

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROBIN LEE BENJAMIN,

Petitioner,

v.

STATE OF NEVADA, *et al.*,

Respondents.

Case No. 3:16-cv-00024-MMD-VPC

ORDER

I. INTRODUCTION

This action is a *pro se* petition for a writ of habeas corpus by Robin Lee Benjamin, who, on March 11, 2011, after a jury trial, was convicted of the crime of exploitation of an older or vulnerable person. The action is before the Court with respect to the merits of the one remaining claim in Benjamin's habeas petition. The Court will deny the petition.

II. BACKGROUND

In its order, on Benjamin's direct appeal, affirming Benjamin's conviction, the Nevada Supreme Court described the crime, as revealed by the evidence at trial, as follows:

In 1993, Kelly Six befriended the victim while they were living in a mobile-home park. As time passed, the victim inherited a large sum of money and purchased a home. In 2008, the victim was hospitalized for dementia and Six obtained a power-of-attorney over her affairs. After officials inspected the victim's residence and deemed it uninhabitable, Six decided to sell the residence. She sought out . . . Robin Lee Benjamin – a real estate broker – to sell the distressed property. Six and Benjamin met and discussed the methods and advantages of moving assets out of the victim's name. Benjamin agreed to buy the property, took title, and issued

1 notes payable to the victim. Benjamin then transferred the home to a non-
2 profit business which she owned – creating the appearance of an
3 unencumbered title. Benjamin also incorporated Wildlife Images for Six.
Several weeks later, Six wrote a \$170,000 check to Benjamin from the
victim's account. Benjamin endorsed the check and deposited it into Six's
Wildlife Images account.

4 (Order of Affirmance, Exhibit 89 at 1 (ECF No. 12-13 at 2).)

5 On March 24, 2010, Benjamin was charged in an indictment, in Nevada's Second
6 Judicial District Court, with the crime of exploitation of an older or vulnerable person. (See
7 Indictment, Exhibit 4 (ECF No. 9-4).) Benjamin was arraigned on April 29, 2010, and she
8 pled not guilty. (See Reporter's Transcript, April 29, 2010, Exhibit 14 (ECF No. 9-14).)
9 Benjamin was tried before a jury in December of 2010. (See Trial Transcripts, Exhibits
10 31, 32, 33, 34, 36, 38, 40, 43, 46, 55 (ECF Nos. 10-5, 10-6, 10-7, 10-8, 10-10, 10-12, 10-
11 14, 10-17, 10-20, 11-4).) The jury rendered its verdict on December 16, 2010, finding
12 Benjamin guilty. (See Verdict, Exhibit 57 (ECF No. 11-6).) Benjamin was sentenced on
13 March 10, 2011. (See Transcript of Sentencing, Exhibit 63 (ECF No. 11-12).) She was
14 sentenced to ten years in prison, with parole eligibility after two years. (See *id.* at 37 (ECF
15 No. 11-12 at 38); Judgment of Conviction, Exhibit 64 (ECF No. 11-13).) Her sentence
16 also includes payment of \$675.00 in fees, and \$181,864.00 in restitution, the restitution
17 to be paid jointly and severally by Benjamin and her co-defendant. (See Judgment of
18 Conviction, Exhibit 64 (ECF No. 11-13).)

19 Benjamin appealed. (See Notice of Appeal, Exhibit 69 (ECF No. 11-18); Fast Track
20 Statement, Exhibit 81 (ECF No. 12-5).) The Nevada Supreme Court affirmed the
21 judgment of conviction on February 9, 2012. (See Order of Affirmance, Exhibit 89 (ECF
22 No. 12-13).) The Nevada Supreme Court denied rehearing on July 31, 2012. (See Order
23 Denying Rehearing, Exhibit 96 (ECF No. 12-20).)

24 On May 20, 2013, Benjamin filed, in the state district court, a motion for
25 modification of her sentence. (See Motion for Modification of Sentence, Exhibit 104 (ECF
26 No. 13-3).) The state district court denied that motion on July 9, 2013. (See Order Denying
27 Motion for Modification of Sentence, Exhibit 109 (ECF No. 13-8).)

28 ///

1 On August 16, 2013, Benjamin filed, in the state district court, a petition for writ of
2 habeas corpus. (See Petition for Writ of Habeas Corpus, Exhibit 110 (ECF No. 13-9).)
3 The state district court appointed counsel to represent Benjamin in that action. (See Order
4 Granting Motion, Exhibit 116 (ECF No. 13-15); Recommendation and Order for
5 Appointment of Counsel, Exhibit 117 (ECF No. 13-16).) With counsel, Benjamin elected
6 not to supplement her petition. (See Notice to Court of No Supplement, Exhibit 119 (ECF
7 No. 13-18).) The state district court held an evidentiary hearing on May 27, 2015. (See
8 Transcript of Proceedings, May 27, 2015, Exhibit 133 (ECF No. 14-7).) On June 4, 2015,
9 the state district court entered a written order, denying Benjamin's state habeas petition.
10 (See Findings of Fact, Conclusions of Law and Judgment Denying Petition, Exhibit 135
11 (ECF No. 14-9).) Benjamin appealed. (See Notice of Appeal, Exhibit 136 (ECF No. 14-
12 10); Fast Track Statement, Exhibit 141 (ECF No. 14-15).) The Nevada Court of Appeals
13 affirmed on November 19, 2015. (See Order of Affirmance, Exhibit 144 (ECF No. 14-18).)

14 This Court received Benjamin's federal habeas petition, initiating this action, on
15 January 21, 2016. (ECF No. 1.) Benjamin's petition asserted fourteen grounds for relief.

16 Respondents filed a motion to dismiss on March 16, 2016. (ECF No. 8.) Benjamin
17 opposed that motion. (ECF No. 19.)

18 In response to the motion to dismiss, Benjamin also filed an amended petition for
19 writ of habeas corpus. (ECF No. 17.) The amended petition was identical to Benjamin's
20 original petition, with respect to the grounds for relief asserted; it only cured defects
21 regarding the named respondents. Respondents moved to strike the amended petition.
22 (ECF No. 18.)

23 On October 3, 2016, the Court denied Respondents' motion to strike Benjamin's
24 amended petition, and granted in part, and denied in part, the motion to dismiss. (ECF
25 No. 21.) The Court dismissed the claims in Grounds 1-8 and 11, to the extent they were
26 based on alleged violations of Benjamin's rights under the Nevada Constitution. The
27 Court found Benjamin's remaining claims in Grounds 1 and 3-14 to be unexhausted. With
28 respect to those unexhausted claims, the Court required Benjamin to make an election:

1 to either abandon those claims and proceed with this action with regard to her remaining
2 claim, in Ground 2, or file a motion for a stay, requesting that this case be stayed while
3 she exhausts her unexhausted claims in state court.

4 On December 19, 2016, Benjamin filed a notice (ECF No. 23) stating her election
5 to abandon her unexhausted claims and proceed with her exhausted claim. On December
6 21, 2016, the Court accepted Benjamin's abandonment of her unexhausted claims, and
7 dismissed those claims. (ECF No. 24.)

8 Respondents filed their answer, responding to Ground 2 of Benjamin's amended
9 petition, on March 21, 2017. (ECF No. 25.) Benjamin filed a reply on May 24, 2017. (ECF
10 No. 26.)

11 **III. DISCUSSION**

12 **A. Standard of Review**

13 28 U.S.C. § 2254(d) sets forth the standard of review applicable in this case under
14 the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

15 An application for a writ of habeas corpus on behalf of a person in custody
16 pursuant to the judgment of a State court shall not be granted with respect
17 to any claim that was adjudicated on the merits in State court proceedings
unless the adjudication of the claim --

18 (1) resulted in a decision that was contrary to, or involved an unreasonable
19 application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or

20 (2) resulted in a decision that was based on an unreasonable determination
of the facts in light of the evidence presented in the State court proceeding.

21 28 U.S.C. § 2254(d).

22 A state court decision is contrary to clearly established Supreme Court precedent,
23 within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts
24 the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts
25 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
26 and nevertheless arrives at a result different from [the Supreme Court's] precedent."
27 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,
28 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

1 A state court decision is an unreasonable application of clearly established
2 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
3 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
4 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S.
5 at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires
6 the state court decision to be more than incorrect or erroneous; the state court’s
7 application of clearly established law must be objectively unreasonable. *Id.* (quoting
8 *Williams*, 529 U.S. at 409).

9 The Supreme Court has instructed that “[a] state court’s determination that a claim
10 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’
11 on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101
12 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court
13 has stated “that even a strong case for relief does not mean the state court’s contrary
14 conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen*
15 *v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted)
16 (describing standard as “a difficult to meet” and “highly deferential standard for evaluating
17 state-court rulings, which demands that state-court decisions be given the benefit of the
18 doubt”).

19 **B. Ground 2**

20 In Ground 2 of her amended habeas petition, Benjamin claims that her
21 constitutional rights were violated as a result of ineffective assistance of her trial counsel,
22 because her trial counsel failed to ensure that she could adequately hear the trial
23 proceedings. (Amended Petition for Writ of Habeas Corpus at 6-8 (ECF No. 17 at 6-8).

24 Benjamin asserted this claim in her state habeas action. (*See* Petition for Writ of
25 Habeas Corpus (Post Conviction), Exhibit 110 at 5-8 (ECF No. 13-9 at 6-9).) The state
26 district court held an evidentiary hearing, at which this claim was the primary focus. (*See*
27 Transcript of Proceedings, May 27, 2015, Exhibit 133 (ECF No. 14-7).) The state district
28 court denied Benjamin’s petition (*see* Findings of Fact, Conclusions of Law and Judgment

1 Denying Petition, Exhibit 135 (ECF No. 14-9)). The state district court's order included the
2 following findings:

3 Turning to the primary claim, the court was aware during the trial that
4 petitioner had impaired hearing. Thus, she was provided with amplification
5 devices during the trial. The post-conviction hearing included an audiologist
6 who testified that long after the trial had ended the petitioner's hearing aids
7 were examined. The doctor testified that one tube was occluded and the
8 other was split and so both would not have been effective. There are two
9 problems with that testimony. First, the examination was long after the trial
10 and second, the petitioner did not have to rely on her hearing aids as the
11 court provided amplification devices that entailed headphones.

12 The court also finds that petitioner has not met her burden of proving
13 that she actually had problems hearing the testimony. Although she testified
14 to some vague problems, Carl Hylin [Benjamin's trial counsel] testified to
15 the contrary that she was a very active participant in the trial and that their
16 discussions of the testimony revealed that she had indeed heard the
17 proceedings. The court finds that testimony was credible.

18 One who would assert a claim of ineffective assistance of counsel
19 bears the burden of proving, by a preponderance of the evidence, that the
20 specific decisions or omissions of counsel fell below an objective standard
21 of reasonableness and that but for the failings of counsel a different result
22 was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 104
23 S.Ct. 2052 (1984); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).
24 There is a presumption that counsel fully discharged his or [her] duties.
25 *Means v. State, supra*. The court finds that petitioner has failed to prove that
26 counsel had a duty to ask the court to suspend the proceedings and find a
27 different accommodation. The court also finds that petitioner did indeed
28 participate in the trial in a meaningful way.

* * *

19 This court, and counsel, made reasonable accommodations and the
20 defendant was able to participate in the trial in a meaningful way. In fact,
21 the evidence does not persuade this court that Benjamin missed a single
22 word of the testimony. Benjamin's claim to the contrary was both vague and
23 incredible. Accordingly, the court finds that petitioner has failed to show that
24 her hearing impairment or the claim of ineffective assistance [of] counsel
25 should lead to relief from her conviction.

26 (Findings of Fact, Conclusions of Law and Judgment Denying Petition, Exhibit 135 at 2-
27 3 (ECF No. 14-9 at 3-4).) Benjamin appealed from the denial of her state habeas petition,
28 and raised this claim of ineffective assistance of trial counsel on appeal. (See Fast Track
Statement, Exhibit 141 at 7-11 (ECF No. 14-15 at 8-12).) The Nevada Court of Appeals
affirmed, ruling as follows:

///

1 Appellant Robin Benjamin claims the district court erred by denying
2 her ineffective-assistance-of-counsel claim. Specifically, she claimed trial
3 counsel were ineffective for failing to ensure that she could hear during the
4 trial. To prove ineffective assistance of counsel, a petitioner must
5 demonstrate that counsel's performance was deficient in that it fell below
6 an objective standard of reasonableness, and resulting prejudice such that
7 there is a reasonable probability that, but for counsel's errors, the outcome
8 of the proceedings would have been different. *Strickland v. Washington*,
9 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683
10 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of
11 the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner
12 must demonstrate the underlying facts by a preponderance of the evidence,
13 *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give
14 deference to the district court's factual findings if supported by substantial
15 evidence and not clearly erroneous but review the court's application of the
16 law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d
17 1164, 166 (2005).

18 Benjamin fails to demonstrate trial counsel were deficient or resulting
19 prejudice. The district court held an evidentiary hearing on this issue.
20 Benjamin testified she could not hear well even with the amplification device
21 provided to her by the district court. Trial counsel testified Benjamin was a
22 very active participant in her defense, discussed the evidence presented
23 during trial, and appeared to understand the proceedings. The district court
24 found trial counsel to be credible, and we conclude substantial evidence
25 supports the decision of the district court.

26 Further, we conclude Benjamin fails to demonstrate prejudice
27 because she fails to demonstrate a reasonable probability of a different
28 outcome at trial had trial counsel done more to ensure she could hear the
proceedings. Benjamin fails to allege specific facts that, if true, would entitle
her to relief regarding how the outcome of the trial would have been different
had she been able to hear better. *See Hargrove v. State*, 100 Nev. 498,
502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in
denying this claim

(Order of Affirmance, Exhibit 144 at 1-2 (ECF No. 14-18 at 2-3).)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded
a two prong test for claims of ineffective assistance of counsel: the petitioner must
demonstrate (1) that the defense attorney's representation "fell below an objective
standard of reasonableness," and (2) that the attorney's deficient performance prejudiced
the defendant such that "there is a reasonable probability that, but for counsel's
unprofessional errors, the result of the proceeding would have been different." *Strickland*,
466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel
must apply a "strong presumption" that counsel's representation was within the "wide
range" of reasonable professional assistance. *Id.* at 689. The petitioner's burden is to

1 show “that counsel made errors so serious that counsel was not functioning as the
2 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To establish
3 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the
4 errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693.

5 Where a state court has adjudicated a claim of ineffective assistance of counsel
6 under *Strickland*, establishing that the decision was unreasonable under the AEDPA is
7 especially difficult. *See Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme Court
8 instructed:

9 The standards created by *Strickland* and § 2254(d) are both highly
10 deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320,
11 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply
12 in tandem, review is “doubly” so, [*Knowles v. Mirzayance*, 556 U.S. 111,
13 123 (2009)]. The *Strickland* standard is a general one, so the range of
14 reasonable applications is substantial. 556 U.S. at 123, 129 S. Ct. at 1420.
Federal habeas courts must guard against the danger of equating
unreasonableness under *Strickland* with unreasonableness under §
2254(d). When § 2254(d) applies, the question is not whether counsel’s
actions were reasonable. The question is whether there is any reasonable
argument that counsel satisfied *Strickland*’s deferential standard.

15 *Harrington*, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th
16 Cir. 2010) (acknowledging double deference required for state court adjudications of
17 *Strickland* claims).

