

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN ELAM,

Appellant,

v.

STATE OF NEVADA,

Respondent.

Docket No. 85421

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entries as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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JURISDICTIONAL STATEMENT

A. Basis for Supreme Court's or Court of Appeal's Jurisdiction:

This appeal is from a denial of a petition for writ of habeas corpus, and appellate jurisdiction in this case derives from NRS 177.015(3).

B. The Filing Dates Establishing the Timeliness of the Appeal:

C. Order Denying Petition Filed: 7/12/2022

D. Notice of Appeal Filed: 8/4/2022

E. Assertion that Appeal is From a Final Order or Judgment:

This Appeal is from a denial of a post-conviction writ of habeas corpus, and thus this Court has jurisdiction.

ROUTING STATEMENT

Appellant was convicted of a category B felony. Therefore, pursuant to NRAP (17)(b)(3), this appeal presumptively is routed to the Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR IN DENYING THE PETITION FOR WRIT OF HABEAS CORPUS?

STATEMENT OF THE CASE

The following facts are from the Supplemental Petition, found at Appellant's Appendix, ("AA"), pp. 1165-1166. Defendant was charged by Grand Jury Indictment on April 17, 2015, with eight (8) felony charges including sexual assault with a deadly weapon, first degree kidnapping with a deadly weapon, attempt sexual assault with a deadly weapon, assault with a deadly weapon, conspiracy to commit kidnapping, unlawful use of an electronic stun device, battery with intent to commit sexual assault and ownership of a firearm by a prohibited person. Defendant entered a not guilty plea on April 28, 2015. On June 18, 2015, the trial was agreed to be continued until January 25, 2016. Trial however did not begin until June 19, 2017. On June 27, 2017, the jury returned a verdict finding Defendant guilty of four (4) counts including Count 1, conspiracy to commit kidnapping; Count 2, first degree kidnapping with use of a deadly weapon; Count 3, assault with a deadly weapon and Count 5, battery with intent to commit sexual assault. Defendant was found not guilty on four (4) counts: Count 4, unlawful use

of stun device and Count 6, sexual assault with use of deadly weapon, and Count 7, attempt assault with use of deadly weapon.

Defendant was sentenced on October 19, 2017, to an aggregate sentence of 13 years to life imprisonment. Judgment of Conviction was filed on October 31, 2017. On November 13, 2017, Defendant filed Notice of Appeal. On April 12, 2019, the Nevada Supreme Court issued an Order of Affirmance, in case number 74581, affirming Defendant's conviction. Remittitur issued May 7, 2019. On May 15, 2019, defense counsel Thomas Erickson filed a Motion to Withdraw. That motion was granted on May 28, 2019.

On May 27, 2020, Defendant filed a *Pro Per* Petition for Writ of Habeas Corpus. On July 6, 2020, the State filed their response to the Petition. On August 18, 2020, the Court granted Defendant's Motion to Withdraw Judgment on the Petition for Writ of Habeas Corpus, thereby allowing Defendant until October 20, 2020, to file a supplemental petition. On August 18, 2020, the Court denied Defendant's Motion for Appointment of Counsel *without* prejudice, stating however if the issues were unduly complex counsel would then be appointed. Defendant acting *pro per* could not file Supplementary Points and Authorities by the October 20, 2020 date and on January 19, 2021, the Court denied the Petition. Defendant then appealed the Order denying his Post Conviction Petition, filing a *Pro Per* Notice of Appeal on February 26, 2021.

On February 17, 2022, the Supreme Court reversed the District Court's denial of Defendant's Petition and remanded to District Court for appointment of counsel in case number 82637. Counsel Terrence M. Jackson, Esq. was appointed on March 10, 2022 to represent Calvin Thomas Elam on further post conviction proceedings. On June 9, 2022, Defendant through counsel filed Supplemental Points and Authorities to his Petition for Writ of Habeas Corpus in case number A-20-815585-W. AA1163. AA1163.

The supplemental petition alleged that trial counsel was ineffective:

Pretrial:

- A. failing to do sufficient investigation, or retain experts;
- B. failing to file meritorious motions, including a motion to suppress and a motion to challenge the deadly weapon enhancement.

At trial:

- A. during jury selection;
- B. failing to retain a jury consultant;
- C. for not seeking sequestered voir dire;
- D. by not objecting to prosecutorial misconduct;
- E. During closing argument. AA1166-1171.

Further, the petition alleged that counsel's ineffectiveness led to a conviction on multiple counts despite the State not proving the charges and led to a lengthy and

overly harsh sentence. AA1166. The petition also alleged that appellate counsel was ineffective. AA1167.

The State's response was that the petition was time barred, as Elam failed to file his petition within the one year time frame. AA1198. The Petition, per the State, was due May 7, 2020, but the *pro per* petition was filed May 27, 2020. AA1198. The State also responded that Elam failed to overcome the procedural bar as he did not establish the existence of an impediment to the deadline to his filing. AA1199. Further, the State argued that Elam did not receive ineffective assistance of counsel. AA1200-1201.

The district court ruled on the merits of the petition, and did not summarily deny it as time barred. AA1233. The court found that trial counsel was not ineffective. AA1233. Specifically, the court found that challenging the deadly weapon enhancement would have been futile, as the legislature amended the statute. AA1234. Additionally, the court stated that there is no requirement that trial counsel retain a jury consultant, nor was counsel ineffective for failing to seek sequestered voir dire, and that counsel appeared to have properly handled voir dire. AA1234.

The court also noted that counsel made a closing argument, and the cases cited were cases where counsel did not make a closing argument. AA1235. Finally, the court held that counsel was not ineffective at sentencing, and that

appellate counsel was not ineffective. AA1235. The court noted it was denying the petition on the grounds set forth in the State's response, and the State incorporated the response into the Findings of Facts, Conclusions of Law, and Order. AA1233.

STATEMENT OF FACTS

The following evidence was presented at Elam's trial:

Arrie Webster: testified that around 11 am or 12 pm on March 10, 2015, she visited her friends Annie and Pamela, who live in apartments very near to Elam. AA0559 and AA0557. Ms. Webster testified that she saw Elam, and she said, "What's up?" And Elam motioned for her to come over to his apartment. AA0560. Elam was standing outside his apartment at the time. *Id.* She further testified that she had previously been to Elam's apartment prior to the day of the alleged criminal activity (AA0563) and that she would refer to Elam as "Cuz" or "cousin" because Elam had children with Ms. Webster's cousin by marriage, Joanique Mack. AA0565-66.

On the day of the incident, Ms. Webster wanted to explain to Elam that she did not have anything to do with the disappearance of two dogs Elam had been missing from a few days earlier. AA0567-68 and AA0569. She testified that when she got to his apartment, Elam was in the apartment, and she walked into the kitchen, and Elam accused her of being involved with the disappearance of his

dogs. AA0570. She said that he became loud and aggressive and he told her to turn around and get on her knees. AA0571. She testified that Elam tied her up with “electrical cords and tape, and stuffed my mouth with – with fabric and covered my eyes up, and then finished it with a pillow case.” AA0572. She alleged that her “arms were tied behind my back connected to my feet.” *Id.*

The prosecutor then prompted Ms. Webster by asking:

Q: You said that he had put stuff in your mouth and tape around you. Before he did that, did he do something else?

A: I mean, before he did that he –

Q: Did he put something else in your mouth?

A: At what particular time? I mean, the –

Q: You tell me.

A: Okay. Yes, he did, and it was – it was the gun.
AA0573.

She testified that Elam then called another male, and two or three women to come over to his apartment. AA0575.

Further, she testified that after the other people arrived, they began videotaping the assault on Ms. Webster. Elam beat her with a belt and tased her with a taser.

AA0578. Elam was the only one who struck her with a belt, the only one who used a taser on her, and the only one who assaulted her with a broomstick. AA0578-79 and AA0581. Her shorts and underwear were pulled down and she was beaten with a belt on her bare skin. AA0584. She was threatened with a broomstick and that she “was exhausted” and blanked out when she thought she might be assaulted with the

broomstick. AA0580-81. She was tied up and assaulted for “at least a couple of hours.” AA0581.

She testified that she thought she might be assaulted with the broomstick, but she didn’t know if she was because “she passed out” and she doesn’t remember. AA0583. She escaped the apartment when she no longer could hear anyone in the apartment. AA0586.

On cross-examination, Ms. Webster testified that on the day of the alleged incident she filled out a handwritten voluntary statement, and acknowledged after reviewing her voluntary statement that she did not mention anything about being threatened with a gun, having a gun placed in her mouth, or being threatened with a broomstick. AA0613.

She remembered being interviewed by Detective Nelson. AA0616. She told Det. Nelson, when talking about the alleged use of a broomstick, “He – they didn’t put no penetration. . . . But they, like, act like they wanted to do it. You know, I thought they were going to do it.” AA0621, ll. 4-20. She also told Det. Nelson, when he asked if the suspects had sexually assaulted her, “No, but I just thought they would.” AA0626-27.

She told Det. Nelson that the paramedics “saw marks on [her] rear end from being whipped with a belt” (AA0622) and that she was hit with a belt “over 25 times.” AA0623. She told Det. Nelson that she thought she had been tased “six or

seven times” (AA0624) on “my legs, back of my neck, my back.” AA0626, ll. 2-4. She further testified that she told Det. Nelson that it was the other alleged male suspect who threatened her with a broomstick, rather than Elam. AA0624, ll. 13-18.

She was examined by a UMC nurse on March 12, 2015 (two days after the alleged incident). Detective Ryland then questioned her about the allegations.

Bradley Grover: He is a senior crime scene analyst with LVMPD. AA0672. He was asked to take photographs of the alleged victim on the March 10, 2015, the date of the alleged incident. AA0705. He believed he was made aware that Ms. Webster alleged she had been beaten by a belt. He was not asked to take “photographs attempting to document any injury from the beating.” AA0707. He did not recall being asked to try to take photos related to any tasing injuries on Ms. Webster. AA0707.

Theodore Weirach: He interviewed Appellant Elam during the investigation. At the time of the interview, Elam was at the LVMPD headquarters building in an interview room and handcuffed and chained to a bar attached to the table in the interview room. AA0715-16.

Mr. Weirach read Elam a *Miranda* warning from a LVMPD issued card that had been updated by the time Mr. Weirach was testifying at the trial. Mr. Weirach testified he read the warning to Elam from the old card he had been issued. He

testified he believed that the change between the old card read to Elam and the new card Mr. Weirach had with him at the trial was that the new card added the language “you have the right to consult with an attorney before questioning.” AA0718, ll. 17-25. Mr. Weirach testified that he did would not have given that warning to Elam at the time he was questioned as Mr. Weirach “would’ve read it just verbatim off the card of the day.” AA0719, ll. 1-2.

Detective Weirach testified that his updated *Miranda* card read as follows on the day he testified at trial:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to consult with an attorney before questioning. You have the right to the presence of an attorney during questioning. If you cannot afford an attorney, one will be appointed to you before questioning. Do you understand these rights?

The trial judge refused to suppress the statement Elam gave to the police. AA0719.

Heather Gouldthorpe: is a forensic scientist in the latent print unit in the LVMPD forensic laboratory. AA0760. She was not able to recover any latent fingerprints that could be compared with any known samples. AA0075-76.

Jeri Dermanelian: is a sexual assault nurse examiner. AA0818. She performed an examination of Arrie Webster on March 12, 2015, at the University Medical Center in Las Vegas, Nevada. AA0827. Ms. Dermanelian personally interviewed Ms. Webster. AA0861. In the “history of the event,” Ms. Dermanelian reported

that Ms. Webster stated the male “forced penis, finger, and tongue to her vagina.” AA0862, ll., 3-6.

Ms. Dermanelian asked Ms. Webster, “Was there oral penetration with a penis or other object?” Ms. Webster answered, No. AA0862, ll. 7-12. Ms. Dermanelian checked the boxes on the interview sheet indicating that the alleged victim reported that she was vaginally penetrated by a penis, by a finger, by a tongue, and “possible broomstick.” AA0862-63.

Ms. Dermanelian did a visual inspection of Ms. Webster’s body. When asked, “Did you observe any marks on her rear end that would indication to you a possible beating with a belt?” Ms. Dermanelian replied, “No. She had no bruises or contusions or lacerations . . . on her buttocks.” AA0863, ll. 20-24. Ms. Dermanelian used a special light tool in examining Ms. Webster for injuries and still did not see any injuries to Ms. Webster’s vaginal area, rectal area, or rear end. AA.0864. Ms. Dermanelian did a “head to toe” examination and “did not see any signs of injuries that would have been caused by a Taser.” AA0868, ll. 2-7.

Ms. Webster declined to give a urine sample during the examination. AA0866.

Detective Jesse Ryland: is a LVMPD detective with the sexual assault section. She interviewed Ms. Webster, with another female detective, on March 13, 2015 [three days after the alleged incident]. AA0895. Ms. Webster told her that Ms. Webster “smoked spice and methamphetamine” and, on the day of the interview,

Ms. Webster estimated that she had used methamphetamine “four to five days earlier”. AA0897.

Detective Jason Nelson: is a LVMPD detective. He interviewed Ms. Webster on the day of the alleged incident. At the trial, he reviewed the AMR report from the medical examination conducted by AMR personnel on the day of the alleged incident. AA1004. He testified that the AMR report did not identify injuries consistent with a beating with a belt or tasing with a stun gun. AA1005.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying the petition for writ of habeas corpus, post conviction.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PETITION FOR WRIT OF HABEAS CORPUS.

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden, Nevada Dept. of Prisons*, 106 Nev. 67, 787 P.2d 390 (1990).

A. The District Court erred in finding that appellate counsel was not ineffective for failing to litigate the conviction for first degree kidnapping

Elam alleged that appellate counsel should have litigated the conviction for first degree kidnapping. AA1275. The district court found that this was not

ineffective as there was “substantial evidence” of the kidnapping and it would have been futile for counsel to raise the issue. AA1276.

To sustain convictions for both kidnapping and another offense arising! out of the same course of conduct, the movement or restraint involved in the kidnapping must have independent significance apart from the other offense, create a substantially greater risk of danger, or involve movement that substantially exceeds that necessary to complete the other offense. *See Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

Generally, "movement or restraint incidental to an underlying offense where restraint or movement is inherent" will not expose a defendant to criminal liability for kidnapping. *Mendoza*, at 267. But when the movement or restraint "substantially increase[s] the risk of harm to the victim over and above that necessarily present in an associated offense . . . or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged," a kidnapping charge can stand. *Id.* at 274-75, 130 P.3d at 180. Whether, the movement was incidental or substantially increased the risk of harm are questions generally left for a jury "in all but the clearest of cases." *Guerrina v. State*, 134 Nev. ___, ___, 419 P.3d 705, 710 (2018) (internal quotation marks omitted).

The State charged Elam with first degree kidnapping, alleging that the seizing, confining, inveigling, enticing, etc. was done for the purpose of committing substantial bodily harm and/or for the purpose of committing a sexual assault and/or to kill Webster. AA00002.

Webster testified that on the day of the alleged incident, she was visiting friends, and saw Elam. AA559, 560. Elam, who referred to as “Cuz,” motioned for her to come over to where he was. AA560. Webster went over because she wanted to speak to him about some puppies that Elam owned which were missing. AA567. Webster wanted to tell Elam “she did not have anything to do” with the dogs being missing. AA569. According to Webster’s statement to the police, Elam invited her over, and she went, testifying at trial that she was “eager to go” because she wanted to explain about the puppies. AA616.

Webster went into Elam’s apartment, and when she informed Elam she did not have anything to do with the puppies, he got angry and did not believe her. AA570. Elam then told her to get on her knees. AA571.

After she got on her knees, Elam tied her with electrical cords and tape, and stuffed her mouth with fabric, and covered her eyes. AA572. At some point after that, Elam put a shotgun in her mouth. AA574. Elam beat her with a belt, pulled her pants down, angled a broomstick at her anus. AA575. Elam made a phone call and three women and an man came in the door of the

apartment. AA575. Elam's girlfriend was in the apartment and saw Webster hogtied at one point. AA570. Webster was able to leave the apartment, and some people in the parking lot helped untie her. AA586.

Here, this restraint is not above and beyond that required to inflict a beating, a murder, or sexual assault. To effectuate any of those crimes, one would have to restrain the victim. The restraint did not subject her to any more risk than she was already at, because if you accept her version as true, Elam had every intention of beating her and exacting revenge for what he perceived as her role in the theft of his puppies. It is unclear how this restraint subjected Webster to any risk above and beyond the harm inherent in a beating, sexual assault or murder. Appellate counsel should have appealed this verdict, and such appeal would have saved Elam a conviction on a category A felony. Elam faced prejudice because counsel failed to litigate such a clear cut issue in the appeal.

The district court erred in finding that appellate counsel was not ineffective for not raising that issue.

B. The district court erred in finding that trial counsel was not ineffective for failing to object to a misstatement of the law by the prosecutor

Elam alleged that trial counsel should have objected to the prosecutor's misstatement of the law regarding an unarmed offender. The district court found that what the prosecutor said was not a misstatement of the law, and such alleged mistake would not have prejudiced Elam. AA1269.

The district court erred. In the prosecutor's closing argument, she stated that the unarmed offender is liable for the use of a deadly weapon used by someone else. AA1031. The prosecutor made this statement when discussing the instruction on the unarmed offender. The statement made leaves out the fact that the unarmed offender must have knowledge of the use of the weapon. AA1214. While the instruction to the jury was correct, the prosecutor's explanation was not. Because an attorney never knows what information a juror will seize on, it is crucial that the jury is always properly instructed. The prosecutor left out a key element of the unarmed offender's liability. Counsel should have objected as this was a clear misstatement of the law.

To allow the jury to have a misconception about what the State needs to prove cannot be said to be effective. It cannot be said to be harmless, as this Court cannot know if this misstatement caused a juror to believe Elam was guilty as an unarmed offender because the State made it seem as if all that was required was that someone used a weapon. The district court erred in deciding this issue.

C. The district court erred in not holding an evidentiary hearing and dismissing all claims summarily.

A defendant is entitled to an evidentiary hearing if he asserts specific factual allegations that are not belied by the record and if true, would entitle him to relief.

See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) provides that "[w]here ... something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing'..."

Here, the court held that it could resolve the issues in the petition without expanding the record. However, the court summarily dismissed the issues when it should have expanded the record.

Elam alleged that his counsel failed to investigate in a case where it was clear the victim and Elam knew each other, and had friends in common. In a case where the evidence was comprised almost entirely of Webster's testimony, any information that was relevant or germane to impeaching her should have been sought. Further, her contentions were that Elam did this because he believed Webster stole his puppies, the puppy story should have been investigated. The district court did not inquire into counsel's investigation at all. This is a case where the jury did not believe Webster with regard to some of the charges, and investigation was crucial.

Elam's contention that appellate counsel erred in not challenging his kidnapping conviction is not a bare allegation, and the record should have included why counsel ignored what was a salient issue to be raised on appeal.

CONCLUSION

The district court erred when it denied Elam's post conviction writ of habeas corpus.

Respectfully submitted,

By: /s/Monique McNeill
Monique McNeill
Nevada Bar # 9862

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirement of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because:

X This brief has been prepared in a monospaced typeface using Word with Times New Roman, 14 point, which does not contain more than 10 ½ characters per inch.

2. This brief does not exceed the page or type limitations found in NRAP32(a)(7) because it contains 4395 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand

that I may be subject to sanction in the event that the accompanying brief is not in conformity with requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of March, 2023.

By: /s/Monique McNeill
Monique McNeill
Nevada Bar # 9862

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of March, 2023, via Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:
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MONIQUE MCNEILL STEVEN WOLFSON

I further certify that I served a copy of this document, via United States Postal Service to Calvin Elam.

Dated this 27th day of March, 2023.

By: /s/Monique McNeill
Monique McNeill