IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH A. POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42262

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

After a jury trial, appellant Elizabeth A. Powell was convicted of first degree murder with the use of a deadly weapon and kidnapping with the use of a deadly weapon. Powell had counsel at all stages of this proceeding. The district court sentenced Powell to two consecutive terms of life in prison without the possibility of parole for murder with the use of a deadly weapon and an additional two consecutive terms of life in prison with the possibility of parole for kidnapping with the use of a deadly weapon. The district court ordered Powell to serve the sentences on the two counts concurrently. Powell filed a direct appeal, which this court dismissed.[1] Powell filed a post-conviction petition for a writ of habeas corpus in district court. After conducting an evidentiary hearing, the district court denied the petition.

[1]See Powell v. State, Docket No. 34512 (Order of Affirmance, March 6, 2001).

05-05211

On appeal, Powell argues that the district court should have granted her petition because her appellate counsel was ineffective for (1) failure to communicate with Powell; (2) failure to appeal the district court's decision to admit prior bad acts evidence; and (3) failure to appeal an improper jury instruction regarding NRS 50.095. Powell also argues that her trial counsel were ineffective due to (1) failure to object to inadmissible and prejudicial bad acts evidence; (2) failure to adequately confront witnesses against Powell; (3) failure to provide mitigating evidence at the sentencing stage; and (4) failure to advise the court of a serious breakdown in the attorney-client relationship and move to withdraw as counsel of record. Finally, Powell claims that cumulative error mandates a reversal.

FACTS

On May 18, 1998, the police arrested Powell in connection with the murder of Linda Bartholomew in Pershing County, a rural area adjacent to Winnemucca, Humboldt County. On May 19, 1998, Robert Burkman, an alleged accomplice, gave a statement to law enforcement officers, detailing the events from the days preceding Powell's arrest. Burkman stated that on May 16, 1998, he had accompanied Powell to a bar in Winnemucca, where he and Powell picked up an individual by the name of Curtis Moss. Moss supposedly owed Powell approximately $1,000 for prior drug purchases.

Powell allegedly asked Burkman to drive north on Highway 95, which he proceeded to do. As Burkman was driving, Powell and Moss got into a heated argument about Moss's drug debt. Powell pulled out a gun and threatened to shoot Moss. Although Moss begged Powell to spare his life, Powell said it was too late and asked Burkman to stop the car.

Powell then told Moss to get out of the car and get on his knees. Moss started to run and Powell began shooting at him. Moss fell down, Powell approached him, and a scuffle ensued. Although Moss managed to get away again, Powell anticipated the direction of his flight and pursued him with the car. At some point, Powell got out of the car, jumped over a fence, and continued to chase Moss on foot. Although Burkman did not testify that he saw Powell shoot Moss at this time, Burkman heard shots and subsequently observed Powell kneeling by Moss's body and searching his pockets. Powell and Burkman returned to Winnemucca after the incident.

On May 17, 1998, the day after Moss's death, Powell and Burkman were at a residence in Winnemucca. The residence belonged to Beverly Castro, a friend of Powell's; Roberta Balduc, a friend of Castro's, was also present. Powell informed the group that she had to go to Shirley Moreau's house because Moreau allegedly owed her money. Shirley Moreau was Balduc's long-term acquaintance who resided in Pershing County.

Powell arrived at Moreau's residence around 7 p.m., carrying her .38 caliber handgun. Randy Leavitt, Linda Bartholomew, and Moreau were at the residence. Powell was in a bad mood and got into an argument with Bartholomew. Powell began waving her gun around, proceeded to shoot through the door and the floor, and threatened to "clean the house." Eventually, Powell shot Bartholomew, and the police arrested her the following day.

As a result of Burkman's statement to the police, on September 8, 1998, the State filed a felony information in Humboldt County, charging Powell with open murder with the use of a deadly weapon and kidnapping in the first degree with the use of a deadly

weapon. These charges pertained to Moss's murder in Humboldt County. The State separately charged Powell with second degree murder for Bartholomew's death in Pershing County. Chet Kafchinski, Esq., and Robert Dolan, Esq., deputy public defenders, were appointed as Powell's counsel on the Humboldt County case.

On February 10, 1999, the district court held a Petrocelli[2] hearing regarding specific bad acts evidence that the State wished to introduce. After hearing testimony from the witnesses and arguments from counsel, the district court concluded that a portion of the evidence was critical to the State's case and the State had a right to present it.

Trial began on February 22, 1999, and lasted five days. On counsel's advice, Powell did not testify. On February 26, 1999, the jury convicted Powell of first degree murder with the use of a deadly weapon and kidnapping with the use of a deadly weapon. After Powell waived the right to a jury sentencing, the district court sentenced her to two consecutive terms of life in prison without the possibility of parole for murder with the use of a deadly weapon and an additional two consecutive terms of life in prison with the possibility of parole for kidnapping with the use of a deadly weapon. The district court ordered Powell to serve the sentences on the two counts concurrently.

Powell filed a direct appeal, which this court dismissed.[3] Powell subsequently filed a post-conviction petition for a writ of habeas

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[3]See Powell v. State, Docket No. 34512 (Order of Affirmance, March 6, 2001).

corpus in district court. After conducting an evidentiary hearing, the district court denied Powell's petition. This appeal followed.

DISCUSSION

Standard of review

Under Strickland v. Washington, to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness; and (2) his counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would have been different.[4] "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."[5] "Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy."[6] Because an ineffective assistance of counsel claim involves a mixed question of law and fact, it is subject to independent review.[7]

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[4]466 U.S. 668, 687 (1984); accord Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[5]Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

[6]Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

[7]Id. at 43, 83 P.3d at 822-23.

Appellate counsel

Failure to communicate

We review counsel's duty to communicate under Strickland's objective reasonableness test.[8] Although counsel admitted that he had not met Powell in person before the post-conviction evidentiary hearing, counsel also testified that he had corresponded with Powell on "a couple of" occasions. Counsel specifically recalled a communication in which Powell expressed a concern that the police had not bagged Burkman's hands, but had bagged hers.[9] Counsel wrote back to Powell and informed her that the issue was more appropriate for post-conviction review. There is no evidence that he refused to communicate with her or address her concerns. Therefore, we conclude that Powell has failed to establish that counsel's conduct fell below an objective standard of reasonableness. Furthermore, Powell has failed to show how increased communication with counsel would have affected the outcome of the appeal.

Failure to appeal admission of bad acts evidence

"The constitutional right to effective assistance of counsel extends to a direct appeal. To establish prejudice, the claimant must show that an omitted issue would have had a reasonable probability of success on appeal."[10] "Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue."[11]

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[8]466 U.S. at 687.

[9]"Bagging" refers to a procedure used to establish the presence of gun residue.

[10]Thomas, 120 Nev. at 44, 83 P.3d at 823.

[11]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

Although evidence of prior bad acts is generally inadmissible to prove conforming conduct, it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[12] In determining whether such evidence is admissible, "the district court must conduct a hearing and determine whether '(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.'"[13] The district court has discretion whether to admit or exclude prior bad acts evidence and this court will not reverse the district court's decision "absent manifest error."[14]

On February 10, 1999, the district court held a pre-trial hearing on the admissibility of prior bad acts evidence. After hearing testimony from the witnesses and arguments from counsel, the district court concluded that a portion of the evidence was critical to the State's case and the State had a right to show res gestae, identity, and opportunity. Although the district court concluded that the evidence was inadmissible to show motive as to both murders, the court nevertheless stated that Powell had a motive to kill Moss to collect a drug debt. The district court precluded introduction of Bartholomew's actual killing.

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[12]NRS 48.045(2).

[13]Braunstein v. State, 118 Nev. 68, 72-73, 40 P.3d 413, 416-17 (2002) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

[14]Braunstein, 118 Nev. at 72, 40 P.3d at 416.

Leavitt's testimony

At the Petrocelli hearing, Leavitt testified that after shooting Bartholomew, Powell went outside the house, waiving a gun, and asked where Leavitt was because she was going to "do him too." At trial, Leavitt testified to the same thing. Dolan moved to strike Leavitt's testimony and Kafchinski moved for a mistrial during the subsequent sidebar. The district court, however, reasoned that the statement could have related to Moss because the jury had no knowledge of the Bartholomew homicide and denied the motion.

