IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44868

FILED

FEB 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

This court's opinion on direct appeal sets forth the following facts.[1] In the early morning of June 3, 1999, appellant Zane Michael Floyd had a woman from an "outcall" service sent to his apartment. As soon as she arrived, he threatened her with a shotgun and then repeatedly sexually assaulted her. Eventually Floyd said that he was going to go out and kill the first people that he saw. He told the woman she had 60 seconds to run or be killed, and she fled the apartment. Floyd then took his shotgun and walked to a nearby Albertson's supermarket.

The store's security videotape showed that after entering the store, Floyd immediately shot a store employee in the back, killing him. He next shot and killed two more employees, then chased down and shot another employee, but the man survived. Floyd finally went to the rear of the store and shot dead a female employee. When Floyd encountered Las Vegas Metropolitan Police Department officers waiting outside the store,

[1]Floyd v. State, 118 Nev. 156, 162-63, 42 P.3d 249, 253-54 (2002).

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he pointed the shotgun at his own head. After an officer spoke with him for several minutes, Floyd put the gun down, was arrested, and admitted that he had shot the people in the store.

The preceding evidence was presented at trial, and the jury found Floyd guilty of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.

At the conclusion of the penalty hearing, the jury found three aggravating circumstances in regard to each murder: in committing the murder, Floyd knowingly created a great risk of death to more than one person by means which would normally be hazardous to the lives of more than one person; he committed the murder at random and without apparent motive; and he had, in the immediate proceeding, been convicted of more than one murder. For each murder, the jury returned a death sentence, finding that the aggravating circumstances outweighed any mitigating circumstances. For the other seven offenses, the district court imposed the maximum terms in prison, to be served consecutively.

On direct appeal this court affirmed, and remittitur issued on March 10, 2003.[2] Floyd filed a post-conviction petition for a writ of habeas corpus in June 2003, and a supplemental petition in October 2004. In February 2005 the district court denied habeas relief without conducting an evidentiary hearing.

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[2]Id. at 177, 42 P.3d at 263.

The overarching issue in this appeal is whether the district court properly denied Floyd's petition without holding an evidentiary hearing first. Relevant to this issue is the following law. A petitioner for post-conviction relief cannot rely on conclusory claims for relief.[3] He is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief.[4] He is not entitled to such a hearing if the factual allegations are belied or repelled by the record.[5]

As a preliminary matter, the State contends that some of Floyd's claims should have been raised on direct appeal and are therefore waived.[6] However, we conclude that he adequately couched his claims as ones of ineffective assistance of counsel. Therefore, the claims were properly raised in this habeas petition and were not waived.[7]

To establish ineffective assistance of counsel, a defendant must show that an attorney's representation fell below an objective standard of reasonableness and that the attorney's deficient performance

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[3]Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

[4]Id.; Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); cf. NRS 34.770(1), (2).

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

[6]See NRS 34.810 (providing that a court must dismiss habeas claims that could have been, or were, presented in an earlier proceeding unless the court finds both cause for failing to present the claims earlier, or for raising them again, and actual prejudice to the petitioner).

[7]Evans, 117 Nev. at 622, 28 P.3d at 507 (explaining that it is proper to raise claims of ineffective assistance of trial or appellate counsel initially in a timely, first post-conviction petition for a writ of habeas corpus).

prejudiced the defense.[8] To establish prejudice, the defendant must show that but for the attorney's mistakes, there is a reasonable probability that the result of the proceeding would have been different.[9] Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy.[10] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to this court's independent review.[11]

Floyd asserts that his trial counsel should have objected to, and his appellate counsel should have challenged, the following remarks by the prosecutor during the opening statement of the penalty phase.

> [Mitigating circumstances] can be anything—they can be the age or youth of the offender, the lack of criminal history, psychosis, drinking, drug abuse, poor upbringing, good upbringing, whatever the defense wishes to bring out in the form of, they would say, explanation—I would categorize as excuse—for the conduct that was committed on June the third.
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> . . . .
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> I was discussing the statutory aggravating circumstances, which you will weigh against whatever mitigating excuses that he offers you during the case today and tomorrow.

