

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER DUNCAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44435

FILED

MAR 04 2005

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying appellant Christopher Duncan's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On August 21, 2003, the district court convicted Duncan, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Duncan to serve two consecutive terms of ten to twenty-five years in the Nevada State Prison. This court affirmed Duncan's judgment of conviction and sentence on appeal.¹ The remittitur issued on March 9, 2004.

¹Duncan v. State, Docket No. 42098 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, February 12, 2004).

On August 25, 2004, Duncan 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 Duncan or to conduct an evidentiary hearing. On November 18, 2004, the district court denied Duncan's petition. This appeal followed.

In his petition, Duncan raised numerous claims of ineffective assistance of trial counsel.² To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.³ A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results

²To the extent that Duncan raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived and he did not demonstrate good cause for failing to raise them earlier. See NRS 34.810(1)(b). Duncan additionally asserted that his appellate counsel was ineffective for failing to raise several of the following issues on appeal. For the reasons discussed below, Duncan failed to demonstrate that his appellate counsel was ineffective.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

of the proceedings would have been different.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, Duncan contended that the first attorney appointed to represent him was ineffective due to an actual conflict of interest. We conclude that this claim is without merit.

"The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."⁶ In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."⁷ The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."⁸

⁴Id.

⁵Strickland, 466 U.S. at 697.

⁶Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

⁷Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Clark, 108 Nev. 324, 831 P.2d 1374.

⁸Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

A review of the record reveals that Charles Cano of the Clark County Public Defender's Office was initially appointed to represent Duncan. Prior to Duncan's preliminary hearing, Cano moved to withdraw due to a conflict. Specifically, the Clark County Public Defender's Office was also representing Dana Crawford, a witness in Duncan's case. Cano's motion was granted, and special public defender Alzora Jackson was appointed to represent Duncan. Duncan failed to demonstrate that Cano acted with divided loyalties during the brief period he represented Duncan. Therefore, the district court did not err in denying this claim.

Second, Duncan claimed that his trial counsel was ineffective for failing to challenge the justice court's jurisdiction. However, Duncan failed to provide any relevant evidence to support a claim that the justice court was without jurisdiction to conduct Duncan's preliminary hearing and bind him over to the district court.⁹ As such, Duncan did not demonstrate that his counsel was ineffective on this issue.

Third, Duncan contended that his trial counsel was ineffective for failing to object to an unnecessarily suggestive physical lineup. The record reveals that witness Kamlesh Chandra viewed Duncan and six other men with a similar appearance at the Clark County Detention Center. Chandra identified Duncan, who was located in position six.

⁹See NRS 4.370; 171.178; 171.196.

When Chandra wrote out his statement in another room, however, he indicated that he recognized the individual in position seven. A detective immediately questioned Chandra about the discrepancy, and Chandra admitted that he was confused by the numbers. Chandra then returned to the viewing room and stated a second time that he recognized the person in position six, and that he had been mistaken in writing down position seven. We conclude that Duncan did not establish that Chandra's identification of him was unduly suggestive, such that his counsel acted unreasonably in failing to object.¹⁰ Consequently, we affirm the district court's denial of this claim.

Fourth, Duncan asserted that his trial counsel was ineffective for failing to adequately investigate whether the victim was strangled by a telephone cord or hands. Duncan appeared to claim that further investigation would have revealed that the victim was killed with hands, and the jury therefore would not have found him guilty of using a deadly weapon.

A review of the record reveals that Shalynn Hatter's body was found in a dumpster with a phone cord wrapped around her neck. Coroner Dr. Roxene Worrell opined that Hatter was strangled with the phone cord, although she could not exclude the possibility that hands were also used.

¹⁰See Banks v. State, 94 Nev. 90, 575 P.2d 592 (1978).

Duncan did not articulate how further investigation would have yielded information to contradict Worrell's testimony. Consequently, Duncan failed to establish that his counsel's performance was deficient, and the district court did not err in denying him relief on this claim.