Powell correctly notes that the district court expressly prohibited Leavitt from proffering testimony that Moreau told him and others that Powell admitted to shooting and/or killing Moss because the testimony was inadmissible hearsay. However, Leavitt's testimony that Powell said she would "do him too" does not violate the district court's prohibition because it is a party admission.[15]

Turning to the district court's decision to deny the motion for a mistrial, we conclude that the district court's decision was proper. Since the district court had excluded evidence of Bartholomew's murder, the only murder about which the jury had heard was the Moss murder. To the jury's knowledge, the "do him too" comment pertained to the Moss murder. Therefore, appellate counsel acted reasonably in deciding not to appeal the admission of the evidence. Furthermore, Powell has failed to show that the failure to appeal prejudiced her under the Strickland standard.

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[15]See NRS 51.035(3)(a).

Evidence of drug use and possession

At trial, Dan Swindlehurst, a Winnemucca resident, testified that he and Powell did drugs together. At the post-conviction hearing, Dolan testified that he did not object to Swindlehurst's testimony because he wanted the jury to understand the drug culture in Winnemucca and realize that a lot of people had a motive to kill Moss.[16] Thus, trial counsel's decision resulted from sound trial strategy and appellate counsel was not ineffective for failing to raise the issue on appeal.

The testimony that Powell had been previously arrested in connection with drugs, was facing a possession for sale charge, and had kept drugs in her crotch was also relevant to show Powell's participation in Winnemucca's drug culture. This was important evidence for the State's case because there was testimony that Moss had owed Powell money for drugs and she had unsuccessfully tried to collect it on various occasions.

Counsel's decisions resemble an issue we recently addressed in Lara v. State.[17] In Lara, we held that counsel was not ineffective for failing to object to gang-affiliation evidence because the evidence was relevant to establish a motive for the killing and to evaluate the credibility of witnesses.[18] Similarly, the drug use and possession evidence was relevant to establish motive for the Moss killing. It also had a bearing on the witnesses' credibility because testimony of drug use with Powell would also discredit the testifying witness. Because trial counsel's decisions

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[16]Apparently, Moss owed money to many people.

[17]120 Nev. 177, 87 P.3d 528 (2004).

[18]Id. at 180-81, 87 P.3d at 530.

appear to result from sound trial strategy and the district court's ruling at the Petrocelli hearing, appellate counsel's choice not to appeal the admission of the evidence was well-reasoned.[19]

"Surprise" evidence

Trial counsel could not have been surprised by evidence of Powell waiving her gun and shooting at Moreau's residence because at the Petrocelli hearing, Leavitt testified that Powell got into an argument with Bartholomew at Moreau's house and waived a gun. Leavitt also testified that Powell discharged the gun in the floor and later shot through the door. Trial counsel's lack of objection resulted from the district court's ruling at the Petrocelli hearing. As such, appellate counsel's decision not to appeal the admission of the evidence was appropriate.

Regarding Castro's testimony, at trial Castro stated that she had overheard Powell tell Moss's girlfriend that Powell "liked seeing men beg for their lives and 'tight lips were good lips; don't make me come back to Winnemucca.'" Castro had made no such statement at the Petrocelli hearing. Although the statement appears prejudicial, it was nevertheless properly before the jury. Castro testified that she heard Powell make the statement and thus she was not relaying hearsay, but a statement by a party, admissible under NRS 51.035(3)(a). The evidence was very probative because Burkman testified that Moss had asked Powell to spare his life, but she had refused. Thus, the statement related to Powell's state of mind at the time of the murder. Because Powell has failed to show how

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[19]Although evidence that Powell had failed to appear in court on a drug charge may have been improper, it was harmless in light of the overwhelming evidence of Powell's involvement with drugs.

appealing the issue would have had a reasonable probability of success, appellate counsel was not ineffective.

Weapon ownership

At trial, Craig Remlinger, a pawnshop employee, testified that he had seen Powell with guns on three different occasions. On the first occasion, Powell had a .22 Beretta, on the second occasion Powell had a 9 millimeter Ruger, and on the third occasion Powell carried a .38 special Smith & Wesson. Powell, however, fails to show how this testimony prejudiced her because Remlinger also testified that he did not know whether Powell owned the guns. Therefore, Powell's contention that there was evidence of gun ownership is unpersuasive. Furthermore, Remlinger testified that the .38 caliber gun that he saw was not the handgun later identified as the murder weapon. Powell, therefore, fails to show how the evidence prejudiced her case and how appealing the admission of the evidence would have had a reasonable probability of success. Thus, she has not shown that her appellate counsel was ineffective.

Pershing County murder

Powell takes issue with appellate counsel's decision not to appeal the outcome of the Petrocelli hearing. Powell's contentions are unpersuasive. When questioned about why he did not attack the district court's ruling, counsel answered that the Petrocelli hearing had been procedurally proper and the bad acts evidence introduced at trial was consistent with the State's theory of the case. Counsel also testified that he had previously appealed many cases involving the admission of prior bad acts evidence and the hearing the district court had conducted was one of the best he had ever seen. Counsel discounted the issue because he

did not think he could validly challenge it. We conclude that counsel's actions were reasonable.

The State's theory of the case was that Powell wanted to collect her drug debts and get out of town. Thus, evidence of her involvement with drugs was relevant to show her intent and motive regarding the Moss murder. Evidence of Powell's possession of a gun on both days connects her to the murder weapon, which supports the State's claim that she shot Moss. Additionally, the two murders were in such close temporal proximity that the gun evidence suggests they were a part of the same transaction. Consequently, counsel was not ineffective for failing to appeal the issue.

Failure to appeal a jury instruction

Pursuant to NRS 50.095(1), a party may attack the credibility of a witness by presenting evidence that the witness has been previously convicted of a felony. A felony conviction, however, is inadmissible if more than ten years have elapsed since "[t]he date of the release of the witness from confinement" or "[t]he expiration of the period of his parole, probation or sentence, whichever is the later date."[20]

Although the district court's instruction was erroneous, Powell fails to show how it prejudiced her. While Powell claims that Leavitt's testimony was highly damaging to her case and it was important to undermine Leavitt's credibility, defense counsel effectively discredited Leavitt before the jury. The jury heard that Leavitt was arrested twice, and the second arrest was for a parole violation associated with the first arrest charges. This implies that there was a prior conviction. Because

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[20]NRS 50.095(2).

the jury heard that Leavitt was arrested for a parole violation three years after the initial arrest, the jury could have easily surmised that the prior conviction was for a felony.

Furthermore, the 1988 arrest and subsequent conviction involved drug possession with intent to sell. The jury heard that Leavitt violated his parole because he possessed marijuana. Therefore, the jury heard about Leavitt's relation to drugs. Based on what the jury heard, it could have logically concluded that Leavitt had a prior felony conviction, albeit not in the last ten years, and he was involved with drugs. Accordingly, the district court's erroneous instruction was harmless.

Turning to counsel's decision not to raise the issue on direct appeal, counsel stated that he believed the erroneous instruction had no impact on the jury. Counsel's rationale rested on Dolan's effective cross-examination and another jury instruction which permitted the jury to consider "the fact that a witness has been convicted of a felony" in weighing the witness's credibility. (Emphasis added.) Since the jury instruction mentioned nothing about a ten-year period, counsel concluded that the district court's instruction was harmless. We conclude that counsel's conclusions were reasonable; and even if they were not, Powell has failed to show that the decision not to appeal the erroneous instruction prejudiced her under the Strickland standard.

Trial counsel

Powell argues that her trial counsel were ineffective for (1) failure to object to bad acts evidence, (2) failure to confront witnesses, (3) failure to provide mitigating evidence at sentencing, and (4) failure to advise the court of an alleged breakdown in the attorney-client

relationship and move to withdraw. We conclude that Powell's contentions lack merit and we will address each contention in turn.

Failure to investigate

"An attorney must make a reasonable investigation in preparation for trial, or a reasonable decision not to investigate."[21] "'Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'"[22]

At the post-conviction evidentiary hearing, both Kafchinski and Dolan admitted that they did not review the witnesses' court files for any criminal convictions or pending criminal charges. We conclude, however, that although counsel may have been deficient in failing to review the witnesses' files, Powell fails to show how that deficiency prejudiced her. Since NRS 50.095(1) permits impeachment with felony convictions only, Leavitt's and Castro's pending criminal charges would have been inadmissible. Although Dolan had failed to obtain a copy of Leavitt's prior felony conviction and Leavitt's testimony was damaging to Powell's case, Dolan effectively cross-examined Leavitt regarding the conviction. Additionally, on direct examination of Swindlehurst, the State elicited Swindlehurst's prior conviction for possession of marijuana and on cross-examination Dolan questioned Swindlehurst about his drug and alcohol use.

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[21]Kirksey v. State, 112 Nev. 980, 992-93, 923 P.2d 1102, 1110 (1996).

[22]Id. at 993, 923 P.2d at 1110 (quoting Strickland v. Washington, 466 U.S. 668, 690-91 (1984)).

Balduc testified at the preliminary hearing that she had a felony conviction for sale of a controlled substance in 1982. Although Dolan did not cross-examine Balduc at trial about the conviction, the conviction was inadmissible because it was more than ten years old.[23] While counsel failed to discover that Balduc pleaded guilty in 1990 to conspiracy to cheat or defraud in violation of NRS 199.480, the statute stipulates that the offense constitutes a gross misdemeanor.[24] Because misdemeanor convictions are inadmissible for impeachment,[25] counsel's failure to discover the conviction did not prejudice Powell.

Powell contends that Balduc testified at the preliminary hearing that she did not see any dark stains on Powell's jeans following Moss's murder, but at trial Balduc testified to the contrary. We determine, however, that counsel's deficiency did not prejudice Powell. At trial, Burkman testified that after Moss's murder, he saw bloodstains on the thighs of Powell's pants. Balduc testified that after Powell and Burkman returned to Winnemucca on the day of Moss's murder, Powell changed clothes. Castro also testified about Powell's change of clothes. Even if counsel had discredited Balduc, Burkman's and Castro's testimony independently corroborated Balduc's testimony about the bloodstains on Powell's pants. As far as Balduc's testimony regarding Powell having an outstanding bench warrant for an unrelated felony, the felony charge

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[23]The trial took place in February 1999; Balduc's probation term expired in 1987.

[24]NRS 199.480(3)(d).

[25]NRS 50.095(1).

related to Powell's involvement with drugs, which was relevant to establish motive for the Moss murder.

Powell states that Dolan admitted to being surprised by Castro's testimony that Powell said she liked to see men beg for their lives. Nevertheless, there is no evidence that counsel's conduct necessarily prejudiced Powell. Even if Dolan had a reason to expect the testimony, there is no guarantee that he would have managed to exclude it. Since the statement was Powell's and the State offered it against her, it was admissible as a statement by a party.[26] While Dolan could have argued that it was more prejudicial than probative, this decision rests with the district court.[27]

Powell argues that counsel's cross- examination of Burkman was inadequate for failing to inquire into the crime scene details and ask whether Burkman had fired any shots. On direct examination, Burkman testified that he had jumped out of the car and had started walking toward the fence when he heard shots and subsequently saw Powell leaning over Moss's body. There is no reason to believe that Burkman would have testified differently if defense counsel had inquired whether Burkman had fired any shots. Thus, Powell fails to show how the lack of such questioning prejudiced her.

Although in Warner v. State[28] and Sanborn v. State[29] we held that counsel was ineffective for failure to investigate, these cases are

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[26]NRS 51.035(3)(a).

[27]Elvik v. State, 114 Nev. 883, 897, 965 P.2d 281, 290 (1998).

[28]102 Nev. 635, 729 P.2d 1359 (1986).

[29]107 Nev. 399, 812 P.2d 1279 (1991).

distinguishable. In Warner, we held that counsel was ineffective for failure to use the public defender's full-time investigator, investigate the victim's background, present evidence of the appellant's good character, and contact witnesses, employers, and co-workers.[30] We concluded "that trial counsel's performance was so deficient as to render the trial result unreliable."[31] In Sanborn, "although defense counsel used an investigator to some degree, he admitted that the information contained in the witnesses' affidavits was more useful than the investigator had led him to believe."[32] Counsel also failed to contact many potential witnesses, although some witnesses would have supported the defendant's self-defense theory by testifying that the victim was violent and carried a gun. Counsel admitted that such testimony would have been important. Additionally, counsel failed to pursue further testing of the defendant's wounds and such testing would have created doubt around the State's claims that the defendant had inflicted the wounds upon himself.[33]

Unlike in Warner, Kafchinski testified at the post-conviction hearing that he utilized the investigators from the Public Defender's office. Distinguishable from Warner and Sanborn, there is no evidence that counsel failed to contact potential witnesses or investigate the victim's background. Trial testimony established that Moss was involved in Winnemucca's drug culture. Additionally, Kafchinski testified that he

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[30]102 Nev. at 637, 729 P.2d at 1360.

[31]Id. at 638, 729 P.2d at 1361.

[32]107 Nev. at 405, 812 P.2d at 1284.

[33]Id. at 405-06, 812 P.2d at 1284.

reviewed the preliminary hearing transcripts and the police reports and met with the sergeant who was in charge of the investigation for the State. Although counsel did not extensively cross-examine Burkman about the crime scene details, unlike Sanborn, there is no showing that such questioning would have created doubt around the State's claims. Consequently, we conclude that counsel's performance did not fall below an objective standard of reasonableness, creating prejudice to Powell.

Failure to adequately investigate police work

At the post-conviction evidentiary hearing, Kafchinski testified that he did not move to suppress Burkman's testimony because the testimony was a large part of the State's case and he did not believe that the district court would grant the motion. Additionally, Kafchinski stated that excluding Burkman's testimony would have been harmful to Powell's case because the defense would have faced the evidence of Powell's admissions and her activities before and after the shooting. Kafchinski thought that it would be more beneficial to have Burkman on the stand and aim to show that the State focused on Powell and made a plea offer to Burkman. Because counsel's decision not to suppress Burkman's testimony resulted from sound strategy, counsel was not ineffective.

Counsel cross-examined Burkman regarding his plea bargain with the State, thus exposing his bias in front of the jury. Counsel diminished Burkman's credibility by eliciting testimony that Burkman would not lie to save his life and pointing out various inconsistencies in Burkman's statements to the police. Counsel also cross-examined Burkman about a statement by Martin Roberto, an officer from the Nevada Division of Investigation, that "we'll prove you innocent."

Counsel's cross-examination effectively complied with counsel's theory of the case and, therefore, counsel was not ineffective. Further, given counsel's effective cross-examination, we conclude that Powell was not prejudiced by the failure to move for suppression.

Kafchinski testified that in preparation for trial, he reviewed the preliminary hearing transcripts and police reports, utilized the investigators of the Public Defender's office, had multiple meetings with his client, and met with the sergeant who was in charge of the investigation for the State. Kafchinski also reviewed the witnesses' statements to the police and compared them to the physical evidence of which he was aware. We conclude that counsel's conduct does not evidence ineffectiveness.

The above facts indicate that counsel did examine the police investigation on the matter. Although the police did not bag Burkman's hands, on cross-examination at the post-conviction hearing Powell's expert admitted that larger jurisdictions had stopped the bagging practice because the evidence was subject to different interpretations. While the police should have taken Burkman to the crime scene, Powell fails to show how counsel's attack in that aspect would have yielded support for Powell's position.

In Browning v. State, we held that defense counsel was deficient in failing to interview a police officer who had investigated the murder because the investigation would have discovered a discrepancy in the victim's description of the perpetrator's hair.[34] Unlike Browning, Powell fails to allege what specific evidence would have surfaced, but for

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[34]120 Nev. ___, ___, 91 P.3d 39, 46 (2004).

counsel's alleged deficiency. Powell's naked allegations that further investigation would have provided grounds to suppress Burkman's statement are insufficient to establish ineffective assistance of counsel.

Failure to provide mitigating evidence at sentencing

A defendant has the right to present mitigating evidence during sentencing.[35] At the beginning of the sentencing hearing, the district court indicated that it had received a pre-sentencing report from the Division of Parole and Probation. Although Dolan did not deliberate upon the specific instances of abuse Powell had suffered, he did bring Powell's history of abuse before the district court. During argument, Dolan stated, "Your Honor, . . . although the full measure of the defendant's life is not before the Court as regards her family history, break ups, dysfunctional family, abuse, physical abuse, sexual abuse, emotional abuse, the psychological abuse[,] that all became part of her cognitive mind set." Dolan also stated that perhaps Powell's conscience was not operating on the day of the murder as a result of a combination of factors, including a history of abuse.

While Dolan did not dwell upon the incidents from Powell's childhood, Dolan did alert the district court to Powell's history of child abuse and argued that it had impacted Powell's mindset on the day of the murder. Additionally, at the post-conviction evidentiary hearing, Dolan testified that the pre-sentencing report contained information on Powell's family history and, thus, the district court had received sufficient information about Powell's past. There is evidence that the district court considered Powell's childhood in rendering the sentence. The court

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[35]Kirksey v. State, 112 Nev. 980, 995, 923 P.2d 1102, 1112 (1996).

recognized that the pre-sentencing report to some degree exhibited what happens to innocent little children over a lifetime and that the report was a summary of the life of "a young woman that has come through a lot of abuse." The district court specifically stated that it wondered whether Powell could have done something great in her life "had she grown up in a loving kind of family." (Emphasis added.) In light of this, we conclude that counsel was not ineffective for failing to present mitigating evidence at the sentencing.

Failure to advise the court about a breakdown in the attorney-client relationship

This court has previously held that a criminal defendant is not entitled to reject court-appointed counsel and obtain substitution of other counsel at public expense absent a showing of adequate cause.[36] An appellant's general loss of confidence or trust in counsel alone is not adequate cause for the appointment of new counsel.[37] An indigent criminal defendant is not entitled to choose his counsel and an indigent defendant's uncooperative attitude does not merit the appointment of substitute counsel.[38]

It is undisputed that Powell and Kafchinski did not have a good working relationship. Kafchinski testified that he enlisted the services of co-counsel because of the problems he had with Powell in the beginning. Although Powell initially refused to discuss the facts of the case with him, their relationship improved once Powell accepted the fact

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[36]Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978).

[37]Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985).

[38]See State v. Lucero, 725 P.2d 266, 271 (N. M. Ct. App. 1986).

that he was representing her. Kafchinski testified that he had multiple meetings with Powell. We conclude that the initial problems between Powell and Kafchinski are insufficient to constitute a breakdown of the attorney-client relationship.

The record evidences communication between Powell and Kafchinski. Powell's alleged poor relationship pertains only to Kafchinski, not Dolan. Dolan testified that he had met with Powell outside Kafchinski's presence. Thus, Powell had an opportunity to communicate with counsel, even if she had completely refused to communicate with Kafchinski. The lack of initial communication between Powell and Kafchinski resulted from prior disagreements and had nothing to do with Kafchinski's conduct in this case. Powell may not justify the need for another counsel with her own uncooperative behavior.

At the conclusion of trial, the district court asked Powell whether she felt that counsel represented her fairly and whether she had consulted with them throughout trial. Powell answered affirmatively. In light of this, we conclude that Powell's argument lacks merit.

Cumulative error

While the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually,[39] our prior discussion evidences that counsel was not ineffective.

CONCLUSION

We conclude that Powell received effective assistance from her appellate and trial counsel. We further conclude that there was no

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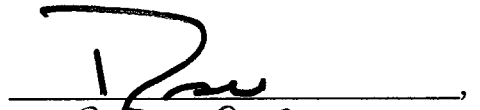
[39]Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

cumulative error below. Accordingly, we ORDER the judgment of the district court AFFIRMED.[40]



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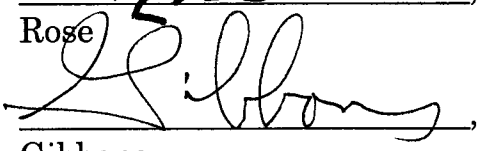

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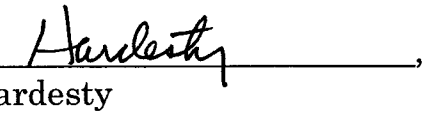
Gibbons



_____, J.
Hardesty

cc: Hon. Richard Wagner, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk

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[40]We have considered Powell's other arguments and we find them without merit.