IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES NEIFELD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50116

FILED

AUG 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

On November 4, 2005, the district court convicted appellant, pursuant to a jury trial, of one count of conspiracy and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison a term of 12 to 48 months for the conspiracy count and two consecutive terms of 36 to 120 months for the robbery count, the latter to be served concurrently with the former. This court affirmed appellant's judgment of conviction on direct appeal.[1] The remittitur issued on June 13, 2006.

On April 18, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Neifeld v. State, Docket No. 46321 (Order of Affirmance, May 19, 2006).

08-20165

State opposed the petition, and appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On September 20, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition.[2] This appeal followed.

In his petition, appellant claimed that he 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 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.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4] A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual

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[2]We note that an affidavit from trial counsel was filed in the district court prior to the evidentiary hearing. However, because the district court conducted an evidentiary hearing, there was no violation of appellant's statutory rights by the consideration of the affidavit as trial counsel was subject to cross-examination at the evidentiary hearing. See Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002).

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

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

findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, appellant claimed that trial counsel was ineffective for failing to file a pretrial motion to suppress the identifications as unnecessarily suggestive because appellant was in the back of a patrol car, surrounded by other patrol cars, in handcuffs when the victim and witnesses were brought to the scene to identify him, and the suspect's vehicle was present at the scene. Appellant further argued the identifications were unreliable because only two of the three witnesses identified him, and Jason Minkler identified appellant as the passenger/gunman whereas Carolyn Paquette identified appellant as the driver. Appellant further claimed that Jason Minkler's pretrial identification was unreliable because Minkler: (1) had a limited view of the gunman's face and head because the gunman was in a ski mask; (2) was hysterical and on the phone to 911 during the crime; (3) described both men as black males whereas appellant is white; (4) described the gunman as wearing all black clothing when appellant was wearing dark blue jeans, a black t-shirt, and white and blue shoes with yellow laces; (5) no black, hooded sweatshirt was found in appellant's possession despite a description of the gunman wearing a hooded sweatshirt; and (6) Minkler identified appellant from his stance, complexion, height and body features. Appellant also claimed that Carolyn Paquette's, the victim of the robbery, on-scene identification was unreliable because Paquette: (1) identified appellant as the driver whereas Minkler identified appellant as the

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[5]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

masked gunman; (2) Paquette had a questionable opportunity to view the driver as she was being robbed by the masked gunman and she was at a greater distance from the vehicle; (3) Paquette's attention to details was affected by gunman and the effects of alcohol; (4) Paquette described the driver as black to the police whereas she identified appellant as the driver and he is white; and (5) no record was made of how certain she was of the identification. Appellant claimed that if trial counsel had filed a motion to suppress that the on-scene identifications would have been suppressed as they were the only direct evidence placing appellant at the scene of the crime and would have excluded the witnesses' identification testimony which contradicted codefendant Nelson's testimony.

Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he made a strategic decision not to raise the issue of the contradictory identifications prior to trial. Trial counsel testified that he wanted the jury to hear the contradictory testimony from the witnesses regarding the identifications in order to raise reasonable doubt. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here.[6] Moreover, appellant failed to demonstrate prejudice in the instant case. On direct appeal, appellant argued that the show-up identification was overly suggestive and unreliable. This court noted that a pretrial motion to suppress had not been filed or any other objection made below, and thus,

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[6]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

the issue had not been preserved. However, this court further stated that even if the procedure was suggestive and unreliable, there was no plain or constitutional error. Because plain-error analysis requires a consideration of prejudice—whether the error affected the substantial rights of the defendant—this court already determined that any error relating to the pretrial identifications did not affect his substantial rights.[7] Therefore, appellant cannot demonstrate that he was prejudiced by trial counsel's performance in this regard, and we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object at sentencing to the deadly weapon enhancement as a violation of double jeopardy. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the deadly weapon enhancement does not violate double jeopardy.[8] Therefore, we conclude that the district court did not err in denying this claim.

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[7]See Calvin v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006) ("In conducting a plain-error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights.").

[8]See NRS 193.165(3) (providing that this statute did not create a separate offense but provided for an additional penalty for the primary offense upon the finding of the prescribed fact); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975) (rejecting a double jeopardy claim to NRS 193.165 and recognizing that there is no double jeopardy violation where the enhancement does not create a separate offense but provides for an additional penalty upon the finding of the prescribed fact).

Next, appellant claimed that he 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 resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[9] Appellate counsel is not required to raise every non-frivolous issue on appeal.[10] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[11]

First, appellant claimed that appellate counsel was ineffective for failing to argue on appeal that jury instruction 9 failed to correctly state the law of joint or constructive possession for an unarmed defendant because it omitted the element of "control."[12] Jury instruction 9 read:

> The participation of a defendant not actually in possession of the weapon who is aware that a weapon is to be used and benefits by the use of such a weapon by aiding or abetting the actual user in unlawful use of the weapon, makes a defendant equally subject to the added weapon enhancement available to the user who commits a crime through the use of a deadly weapon.