(Emphasis added.)

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[8]Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[9]Id. at 694.

[10]Id. at 689.

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

Floyd contends that the prosecutor improperly dismissed mitigating circumstances as nothing more than "excuses." We agree that "excuse" is an improper characterization of mitigating circumstances that prosecutors should not make. Mitigating circumstances cannot and are not intended to excuse a murder in either the legal or lay sense of the term. An excuse is generally defined as "something offered as justification."[12] According to Black's, excusable homicide "consists of a perpetrator's acting in a manner which the law does not prohibit, such as self-defense or accidental homicide."[13] If misled to believe that mitigating circumstances must somehow excuse the murder, a juror might give no consideration to potential mitigating evidence, in violation of the Constitution.[14]

Mitigating circumstances are simply "'factors [a juror] may take into account as reasons for deciding not to impose a sentence of death on the defendant.'"[15] As this court stated after discussing potential mitigating evidence in Hollaway v. State, "None of this in any way excuses or justifies Hollaway's crime, nor does any of this necessarily render

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[12]Merriam-Webster's Collegiate Dictionary 405 (10th ed. 1995).

[13]Black's Law Dictionary 506 (abr. 6th ed. 1991).

[14]Hollaway v. State, 116 Nev. 732, 744, 6 P.3d 987, 995 (2000) ("[T]o ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.'") (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989)).

[15]Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 285 (1996) (approving and quoting from a jury instruction).

Hollaway death 'ineligible,' but it could provide a basis for jurors to find the crime mitigated and impose a less severe sentence."[16]

Despite the prosecutor's improper remarks here, we conclude that Floyd does not warrant relief on this issue. First, although his trial counsel did not directly object to the remarks, counsel forcefully and accurately responded to them in his own opening statement. Counsel informed the jury:

> Mitigating factors are not excuses. There is never going to be an effort or an attempt in this case to excuse Zane Floyd's behavior. They're not justifications. No effort will be made to justify Zane Floyd's behavior. And at no time throughout this penalty proceeding or ever is anybody ever going to ask you to forgive Zane Floyd, because the penalty hearing is not about excuses, it's not about justification, it's not about forgiveness. It's about understanding.

This response, rather than an objection, appears reasonable. But even assuming counsel acted deficiently in not objecting, Floyd was not prejudiced. The effectiveness of his counsel's response was reinforced by the district court's instruction properly defining mitigating circumstances:

> Mitigating circumstances are those factors which do not constitute a legal justification or excuse for the commission of the offense in question, but may be considered by the jury, in fairness and mercy, as extenuating or reducing the degree of the defendant's moral culpability. The jury must consider any aspect of the defendant's character or record, and any circumstances surrounding the

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[16]116 Nev. at 743, 6 P.3d at 995.

> offense, that the defendant proffers as evidence for a sentence less than death.

Considering the proper guidance given to the jury by defense counsel and the district court, as well as the facts of this case, we see no reasonable probability of a different result even if Floyd's counsel had objected to the remark at trial or challenged it on appeal.

Floyd claims that his trial and appellate counsel were ineffective in failing to challenge another remark by the prosecutor during the same opening statement: "I trust that you will agree with Mr. Bell and myself that for his crimes [Floyd] deserves what is in this case a just penalty of death." Floyd contends that the remark was an improper statement of personal opinion but he cites no apposite authority. We consider the remark acceptable. The prosecutor did not invoke the authority of his office or imply that he had any special knowledge of the case, conduct which would render a remark improper.[17] Floyd's counsel were not ineffective in this regard.

