IN THE SUPREME COURT OF THE STATE OF NEVADA

BARUCH ARMIEN WASHINGTON A/K/A BARUCH ARMIEGN WASHINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39754

FILED

FEB 0 6 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On July 26, 2000, the district court convicted appellant, pursuant to a jury trial, of one count of burglary, one count of robbery with the use of a deadly weapon, one count of conspiracy to commit robbery, and one count of coercion. The district court sentenced appellant to serve maximum terms totaling three hundred and twelve months with parole eligibility after seventy months had been served in the Nevada State Prison. This court affirmed appellant's conviction on appeal, but remanded for the limited purpose of correcting a clerical error in the judgment of conviction.[1]

[1]Washington v. State, Docket No. 36496 (Order Affirming and Remanding to Correct Judgment of Conviction, March 15, 2001). The judgment of conviction erroneously stated that appellant's judgment of conviction was the result of a guilty plea when, in fact, appellant had been convicted pursuant to a jury verdict. An amended judgment of conviction was entered on June 12, 2001, correcting this error.

03-02127

On May 28, 2001, appellant filed a proper person motion to vacate or correct an illegal sentence in the district court. The State opposed the motion. On June 20, 2001, the district court denied appellant's motion. This court affirmed the order of the district court.[2]

On March 14, 2002, appellant filed a 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 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 30, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of appellate counsel.[3] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[4] Appellate counsel is not required to raise every non-frivolous issue on appeal.[5] This court has held that appellate counsel will be most effective

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[2]Washington v. State, Docket No. 38202 (Order of Affirmance, April 24, 2002).

[3]To the extent that appellant raised any of his claims independently from his ineffective assistance of appellate counsel claims, appellant waived these issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised the claims on direct appeal.

[4]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

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

when every conceivable issue is not raised on appeal.[6] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[7] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[8]

First, appellant claimed that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence.[9] Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[10] The victim and his wife testified that three men forced their way into the victim's house demanding money and drugs during the early morning hours of September 23, 1999. The victim and his wife further testified that at least two of the men brandished guns, one of the men was wearing a white shirt, one of the men was wearing a black shirt, and the third man

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

[7]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[8]Strickland v. Washington, 466 U.S. 668, 697 (1984).

[9]Appellant appeared to also claim that there was insufficient evidence presented at the preliminary hearing. On direct appeal, this court considered and rejected appellant's argument that there was insufficient evidence to bind him over on the charge of kidnapping. The doctrine of the law of the case prevents further relitigation of this issue and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[10]Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

was wearing a dark shirt. The victim testified that he was forced upstairs at gunpoint to the bedroom occupied by his wife and children, where he was threatened and beaten. The victim's wife observed the man in the white sweatshirt look through several drawers and remove an envelope containing nine hundred dollars. The victim's wife identified appellant as the man in the white sweatshirt. The victim's neighbor observed three men arrive together in a white car and force their way into the victim's house.[11] The victim's neighbor further observed the three men leaving the house approximately ten minutes later and testified that the man in the white shirt entered the passenger side of the white car. The white car sped away as the police approached the victim's house.[12] Officer David Newton, one of the officers in pursuit, testified that the passenger in the fleeing car was wearing a white sweatshirt and had the passenger door open during the chase. Appellant was apprehended shortly after the white car crashed into a trash dumpster. Officer Jeffrey Jacobs testified that over nine hundred dollars was found on appellant's person at the time of his arrest. A detective in the case testified that appellant was wearing a white long-sleeved sweatshirt in his booking photograph. Appellant's fingerprints were found in the white car. Appellant testified that he was

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[11]The victim's neighbor testified that he saw three men exit a white car parked in front of the victim's house and that one of the men was wearing a white shirt and a second man was wearing darker clothing. He did not recall what the third man, the driver, was wearing. The three men entered the house together after the front door had been kicked open. He believed that the man in the white shirt kicked open the front door of the victim's house.

[12]One of the men, the man in black, was forced to flee the scene on foot when the white car sped away without him. The man in black was apprehended shortly thereafter.

present in the car, that he never entered the house, and that he ran because he was nervous. Appellant admitted that he was wearing a white sweatshirt that morning. The jury could reasonably infer from the evidence presented that appellant committed the crimes of burglary, robbery with the use of a deadly weapon, conspiracy to commit robbery, and coercion. The jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict.[13] Thus, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Second, appellant claimed that his appellate counsel was ineffective for failing to challenge the sufficiency of the charging information on the ground that the information stated that the means were unknown to the State. This issue did not have a reasonable probability of success on appeal. The criminal information was sufficient.[14] Therefore, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

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[13]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[14]NRS 173.075(1) (providing that the information must include a written statement of the essential facts that constitute the charged offenses); NRS 173.075(2) ("It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means."); Walker v. State, 116 Nev. 670, 673-74, 6 P.3d 477, 479 (2000) (holding that the information was sufficient and provided notice that the State was pursuing alternate theories of criminal liability where the State alleged that the defendant directly committed the offense, aided and abetted in the commission of the offense by acting in concert in its commission, and conspired to commit the offense and thus was vicariously liable for acts committed in furtherance of the conspiracy).

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State failed to disclose facts and evidence favorable to the defense. Specifically, appellant claimed that the State: (1) failed to disclose "footprint evidence" that would have established that appellant was not the individual that kicked open the door, (2) failed to actually present a white shirt at trial, and (3) failed to disclose that a deadly weapon was never recovered by the police. Appellant believed that this evidence would have shown that he was not the man in the white shirt, and thus, he was innocent of the crimes. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant failed to establish that the alleged evidence was favorable or material to the defense.[15] Appellant was identified as one of the three men that robbed the victim. Because appellant was charged under alternative theories of liability and because the jury found appellant guilty of the crime of conspiracy to commit robbery, it was immaterial which of the three men actually kicked open the door of the victim's house.[16] Although the State did not present at

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[15]Evans v. State, 117 Nev. __, 28 P.3d 498, 510 (2001) (holding that Brady v. Maryland, 373 U.S 83 (1963), requires the prosecutor disclose material evidence favorable to the defense and that evidence is material if there is a reasonable probability that the result would have been different if it had been disclosed); Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (holding that in a claim alleging that the State failed to gather evidence the defendant must show that the evidence was material, "meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different.").

[16]Lewis v. State, 100 Nev. 456, 460, 686 P.2d 219, 221-22 (1984) ("It is settled in this state that evidence of participation in a conspiracy may, in itself, be sufficient evidence of aiding and abetting an act in furtherance of the conspiracy to subject the participant to criminal liability as a

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trial the white sweatshirt worn by appellant, a detective testified that appellant was wearing a white long-sleeved sweatshirt in the booking photograph that followed appellant's arrest for the instant offenses. Moreover, appellant admitted at trial that he was wearing a white sweatshirt the morning of September 23, 1999. The jury was presented with the information that the police did not recover any weapons. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the deadly weapon enhancement violated Apprendi v. New Jersey[17] because it was not "specified to the jury for determination." Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The jury was given instructions regarding the deadly weapon enhancement. In returning a guilty verdict of robbery with the use of a deadly weapon, the jury determined beyond a reasonable doubt that a deadly weapon had been used in commission of the crime of robbery. Finally, this court previously considered and rejected a similar challenge to the deadly weapon enhancement in appellant's motion to vacate or correct an illegal sentence. The doctrine of the law of the case prevents further relitigation of this issue and cannot be avoided by a more detailed and precisely focused

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principal pursuant to NRS 195.020."); see also Walker, 116 Nev. at 673-74, 6 P.3d at 479 (recognizing alternative theories of principal liability).

[17]530 U.S. 466 (2000).

argument.[18] Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant claimed that his trial counsel was ineffective for failing to conduct a thorough pretrial investigation regarding appellant's innocence. 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.[19]

First, appellant claimed that his trial counsel failed to discover, present evidence, and file a motion to dismiss the charges on the ground that appellant was not the individual in white who kicked open the door of the victim's house. Appellant claimed that there was no evidence presented that he was wearing a white shirt. Appellant further claimed that the shoeprint on the door did not match his shoes. Appellant failed to demonstrate that he was prejudiced by counsel's performance. A motion to dismiss the charges would not have been granted on the ground suggested by appellant. The record on appeal belies appellant's claim that no evidence was presented that appellant was wearing a white shirt; a detective testified that appellant was wearing a white long-sleeved sweatshirt in the booking photograph following his arrest, and appellant admitted at trial that he was wearing a white sweatshirt.[20] As discussed earlier, it is irrelevant whether appellant actually kicked open the door.

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[18]Hall, 91 Nev. 314, 535 P.2d 797.

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

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

Therefore, he failed to demonstrate trial counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charges on the ground that no deadly weapon was recovered by the police. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. A motion to dismiss would not have been granted on the ground suggested by appellant. The testimony of a victim describing the weapon used during the commission of an offense is sufficient to support a deadly weapon enhancement despite the fact that the weapon was never recovered by the police.[21] The victim and his wife testified that at least two of the men carried and used a deadly weapon. Thus, appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate whether three people entered the house. Appellant's claim appears to be premised on his belief that only two men entered the victim's house. Appellant claimed that a more thorough investigation would have revealed that appellant was not in the victim's house, but in the car when his two companions entered the victim's house. Appellant failed to demonstrate that a more thorough investigation by counsel would have changed the results of the trial. The victim and his wife testified that three men were in their house on the morning of September 23, 1999. The victim's neighbor observed three men forcibly enter the victim's house. Officer David Culver observed three men leaving the foyer-area of the victim's house. Although appellant testified that he

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[21]Harrison v. State, 96 Nev. 347, 350-51, 608 P.2d 1107, 1109-10 (1980).

remained in the car when his companions entered the house, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[22] Thus, appellant failed to demonstrate that his trial counsel was ineffective in this regard.

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.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Attorney General/Carson City
Clark County District Attorney
Baruch Armien Washington
Clark County Clerk

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[22]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

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