

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE B. CORDOVA, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43272

**FILED**

FEB 17 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Clyde Cordova's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Cordova confessed to police that he shot into an apartment through a closed door, killing the victim. At trial, however, his defense was that Damian Hodson was the shooter. On February 11, 1999, the district court convicted Cordova, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Cordova to two consecutive prison terms of life with the possibility of parole. This court affirmed the district court's judgment.<sup>1</sup> The remittitur issued on October 19, 2000. On August 24, 2001, Cordova filed a post-conviction petition for a writ of habeas corpus. The district court conducted an evidentiary hearing and on May 13, 2004, denied Cordova's petition. This appeal follows.

Cordova raises nine claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate

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<sup>1</sup>Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000).

a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."<sup>2</sup> "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."<sup>3</sup> To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."<sup>4</sup> Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.<sup>5</sup> However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."<sup>6</sup>

First, Cordova claims that trial counsel was ineffective because he improperly made the following admissions of guilt without Cordova's consent:

(1) that Mr. Cordova knew what happened; (2) that trial counsel was not going to tell the jury that Cordova was innocent; (3) if Mr. Cordova was "over there" [at the apartment] he was not innocent; (4) that neither Mr. Cordova nor Mr.

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<sup>2</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

<sup>3</sup>Id. (citing Strickland, 466 U.S. at 697).

<sup>4</sup>Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

<sup>5</sup>Riley, 110 Nev. at 647, 878 P.2d at 278.

<sup>6</sup>Id.

Hodson were innocent; (5) trial counsel emphasized testimony that two people were at the scene; (6) trial counsel argued that the case was not first-degree murder, but could be manslaughter or second-degree murder; (7) trial counsel argued that the jury needed to make a determination as to the degree of responsibility; (8) trial counsel argued that no matter who did the shooting, the other person still has a level of culpability; (9) trial counsel argued that two people were involved, but one (Mr. Hodson) had gone free; (10) [trial counsel] again argued that both Cordova and Hodson were involved and that the jury must decide the level of responsibility.

(Citations to trial transcript omitted.) Cordova further asserts that trial counsel's failure to object to a witness's statements that "if someone shoots into an apartment, then they're trying to kill somebody" also amounted to an admission of guilt. And Cordova argues that these admissions of guilt deprived him of the right to have a jury decide his guilt or innocence in an adversarial proceeding as required by this court in Jones v. State.<sup>7</sup>

The district court found that trial counsel did not admit Cordova was guilty of any specific crime or admit facts that amounted to a guilty plea. However, he did concede a number of points which tended to be inculpatory. The district court further found that trial counsel testified credibly that, while he did not have Cordova's explicit permission to make these precise concessions, Cordova approved of the general trial strategy which authorized them. The district court found Cordova's testimony to the contrary to be incredible.

During the evidentiary hearing, trial counsel testified that he fully explained the defense strategy to Cordova and that Cordova agreed

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<sup>7</sup>110 Nev. 730, 877 P.2d 1052 (1994).

with the strategy. He stated that the defense strategy was based on the facts, the truth, and the information he had to work with. Cordova was charged with open murder, he had fully confessed to the crime, and he was at the apartment at the time of the shooting, so the defense strategy included the possibility of a plea negotiation in which Cordova would agree to plead guilty to manslaughter. However, when it became apparent that plea negotiations were not available and that trial counsel's efforts to reduce Cordova's exposure to second-degree murder or manslaughter had failed, counsel and Cordova agreed on a strategy which did not require Cordova's testimony, focused on presenting the jury with a range of possibilities, and would get Cordova as close to "not guilty" as possible. This strategy included informing the jury that this was a manslaughter case. Trial counsel further testified that he did not object to the witness's statements that "if someone shoots into an apartment, then they're trying to kill somebody" because the statements were consistent with a second-degree felony murder theory, which was preferable to first-degree murder.

Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and, therefore, are not clearly wrong. Moreover, we have determined that Cordova's reliance on Jones is misplaced. In Jones, we limited our holding to situations "where counsel undermined his client's testimonial disavowal of guilt."<sup>8</sup> Here, Cordova did not testify at trial and agreed to a strategy of conceding culpability. We further conclude that the district court properly judged Cordova's ineffective assistance of counsel claims under the Strickland v. Washington standard.<sup>9</sup>

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<sup>8</sup>Jones, 110 Nev. at 739, 877 P.2d at 1057.

<sup>9</sup>See Florida v. Nixon, \_\_\_ U.S. \_\_\_, 125 S. Ct. 551 (2004).