Floyd also claims that his counsel were ineffective in failing to challenge two remarks by the prosecutor in the opening statement of the guilt phase. The prosecutor was describing two of the murder victims. He told the jury that "Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne," and that "Lucy Tarantino . . . was in her early sixties. She was a wife, mother of three, grandmother." Floyd argues that this

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[17]See, e.g., Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) ("[B]y invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney."), modified on other grounds, Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990).

was victim impact evidence which was highly prejudicial and inadmissible in the guilt phase. This argument is unpersuasive. The prosecutor's remarks were not inflammatory, and "facts establishing a victim's identity and general background" are admissible.[18] Again Floyd's counsel were not ineffective.

Floyd fails to show that he was entitled to an evidentiary hearing on these claims.

Next, Floyd claims that this court has not "addressed the issue of presentation of cumulative victim impact evidence or erected any rule setting forth any limitation on the scope or quantity of the evidence." He faults his trial counsel, apparently for failing to object to any and all victim impact testimony. This claim has no merit.

This court has set forth a number of limits regarding the scope of victim impact evidence. At a capital penalty hearing, a victim's family members are prohibited from giving opinions about the crime, the defendant, or the appropriate sentence.[19] Evidence of impact on victims of "a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible during the penalty phase."[20] Victim impact testimony also "must be excluded if it renders the proceeding fundamentally unfair."[21] "[E]ven relevant evidence 'is not admissible if its

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[18]Libby v. State, 109 Nev. 905, 916, 859 P.2d 1050, 1057 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

[19]Kaczmarek v. State, 120 Nev. 314, 339, 91 P.3d 16, 33 (2004).

[20]Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998).

[21]Floyd, 118 Nev. at 174, 42 P.3d at 261.

probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'"[22]

We addressed a related issue on direct appeal in this case:

> Floyd also complains that the district court denied his motion to allow only one victim impact witness for each murder victim and to exclude other testimony. In fact, the court granted the motion in regard to limiting victim impact witnesses to one per murder victim. The court also ruled that other people who were at the scene of the murders could testify, not as victims but in regard to the great-risk-of-death aggravator and the nature of the murders. Floyd has not shown that there was anything improper about the court's ruling.[23]

Floyd has still not disclosed any error in the district court's ruling, nor has he specified any evidence that was improperly admitted or explained how his trial counsel acted unreasonably. Floyd was not entitled to an evidentiary hearing in regard to this claim.

Floyd asserts that his trial counsel was ineffective in failing to object to several instances of alleged prosecutorial misconduct. Although misconduct occurred, it was not prejudicial in this case.

Floyd's counsel raised prosecutorial misconduct on direct appeal. This court addressed one instance specifically; in regard to the others, we stated: "Floyd asserts that several comments by the prosecution constituted misconduct. . . . Floyd failed to object to some of

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[22]Id. at 175, 42 P.3d at 262 (quoting NRS 48.035(1)).

[23]Id. We also determined that testimony by one murder victim's mother was collateral and inflammatory and should have been excluded, but concluded that the error was not prejudicial. Id.

the remarks. Most of the comments require no discussion because they all either were proper or did not amount to prejudicial error."[24] Given this ruling, Floyd's reliance in part on misconduct alleged on direct appeal fails to establish any prejudice.

But Floyd newly raises three instances of misconduct that his counsel failed to object to. All occurred during closing argument in the penalty phase as the prosecution rejected the mitigating circumstances proffered by Floyd.

> So the defense has made a laundry list of red herrings to make it appear in this case that there is a whole lot of them and, therefore, they should have some weight. They've stacked wishes upon hopes upon dreams that you'll count numbers, that you'll count some things twice, and you'll say, "Well, wait a minute. There's a lot of mitigation here."
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> . . . .
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> Now, it really doesn't matter that Mr. Bell took this entire box of paper clips and threw it on the table. You could have every one of these. How on earth could all of these reasons or excuses, whatever you want to call them, how could all of them put together possibly outweigh the fact that more than one person was killed in this case? How could that possibly outweigh a second murder? It can't. None of these combined.
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> . . . .
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> Cooperation with the police as a mitigating circumstance? Give me a break. How does that reduce his moral culpability?
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> . . . .

