

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES EDWARD JENNINGS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44813

FILED

APR 19 2006

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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On February 20, 1998, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court reversed the conviction on direct appeal and remanded for a new trial.¹ The remittitur issued on August 10, 2000. Appellant was retried, and on June 14, 2001, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly

¹Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000).

weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court upheld the conviction on direct appeal.² The remittitur issued on March 4, 2003.

On February 26, 2004, appellant 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, the district court declined to appoint counsel to represent appellant. An evidentiary hearing was held on May 27, 2004 and continued on February 25, 2005. On March 24, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial and appellate counsel. 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 was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.³ To state a claim of ineffective assistance of

²Jennings v. State, Docket No. 38044 (Order of Affirmance, December 11, 2002).

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

appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁶ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁷ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁸ The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁹

⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

⁵Strickland, 466 U.S. at 697.

⁶Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁷Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

⁸Means v. State, 120 Nev. 1001, ____, 103 P.3d 25, 33 (2004).

⁹Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argued his counsel was ineffective for failing to argue that because there were no African-Americans in the jury venire, the venire was not made up of a fair cross-section of the community, in violation of the Sixth Amendment to the U.S. Constitution. This claim is belied by the record.¹⁰ Counsel raised concerns about the jury venire in chambers and on the record. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant argued counsel was ineffective for failing to make a contemporaneous objection to the State's peremptory challenge of venire person 49, an Asian-American venire member, in violation of Batson v. Kentucky.¹¹ Under the equal protection analysis set forth in Batson, once the opponent of a peremptory challenge makes a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to give a race neutral explanation.¹² The explanation need not be "persuasive, or even plausible," as long as it is facially valid.¹³ If such an explanation is given, then the trial court must

¹⁰Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on claims that are belied by the record).

¹¹476 U.S. 79 (1986).

¹²Purkett v. Elem, 514 U.S. 765, 767 (1995).

¹³Id. at 768.

decide whether the opponent has proved purposeful racial discrimination.¹⁴ At this stage of the Batson analysis, the persuasiveness of the explanation becomes relevant and the district court must determine whether the opponent of the peremptory challenge has carried his burden of proving purposeful discrimination.¹⁵ "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."¹⁶ Because the district court's findings on the issue of discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference.¹⁷

Appellant failed to demonstrate counsel's performance prejudiced him. Appellant's counsel objected to the challenge of juror 49 in chambers on the same day juror 49 was dismissed. Counsel objected again on the record the following day. The State then explained that it had challenged juror 49 because she appeared to favor leniency in sentencing and had difficulty understanding the issues and questions she was asked on voir dire. The district court found that appellant's counsel

¹⁴Id.

¹⁵Id.

¹⁶Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

¹⁷Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998) (citing Hernandez v. New York, 500 U.S. 352, 364 (1991)).

had not proved purposeful discrimination, noting that it too had concerns about juror 49's ability to comprehend the proceedings and would not have handled the proceedings differently had counsel made a contemporaneous objection. We therefore conclude the district court did not err in denying this claim.

Third, appellant claimed his counsel was ineffective for failing to raise contemporaneous objections to the district court's excusal of two additional Asian-American venire persons (52 and 54), whom the district court excused because each informed the district court they had difficulty understanding English.¹⁸ NRS 6.010 requires potential jurors to have sufficient knowledge of the English language. When a venire member is statutorily disqualified from service, it is the trial court's duty to excuse the juror.¹⁹ A juror's statement indicating she is statutorily disqualified from service is sufficient evidence for the district court to act.²⁰ Appellant failed to demonstrate counsel's performance prejudiced him. Appellant failed to show that jurors 52 and 54 had sufficient knowledge of the

¹⁸Appellant contended jurors 49, 52 and 54 were the only minorities in the venire. The district court indicated it believed there were "Asians, some Hispanics" in the venire. However, the venire had been excused by this time in the proceedings, just before the empanelling of the jury.

¹⁹State v. Larkin, 11 Nev. 314, 327 (1876).

²⁰Id. at 326.

English language to qualify them for jury service and that an objection to the excusal of those jurors would have been sustained. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed trial counsel was ineffective for failing to object to the reasonable doubt instruction as improperly shifting the burden of proof from the State to appellant. Appellant failed to demonstrate counsel's performance was deficient. The instruction given matched the language required by NRS 175.211. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed trial counsel was ineffective for failing to object during trial to the reading into the record of appellant's testimony from his first trial. Appellant failed to demonstrate counsel's performance was deficient in this regard. Before the trial, counsel objected twice to allowing the State to use this testimony. Counsel's pretrial objections properly preserved the issue for appeal. Because the court had already ruled on this issue, there was no legal basis for an objection during trial. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed trial counsel was ineffective for failing to move to strike felony murder from the information because appellant was not charged with the qualifying felony (kidnapping). Appellant failed to demonstrate counsel's performance was deficient in this regard. Use of the felony murder theory of first-degree murder does

not require charging the defendant with the underlying felony.²¹ Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed trial counsel was ineffective for failing to object to the State's loss of evidence, specifically, the car in which appellant was seated when the victim was shot. Appellant argued that additional bullets "if found in the vehicle would have been critical, corroborative evidence" supporting his version of events.

This court has held that:

[I]n order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed.²²

Further, this court has held that the burden of demonstrating prejudice lies with appellant:

[Appellant's burden] requires some showing that it could be reasonably anticipated that the evidence

²¹Shaw v. State, 104 Nev. 100, 753 P.2d 888 (1988), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995).

²²Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996) (quoting State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989)).

sought would be exculpatory and material to appellant's defense. It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense.²³

The record does not indicate, and appellant does not allege, that the State released the vehicle to appellant's wife in bad faith. Appellant also failed to demonstrate it could be reasonably anticipated that additional bullets would have been found in the vehicle, and that if additional bullets were found, they would have been both exculpatory and material to his defense. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, appellant contended appellate counsel was ineffective for failing to raise each of the above issues on direct appeal. Appellant failed to demonstrate any of the above issues had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

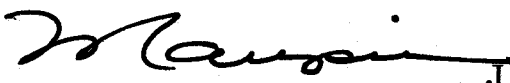
Ninth, appellant contended appellate counsel was ineffective for failing to present his direct appeal claims as violations of the United States Constitution. Appellant failed to demonstrate that the outcome of


²³Id. at 1240, 926 P.2d at 778 (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

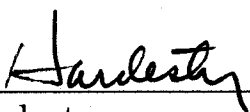
appellant's direct appeal would have been different had appellate counsel presented the issues differently. Further, whether a claim has been preserved for review in a federal habeas corpus proceeding is a question for the federal court to determine in that proceeding. Accordingly, we conclude the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.²⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____ J.

Maupin

_____ J.
Gibbons


_____ J.
Hardesty

²⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge
Charles Edward Jennings
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Clark County District Attorney David J. Roger
Clark County Clerk