one count of conspiracy to commit robbery and one count of robbery with the use of a deadly weapon. The district court sentenced Williams to serve two to six years in prison for conspiracy to commit robbery and two consecutive terms of two to ten years for robbery with the use of a deadly weapon, to run concurrently with her conviction for conspiracy to commit robbery.

Williams's convictions stem from her participation in the armed robbery of the Office Bar II, located in Las Vegas. The victim in the instant case testified at trial. On the evening of August 5, 2004, the victim was working the graveyard shift as a bartender at the Office Bar II. The victim had been employed by Office Bar II for one year, and during that time, Williams and codefendant Lenora Denise Newman had become

regular customers and formed a friendship with the victim. On the evening of the robbery, Newman and Williams came in and out of the bar approximately three times. At some point in the early morning hours, Williams entered the bar without Newman. Only Williams and four other customers remained in the bar. After the other customers left the bar, Williams asked the victim if she could use the telephone, and he complied with her request. After using the telephone, Williams went and stood by the door, peering out, while the victim began cleaning around the bar. At this time, the victim had his back turned to the door. To get into the bar at night, customers had to be buzzed in because the door was always kept locked. A surveillance videotape showed Williams holding the door open, talking to Newman, and then letting Newman into the bar as she exited. While the victim was cleaning, Newman struck him from behind over the head several times with a metal object causing blood to run down his face and partially obstruct his vision. At some point during the robbery, the victim recognized the voice of his attacker as that of Newman. Newman instructed the victim to open various registers and drawers and robbed the bar. On appeal, this court affirmed Williams's judgment of conviction.<sup>1</sup>

On March 8, 2007, Williams and Newman 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. On July 30, 2007, the district court denied Newman and Williams's petition. This appeal followed.

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<sup>1</sup>Williams v. State, Docket No. 46249 (Order of Affirmance, March 24, 2006).

### Ineffective assistance of trial counsel

In her petition, Williams contended 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.<sup>2</sup>

First, Williams claimed that trial counsel was ineffective for failing to object to an improper deadly weapon jury instruction, which she claimed misstated the law regarding an unarmed codefendant's use of a deadly weapon. Specifically, Williams claimed that the jury instruction failed to properly instruct jurors that to find her guilty of the use of a deadly weapon, the State must prove that she had actual or constructive possession of the weapon and knowledge that the other offender was armed. We agree with Williams and conclude that trial counsel was deficient for not objecting to the improper jury instruction.

At the time of Williams's trial, the State was required to prove, pursuant to Anderson v. State, that an unarmed defendant, charged as an aider and abettor or coconspirator, had actual or constructive control over a weapon.<sup>3</sup> To prove actual or constructive possession, the State was required to demonstrate that the unarmed

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

<sup>3</sup>95 Nev. 625, 600 P.2d 241 (1979), abrogated by Brooks v. State, 124 Nev. \_\_\_, 180 P.3d 657 (2008); Jones v. State, 111 Nev. 848, 899 P.2d 544 (1995).

defendant had knowledge of the weapon and that he had the ability to exercise control over the weapon.<sup>4</sup> Here, the district court instructed the jury:

If more than one person commits a robbery, and one of them uses a deadly weapon in the commission of that robbery, each may be convicted of Robbery with Use of a Deadly Weapon, even though he did not personally himself use the weapon.

Neither this instruction nor any of the other instructions provided by the district court appropriately set forth the law as stated in Anderson. Trial counsel did not object to this instruction or offer any instruction concerning an unarmed codefendant's use of a deadly weapon. We conclude that trial counsel's performance in this regard was deficient.

We further conclude that given the evidence presented in this case, the error prejudiced Williams. Here, the evidence adduced at trial showed that Williams and Newman were regular customers at Office Bar II and were also friends with the victim. On the evening of the robbery, Williams allowed Newman access to the bar as she left the premises. Williams was therefore not present at the time the robbery occurred. We conclude that under these circumstances, coupled with the deficient weapon instruction, resulted in prejudice. We therefore reverse the district court's denial of Williams's claim and direct the district court to vacate the deadly weapon enhancement.

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<sup>4</sup>Brooks v. State, 124 Nev. \_\_\_, \_\_\_, 180 P.3d 657, 659 (2008) (concluding that district court erred in giving instruction similar to instruction provided here because instruction was inaccurate description of law).

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

Third, Williams 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, Williams claimed the prosecutor's statements created bias in the jury resulting in an unfair trial. Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. Williams failed to demonstrate that such an objection would have been successful or offer any evidence showing that the jury was biased by the prosecutor's remarks. Moreover, a review of the record revealed that 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 Williams's claim.

Fourth, Williams claimed that trial counsel's failure to question potential jurors about any bias they may have against same-sex relationships resulted in the empanelment of a biased jury. Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. Williams failed to offer any evidence demonstrating

that the jury was biased in this regard.<sup>5</sup> Therefore, the district court did not err in denying Williams's claim.

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

Sixth, Williams claimed that trial counsel was ineffective for failing to allow her to testify in her own defense. Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. Williams's claim is belied by the record on appeal.<sup>6</sup> The record demonstrates that the district court appropriately canvassed Williams concerning her right to testify at trial and that she affirmatively waived

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<sup>5</sup>At 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, Williams's counsel testified that he had no idea that this evidence would be introduced at trial. Therefore, Williams's counsel had no reason to inquire about sexual orientation bias during voir dire. In their petition, Williams and Newman denied the existence of such a relationship. Williams and Newman 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 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.

<sup>6</sup>See Davis v. State, 115 Nev. 17, 19, 21, 974 P.2d 658, 659, 660 (1999).

that right. Therefore, the district court did not err in denying Williams's claim.

Seventh, Williams claimed that trial counsel was ineffective for failing to consult with any expert witnesses. In particular, Williams claimed that trial counsel should have used "post indictment identification procedures, preparatory steps such as systemized or scientific analyzing of the accused, finger prints, blood samples, clothing, hair and the like." Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. Williams failed to elucidate upon the specific evidence such an inquiry would have produced.<sup>7</sup> As a result, Williams failed to demonstrate how trial counsel's use of such information would have resulted in a reasonable probability of a different outcome.<sup>8</sup> Therefore, the district court did not err in denying this claim.

Eighth, Williams claimed that trial counsel was ineffective for failing to obtain an expert to testify regarding the reliability of eye-witness testimony. Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. In her petition and at the evidentiary hearing, Williams failed to indicate what testimony such an expert would have offered if called to testify.<sup>9</sup> Therefore, the district court did not err in denying Williams's claim.

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984).

<sup>8</sup>See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

<sup>9</sup>Id.

Ninth, Williams claimed that trial counsel was ineffective for failing to obtain and review the entire surveillance videotape to compare the build and height of the individual on the tape with that of Williams. Williams failed to demonstrate that her trial counsel was ineffective or that she was prejudiced. Williams appeared in court and the jury was able to compare her appearance to that of the individual on the surveillance videotape. Moreover, at trial, the victim testified that he could identify Williams on the videotape. In her petition and at the evidentiary hearing, Williams failed to elucidate how further review of the videotape would have altered the outcome of the proceedings. Therefore, the district court did not err in denying Williams's claim.

Tenth, Williams claimed that trial counsel was ineffective for not objecting to the prosecutor's "use of peremptory [sic] challenges in an intentional, facially discriminatory and gender discriminatory manner," which Williams claimed could have prejudiced the jury. Williams failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced. Williams did not offer any specific factual allegations demonstrating that the State used peremptory challenges in a discriminatory manner. Therefore, the district court did not err in denying Williams's claim.

Eleventh, Williams claimed that trial counsel was ineffective for failing to present her uncle, Jerry Clark, as an alibi witness. Williams failed to demonstrate that trial counsel was ineffective or that she was prejudiced. At the evidentiary hearing, Williams admitted that she was at her uncle's house at approximately 5:30 or 6:00 in the morning. The victim's 911 call was placed at 4:45 a.m. Therefore, Williams failed to demonstrate that trial counsel was deficient for failing to call an alibi



witness because her uncle could not have truthfully testified that Williams was at his house when the robbery occurred. This is especially true considering the fact that Williams was seen on the video surveillance tape exiting the scene of the crime immediately before the robbery occurred. Therefore, the district court did not err in denying this claim.

Twelfth, Williams claimed that trial counsel was ineffective for failing to contact a woman named "Carrie" and present her as a witness. Williams failed to demonstrate that trial counsel was ineffective or that she was prejudiced. At the evidentiary hearing, Williams admitted that she did not know Carrie's last name and had no contact information. Thus, Williams failed to demonstrate that trial counsel was deficient for failing to present this witness because Williams did not give her attorney sufficient information to find this witness. Therefore, the district court did not err in denying this claim.

Thirteenth, Williams contended that trial counsel was ineffective for failing to obtain Office Bar II's phone records from the evening of the incident, which Williams claimed would have demonstrated that she did not use the phone prior to the robbery. Williams failed to demonstrate that trial counsel was ineffective in this regard. Contrary to Williams's assertions, these records would not have proved that she did not conspire with Newman to commit robbery. The victim's testimony placed her at the scene of the crime and was corroborated by the surveillance videotape, which showed her opening the door of the bar and

allowing Newman to enter. Therefore, the district court did not err in denying Williams's claim.<sup>10</sup>

Ineffective assistance of appellate counsel

In her petition, Williams 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.<sup>11</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>12</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>13</sup>

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<sup>10</sup>Williams argued that "the defendant has to have a certain mental state before she can be found guilty of a specific offense." It appears that Williams 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, Bolden and Sharma apply to specific intent offenses. Bolden, 121 Nev. at 914, 923, 124 P.3d at 195, 201; Sharma, 118 Nev. at 654-55, 56 P.3d at 872. Robbery is a general intent offense. To the extent Williams contended that her trial counsel was ineffective for failing to raise this issue on appeal, we conclude the claim is without merit as it did not have a reasonable probability of success on appeal for the reasons discussed above.

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

<sup>12</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

Williams contended that appellate counsel was ineffective for failing to communicate with her regarding her appeal. Specifically, Williams claimed that she made several attempts to contact her appellate counsel but all of her calls went unanswered. Williams failed to demonstrate that appellate counsel's performance was deficient or that she was prejudiced. At the evidentiary hearing, Williams's appellate counsel testified that he wrote letters to Williams regarding her appeal. Thus, Williams's claim that appellate counsel failed to communicate with her regarding her appeal lacks merit. Therefore, the district court did not err in denying her claim.

Next, Williams raised the following claims, which should have been raised on direct appeal: (1) the district court improperly instructed the jury regarding the necessity of the State to prove beyond a reasonable that Williams had actual or constructive possession of a firearm, (2) prosecutorial misconduct premised upon the prosecutor's statement that she and Newman had a dating relationship, (3) 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 deadly weapon enhancement, and (4) there was insufficient evidence to demonstrate that she used a firearm in the commission of a crime. To the extent Williams 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, we agree with Williams's contention that appellate counsel was ineffective for failing to challenge the erroneous deadly weapon enhancement instruction. As trial counsel failed to object to this instruction at trial, the issue would have been reviewed for plain error on

appeal.<sup>14</sup> Here, we conclude that the error was plain and affected Williams's substantial rights.<sup>15</sup> As discussed above, the district court failed to instruct the jury in accord with Nevada law. Further, the State's evidence that Williams had actual or constructive possession of the weapon used to commit the offense was weak. Accordingly, we conclude that appellate counsel was deficient for failing to raise this claim and that the claim would have had a reasonable probability of success on appeal. Therefore the district court erred in denying Williams claim.

Second, Williams's claim that 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 Newman 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, Williams failed to demonstrate that this evidence resulted in any jury bias. Thus, she failed to demonstrate that this issue had a reasonable probability of success on appeal.

Third, we reject Williams's contention that appellate counsel was ineffective for failing argue on appeal that the jury was improperly instructed that State was not required to have recovered a deadly weapon

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<sup>14</sup>Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

<sup>15</sup>Id.

or produce a deadly weapon in court 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 to prove a deadly weapon enhancement.<sup>16</sup> Instead, a victim's testimony regarding a defendant's possession of a weapon is sufficient.<sup>17</sup> Here, the victim testified that Newman hit him several times with a hard metal object. Thus, we conclude that Williams 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.

Fourth, we disagree with Williams's contention that appellate counsel was ineffective for failing to argue that there was insufficient evidence that she used a firearm or weapon in the commission of the crime. We conclude that this issue lacks merit. Considering the evidence introduced at trial, we conclude that Williams failed to demonstrate that this claim had a reasonable probability of success on appeal.<sup>18</sup> Therefore, the district court did not err in denying this claim.

#### Direct appeal claims

Finally, Williams raised the following claims previously litigated in her direct appeal: (1) the State engaged in prosecutorial misconduct and improperly shifted the burden of proof to the defense by

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<sup>16</sup>Harrison v. State, 96 Nev. 347, 351, 608 P.2d 1107, 1109-10 (1980).

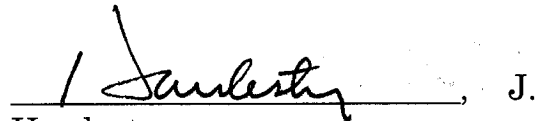
<sup>17</sup>Id.

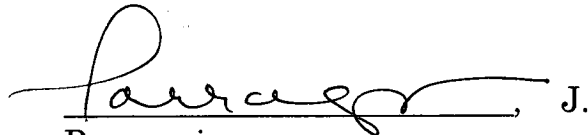
<sup>18</sup>The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution. Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996) (citations omitted).

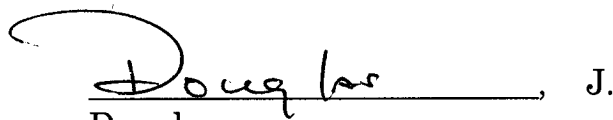
questioning why the defense had not requested a voice line up and (2) that insufficient evidence supported her convictions. These claims are barred by the doctrine of law of the case, and Williams cannot avoid its application by presenting a more detailed and focused argument.<sup>19</sup> Therefore, the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Williams is entitled to relief as set forth above and that briefing and oral argument are unwarranted.<sup>20</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part and REMAND this matter to the district court for proceedings consistent with this order.<sup>21</sup>

  
Hardesty

  
Parraguirre

  
Douglas

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

<sup>20</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>21</sup>We 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.

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