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[24]Id. at 172-73, 42 P.3d at 260 (footnote omitted).

You can throw the whole list away.

We have underlined the rhetoric that is misleading or excessively intemperate and derogatory towards the defense. First, as discussed above, mischaracterizing mitigating evidence as "excuses" could seriously mislead jurors. Second, rhetoric such as "Give me a break" and "red herrings" unfairly imply that the defense is trying something underhanded. This court has repeatedly warned prosecutors not to "disparage legitimate defense tactics" in this manner.[25] We considered it "highly improper" for a prosecutor to tell jurors that a defendant's drug intoxication defense was a "red herring" aimed at gaining a compromise verdict of second-degree murder.[26] As we have explained, prosecutors have a "duty not to ridicule or belittle the defendant or his case. The appropriate way to comment, by the defense or the State, is simply to state that the prosecution's case or the defendant is not credible and then to show how the evidence supports that conclusion."[27]

A defendant and his counsel have the right to introduce evidence and argue the existence of mitigating circumstances in a capital penalty phase. That is all Floyd and his counsel did here, and on direct appeal this court stated: "This mitigating evidence is not insignificant, but given the aggravating circumstances and the multiple, brutal, unprovoked murders in this case, we do not deem the death sentences

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[25]See, e.g., Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979); Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989).

[26]Pickworth, 95 Nev. at 550, 598 P.2d at 627.

[27]Barron, 105 Nev. at 780, 783 P.2d at 452 (citation omitted).

excessive."[28] For their part, prosecutors are entitled to argue that the evidence presented by the defendant fails to establish any mitigating circumstances or that any mitigating circumstances lack weight in comparison to the aggravating circumstances. However, they violate their primary duty, which is to see that justice is done,[29] when they suggest to the jury that the defendant's case for a sentence less than death is somehow outrageous or illegitimate.

We assume that counsel had no sound strategy for not objecting to these remarks. Nevertheless, we conclude that there is no reasonable probability that Floyd would not have received a death sentence if his counsel had objected at trial or raised this issue on appeal.

Floyd claims next that his trial and appellant counsel were ineffective in regard to three jury instructions. As we explain, we conclude that this claim warrants no relief.

Floyd complains that the jury was improperly instructed in the guilt phase that malice "may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." He contends that the instruction establishes an impermissible presumption of malice and uses terms that are pejorative, archaic, and devoid of rational content. This court has rejected these contentions.[30] The jury also received a so-called "antisympathy instruction" in the guilt phase, which Floyd contends

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[28]Floyd, 118 Nev. at 177, 42 P.3d at 263.

[29]See Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

[30]See Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001); Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000).

undermined the jury's obligation to consider all mitigating evidence. We have also rejected this contention where, as here, the jury was instructed to consider any mitigating circumstances.[31] Counsel had no basis to challenge these two instructions and were not ineffective.

Floyd contends that in the penalty phase the jury was not properly instructed that it could not consider character evidence in weighing aggravating circumstances against mitigating circumstances. The jury was not fully instructed on this topic; however, we conclude that Floyd was not prejudiced as a result.

This court has held that jurors cannot consider character (or "other matter") evidence "in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances."[32] The jury here was instructed that it could impose a sentence of death only if:

> (1) The jurors find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists; (2) Each and every juror determines that the mitigating circumstance or circumstances, if any, which he or she has found do not outweigh the aggravating circumstance or circumstances; and (3) The jurors unanimously determine that in their discretion a sentence of death is appropriate.

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[31]See Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 803-04 (1996).

[32]Hollaway, 116 Nev. at 746, 6 P.3d at 997; see also NRS 175.552(3) (providing that at a penalty hearing, evidence may be presented on aggravating and mitigating circumstances "and on any other matter which the court deems relevant to sentence").

Citing Byford v. State,[33] Floyd argues that the jury should have been further instructed that "[e]vidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances."

This court in Byford approved of both of these instructions, concluding that they properly informed the jury that it could not consider general character evidence until it had determined whether the defendant was eligible for the death penalty.[34] In an earlier opinion, we expressly directed district courts to give the first instruction in capital penalty hearings.[35] We did not direct in Byford, or elsewhere, that the second one be given.[36] However, in 2001, a year after both the Byford decision and Floyd's trial, this court provided an instruction on this topic for future use.[37] So it would have been better if the second instruction or an equivalent had been given, but that does not mean that trial counsel's failure to request the instruction was so deficient or prejudicial that it amounted to ineffective assistance.

Trial counsel may not even have acted deficiently since at that time this court had not yet required such an instruction. Assuming counsel reasonably should have requested the instruction, its omission was not prejudicial. As the State points out, Floyd's opening brief does not

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[33]116 Nev. 215, 239, 994 P.2d 700, 716 (2000).

[34]Id.

[35]See Geary v. State, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998) (Geary II).

[36]116 Nev. at 239, 994 P.2d at 716.

[37]See Evans, 117 Nev. at 635-36, 28 P.3d at 516-17.

even describe any character evidence presented by the State. In his reply brief, Floyd points to only two instances of character evidence, both presented in the guilt phase: the testimony of the sexual-assault victim portraying him "as a bad person with 'sick little fantasies'" and evidence that pornographic videos were found in his room. In the context of this quadruple-murder case, the potential prejudicial impact of this evidence appears negligible.

Further, Floyd has not explained why we should fear that jurors improperly considered this evidence in determining the existence or weight of the aggravating circumstances. Although the written instructions did not expressly tell the jurors not to consider such evidence, the jurors were properly instructed on the elements of the three alleged aggravators. Further, during the penalty closing argument, the district court correctly informed the jury on this topic after the prosecutor made the following argument:

> The law does not look at the number of mitigators versus the number of aggravators. It looks at the total weight. So what I'm telling you is take that laundry list [of mitigating circumstances], put them all over there on the scale and then compare that to this defendant terrorizing, terrorizing three dozen people—

Defense counsel objected: "Not an aggravator, Judge. Objection." The district court sustained the objection "as to the form" of the prosecutor's argument and told the jury: "The aggravating circumstances are those that Mr. Bell [the prosecutor] just talked about. If you find the aggravating circumstances outweigh the mitigating circumstances, then you can go on to consider other things." (Emphasis added.) Considering the record as a whole, we conclude that the jurors were sufficiently

instructed on this matter, and the presumption is that they followed those instructions.[38]

Floyd does not show that he was prejudiced by the challenged jury instructions or that an evidentiary hearing was required on this issue.

Finally, Floyd asserts that his trial and appellate counsel should have challenged two aggravating circumstances as improperly "overlapping" because the same set of facts gave rise to the aggravator of creating a great risk of death to more than one person and the aggravator of having been convicted of more than one murder in this case. He fails to cite, let alone discuss, this court's caselaw regarding duplicative aggravators. We conclude that both aggravators were proper.

Even if aggravators are based on the same facts, they are not improperly duplicative when they each could be based upon different facts in another case and address different state interests.[39] The two aggravators here are based to some degree on the same facts, but not completely—Floyd created a risk to the lives of more than just the four people that he murdered. The interests behind the aggravators are distinguishable as well. One is directed against indiscriminately dangerous conduct by a murderer, regardless of whether it causes more than one death; the other is directed against murderers who kill more than one victim, regardless of whether their conduct was indiscriminate or precise. No evidentiary hearing was necessary on this issue.

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[38]See Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 448 (2000).

[39]See Hernandez v. State, 118 Nev. 513, 529-30, 50 P.3d 1100, 1111 (2002); Geary v. State, 112 Nev. 1434, 1448, 930 P.2d 719, 728 (1996), clarified on rehearing, Geary II, 114 Nev. 100, 952 P.2d 431.

None of Floyd's claims warrants relief. Accordingly, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Honorable Jackie Glass, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk