

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND PAUL ROSAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44367

FILED

MAY 02 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Raymond Rosas's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On June 2, 2000, the district court convicted Rosas, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and conspiracy to commit murder. Rosas was sentenced to serve four consecutive terms of life in prison without the possibility of parole plus an additional consecutive term of 120 months with the possibility of parole in 48 months. This court affirmed his conviction.¹

Rosas filed a post-conviction petition for a writ of habeas corpus in the district court in proper person. He was appointed counsel, and several supplements and addendums to his petition were filed. The district court held two separate evidentiary hearings on Rosas's petition, where multiple witnesses, including his trial and appellate counsel,

¹Rosas v. State, Docket No. 36447 (Order of Affirmance, May 29, 2001).

testified. Thereafter, the district court issued an order denying Rosas habeas relief. This appeal followed.

Rosas appeals from the district court's denial of eight claims of ineffective assistance of trial counsel. A claim of ineffective assistance of trial counsel presents a mixed question of law and fact that is subject to independent review.² To establish a meritorious claim, a two-part test must be satisfied.³ First, it must be shown that the performance of the petitioner's counsel was deficient, falling below an objective standard of reasonableness.⁴ Second, there must be prejudice.⁵ Prejudice is demonstrated by showing that, but for the errors of counsel, there is a reasonable probability that the result of the proceedings would have been different.⁶ Both parts of the test do not need to be considered if an insufficient showing is made on either one.⁷ Moreover, review of counsel's performance is highly deferential, and the petitioner must overcome the presumption that his counsel's decisions were sound trial strategy.⁸ And a district court's factual findings regarding counsel's performance will be

²See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

³See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

⁴See Strickland, 466 U.S. at 687.

⁵Id.

⁶Id. at 694.

⁷Id. at 697.

⁸Id. at 689.

given deference on appeal, so long as they are supported by substantial evidence and not clearly wrong.⁹

1. Failure to call psychologist Dr. Martha Mahaffey as a witness

Rosas first contends that the district court improperly denied his claim that his trial counsel, Washoe County Deputy Public Defender Maizie Pusich, was ineffective for failing to call Dr. Martha Mahaffey, a psychologist, to testify as an expert witness. During his trial, Rosas defended himself on the theory that he was under the control of an accomplice, Cecele Linton, when he committed his crimes. Of the two fatal shotgun blasts Rosas fired at the victim, Homer Mitchell Stockmann, he maintained at trial that the first was an accident and the second was done only after Linton ordered him to shoot.

Dr. Mahaffey testified during the evidentiary hearing that Rosas had several mental health disorders and substance abuse problems that were related to physical abuse he suffered from his father and sexual abuse he suffered from his stepsister when he was a child. Dr. Mahaffey believed that these disorders and problems triggered a post-traumatic stress reaction in Rosas before, during, and after he kidnapped and killed Stockmann. Had Pusich called Dr. Mahaffey to testify, Rosas maintains, it would have shown that he lacked the requisite mens rea to commit these crimes.

The district court found that Rosas did not show how any failure by Pusich to secure Dr. Mahaffey's testimony was unreasonable or how he was prejudiced by its omission from his trial. We agree.

⁹See Lader v. Warden, 121 Nev. ___, ___, 120 P.3d 1164, 1166 (2005).

Our review of Dr. Mahaffey's testimony reveals that she may have bolstered Rosas's theory of defense, but not so much so that there is a reasonable probability that it would have altered the jury's verdict. Contrary to Rosas's assertion, the whole of Dr. Mahaffey's testimony did not support the proposition that he lacked the mens rea to kidnap and murder in the first-degree. Despite her belief that Rosas suffered from post-traumatic stress, Dr. Mahaffey also opined that at the time of the crimes Rosas knew right from wrong, he had the capacity to make voluntary choices, and he had the capacity to deliberate. She expressly declined to conclude that he lacked the capacity to premeditate. Dr. Mahaffey also could not conclude that Rosas lacked the capacity to form the specific intent to kill.

Rosas has failed to demonstrate that he was prejudiced by Dr. Mahaffey's absence from his trial or that any failure by Pusich to call her as a witness was unreasonable. For these reasons, we conclude that the district court properly denied him relief on this claim.¹⁰

¹⁰Rosas also contends on appeal that Pusich was ineffective for failing to have the jury instructed about whether he had the requisite intent to commit first-degree murder and kidnapping. The district court did not specifically address this argument in its order, but the State briefly responds to its merits on appeal. Our review of the record reveals that it was raised by Rosas in a supplemental petition in only a general manner. To the extent this argument was properly raised below, we conclude that it is belied by the record and without merit because the jury received instructions properly defining the elements of both crimes. Moreover, Rosas's reliance upon this court's decision in Geary v. State and other authority in contending that Pusich was ineffective for failing to offer additional instructions regarding his "state of mind" is misplaced. See 91 Nev. 784, 792-93, 544 P.2d 417, 422-23 (1975). Geary and the other cases Rosas cites neither addressed the effectiveness of counsel nor mandated that a "state of mind" instruction be given.

2. Failure to call ballistics expert Kevin Lattyak as a witness

Rosas next contends that the district court improperly denied his claim that Pusich was ineffective for failing to call Washoe County Crime Lab Forensic Examiner Kevin Lattyak as a ballistics expert witness. He contends that Lattyak's testimony would have corroborated his story that the first gunshot he fired at Stockmann was an accident.

The district court found that Pusich made a reasonable strategic decision not to call a ballistics expert to testify at trial and, even if Lattyak had testified, it would have not changed the result. We agree.

Our review of Lattyak's evidentiary hearing testimony reveals that it would not have supported Rosas's defense theory that the shooting was an accident. Rather, Lattyak's testimony would have likely undermined this defense theory. Specifically, Lattyak testified that he examined the 12-gauge Mossberg shotgun Rosas used to murder Stockmann. Although Lattyak believed that the shotgun trigger was "slightly lighter" than most guns, he added that it was not significantly so. Moreover, Lattyak testified that the shotgun Rosas used did not have a "hair trigger" and that "you'd have to have a definite pull on that trigger" in order for the gun to fire. Lattyak further testified that the shotgun was a pump-action. To fire the shotgun, Lattyak explained, the safety would have to be disengaged, a round loaded, and the gun manually pumped.

Additionally, Rosas testified that he pulled the gun's trigger, not that it fired on its own accord. And Pusich testified at the evidentiary hearing that she considered and rejected the idea of calling a ballistics expert to testify at trial because it would not have explained the second shot Rosas fired at Stockmann that was not an accident.

Lattyak's testimony supported the conclusion that deliberate action was necessary to fire the shotgun. Rosas failed to demonstrate that

he was prejudiced by Lattyak's absence as a witness at his trial. Pusich's decision not to call a ballistics expert to testify was a reasonable strategic decision. We conclude that the district court properly denied Rosas relief on this claim.

3. Failure to call former girlfriend Jane Cordova as a witness

Rosas thirdly contends that the district court improperly denied his claim that Pusich was ineffective for failing to call his former girlfriend, Jane Cordova, as a witness. Rosas maintains that Cordova's testimony would have corroborated his theory of defense by providing facts about his personality, his relationship with Stockmann, and his behavior before and after Stockmann's death.

The district court found that Pusich made a reasonable strategic decision not to call Cordova as a witness and that Rosas failed to show that he was prejudiced by her absence from his trial. We agree.

Our review of Cordova's testimony at the evidentiary hearing reveals that she would have provided testimony at trial that may have assisted Rosas's defense, but also hurt it. For example, Cordova would have testified about Rosas's behavior both before and after Stockmann's murder and that Rosas told her that he accidentally shot and killed Stockmann. Yet Cordova would have also testified that Rosas lied to her, he had specifically plotted to murder Stockmann, and he originally intended to stab Stockmann in the neck with a knife.

Pusich had interviewed and subpoenaed Cordova prior to trial. However, Pusich ultimately concluded Cordova's testimony would be more damaging than helpful and, thus, decided not to rely on her as a witness. Pusich informed Rosas of this decision and, according to Pusich, he acquiesced.

Pusich's decision not to call Cordova as a witness was a matter of reasonable trial strategy that does not support an ineffective-assistance-of-counsel claim. Moreover, Rosas failed to demonstrate a reasonable probability that he was prejudiced by the omission of Cordova's testimony at trial. For these reasons, we conclude that the district court properly denied Rosas relief on this claim.

4. Failure to call psychologist Dr. Mary Sorenson as a witness

Rosas also contends that the district court improperly denied his claim that Pusich was ineffective for failing to call Dr. Mary Sorenson, a psychologist, to testify as an expert witness. Dr. Sorenson testified during the evidentiary hearing that Rosas suffered from "fragmentary blackouts" that were induced by his alcohol use and opined that Rosas experienced such a blackout on the night he killed Stockmann. Dr. Sorenson's testimony, Rosas contends, would have supported a "voluntary intoxication" defense and negated the specific intent element for first-degree murder and kidnapping.

The district court found that Dr. Sorenson's opinions were based upon statements made to her by Rosas over three years after his trial and that these statements lacked credibility. Even if Dr. Sorenson had testified during the trial, the district court also found there was no reasonable probability that her testimony would have altered the outcome. We agree.

Our review of the record reveals that Rosas's claim that he suffered from "fragmentary blackouts" on the night he murdered Stockmann was unsupported by his own trial testimony—he testified to remembering events before, during, and after the murder. Not once did Rosas claim that he blacked out due to alcohol consumption.

Moreover, Pusich testified at the evidentiary hearing that Rosas gave her no reason to believe he suffered from any such blackouts. And although Dr. Sorenson's testimony that Rosas suffered from "fragmentary blackouts" could, perhaps, be relevant to Rosas's memory after the murder, Rosas failed to demonstrate that it was relevant to whether he had the requisite intent to actually commit the crimes.

Rosas failed to demonstrate any probability of success of a defense based on voluntary intoxication and that he was prejudiced by the absence of Dr. Sorenson as a witness. He also failed to demonstrate that Pusich's decision not to pursue the possibility that he suffered from "fragmentary blackouts" was unreasonable. We conclude that the district court properly denied Rosas relief on this claim.

5. Failure to call brother Sergio Rosas as a witness

Rosas next contends that the district court improperly denied his claim that Pusich was ineffective for failing to call his brother Sergio Rosas as a witness during the penalty phase of his trial.¹¹ Sergio testified during the evidentiary hearing about abuse he and Rosas suffered from their father as children, as well as incidents of domestic violence they observed between their parents. He also testified about Rosas's alcohol and drug use, as well as sexual abuse Rosas endured from his stepsister.

¹¹Rosas also contends on appeal that Pusich was ineffective for failing to call Sergio to testify during the guilt phase of his trial. Rosas did not clearly raise this claim in his petition, but did call Sergio to testify during the evidentiary hearing. Because the district court only addressed this claim in its order with respect to the penalty phase, it will not be addressed as it relates to the guilt phase. See Barnhart v. State, 122 Nev. ___, ___ P.3d ___ (Ad. Op. No. 26, March 16, 2006).

Sergio's testimony, Rosas contends, would have supported his defense theory and also resulted in a more lenient sentence.

The district court found Sergio to be a credible witness, but that Pusich's decision not to call him to testify during the penalty hearing was a reasonable one. Even if Sergio had testified, the district court also found, there was no reasonable probability that Rosas would have received a more lenient sentence. We agree.

Our review of the record reveals that Rosas's mother, Kelly Jo Guzman, testified at his penalty hearing about the severe physical abuse Rosas suffered by his father and sexual abuse he suffered from his stepsister. His mother also testified about domestic violence and family instability Rosas experienced while growing up and that he had attempted suicide. Psychologist Dr. William O'Donohue also testified during that hearing about the abuse Rosas suffered as a child from his father and the mental health problems he experienced as a result of that abuse.

Although the testimony of Sergio may have been moving, it would have also been largely duplicative of testimony already presented to the jury during the penalty hearing. Rosas has failed to demonstrate that his sentence would have been different had Pusich called Sergio to testify and that any decision by Pusich not to call him as a witness was unreasonable. We conclude that the district court properly denied Rosas relief on this claim.

6. Failure to adequately examine Rosas

Rosas further contends that Pusich failed to adequately examine him while he testified at trial and to develop a defense theory that he abandoned his intent to kill when he did not stab Stockmann with a knife in the neck as originally planned.

The district court found that Pusich's decision not to pursue an "abandonment defense" was reasonable and that such a defense had no reasonable probability of success. We agree.

Rosas murdered Stockmann by shooting, not stabbing. Even if Rosas abandoned his original plan to stab Stockmann with a knife, as he claimed, this does not establish that he abandoned his specific intent to murder him. It only shows that Rosas altered his method of doing so.

Moreover, this court concluded on direct appeal that sufficient evidence supported the jury's verdict that Rosas murdered Stockman with the requisite specific intent to support a theory of first-degree murder. Rosas has failed to demonstrate that an abandonment theory of defense had any probability of success. Pusich's decision not to advance such a defense was reasonable. We conclude that the district court properly denied Rosas relief on this claim.

7. Failure to adequately cross-examine forensic pathologist Dr. Ellen Clark

Rosas also contends that the district court improperly denied his claim that Pusich was ineffective for failing to cross-examine forensic pathologist Dr. Ellen Clark and pursue a "mistake of fact" defense theory. Stockmann was shot by Rosas first in the back and then later in the head. Dr. Clark testified at Rosas's preliminary hearing that both wounds were fatal, and that either one could have independently caused Stockmann's death. But she could not determine by examining the body which wound was inflicted first. If Stockman was initially shot in the back, Dr. Clark opined, there may have been an "interval of consciousness" before Rosas shot him in the head.

According to Rosas, Dr. Clark's trial testimony on this matter changed "slightly" from her preliminary hearing testimony and that the

strength of her opinions carried less force. Rosas maintains that Pusich should have impeached Dr. Clark on cross-examination during trial with her preliminary hearing testimony and argued that Rosas could not be guilty of first-degree murder because Stockmann was in fact dead when he fired the second gunshot to his head.

The district court found that Rosas failed to demonstrate how he was prejudiced by any failure by Pusich on this matter. We agree.

Our review of the preliminary hearing and trial transcripts reveals that Dr. Clark's testimony on this matter was essentially the same. During both proceedings she testified that both wounds were fatal, she could not determine from the body which wound was inflicted first, and if the back wound occurred first there would have been a period of consciousness. Rosas has failed to demonstrate how Pusich could have successfully impeached Dr. Clark at trial with her preliminary hearing testimony.

Moreover, Rosas has also failed to show how a "mistake of fact" defense based upon the premise that Stockmann was already dead when Rosas fired the second shot would have had any reasonable likelihood of success at trial. For such a defense to have been successful, the jury would have had to believe that the first wound Stockmann received from Rosas was an accident. Given that Rosas entered into a plan to murder Stockmann, lured Stockman to a remote location, specifically asked to see Stockmann's loaded shotgun, disengaged the gun's safety, and proceeded to shoot Stockmann in the back, Rosas's claim that this first shot was an accident is unbelievable. That Rosas had prior military training, testified that his finger actually pulled the gun's trigger, and shot Stockmann a second time in the head to ensure that he was dead

only strengthens this conclusion and further belies Rosas's story that the first shot was an accident.

Rosas failed to demonstrate that Pusich's cross-examination of Dr. Clark was deficient in any manner and that a "mistake of fact" defense had any probability of success at trial. For these reasons, we conclude that the district court properly denied Rosas relief on this claim.

8. Failure to call favorable psychologists or psychiatrists to testify during the guilt and penalty phases

Rosas finally contends that the district court improperly denied his claim that Pusich was ineffective for failing to call a favorable psychologist or psychiatrist to testify during the guilt phase of his trial and was equally ineffective for calling Dr. O'Donohue, a psychologist, to testify during the penalty phase. He contends that Dr. O'Donohue's testimony was damaging and that a different psychologist, such as Dr. Mahaffey, should have been called to testify on his behalf instead.

The district court found that Pusich's decisions on this matter were not unreasonable and that Rosas failed to show prejudice. We agree.

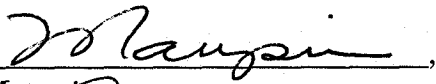
Pusich testified at the evidentiary hearing that Rosas was evaluated prior to trial by Dr. O'Donohue, whom she had previously relied upon in other cases and whose results she trusted. Like Dr. Mahaffey, Dr. O'Donohue concluded that Rosas suffered from post-traumatic stress. But unlike Dr. Mahaffey, Dr. O'Donohue concluded that Rosas was malingering during much of his evaluation.

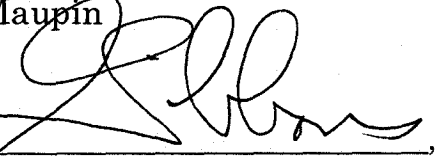
Pusich's prior experience with Dr. O'Donohue was that he was a straightforward witness. She determined that his testimony was best suited for a case in mitigation during the penalty phase. Rosas has failed to show that Pusich's decision on this matter was unreasonable. Moreover, Rosas's claim that Pusich was ineffective for not instead

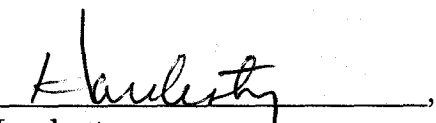
securing the testimony of Dr. Mahaffey—who evaluated Rosas many years after Dr. O'Donohue and only after Rosas had been convicted—invokes the type of speculation and hindsight that is proscribed when reviewing counsel's performance.¹² As previously discussed, we conclude that Pusich was not ineffective for failing to call Dr. Mahaffey to testify during the guilt phase of trial. Our conclusion applies to Pusich's decision not to call her to testify during the penalty phase as well.

Rosas failed to show that had Pusich called any different, or additional, mental health professionals to testify on his behalf during either phase of his trial that the result of the proceedings would have been different. For these reasons, we conclude that the district court properly denied him relief on this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

¹²See Strickland, 466 U.S. at 689.

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
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Washoe District Court Clerk