Fifth, Duncan contended that his trial counsel was ineffective for failing to proffer a jury instruction providing that in addition to a telephone cord, hands were used in the victim's strangulation.¹¹ Duncan did not establish that his counsel acted unreasonably in failing to propose this instruction. The purpose of jury instructions is to inform the jury of the pertinent law; the district court is prohibited from instructing the jury on facts.¹² The jury was correctly instructed on the definition of a deadly weapon pursuant to NRS 193.165(5) and it was the jury's responsibility to determine whether a deadly weapon was used in the commission of the crime. Duncan therefore failed to demonstrate that his counsel was ineffective with respect to this issue, and we affirm the district court's denial of this claim.

¹¹Specifically, Duncan asserted that his counsel should have proposed the following instruction: "In addition, to the Telephone Cord, used as a deadly weapon, pursuant to NRS 193.165(5)(b), there also were Hands used as a deadly weapon, pursuant to NRS 193.165(5)(b), which may have caused the asphyxia strangulation death of Shalynn Hatter, because Hands are an element of NRS 193.165(5)(b)."

¹²See NRS 175.161(1).

Sixth, Duncan claimed that his trial counsel was ineffective for failing to conduct a sufficient investigation concerning the credibility of witness Christina Colston. Colston gave investigators several different versions of the events at issue, and at trial stated that she lied in all of her previous statements. Duncan did not adequately specify what additional investigation his trial counsel should have conducted, and how it would have altered the outcome of his trial.¹³ We note that his trial counsel conducted an extensive cross-examination of Colston concerning her prior inconsistent statements. We therefore conclude that Duncan did not establish that his counsel was ineffective in this regard.

Seventh, Duncan alleged that his trial counsel was ineffective for failing to propose a jury instruction concerning Colston's credibility. However, a review of the record reveals that the district court gave the jury an instruction concerning witness credibility.¹⁴ Duncan therefore did

¹³See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹⁴Jury instruction twenty-three was as follows:

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statement and the strength or weakness of his recollections. If you believe

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not establish that his counsel's performance was deficient for failing to proffer a jury instruction specifically concerning Colston's credibility, and the district court did not err in denying this claim.

Eighth, Duncan contended that his trial counsel was ineffective for failing to prepare an alibi defense and request an alibi jury instruction. Duncan argued that he was with Colston during the time period the victim was murdered. We conclude that Duncan did not establish that his trial counsel was ineffective in this regard. The State alleged that Hatter was murdered the night of January 12 or the morning of January 13, 2003. Colston testified that Duncan stayed with her the night of January 13. Therefore, Colston did not provide an alibi for Duncan during the time period the murder was alleged to have occurred. Duncan did not articulate how further investigation by his counsel would have altered this.¹⁵ Because there was no evidence presented at trial that Duncan was elsewhere when the murder occurred, he did not demonstrate

... continued

that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

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

that he was entitled to an alibi jury instruction.¹⁶ Consequently, the district court did not err in denying this claim.

Ninth, Duncan contended that his trial counsel was ineffective for waiving his right to a separate penalty hearing before the jury in the event he was convicted of first-degree murder.¹⁷ Duncan failed to demonstrate that he was prejudiced by his counsel's actions, however, because he was ultimately convicted of second-degree murder and not entitled to a separate penalty hearing.¹⁸ Thus, we affirm the district court's denial of this claim.

Duncan next asserted that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.¹⁹ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted

¹⁶See Duckett v. State, 104 Nev. 6, 752 P.2d 752 (1988).

¹⁷See NRS 175.552(1)-(2).

¹⁸See NRS 175.552(1).

¹⁹See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

issue would have a reasonable probability of success on appeal."²⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.²¹

First, Duncan asserted that his appellate counsel was ineffective for failing to argue that his right to confront the witnesses against him was violated when the coroner was not called to testify at trial and her preliminary hearing testimony was instead read to the jury.²² We conclude that Duncan did not demonstrate that this issue had a reasonable probability of success on appeal. The record reveals that the coroner was unavailable at Duncan's trial, and her preliminary hearing testimony was therefore admissible as an exception to the hearsay rule.²³ Because Duncan had a prior opportunity to cross-examine the coroner, he failed to demonstrate that the Confrontation Clause was violated.²⁴ Therefore, the district court did not err in denying this claim.

²⁰Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

²²See U.S. Const. amend. VI.

²³See NRS 51.325.

²⁴See Crawford v. Washington, 541 U.S. 36 (2004); City of Las Vegas v. Walsh, 120 Nev. ___, 91 P.3d 591 (2004).

Second, Duncan contended that his appellate counsel was ineffective for failing to challenge the district court's coercion of the verdict.²⁵ Specifically, the jury found Duncan guilty of both second-degree murder with the use of a deadly weapon and accessory after the fact to murder. Upon receiving the verdict form, the district court informed the jury that a defendant cannot be convicted of both a primary offense and being an accessory to that same offense. The court instructed the jury that it should only address the accessory charge if it unanimously found that Duncan was not guilty of murder or manslaughter. After further deliberations, the jury found Duncan guilty of second-degree murder with the use of a deadly weapon only. The district court polled each juror and the verdict was unanimous.

We conclude that Duncan failed to demonstrate that the district court erred in instructing the jury it could not find Duncan guilty of both offenses, such that his counsel was ineffective for failing to raise this issue on appeal.²⁶ Duncan did not point to any authority to support his proposition that the district court should have accepted the jury's

²⁵To the extent that Duncan also claimed that his appellate counsel should have raised this claim as a violation of his double jeopardy rights, we conclude that this contention is without merit.

²⁶See Sellers v. State, 108 Nev. 1017, 843 P.2d 362 (1992).

initial verdict and then dismissed his second-degree murder conviction. Consequently, Duncan was not entitled to relief on this claim.

Third, Duncan argued that his appellate counsel was ineffective for failing to challenge his conviction as a violation of Apprendi v. New Jersey.²⁷ In Apprendi, the United States Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."²⁸ Duncan appeared to argue that his conviction of the deadly weapon enhancement violated Apprendi. We conclude that this argument is without merit. The State introduced evidence that Duncan strangled the victim with a phone cord. The jury was properly instructed on the definition of a deadly weapon pursuant to NRS 193.165(5) and found that Duncan used a deadly weapon in the commission of second-degree murder beyond a reasonable doubt. Therefore, Duncan did not establish that his counsel was ineffective for failing to raise this issue on appeal.

Fourth, Duncan asserted that his appellate counsel was ineffective for failing to raise a claim of cumulative error. The cumulative effect of harmless errors may violate a defendant's right to a fair trial.

²⁷530 U.S. 466 (2000).

²⁸Id. at 490.

Duncan failed to demonstrate that errors occurred at his trial, however, and he therefore necessarily failed to demonstrate that a claim of cumulative error would have likely succeeded on appeal. As such, Duncan did not establish that his appellate counsel was ineffective in this regard.

Finally, Duncan claimed that he was erroneously convicted of using a deadly weapon, and that he was denied due process by Colston's perjured testimony. However, these claims are outside the scope of a post-conviction petition for a writ of habeas corpus and should have been raised on direct appeal.²⁹ Therefore, we affirm the district court's denial of these claims.


Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Duncan is not entitled to relief and that briefing and oral argument are unwarranted.³⁰ However, our review of the judgment of conviction reveals an error. Although this court previously remanded the matter to the district court for a correction of Duncan's judgment of conviction, it appears that his judgment of conviction was never corrected. Duncan's judgment of conviction states that he was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We therefore conclude that this


²⁹See NRS 34.810(1)(b)(2).

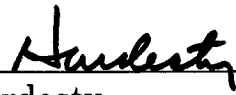
³⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

matter should be remanded to the district court for a correction of the error. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge
Christopher Duncan
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk