

IN THE SUPREME COURT OF THE STATE OF NEVADA

LERLENE EVONNE ROEVER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40521

**FILED**

**FEB 13 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Lerlene Evonne Roever's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis.

On August 10, 1999, the district court convicted Roever, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon.<sup>1</sup> The district court sentenced her to serve two consecutive terms of

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<sup>1</sup>Roever was previously convicted twice for the same offense, but each of those convictions was reversed on appeal and remanded for a new trial. Specifically, on August 17, 1995, this court reversed Roever's conviction for first-degree murder and possession of marijuana and remanded the matter for a new trial. See Roever v. State, 111 Nev. 1052, 901 P.2d 145 (1995). Following her second trial, Roever was again convicted of first-degree murder and possession of marijuana. This court again reversed Roever's conviction and remanded the matter for a new trial. See Roever v. State, 114 Nev. 867, 963 P.2d 503 (1998).

life in prison with the possibility of parole. This court affirmed the judgment of conviction.<sup>2</sup> The remittitur issued on February 27, 2001.

On January 30, 2002, Roever filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On August 29, 2002, Roever's appointed counsel filed a supplemental habeas petition. On October 24, 2003, after conducting an evidentiary hearing, the district court denied her petition. This appeal followed.

In her proper person opening brief, Roever asserts that the district court erred in denying numerous claims of ineffective assistance of trial and appellate counsel raised in her habeas petition below.<sup>3</sup> Claims of ineffective assistance of counsel present mixed questions of law and fact that are subject to independent review.<sup>4</sup> To establish a claim of ineffective assistance of counsel, Roever must satisfy a two-part test.<sup>5</sup> First, she must demonstrate that her counsel's performance was deficient, falling below an

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<sup>2</sup>Roever v. State, Docket No. 34859 (Order of Affirmance, January 30, 2001).

<sup>3</sup>Roever is represented by counsel in this appeal, and counsel filed an opening brief. On February 2, 2004, after reviewing counsel's brief, this court granted Roever's proper person motion for leave to file a supplemental proper person opening brief. Thus, in resolving this appeal, we have considered the issues raised both by counsel and by Roever in proper person.

<sup>4</sup>See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>5</sup>See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

objective standard of reasonableness.<sup>6</sup> Second, she must show prejudice.<sup>7</sup> Where the claim involves trial counsel, prejudice is demonstrated by showing that, but for trial counsel's errors, the result of the proceedings would have been different.<sup>8</sup> Where the claim involves appellate counsel, prejudice is demonstrated by showing that an omitted issue had a reasonable probability of success on appeal.<sup>9</sup> The court need not consider both prongs of the Strickland test if a petitioner fails to make the required showing on either prong.<sup>10</sup>

#### Ineffective assistance of counsel claims

Roever first claims that her trial counsel was ineffective for failing to object to the following jury instruction on presumed intent: "A man is presumed to intend the natural consequences of his own acts; so the intent to murder is presumed when a deadly weapon is used in the manner in which it was used in this case." Roever argues that this instruction improperly advised the jury that, as a matter of law, it must presume that she intended to murder the victim solely because a deadly weapon was used. She characterizes the instruction as impermissibly requiring her to

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<sup>6</sup>See Strickland, 466 U.S. at 687.

<sup>7</sup>Id.

<sup>8</sup>Id.

<sup>9</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

<sup>10</sup>See Strickland, 466 U.S. at 697.

rebut the presumption with "evidence that [the deadly weapon] was not used the way the prosecutor inferred that it was used."

The district court may not direct a jury to find a presumed fact against an accused; rather, any instruction dealing with presumptions against an accused must be in permissive terms.<sup>11</sup> However, an instruction that directs the jury to conclusively "presume an ultimate element of the offense based on proof of certain predicate facts (e.g., 'You must presume malice if you find an intentional killing')" is subject to a harmless-error analysis.<sup>12</sup> "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."<sup>13</sup>

Roever is entitled to relief only if she demonstrates that counsel's performance was deficient and that she suffered prejudice, *i.e.*, that absent counsel's deficiency there is a reasonable probability that the results of her trial would have been different.<sup>14</sup> "A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>15</sup>

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<sup>11</sup>See NRS 47.230; Barnett v. State, 96 Nev. 753, 754, 616 P.2d 1107, 1107-08 (1980); Hollis v. State, 96 Nev. 207, 209, 606 P.2d 534, 535-36 (1980).

<sup>12</sup>Neder v. United States, 527 U.S. 1, 10 (1999); see Collman v. State, 116 Nev. 687, 720-21, 7 P.3d 426, 449 (2000).

<sup>13</sup>Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

<sup>14</sup>See Foster v. State, 121 Nev. \_\_\_, \_\_\_, 111 P.3d 1083, 1086 (2005).

<sup>15</sup>Id. (quoting Strickland, 466 U.S. at 694).

We conclude that the instruction at issue was erroneous and that trial counsel's failure to object to the presumed intent instruction was deficient. As discussed below, however, we further conclude that Roever has failed to demonstrate prejudice resulting from counsel's deficient performance.

In Collman v. State, we adopted and applied the harmless error analysis approved by the United States Supreme Court in Neder v. United States.<sup>16</sup> Based on Neder, Collman concluded that where "a jury-instruction error is not 'structural' in form and effect, this court will henceforth review for harmless error improper instructions omitting, misdescribing, or presuming an element of an offense."<sup>17</sup> In conducting harmless error review in this context, Collman found particularly instructive the two-part test set forth in Yates v. Evatt,<sup>18</sup> a case cited with approval in Neder.<sup>19</sup> This court noted:

[Yates] explained first that "[i]f . . . the fact presumed is necessary to support the verdict, a reviewing court must ask what evidence the jury considered as tending to prove or disprove that fact." At issue is whether the jury looked only at

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<sup>16</sup>116 Nev. at 720-24, 7 P.3d at 447-50 (citing Neder, 527 U.S. at 10-15).

<sup>17</sup>Id.

<sup>18</sup>500 U.S. 391, 404-05 (1991).

<sup>19</sup>Collman, 116 Nev. at 721-22, 7 P.3d at 448-49; see also Rose v. Clark, 478 U.S. 570 (1986).

the predicate facts or whether it considered "other evidence bearing on the fact subject to the presumption." The court should also apply the "customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so."

Second, Yates explained, the court reviewing for harmless error must "weigh the probative force of that evidence as against the probative force of the presumption standing alone." The issue is "whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." If "the force of the evidence presumably considered is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption[.]" then the reviewing court can conclude that the erroneous instruction did not contribute to the verdict rendered.<sup>20</sup>

Thus, as stated in Collman, a harmless error inquiry respecting an erroneous presumption instruction requires us to ask and answer: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"<sup>21</sup> "If the reviewing court cannot reach this conclusion—for example, where the defendant contested the omitted

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<sup>20</sup>Collman, 116 Nev. at 722, 7 P.3d at 449 (quoting Yates, 500 U.S. at 404-05).

<sup>21</sup>Id. at 722-23, 7 P.3d at 449 (quoting Neder, 527 U.S. at 18).

element and raised evidence sufficient to support a contrary finding—it should not find the error harmless."<sup>22</sup>

As noted, in the instant case, the district court erroneously instructed the jury that "intent to murder is presumed when a deadly weapon is used in the manner in which it was used in this case." Rather than explaining this presumption in permissive terms, the district court directed the jury in mandatory terms to presume that the killer in this case possessed the intent to murder. Although the instruction was clearly erroneous, the error is subject to the harmless error analysis we approved in Collman.

Proceeding with this analysis, we note first that Roever's jury was presented with the following evidence bearing on the issue of her intent to murder. Several witnesses testified that Roever's relationship with the victim was tumultuous and that Roever had threatened to kill him. Roever and the victim argued on the night of the murder. Roever was present and had the opportunity to commit the crime. The only other persons known to be present when the victim was killed were Roever's children, and no direct evidence was presented implicating any of the children in the murder. Although the murder weapon was never recovered, the evidence revealed that there were guns in the home, that Roever owned one of them, and that she had experience using guns. Additionally, the evidence revealed that the victim suffered a single gunshot to the head.

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<sup>22</sup>Id. at 723, 7 P.3d at 449 (quoting Neder, 527 U.S. at 19).

Additionally, we view as significant that Roever's defense strategy did not directly challenge the issue of her intent to murder the victim, and she presented no evidence bearing on that issue. Rather, although the police found no evidence of an intruder, Roever's defense at trial was that an intruder committed the murder. The murder occurred on a stormy night, leaving the ground around the trailer wet and muddy. But there were no muddy footprints or other evidence that an intruder entered the trailer around the time the victim was killed. Evidence was presented that the family dogs barked "at almost anything," including strangers who approached the property. Yet none of children heard the dogs bark or any other disturbance on the night of the shooting.

Therefore, in weighing the probative force of this evidence against the probative force of the presumption standing alone, we have considered that Roever's intent to murder was not the paramount issue in this case. Rather, the identity of the killer was the crucial issue at trial; Roever's defense was that she was not the killer. Further, it was undisputed that the victim was shot in the back of the head while in bed asleep. Roever did not advance any theory that the shooting was an accident, or that she acted in self-defense, or that the killing resulted from some other provocation. In other words, Roever did not directly contest the issue of her intent to murder at trial.

The record also reveals that the jury was otherwise properly instructed regarding express and implied malice and informed of the definition of murder. The district court also instructed the jury that "[t]he fact that a killing was intentional does not necessarily prove that it was



done with malice; for an intentional killing may be justifiable." The jury was further instructed that "[m]alice aforethought may be inferred from the intentional use of a deadly weapon in a dangerous and deadly manner."<sup>23</sup>

(Emphasis added.) Further, the jury was instructed that:

In considering an inference or a presumption, you may consider the following as kinds of presumptions that are disputable:

1. That an unlawful act was done with an unlawful intent.
2. That a person intends the ordinary consequences of his voluntary act.
3. That the evidence willfully suppressed would be adverse if produced.

These instructions reflect the requisite permissive language and tempered the mandatory language the district court included in the erroneous instruction at issue. Finally, the jury was instructed that it was not required to find a presumed fact and that certain presumed facts must be proved beyond a reasonable doubt.

After a careful review of the evidence and the instructions, we conclude beyond a reasonable doubt that given the force of the evidence presumably considered by the jury in accordance with all of the instructions, the erroneous mandatory presumption had a comparatively minimal impact on the jury's verdict. It is clear that the jury believed

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<sup>23</sup>See Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975) (noting that "[m]alice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner").

Roever committed a willful, deliberate, premeditated murder and that she acted with malice aforethought. We are persuaded beyond a reasonable doubt that the verdict would have been the same absent the erroneous instruction.<sup>24</sup> Although counsel was deficient in failing to object to the challenged instruction, because the erroneous instruction was harmless beyond a reasonable doubt, we further conclude that Roever has failed to demonstrate prejudice resulting from counsel's omission. Therefore, the district court did not err in rejecting this claim.<sup>25</sup>

Roever also asserts that the district court erred in rejecting her claim that her trial counsel was ineffective for failing to object to instructions 21(a) and 23(a) respecting express and implied malice. These instructions were proper and in accord with existing Nevada law.<sup>26</sup> The district court did not err in denying this claim.<sup>27</sup>

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<sup>24</sup>Yates, 500 U.S. at 405.

<sup>25</sup>We further conclude for the same reasons that the district court properly rejected Roever's claim that her appellate counsel was ineffective for failing to challenge the instruction in her direct appeal.

<sup>26</sup>See NRS 200.020; Moser, 91 Nev. at 812, 544 P.2d at 426; Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970).

<sup>27</sup>Roever also argues that the erroneous presumed intent instruction precluded the jury from finding her guilty of the lesser-included offense of voluntary manslaughter because she did not present evidence of sufficient provocation. We conclude Roever's claim is without merit. Roever's defense at trial was that an intruder murdered the victim.

Next, in his opening brief on appeal, Roever's counsel contends that the district court violated her constitutional rights by depriving her of the fundamental right to be present a critical stage of her trial. This issue, as specifically framed by counsel, should have been presented on direct appeal, and counsel has failed to demonstrate good cause for the failure to raise the issue on direct appeal or prejudice.<sup>28</sup> Therefore, we conclude that this claim as presented in counsel's opening brief was waived.

Roever herself, however, has properly raised this matter in her proper person brief on appeal in the context of an ineffective assistance of counsel claim. The record reveals that during jury selection, the district court held an in camera hearing in chambers with both counsel and prospective juror, Beverly Hanna. Roever was not present. The purpose of the hearing was to determine Hanna's knowledge of the case because she was employed by the Pahrump Valley Times and many articles concerning Roever's case had been published in the newspaper.

This court has held that a defendant does not have an unlimited right to be present at every proceeding.<sup>29</sup> Even assuming that counsel was deficient in failing to secure her presence at the hearing, we conclude that Roever has failed to demonstrate prejudice. First, she was

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<sup>28</sup>See NRS 34.810(1)(b).

<sup>29</sup>See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

present when challenges to prospective jurors were made.<sup>30</sup> Second, counsel's decision to not challenge Hanna was a tactical one and thus was virtually unchallengeable.<sup>31</sup> Accordingly, we conclude that the district court did not err in denying this claim.

Roever also argues that her counsel was ineffective for failing to object to and seek a curative instruction when a State witness alluded to specific, uncharged bad acts other than the one incident the district court ruled was admissible. Gloria Lambert was allowed to testify respecting an incident in a bar in Crystal City in which Lambert heard Roever threaten to shoot the victim. During direct examination, the prosecutor asked Lambert whether she had witnessed Roever acting jealous before and after the Crystal City incident, to which Lambert responded affirmatively. The prosecutor asked Lambert to recall the event. Apparently confused, Lambert responded, "Well, at her home the one time we went?" The prosecutor immediately clarified his question by telling Lambert that he was referring to the Crystal City incident.

Even assuming counsel should have objected to such a passing and ambiguous reference to other incidents, we conclude that Roever has failed to demonstrate any prejudice in light of other evidence presented

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<sup>30</sup>See Lewis v. United States, 146 U.S. 370, 376 (1892) (holding that exercising juror challenges is an essential part of the trial during which a defendant is entitled to be present).

<sup>31</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds as recognized in Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

concerning the tumultuous nature of her relationship with the victim. Accordingly, we conclude that the district court did not err in denying this claim.

Roever argues that her counsel was ineffective for failing to "object and/or seek permission from the court to call the prosecutor as a witness when the prosecutor became an unsworn witness for the State" during the State's direct examination of Dominick Roever. During direct examination, the prosecutor confronted Dominick concerning the differences between his testimony and statements he had previously made to the prosecutor and the State's investigator. NRS 50.135 permits the introduction of prior contradictory statements of a witness.<sup>32</sup> Here, Dominick testified and was available to explain or deny the alleged previous statements. Therefore, we conclude that Roever failed to demonstrate that her counsel was deficient. The district court did not err in denying this claim.

Next, Roever contends that her counsel was ineffective for failing to object to the admission of an essay she allegedly wrote. This claim is belied by the record.<sup>33</sup> The record reveals that Roever's counsel objected to the essay's admission, arguing that the State had failed to lay a proper foundation for its admission. Despite counsel's objection, the district court determined that the essay was admissible. The district court did not err in denying this claim.

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<sup>32</sup>See LaPierre v. State, 108 Nev. 528, 532, 836 P.2d 56, 58 (1992).

<sup>33</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Roever further asserts that her counsel was ineffective for failing to object to and request a curative instruction regarding certain statements by the prosecutor that Roever claims alluded to inadmissible evidence. Roever specifically refers to the prosecutor's argument requesting the district court to permit Detective Ruas to testify to what he had learned in conversations he had with a number of witnesses. The record reveals that counsel initially objected to the prosecutor's line of questioning, although he did not specifically object to the prosecutor's argument on this matter. Roever has not demonstrated how counsel's failure to object to the prosecutor's vague references to other evidence or to request a curative instruction prejudiced her. Accordingly, the district court did not err in denying this claim.

Roever also argues that her counsel was ineffective for failing to adequately communicate or consult with her before and during trial, and for dissuading her from testifying on her own behalf. Her petition below failed to substantiate these claims. Therefore, the district court did not err in rejecting them.<sup>34</sup>

Roever next claims that her counsel was ineffective for failing to present numerous pieces of evidence and for failing to call several witnesses that would have allegedly dispelled the State's circumstantial evidence of her guilt. We have carefully reviewed Roever's submissions and conclude that she failed to demonstrate that counsel's omissions in this

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<sup>34</sup>See *id.* at 502, 686 P.2d at 225.

regard, even if deficient, prejudiced her. Therefore, the district court did not err in denying this claim.

Finally, Roever asserts that the cumulative effect of trial counsel's errors denied her a fair trial. Based on the foregoing discussion, we conclude that the district court did not err in denying this claim.

Ineffective assistance of appellate counsel claims

Roever argues that her appellate counsel was ineffective for failing to adequately address her claim on direct appeal that an essay she allegedly authored was improperly admitted. In the order affirming her conviction, this court declined to address this issue on the merits because it was not properly supported with relevant authority.<sup>35</sup> This court further concluded that "there was no plain error affecting Roever's substantial rights that might warrant relief notwithstanding her failure to properly present the issue." In her petition below and in this appeal, Roever has similarly failed to provide any supporting authority demonstrating that this claim had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err in denying this claim.

Roever next asserts that her appellate counsel was ineffective for failing to communicate with her and to allow her to participate in her appeal. She argues that had appellate counsel consulted with her, she would have insisted that he raise the following claims: she was denied her right to be present at a critical stage of the trial; the district court allowed a

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<sup>35</sup>Roever v. State, Docket No. 34859 (Order of Affirmance, January 30, 2001).

State witness to allude to inadmissible prior bad act evidence; the district court failed to intervene and stop the prosecutor from inferring that there was additional inadmissible evidence against Roever; the district court improperly gave burden shifting jury instructions; she was denied her right to confrontation, cross-examination, and effective assistance of counsel when the prosecutor became an unsworn witness against her; and the prosecutor impermissibly alluded to inadmissible evidence against her. Based on our preceding discussion of these matters, we conclude that Roever has failed to demonstrate that any of these claims had a reasonable likelihood of success on appeal. Therefore, we conclude that the district court did not err in denying these claims.

Roever also argues that her appellate counsel was ineffective for failing to raise the following claims on appeal: the district court improperly admitted prior bad act evidence through Gloria Lambert's testimony; the district court erroneously admitted evidence as a declaration against Roever's interest; the prosecutor improperly commented on Roever's right to not testify; and the evidence was insufficient to sustain her murder conviction. We conclude that a challenge to the sufficiency of the evidence would not have had a reasonable chance of success on appeal. Moreover, Roever has failed to adequately substantiate any of the remaining claims or demonstrate that they resulted in the requisite prejudice. The district court did not err in denying these claims.

Roever also argues that her appellate counsel was ineffective for failing to assert that the district court erred in sentencing her to an additional term of life without the possibility of parole after she had already



begun serving her sentence. At her sentencing hearing, the district court orally announced a sentence of only one life term. Subsequently, however, the district court entered a written judgment of conviction, which properly set forth a sentence of life with the possibility of parole plus an equal and consecutive term for the deadly weapon enhancement.<sup>36</sup> The district court's sentencing decision is not final until a written judgment of conviction is entered. Until a written judgment conviction is entered setting forth the sentence, the district judge is free to reconsider its oral decision.<sup>37</sup> Therefore, the district court did not err in denying this claim.

Finally, Roever claims that she was denied the effective assistance of counsel due to the cumulative effect of appellate counsel's errors. Based on the foregoing discussion, we conclude that the district court did not err in denying this claim.

#### Miscellaneous claims

Roever argues that she is actually innocent of the crime, listing nine examples of circumstantial evidence that the State presented that she claims can be "explained away" by other circumstantial evidence. In the proceedings below, however, trial counsel countered all of these examples of the State's circumstantial evidence precisely the way Roever challenged the State's evidence in her petition. Based on our review of the record, we conclude that Roever failed to demonstrate that she is actually innocent of

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<sup>36</sup>See NRS 200.030; NRS 193.165

<sup>37</sup>See Miller v. Hayes, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979).

the crime. Therefore, we conclude that the district court did not err in denying this claim.

Roever also raises many of the foregoing claims as direct claims of district court error at trial. For example, she asserts that the district court improperly allowed a State witness to allude to other alleged threats Roever made to the victim after the district court admonished the witness to confine her answers to one particular incident; the district court erred in failing to stop the prosecutor from asking a police detective about any evidence of which he was aware that indicated who shot the victim; the district court erred in giving burden shifting instructions; the prosecutor became an unsworn witness during his direct examination of Dominick Roever; the prosecutor improperly alluded to the jury that there was other evidence of Roever's guilt that the jury should hear regardless of its admissibility; and that the cumulative affect of all these errors denied her right to a fair trial.

Such assignments of district court error at trial should be asserted in a direct appeal from the judgment of conviction. They are not properly raised in a post-conviction petition unless the petitioner demonstrates good cause for the failure to raise these claims on direct appeal or prejudice.<sup>38</sup> Roever has failed to do so. Therefore, we conclude

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<sup>38</sup>See NRS 34.810(1)(b)(2); NRS 34.810(3).

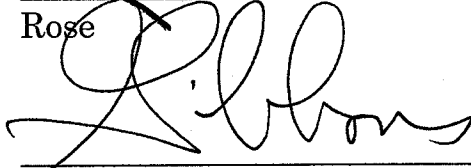
that the issues were waived,<sup>39</sup> and the district court did not err in denying these claims.

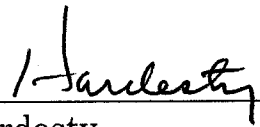
We note that Roever asserted in her petition below that trial counsel was ineffective for failing to investigate the need for an expert in child psychology and for failing to call a firearms expert. However, she has not contested the district court's denial of these claims in this appeal. Accordingly, we have not considered them.

We conclude that the district court did not err in denying Roever's post-conviction petition for a writ of habeas corpus, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C. J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

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<sup>39</sup>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).

cc: Hon. John P. Davis, District Judge  
Andrew S. Fritz  
Attorney General George Chanos/Carson City  
Nye County District Attorney/Tonopah  
Nye County Clerk