IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	MEMORANDUM DECISION (Not For Official Publication)
Plaintiff and Appellee,	)	Case No. 20080393-CA
v.	)	F I L E D (February 12, 2009)
Heather Carlson,	)	
Defendant and Appellant.	)	2009 UT App 36

Fifth District, St. George Department, 051501768
The Honorable James L. Shumate

Attorneys: Heather Carlson, Walnut Creek, California, Appellant Pro Se
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

-----

Before Judges Greenwood, Davis, and McHugh.

PER CURIAM:

Heather Carlson appeals her convictions of three counts of possession of a controlled substance in a drug free zone and one count of possession of drug paraphernalia in a drug free zone. We affirm.

Carlson first asserts that the district court erred in refusing to allow her to represent herself during trial. In order for a defendant to invoke her right of self-representation, she must do so "clearly and unequivocally." State v. Bakalov, 1999 UT 45, ¶ 16, 979 P.2d 799. "If a defendant equivocates in his request to represent himself, he is presumed to have requested the assistance of counsel." Id.; see also State v. Hassan, 2004 UT 99, ¶ 22, 108 P.3d 695 (stating that because "[p]ro se defendants may often find themselves at a serious disadvantage in our legal system[,] . . . trial courts must be assured that a defendant has 'clearly and unequivocally requested' the right to proceed pro se"). Here, immediately before trial, Carlson requested that she be allowed to proceed pro se. As a result, the district court entered into a colloquy with Carlson to determine if she had both the ability and desire to proceed pro se. At the end of the colloquy, the district

court asked Carlson if she still wanted to fire her counsel and proceed pro se. In response, Carlson stated, "I don't know what I want to do." As a result, the district court required counsel to continue representing Carlson. Because at the end of the colloquy Carlson did not unequivocally indicate that she desired to fire her counsel and proceed pro se, the district court did not err in refusing her request.

Carlson next argues that she was subjected to cruel and unusual punishment because a taser was allegedly strapped to her leg during trial so that it could be activated by remote control if she became disruptive. However, we cannot consider this claim because Carlson failed to preserve the issue for appeal by timely objecting to the alleged conduct in order to give the district court the opportunity to rule on the issue. See State v. Winfield, 2006 UT 4, ¶ 23, 128 P.3d 1171 (stating that generally Utah courts will not consider issues raised for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist). Therefore, because the issue is not preserved and Carlson makes no attempt to demonstrate that the district court committed plain error or that exceptional circumstances exist, we will not consider the issue for the first time on appeal.

Further, even if this court were to assume for the sake of argument that exceptional circumstances exist that would otherwise warrant review of this unpreserved issue, we could still not review Carlson's claim because the record does not contain references to any of the conduct of which Carlson now complains. "As an appellate court, our 'power of review is strictly limited to the record presented on appeal.'" Gorostieta v. Parkinson, 2000 UT 99, ¶ 16, 17 P.3d 1110. In simple terms, this means that this court is limited to reviewing solely the evidence presented in the district court. See Utah R. App. P. 11(a) (describing composition of the record on appeal). Accordingly, this court may not review evidence that was not presented to the district court and must disregard any newly presented materials improperly included in a party's brief. See Tillman v. State, 2005 UT 56, ¶ 14 n.5, 128 P.3d 1123. Carlson's sole evidence supporting this claim is found in affidavits attached to her brief. Such affidavits are new evidence that is not part of the record on appeal. Accordingly, this court is prohibited from considering the affidavits. See Utah R. App. P 11(a). Therefore, because Carlson has failed to cite to any part of the record that would support her claim, we cannot consider it. See State v. Thomas, 1999 UT 2, ¶ 11, 974 P.2d 269.

Carlson next asserts that she was denied due process because the testimony of one of the State's witnesses, as well as some of Carlson's testimony, was not recorded and, as such, the testimony

is not available to this court for review. However, Carlson has not raised a sufficiency of the evidence claim or otherwise stated how the missing testimony is in any way relevant to the issues she has raised on appeal. Accordingly, any error that resulted from the failure to record the referenced testimony is harmless. See State v. Evans, 2001 UT 22, ¶ 20, 20 P.3d 888 ("Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.").

Finally, Carlson makes passing references to arguments that she was denied a speedy trial and that her counsel was ineffective. However, Carlson fails to provide any analysis, citation to legal authority, or citation to the record to support these claims. See generally Utah R. App. P. 24(a)(9) (stating that an appellant must include "citations to the authorities, statutes, and parts to the record relied on" in making her argument). Accordingly, because Carlson has failed to adequately brief these issues, we do not address them. See State v. Sloan, 2003 UT App 170, ¶ 15, 72 P.3d 138.

Affirmed.

____
Pamela T. Greenwood,
Presiding Judge

____
James Z. Davis, Judge

____
Carolyn B. McHugh, Judge