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

[10]Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

[12]Codefendant Nelson's trial counsel objected to the unarmed defendant jury instruction and appellant's trial counsel joined without any specific argument.

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. In Nelson v. State,[13] the direct appeal of appellant's codefendant, this court stated, "Under Nevada law, an unarmed defendant who benefits from the firearm even though he does not have the ability to exercise control over the firearm may be held criminally responsible for the actions of the armed defendant."[14] This statement was preceded by the recognition that an unarmed offender who benefits from the armed offender's use of a weapon by his "'knowledge of the use of the gun and by his actual presence participates in the robbery,'" derivatively adopts the lethal potential of an armed offender's use of a weapon.[15] Jury instruction 9 sufficiently set forth these statements of law. Even assuming that the unarmed defendant jury instruction was not entirely complete, appellant failed to demonstrate any prejudice in the instant case. The State's theory of the case, as noted by this court in the opinion in Nelson v. State, was that appellant was the armed defendant and Anthony Nelson, the codefendant, was the driver and unarmed defendant.[16] Although Carolyn Paquette and Alicia Chugg identified appellant as the driver, codefendant Nelson testified that he was the

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[13]123 Nev. ___, 170 P.3d 517 (2007).

[14]Id. at ___, 170 P.3d at 528.

[15]Id. at ___, 170 P.3d at 527 (quoting Jones v. State, 111 Nev. 848, 852, 899 P.2d 544, 546 (1995)).

[16]Id. at ___, 170 P.3d at 526.

driver of the suspect vehicle.[17] Jason Minkler identified appellant as the masked gunman and Nelson as the driver of the vehicle. When police stopped the suspect vehicle within approximately an hour of the robbery, after a high speed chase, Nelson was identified as the driver of the vehicle and appellant as the passenger in the vehicle. Paquette's credit/debit card was found on the center console and a makeshift ski mask was found behind the glove box on the passenger side of the vehicle.[18] Thus, any alleged error relating to the jury instruction on the unarmed defendant was harmless beyond a reasonable doubt in the instant case as it did not contribute to the jury's verdict in relation to appellant.[19] Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that the deadly weapon enhancement violated double jeopardy. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

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[17]Nelson testified that a man named "Dwight" was the masked, armed passenger, who unbeknownst to him robbed Carolyn Paquette when "Dwight" said someone in the vehicle owed "Dwight" money. Nelson testified that he kicked "Dwight" out of his vehicle shortly after the robbery and picked up appellant, who was walking along the roadside because his car had broken down. It was for the jury to determine to the weight and credibility of the witnesses and testimony presented. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

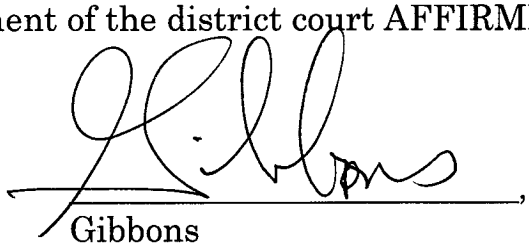
[18]No weapon and no hooded sweatshirt were found in the vehicle.

[19]See Collman v. State, 116 Nev. 687, 720-22, 7 P.3d 426, 447-449 (2000) (discussing harmless error analysis relating to jury instructions that omit or misdescribe an element of the offense); see also Neder v. United States, 527 U.S. 1, 15-16 (1999); Chapman v. California, 386 U.S. 18, 24 (1967).

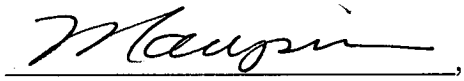
As stated earlier, the deadly weapon enhancement does not violate double jeopardy.[20] Therefore, we conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[21] Accordingly, we

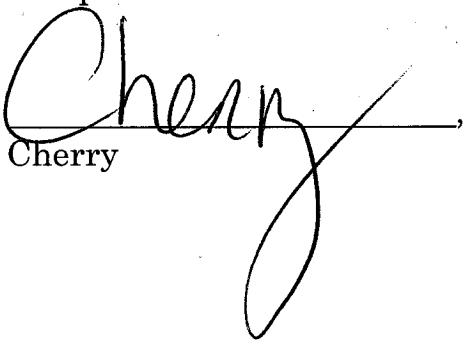
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Maupin



_____, J.
Cherry

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[20]See NRS 193.165(3) (providing that this statute did not create a separate offense but provided for an additional penalty for the primary offense upon the finding of the prescribed fact); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975) (rejecting a double jeopardy claim to NRS 193.165 and recognizing that there is no double jeopardy violation where the enhancement does not create a separate offense but provides for an additional penalty upon the finding of the prescribed fact).

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

cc: Chief Judge, Eighth Judicial District
Hon. J. Charles Thompson, Senior Judge
Matthew James Neifeld
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk