

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL D. FOWLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44259

FILED

FEB 15 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying Paul D. Fowler's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On June 16, 1995, the district court convicted Fowler, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Fowler to a life term in the Nevada State Prison without the possibility of parole plus an equal and consecutive term for the deadly weapon enhancement. This court dismissed Fowler's appeal from his judgment of conviction.¹ The remittitur issued on May 21, 1996.

On May 21, 1997, Fowler 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 appointed counsel to represent Fowler and conducted an evidentiary

¹Fowler v. State, Docket No. 27377 (Order Dismissing Appeal, May 1, 1996).

hearing. On November 4, 2004, the district court denied Fowler's petition. This appeal followed.

In his petition, Fowler contended that his counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Fowler must demonstrate that his 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

First, Fowler claimed that his counsel was ineffective for failing to object to the introduction of victim impact evidence introduced during the guilt phase of his trial. During redirect, the prosecutor asked the victim's (Lori Merchant) daughter, Honey Merchant, if she remembered telling the 9-1-1 operator that her "mom was all [she] had." Defense counsel objected and the district court sustained the objection on the basis of relevancy. The prosecutor then questioned Honey about the numerous places she had lived after Lori's death until the time of trial, including the fact that she lived with Fowler for two months preceding the trial. Fowler's counsel cross-examined Honey on this matter. It appears from the record that the prosecutor engaged in the challenged line of questioning with Honey to reveal a possible bias in favor of Fowler in light of inconsistencies between previous statements and her trial testimony. However, even assuming counsel should have further objected to the challenged testimony, we conclude that Fowler did not demonstrate that he was prejudiced by his counsel's omission in light of the overwhelming

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

evidence of his guilt. Accordingly, we conclude Fowler failed to demonstrate that his counsel was ineffective in this regard.

Second, Fowler asserted that his counsel was ineffective for failing to conduct an adequate investigation and to introduce evidence concerning Fowler's state of mind at the time of the murder and James Bottoms' culpability in the murder. Specifically, Fowler claimed that his counsel should have called his sister, Carol Fowler, and Leon Simon, Fowler's first attorney, to testify that immediately following the murder, Fowler was distraught, "glassy-eyed" and "acted like a zombie." Fowler argued that such evidence illustrated that the killing was not deliberate or premeditated. The record reveals that counsel elicited testimony from Bottoms, who witnessed the event, that Fowler was shaking and distraught after the shooting. Considering the entire record, we conclude that Fowler failed to demonstrate that his counsel's failure to produce Carol and Simon's testimony prejudiced him.

Fowler also argued that his counsel was ineffective for failing to introduce evidence of Bottoms' culpability in the murder. Fowler asserted in his petition that Bottoms told Carol that he admitted to shooting Lori in the head after Fowler left the Silver State Transmission shop, where the killing occurred. At the evidentiary hearing, Fowler's counsel testified that he considered implicating Bottoms in Lori's murder. However, he declined to do so because Fowler admitted to him that he shot Lori and provided a detailed account of the event. Additionally, counsel testified that Bottoms was extremely valuable to the defense in substantiating its self-defense claim or, alternatively, that Fowler had committed voluntary manslaughter. Bottoms could testify about Lori's violent nature; that Fowler was "a nice guy"; that Fowler was initially

calm when Lori arrived at the Silver State Transmission Shop and that Lori was upset; and that Lori was "the problem in [her and Fowler's] marriage." Counsel also testified that he abandoned the idea of implicating Bottoms because Lori suffered two fatal shots, one to her head and one to her chest. Thus, evidence that Bottoms also fatally shot Lori would not have absolved Fowler. Moreover, counsel testified that he was not made aware of Carol's affidavit implicating Bottoms until after the trial concluded. Based on the record, we conclude that Fowler did not demonstrate that his counsel was ineffective in this regard.

Third, Fowler alleged that his counsel was ineffective for not filing a motion in limine to preclude introduction of the audiotape of Honey's 9-1-1 call. Fowler's claim is without merit. Counsel objected to the admission of this audiotape at trial. However, the district court ruled the audiotape admissible.³ We conclude that Fowler failed to demonstrate that he suffered any prejudice from counsel's failure to file a motion in limine. Accordingly, we conclude that Fowler did not demonstrate that his counsel was ineffective in this regard.

Fowler also claimed that his counsel was ineffective for failing to object to the audiotape of Honey's 9-1-1 call on the basis that the State improperly introduced the audiotape as evidence of prior inconsistent statements. In addition to seeking its admission as a prior inconsistent statement, the State argued that the audiotape was admissible as an excited utterance. Fowler's counsel conceded that the audiotape was an

³See Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

excited utterance, and the district court admitted it as such.⁴ Accordingly, we conclude that Fowler failed to demonstrate that his counsel was ineffective in this regard.

Fourth, Fowler asserted that his counsel was ineffective for failing to object to the introduction and admission of crime scene and autopsy photographs that "were never used to illustrate the testimony of any witness and were never exhibited to the jury during the evidentiary portion of the trial." However, Fowler provided no basis upon which to exclude the crime scene photographs and contrary to his assertion, the State used the autopsy photographs during the forensic pathologist's testimony. Moreover, this court has held that "even gruesome photographs are admissible if they aid in ascertaining the truth, such as when used to show the cause of death, the severity of wounds and the manner of injury."⁵ Accordingly, we conclude that Fowler failed to demonstrate that his counsel was ineffective in this regard.

Fifth, Fowler contended that his counsel was ineffective for failing to object to the prosecutor's use of "speaking" objections and other comments by the prosecutor. Fowler listed numerous excerpts from the record that he believed illustrated prosecutorial misconduct. We conclude that Fowler failed to establish that any of the challenged comments were so severe as to render the jury's verdict unreliable in light of the

⁴See NRS 51.095.

⁵See Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000); Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978) (holding that the admissibility of autopsy photographs lies within the sound discretion of the district court and will not be overturned absent an abuse of discretion).

overwhelming evidence against Fowler.⁶ Accordingly, we conclude that Fowler failed to demonstrate that his counsel was ineffective for failing to object to the challenged comments.

Sixth, Fowler claimed his counsel was ineffective for failing to object to jury instructions regarding malice, reasonable doubt and premeditation. We conclude that the instructions regarding malice and reasonable doubt were proper.⁷ Fowler argued that the premeditation instruction confused the distinction between first-degree and second-degree murder. We conclude that the premeditation instruction given comported with law at the time of Fowler's trial and that the evidence adduced at trial sufficiently demonstrated that Fowler acted with premeditation and deliberation when he killed Lori.⁸ Accordingly, we conclude that Fowler failed to demonstrate that his counsel was ineffective for failing to object to the challenged instructions.

Seventh, Fowler contended that his counsel was ineffective for failing to object to prosecutorial misconduct committed during closing

⁶See Williams v. State, 103 Nev. 106, 111, 734 P.2d 700, 703 (1987); NRS 178.598.

⁷See Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992) overruled in part by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582 (1992); NRS 200.020; NRS 175.211 (stating that no other reasonable doubt instruction may be given).

⁸See Byford, 116 Nev. at 233-35, 994 P.2d at 712-14; Kazalyn, 108 Nev. at 75-76, 825 P.2d at 583; see Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), vacated on other grounds by Powell v. Nevada, 511 U.S. 79 (1994).

argument. Fowler listed several comments the prosecutor made during closing argument that Fowler believed were improper. We have carefully reviewed the comments at issue and conclude that Fowler failed to demonstrate any prejudice he suffered from his counsel's failure to object to the challenged statements. Accordingly, we conclude Fowler did not establish that his counsel was ineffective in this regard.

Eighth, Fowler asserted that his counsel was ineffective for failing to request a curative instruction after the State attempted to elicit evidence of prior violent actions by Fowler from Honey. However, Fowler's counsel objected to the State's line of questioning and the district court sustained the objection. We conclude that Fowler failed to demonstrate that his counsel's failure to request a curative instruction in addition to his objection prejudiced Fowler. Accordingly, we conclude that Fowler did not establish that his counsel was ineffective in this regard.

Ninth, Fowler claimed that his counsel was ineffective for failing to request an evidentiary hearing to determine whether a conflict of interest existed with the district attorney's office due to a previous alleged privileged meeting between Stewart Bell, a prosecutor, and Fowler when Bell was a defense attorney. This court has not adopted a per se rule of vicarious disqualification; rather, the disqualification of a prosecutor's office rests within the sound discretion of the district court.⁹ In exercising its discretion, the district court "should consider all the facts and circumstances and determine whether the prosecutorial function could be

⁹Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982).

carried out impartially and without breach of any privileged communication."¹⁰

We conclude Fowler's claim is without merit. In an affidavit accompanying the State's opposition to Fowler's motion to disqualify, Bell averred that he did not recall consulting with Fowler and had no record of such a meeting. Once Bell became aware of Fowler's motion for disqualification, he isolated himself from all matters relating to the case. Moreover, Fowler does not identify any further information he desired to obtain if an evidentiary hearing had been held. Rather, he asserted that Bell should have been compelled to appear at an evidentiary hearing to "state affirmatively whether he did or did not meet with Fowler or could again state that he did not remember such a meeting." However, such information was already secured through Bell's affidavit. Based on the record, we conclude that Fowler failed to demonstrate that his counsel was ineffective in this regard.

Tenth, Fowler alleged that his counsel was ineffective for inadequately investigating the relationship between the victim impact witnesses and Lori. Based on our review of the record, we conclude that Fowler did not establish that counsel's alleged failure to investigate these matters influenced the district court's determination of his sentence, considering the facts of the case and the gravity of the offense. Accordingly, we conclude that Fowler failed to demonstrate that his counsel was ineffective in this regard.

¹⁰Id. at 310, 646 P.2d at 1220.

Eleventh, Fowler claimed that the cumulative errors committed by his trial counsel denied him a fair trial. Based on the foregoing discussion, we conclude that Fowler's claim is without merit.


Finally, Fowler raised the following claims: that he was denied a fair trial by the introduction of victim impact evidence during the guilt phase of his trial; that he was denied a fair trial by the admission of a 9-1-1 audiotape; that he was denied a fair trial by the admission of crime scene and autopsy photographs; that he was denied a fair trial by the prosecutor's use of "speaking objections" and other comments the prosecutor made during trial; that he was denied a fair trial by erroneous and prejudicial jury instructions regarding malice, reasonable doubt and premeditation; that he was denied a fair trial due to the prosecutor's misconduct during closing argument; and that the cumulative impact of these alleged errors denied him a fair trial.¹¹ As these claims were more appropriate for direct appeal and Fowler failed to demonstrate good cause for his failure to raise these issues on direct appeal, we conclude that Fowler waived these matters.¹²


¹¹Fowler also claimed that his appellate counsel was ineffective for not raising these claims in his direct appeal. However, in light of our discussion above, we conclude that Fowler failed to demonstrate that his appellate counsel was ineffective in this regard. See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

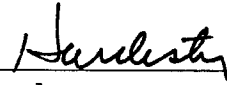
¹²Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Fowler is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. John S. McGroarty, District Judge
Paul D. Fowler
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have reviewed all documents that Fowler has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.