IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN R. MCGINNESS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43499

FILED

OCT 15 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Robin McGinness' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On February 1, 2002, the district court convicted McGinness, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, first-degree kidnapping with substantial bodily harm with the use of a deadly weapon, and robbery. The district court sentenced McGinness to serve two consecutive life terms in the Nevada State Prison without the possibility of parole for the murder and kidnapping convictions with two equal and consecutive terms for the use of a deadly weapon. The district court also sentenced McGinness to a term of 35 to 156 months for the robbery conviction, to run concurrently with the murder conviction. This court affirmed McGinness' conviction and sentence.[1] The remittitur issued on July 1, 2003.

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[1]McGinness v. State, Docket No. 39278 (Order of Affirmance, June 3, 2003).

04-19112

On March 22, 2004, McGinness filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent McGinness or to conduct an evidentiary hearing. On June 24, 2004, the district court denied McGinness' petition. This appeal followed.

In his petition, McGinness asserted numerous ineffective assistance of counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not consider both prongs if a defendant failed to make a showing on either prong.[3]

First, McGinness complained that his counsel was ineffective for failing to employ certain experts to testify for the defense. We conclude that McGinness failed to adequately explain any additional evidence these experts would have contributed that would have been favorable to the defense. Accordingly, we conclude that McGinness' claim of ineffective assistance of counsel in this regard is without merit.

Second, McGinness asserted that his counsel was ineffective throughout the jury selection process. Specifically, McGinness argued that his counsel was ineffective for failing to adequately question certain jurors and for failing to question other jurors at all. However, McGinness

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]See Strickland, 466 U.S. at 697.

failed to identify what additional information he desired his counsel to elicit from any juror. McGinness also complained that his counsel was ineffective for "failing to find any jurors who would be considered peers (construction workers, who could understand the evidence brought against petitioner)," noting that eleven of the jurors were women.[4] McGinness' claim is wholly without merit.[5] McGinness also asserted that his counsel was ineffective for failing to assert challenges for cause against four particular jurors -- Michael Hanley, Barbara Johnson, John Palacio and Vickie Shoate. McGinness claimed that these four jurors were biased against him. However, based on our review of the record, we conclude that McGinness' failed to demonstrate that these jurors were biased.[6] Accordingly, we conclude that McGinness failed to establish that his counsel was ineffective during the jury selection process.

Third, McGinness claimed that his counsel was ineffective for failing to object to instances of prosecutorial misconduct. McGinness asserted that the "introduction of irrelevant and prejudicial evidence and displays" constituted prosecutorial misconduct. However, McGinness failed to identify whatsoever the evidence and displays to which he was referring.[7] Accordingly, we conclude this issue is without merit. McGinness also asserted that his counsel was ineffective for failing to object to certain statements made by the prosecutor during closing

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[4]The record indicates that the jury included ten female jurors.

[5]See Nev. Const. art 4, § 27; NRS 16.050.

[6]See Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997); Bryant v. State, 72 Nev. 330, 333-34, 305 P. 2d 360, 361-62 (1956).

[7]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

argument. Having carefully reviewed the prosecutor's comments, we conclude that his closing argument did not constitute prosecutorial misconduct. Even assuming McGinness' counsel should have objected to portions of the prosecutor's closing argument, McGinness failed to establish that he suffered any prejudice from his counsel's omission.

Fourth, McGinness claimed that his counsel was ineffective for failing to interview and/or prepare for trial Virginia Foley, Lora Quartuccio, Courtland Smith,[8] Mike Schofield and Barney Joe Gray. However, McGinness failed to identify any additional or relevant information these witnesses would have provided that would have assisted his defense.[9] McGinness also argued that his counsel was ineffective for failing to interview: the "neighbor across the street"; regular patrons of the Messin' Around Lounge; and residents of Budget Suites. Not only did McGinness fail to specifically identify any of these "defense witnesses," he neglected to identify any relevant information they would have provided.[10] Accordingly, we conclude that McGinness did not demonstrate that his counsel was ineffective in this regard.

Fifth, McGinness contended that his counsel was ineffective for failing to adequately cross-examine the prosecution's witnesses and experts. Other than Virginia Foley, McGinness did not identify to which prosecution witnesses and expert witnesses he was referring, nor did he indicate what additional cross-examination he desired his counsel to

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[8]Courtland Smith died approximately two months prior to McGinness' trial.

[9]See id.

[10]Id.

undertake.[11] The record reveals that McGinness' counsel thoroughly cross-examined each prosecution witness. With respect to Foley, McGinness complained that his counsel should have cross-examined her about "certain events that happened prior to March 21, 1999, that only Foley and Doepke's immediate family would know." McGinness asserted that this testimony would have established that he harbored no animosity toward Doepke. McGinness also claimed his counsel should have questioned Foley regarding an alleged visit Doepke made to McGinness' storage shed during which Doepke apparently left his business card with a note to McGinness to call him. McGinness failed to demonstrate that the absence of Foley's proposed testimony prejudiced him. Accordingly, we conclude that McGinness failed to demonstrate that his counsel's cross-examination of the prosecution witnesses and expert witnesses was deficient or prejudicial.

Sixth, McGinness argued that his trial counsel was ineffective for failing to request Eric Scheiben's taped voluntary statement, his work record, his criminal record, including three pending "hit and runs," and a statement from his mother that Scheiben did not take care of his brother. McGinness did not explain how the introduction of Scheiben's taped statement would have assisted the defense. Similarly, he did not explain the purpose or relevance of Schieben's work record. Furthermore, the admissibility of Scheiben's criminal record, if any, is questionable.[12]

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[11]Id.

[12]See NRS 50.095; NRS 50.085; Patterson v. State, 111 Nev. 1525, 1534, 907 P.2d 984, 990 (1995); Givens v. State, 99 Nev. 50, 52-53, 657 P.2d 97, 98-99 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 301 n.3, 721 P.2d 764, 768 n.3 (1986).

Finally, McGinness apparently desired his counsel to challenge Scheiben's testimony during cross-examination that he took care of his handicapped brother with testimony from Scheiben's mother to the contrary. Such testimony, assuming it could be produced, would be inadmissible.[13] Accordingly, we conclude that McGinness' counsel was not ineffective in this regard.

Seventh, McGinness contended that his counsel was ineffective for failing to use due diligence to locate Mary Spratt and prepare her for trial. McGinness apparently believed Spratt would have provided him an alibi. However, as there was no definitive evidence regarding the date or time of Doepke's death, Spratt's ability to provide McGinness an alibi was dubious at best. Moreover, McGinness did not articulate what additional means he desired his counsel to undertake to locate Spratt. Even assuming counsel could have engaged in further search efforts, we conclude that counsel's failure to do so did not prejudice McGinness. Consequently, we conclude that counsel was not ineffective in this regard.

Eighth, McGinness claimed that his counsel was ineffective for failing to object to the jury instructions regarding reasonable doubt, premeditation and deliberation, malice aforethought, and express malice. McGinness' claim is without merit. None of the instructions about which

[13]See NRS 50.085; Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000) (stating that impeachment of a witness on a collateral matter is not allowed).

McGinness complained were improper.[14] Accordingly, we conclude counsel was not ineffective for declining to object to them.

Ninth, McGinness claimed that his counsel was ineffective for failing to provide him with complete discovery, including "true photos, police interviews, witness statements, etc." Even assuming such an omission constituted deficient performance, McGinness did not demonstrate prejudice, but rather proffered a bare allegation of error.[15] Accordingly, we conclude McGinness' claim is without merit.

Tenth, McGinness alleged his counsel was ineffective for failing to maintain a working relationship with him. He provided no support whatsoever for his claim.[16] Consequently, we conclude that McGinness failed to demonstrate that counsel was ineffective in this regard.

Eleventh, McGinness argued that his counsel was ineffective for failing to prepare him to testify on his own behalf. The district court advised McGinness that he was not compelled to testify, but had a right to do so. McGinness chose not to testify. McGinness did not elaborate on what additional preparation he desired his counsel to undertake. However, even assuming his counsel failed to prepare him to testify, McGinness failed to demonstrate prejudice as he apparently declined to testify.

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[14]See NRS 200.010; NRS 200.020; NRS 193.0175; Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003); Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000); Guy v. State, 108 Nev. 770, 776, 839 P.2d 578, 582 (1992).

[15]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[16]Id.

Twelfth, McGinness argued that his counsel was ineffective for failing to prepare for trial and for not advancing any defense theory, including "actual innocence." He further contended that had his counsel called his list of unnamed witnesses to testify, the jury would have found him not guilty. McGinness' claim is without merit. McGinness' counsel filed several pretrial motions and a pretrial petition for a writ of habeas corpus, extensively cross-examined the State's witnesses, and challenged the State's evidence at every turn. Counsel's tactic at trial was to attack the sufficiency of the evidence and, in light of the evidence presented and McGinness' prior felony conviction for stealing and using Doepke's credit card, such an attack was a reasonable trial strategy.[17] Moreover, McGinness failed to explain what additional preparation he believed his counsel should have completed. Consequently, we conclude that McGinness failed to demonstrate that his counsel was ineffective in this regard.

Thirteenth, McGinness claimed that his counsel was ineffective for failing to file timely motions. McGinness' counsel filed a motion to dismiss for failure to give proper notice of a grand jury hearing. The district court denied counsel's motion, concluding that the motion was untimely filed and that McGinness received timely notice of the grand jury hearing. There is no evidence in the record of any other untimely motions filed by his counsel, and McGinness pointed to no others in his petition.

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[17]See Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991) (stating that "[o]n appeal, this court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion").

We conclude that even if counsel's performance was deficient in this regard, McGinness failed to demonstrate prejudice.

Fourteenth, McGinness argued that his counsel was ineffective for failing to assert his right to be sentenced by a jury. McGinness claimed his counsel never discussed this matter was him. However, his assertion is belied by the record.[18] The prosecutor, McGinness' counsel and McGinness signed a stipulation waiving jury sentencing, and the district court signed an order so reflecting. Accordingly, we conclude that counsel was not ineffective in this regard.

Fifteenth, McGinness contended that his counsel was ineffective for failing to "pursue cash receipts of wire ties and painter's gloves from Home Depot" and for failing to inspect a day-planner, which allegedly contained a "cash receipt and phone number of the neighbor across the street, Linda Lane." McGinness failed to explain the relevance of this information whatsoever or its impact on his defense.[19] Accordingly, we conclude McGinness' claim is without merit.

Sixteenth, McGinness claimed that his counsel was ineffective for failing to record the time required to travel from the Budget Suites on North Rancho Road to the location of Doepke's body and back to the motel, including the time required to murder Doepke.[20] However, after reviewing the record, we conclude that McGinness suffered no prejudice from his counsel's alleged failure to complete this task.

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[18]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[19]Id. at 502, 686 P.2d at 225.

[20]McGinness was living at the Budget Suites on North Rancho Road in Las Vegas around the time of Doepke's disappearance.

Seventeenth, McGinness claimed that his counsel was ineffective for failing to conduct a "strength test" on the plastic wire ties. McGinness alleged that the bag containing the wire ties advised that "it takes 50 lbs pressure to break." He also asserted that "a child can exert 50 lbs pressure." However, McGinness did not demonstrate that such testing would have produced results favorable to the defense. Therefore, we conclude McGinness failed to demonstrate any prejudice resulting from this omission.

Eighteenth, McGinness claimed his counsel was ineffective for failing to ask Detective Jeff Rosgen "if it was normal procedure to move evidence before the police photographer is present." Considering the entire record, we conclude that McGinness suffered no prejudice from his counsel's failure to question Rosgen as he suggested.

Nineteenth, McGinness contended that his counsel was ineffective for failing to interview jurors after the verdict. McGinness asserted that "this information is lost forever" and that he "has a right to know why he was convicted." The district court instructed the jurors that they were free to discuss the case with anyone, but were not required to do so. McGinness did not explain what information he hoped to obtain from any juror or that any of the jurors were willing to speak to his counsel. Accordingly, we conclude that McGinness failed to demonstrate that his counsel was ineffective on this issue.

Finally, McGinness claimed that his counsel was ineffective for failing to file a motion for new trial. McGinness failed to explain any basis whatsoever to support a motion for new trial.[21] Consequently, we

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[21]See id.

conclude that he did not demonstrate any prejudice resulting from this omission.

McGinness also claimed that his appellate counsel was ineffective for several reasons. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[22] Appellate counsel is not required to raise every non-frivolous issue on appeal.[23] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[24]

First, McGinness asserted that his appellate counsel was ineffective for failing to raise the following claims: that the jury instructions regarding reasonable doubt, premeditation and deliberation, malice aforethought, and implied malice were unconstitutional; that jurors Hanley, Johnson, Palacio and Shoate were biased against him; and that certain comments the prosecutor made during closing argument constituted prosecutorial misconduct. However, as discussed above, these claims are without merit. Therefore, we conclude McGinness did not demonstrate that his appellate counsel was ineffective for failing to raise these matters on appeal.

Second, McGinness argued that his appellate counsel was ineffective for failing to "federalize" his direct appeal issues in order to preserve them for federal appellate review. McGinness failed to

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[22]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[23]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[24]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

demonstrate that the results of his direct appeal would have been different if counsel had "federalized" the issues. Accordingly, we conclude that he did not establish that appellate counsel was ineffective on this claim.

Lastly, McGinness contended that his appellate counsel was ineffective for failing to "look into the fact petitioner was originally charged with theft of the credit card, and went to trial for robbery." McGinness is correct to the extent that he was originally charged and ultimately convicted of stealing and using Doepke's credit card. McGinness was convicted prior to the discovery of Doepke's body, after which the police developed evidence pointing to McGinness as not only Doepke's murderer, but also the person who kidnapped Doepke at gunpoint and stole his truck. McGinness failed to explain what he expected his appellate counsel to find if he "looked into" this matter. McGinness has provided insufficient information to support his claim. Therefore, we conclude that his appellate counsel was not ineffective in this regard.

McGinness asserted that the trial court erred in refusing to grant him substitute trial counsel of his choice and for failing to inquire into the nature of the conflict between him and his counsel. McGinness cited the following as support for his allegation: his counsel was preoccupied during his representation of McGinness because counsel had recently married; counsel vacationed the week before trial; counsel ignored his motion for new trial; counsel did not contact him after the verdict until the day before sentencing; counsel used abusive language in front of the jurors during deliberations; and counsel made a statement during sentencing about the possibility that there was an accomplice to the crime. McGinness asserted that he was so unhappy with his counsel that he filed

a civil suit against him, sent a letter to the bar association, and sent two memoranda to the district court. However, these documents are nowhere in the record. McGinness proffered nothing more than bare allegations in his petition and failed to explain how he was prejudiced by his counsel's alleged inadequacies.[25] Moreover, McGinness is not entitled to counsel of his choosing.[26] Consequently, we conclude that the district court did not err in refusing to provide McGinness substitute trial counsel.[27]

McGinness alleged other errors at trial that he believed invalidated his conviction, including: that the police failed to adequately investigate the charges against him and committed misconduct during the investigation; that jurors Hanley, Johnson, Palacio and Shoate were biased against him; that the trial court improperly instructed the jury concerning reasonable doubt, premeditation and deliberation, and malice aforethought; and that certain statements made by the prosecutor during closing argument rose to the level of prosecutorial misconduct. As these matters were appropriate for a direct appeal, McGinness waived these issues.[28]

Finally, McGinness also claimed that due to the cumulative effect of all the errors committed at his trial, his conviction was invalid.

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[25]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[26]See Wheat v. United States, 486 U.S. 153, 159 (1988).

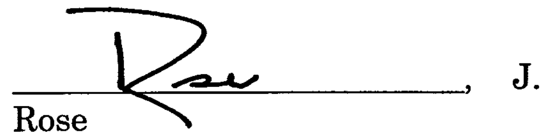
[27]See Gallego v. State, 117 Nev. 348, 362-63, 23 P.3d 227, 237 (2001).

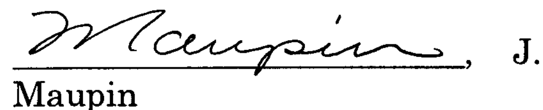
[28]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

To the extent that McGinness raised this claim independently of his ineffective assistance of counsel claim, he waived this claim.[29] We further conclude that because McGinness' ineffective assistance of counsel claims are without merit, he failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that McGinness is not entitled to relief and that briefing and oral argument are unwarranted.[30] Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Rose, J.


Maupin, J.

Douglas, J.

cc: Hon. Jennifer Togliatti, District Judge
Robin R. McGinness
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[29]Id.

[30]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).