Second, Cordova claims that trial counsel was ineffective because he improperly admitted that shooting into an occupied residence was a felony dangerous to human life. Cordova specifically points to a statement made by trial counsel after the jury had been excused and while the court was reviewing jury instructions. The district court found that "when the parties met to settle jury instructions, [trial counsel] offered a jury instruction on second-degree murder which provided, in salient part, that shooting into an occupied residence is a felony dangerous to human life." The district court further found that trial counsel's decision to offer this instruction was reasonable, there was no reasonable probability that the result of Cordova's trial would have been different with a more correct or precise instruction, and even if trial counsel had not offered this instruction, "the trial court would have given a similar instruction pursuant to its duty to correctly instruct the jury on the elements of the offense of second-degree murder." During the evidentiary hearing, trial counsel testified that the defense strategy was to present the jury with a range of options beyond first-degree murder and not guilty. To this end, he requested instructions on second-degree murder and manslaughter. Trial counsel also requested an instruction that shooting into an occupied residence was a dangerous felony. He reasoned that if Cordova were convicted of second-degree felony murder, Cordova might avoid the deadly weapons enhancement if the use of a deadly weapon was found to be an element of the crime.<sup>10</sup> Trial counsel's testimony demonstrates that the

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<sup>10</sup>See NRS 193.165(3) ("The provisions of subsections 1 and 2 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime."); Cordova 116 Nev. at 667-68, 6 P.3d at 483-84.

district court's factual findings are supported by substantial evidence and, therefore, are not clearly wrong.

Third, Cordova claims that trial counsel was ineffective because he elicited testimony as to Cordova's veracity and thereby invaded the province of the jury. However, the district court found that trial counsel's decision to "open the door" to a discussion of Cordova's truthfulness during the police interrogation was reasonable and a trial tactic undertaken with Cordova's approval.<sup>11</sup> During the evidentiary hearing, trial counsel testified that Cordova confessed to Detective Jenkins that "he was there, he was the shooter, he had the gun, he pulled the trigger." However, the defense's theory of the case was that Hodson was the shooter and that Cordova initially took responsibility for the shooting to protect Hodson. Therefore, trial counsel stated that he had to find some way to show that the confession did not truthfully reflect what happened. He did so by eliciting testimony which suggested that Cordova gave the detective false information. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong. Moreover, given our previous holding that the introduction of this testimony "was not plain error and did not affect Cordova's substantial rights,"<sup>12</sup> we conclude that Cordova failed to demonstrate a reasonable probability that the trial result would have been different had this testimony not been elicited.

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<sup>11</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

<sup>12</sup>Cordova, 116 Nev. at 670, 6 P.3d at 485.

Fourth, Cordova claims that trial counsel was ineffective in introducing a hearsay statement by Hodson which placed the murder weapon in Cordova's possession. He contends that he was "unfairly prejudiced because there were no independent witnesses who placed [him] at the scene of the crime at the time of the shooting." While examining Detective Duncan, trial counsel elicited Hodson's out-of-court, unsworn statements that Cordova had borrowed two guns on the night of the shooting and returned the weapons later that evening. The district court concluded that, although Hodson's statements were hearsay, trial counsel's decision to elicit this testimony was reasonable. During the evidentiary hearing, trial counsel testified that his theory of the case was that Hodson was the shooter. However, because Cordova had confessed that he had a gun, trial counsel had to show that the gun he had was not the murder weapon. He attempted to do this by showing that Hodson possessed both the murder weapon and a second gun. Trial counsel stated that, in effect, he was trying to place the murder weapon in Hodson's hands and keep it there in the minds of the jury. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

Fifth, Cordova claims that trial counsel was ineffective because he failed to properly construct, offer, or object to jury instructions for implied malice, second-degree murder, and involuntary manslaughter. However, the district court found that trial counsel's conduct was not unreasonable, the instructions were correct statements of Nevada law, and the presence of the instructions did not undermine the reliability of Cordova's verdict. During the evidentiary hearing, trial counsel testified that he requested the instructions on second-degree murder and manslaughter to reduce the risk that Cordova would be convicted of first-

degree murder with the use of a deadly weapon. This testimony demonstrates that the district court's factual finding that trial counsel acted reasonably is supported by substantial evidence and, therefore, is not clearly wrong. Moreover, on direct appeal we upheld the use of the implied malice instruction and concluded that any error in the second-degree murder instruction was insignificant.<sup>13</sup> The manslaughter instruction consisted of the words used in NRS 200.070 to define involuntary manslaughter.<sup>14</sup> Therefore, we conclude that Cordova failed to demonstrate a reasonable probability that the trial result would have been different had trial counsel objected to or offered different instructions.

Sixth, Cordova claims that trial counsel was ineffective for failing to adequately confer with Cordova regarding possible defenses and trial strategies. The district court found that trial counsel conferred with Cordova on strategy and all available defenses and that Cordova's testimony to the contrary was unworthy of belief. As discussed above, trial counsel testified during the evidentiary hearing that he fully explained the defense strategy to Cordova and that Cordova agreed with the strategy. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

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<sup>13</sup>See Cordova, 116 Nev. at 666-67 & n.2, 6 P.3d at 482-83 & n.2.

<sup>14</sup>See State v. Lewis, 59 Nev. 262, 91 P.2d 820, 823 (1939); State of Nevada v. Kelly, 1 Nev. 188, 190 (1865) (providing that an instruction in the words of a statute and pertinent to the facts of the case correctly places the law of the case before the jury).



Seventh, Cordova claims that trial counsel was ineffective for failing to adequately investigate and present possible exculpatory evidence. Cordova specifically contends that trial counsel was ineffective for failing to call his brother, Walter Cordova, as a witness to corroborate the defense theory that Hodson was the shooter. The district court found that trial counsel, along with his investigator, conducted a reasonably complete pretrial investigation of all facts and circumstances in this case and all the available defenses. The district court further found that trial counsel testified credibly and without contradiction. During the evidentiary hearing, trial counsel testified that he began collecting information from Cordova during their first meeting, that his investigator was able to locate several witnesses, and that he and Cordova discussed the various legal options available based on the facts. Trial counsel gave three reasons for not calling Walter as a witness: Walter was aware of inculpatory statements made by Cordova which might come out during cross-examination, Walter could not testify that Hodson actually admitted involvement in the shooting whereas another defense witness placed Hodson near the time and place of the crime, and Walter was a family member who could be challenged as biased. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

Eighth, Cordova claims that trial counsel was ineffective in failing to object to a gang reference made by the prosecutor during closing arguments. The prosecutor stated:

Today we live in a society where people kill each other for that. People kill each other for making a hand sign. You make a hand sign to me. I have to kill you now. That's just the society we live in now. You think somebody is talking bad of you,

you have to defend your honor, so you go back and get a gun and you go back to their place.

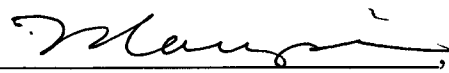
Cordova asserts that this statement was an attempt to paint him as a gang member and this crime as gang related. However, the district court found that the comment did not suggest gang activity or involvement and trial counsel's failure to object was reasonable. During the evidentiary hearing, trial counsel testified that he did not take the comment to be a reference to gang activity, he did not recall a single incident during trial in which anything related to gang activity came up, and that the district court had entered an order that there would be no gang references in this case. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

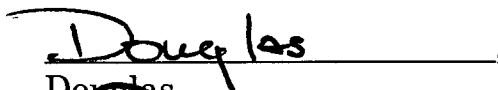
Ninth, Cordova claims that trial counsel erred by failing to present mitigating witnesses at sentencing. Cordova contends that his mother, father, brother, and several cousins, aunts, and uncles were present at sentencing but none were called to testify. However, the district court found that trial counsel's decision to present letters from character witnesses instead of live testimony was reasonable. It further observed that Cordova did not present any character witnesses during the evidentiary hearing and found, therefore, that it was "not in a position to know what these witnesses would have said or whether that testimony would have created a reasonable probability of a different sentence." During the evidentiary hearing, trial counsel testified that he presented written character witness statements to the district court and informed the court on the record that the character witnesses were available in court to provide support for Cordova. Trial counsel further testified that, based on the points he wanted the district court to consider, he had determined that the testimony of individual character witnesses was

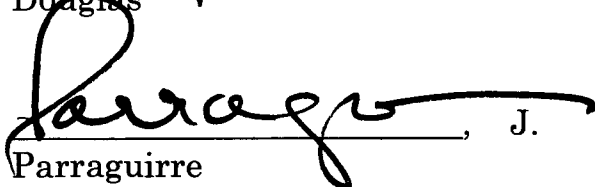
unnecessary.<sup>15</sup> Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

Cordova has failed to demonstrate that the district court erred in denying his post-conviction petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Steven R. Kosach, District Judge  
Law Office of David R. Houston  
Thomas L. Qualls  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>15</sup>See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (stating that determining who should be called as a witness is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances") (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).