18 The Nevada courts’ resolution of this claim was reasonable. The evidence at the
19 evidentiary hearing in state court indicated that Benjamin did have hearing loss, and wore
20 hearing aids, and that her hearing aids may not have been working properly at her trial.
21 (See Transcript of Proceedings, May 27, 2015, Exhibit 133 at 4-42 (ECF No. 14-7 at 5-
22 43).) However, in her testimony at the evidentiary hearing, while she contended,
23 generally, that her hearing impairment rendered her unable to participate fully in her trial,
24 Benjamin did not articulate any specific manner in which her hearing impairment
25 undermined her defense; that is, she did not specify any particular manner in which her
26 hearing impairment may have affected the outcome of the trial. (See *id.* at 25-41 (ECF
27 No. 14-7 at 26-42).) And, Benjamin’s trial counsel testified as follows at the evidentiary
28 hearing:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q. Did your client, Ms. Benjamin – did she participate in the trial?

A. Yes, she was very active.

Q. Did you have conversations?

A. Often.

Q. Were they cogent?

A. Yes.

Q. Did she appear to understand what was happening?

A. Appeared to me she did.

Q. Okay. Were her comments and were her questions relevant?

A. Well, quite relevant. She would even write out questions.

Q. Did she tell [you from] time to time she was having trouble hearing?

A. There were conversations that she would occasionally have trouble hearing. But, you know, I don't remember any specific times or things that she said that had to be repeated in court.

But I do remember the issue came up several times.

Q. Okay. You are aware that a criminal defendant has a right to be able to assist in her own defense?

A. Absolutely.

Q. Was Robin Benjamin able to do that?

A. Yes, she was. She was very active.

Q. And understand the nature of the charges?

A. Clearly understood the nature of the charges.

Q. Did she appear to understand the evidence against her?

A. She understood all of the evidence. As a matter of fact, she was instrumental in developing the theory of the case with me.

Q. What was that theory of the case?

A. Well, the theory of the case was that she, essentially, was only trying to help [the victim] because [the victim], in her infirmity, had rendered her own . . . home uninhabitable.

And Robin Benjamin was attempting to assist her in rehabilitating the home so she could sell it.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q. Okay. If you had seen signs that your client was not able to meaningfully participate because of her hearing problems, what would you have done about it?

A. Well, I would have asked the judge to suspend the proceedings until we could get, you know, the defect fixed.

But I – you know, although the issue came up, it was not a permanent or even an overriding issue in our relationship. I sat next to her for the entire trial, which I think was nearly two weeks long, and I communicated with her effectively both in and outside of court.

She would go to lunch with myself and Mr. Sullivan, and, you know, I had ordinary conversations.

Q. She was able to discuss the evidence that had been presented earlier that day?

A. Absolutely.

Q. As though she had heard it?

A. Yes.

(*Id.* at 43-45 (ECF No. 14-7 at 44-46); *see also id.* at 45-50 (similar testimony on cross and re-direct examination).)

In light of the evidence at the evidentiary hearing, the Nevada Court of Appeals reasonably affirmed the denial of Benjamin’s claim that her trial counsel was ineffective for failing to ensure that she could adequately hear the trial proceedings. There is no showing by Benjamin that her trial counsel acted unreasonably with respect to her hearing impairment, and there is no showing that, had her trial counsel done anything different in that regard, there would have been a reasonable probability of a different outcome at trial. The Nevada Court of Appeal's ruling was not contrary to, or an unreasonable application of, *Strickland* or any other United States Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence.

Accordingly, the Court will deny Benjamin’s petition for a writ of habeas corpus.

IV. CERTIFICATE OF APPEALABILITY

The standard for issuance of a certificate of appealability is governed by 28 U.S.C. § 2253(c). The Supreme Court has interpreted section 2253(c) as follows:

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). Applying this standard, the Court finds that a certificate of appealability is unwarranted.

V. CONCLUSION

It is therefore ordered that the Amended Petition for Writ of Habeas Corpus (ECF No. 17) is denied.

It is further ordered that Petitioner is denied a certificate of appealability.

It is further ordered that the Clerk of the Court is to enter judgment accordingly.

DATED THIS 18th day of June 2018.



MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE