

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN DORAN WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47471

FILED

OCT 21 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an 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 May 5, 2000, appellant Christian Doran Walker was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon and violation of a temporary protective order. Walker was sentenced to serve a term of life in the Nevada State Prison with parole eligibility after ten years for the murder count and a concurrent term of one year for the count of violation of the TPO. Walker appealed, and this court affirmed.¹ The remittitur issued on November 5, 2001.

On October 15, 2002, Walker filed a proper person petition for a writ of habeas corpus. The State opposed the petition. Walker then hired post-conviction counsel and filed a supplemental brief. On May 24,

¹Walker v. State, Docket No. 35996 (Order of Affirmance, October 8, 2001).

2006, after conducting an evidentiary hearing, the district court entered an order denying Walker's petition. This appeal followed.

Ineffective assistance of trial counsel

Walker raises a number of claims that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.² To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.³ The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴ A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, Walker argues that trial counsel was ineffective for failing to call Jesus Antonio Lopez-Tizoc as a witness. Specifically, Walker argues that Lopez could have rebutted testimony that he possessed a .25

²Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the Strickland test).

³Strickland, 466 U.S. at 694.

⁴Id. at 697.

⁵Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

caliber weapon by testifying that the weapon was a .22 caliber. Walker fails to demonstrate that trial counsel's performance was deficient. Trial counsel testified that he disputed the caliber of Walker's weapon at trial, and that because of Walker's many other negative associations it would not have been a good idea to present a witness to the jury who was friends with Walker and was a self-professed weapons expert. In its order, the district court concluded that the decision not to call Lopez was a tactical one.⁶ In the context of claims of ineffective assistance of counsel, "a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances."⁷ Walker has not demonstrated extraordinary circumstances here. Therefore, the district court did not err in denying this claim.

Second, Walker argues that trial counsel was ineffective for failing to call Danielle Michelle Hoop to rebut the testimony of Tawsha Orillo regarding Walker's demeanor in the days after the murder. Appellant fails to demonstrate that counsel's performance was deficient. Trial counsel testified that Hoop was not a sober witness when he interviewed her and that she had moved out of Nevada.⁸ We conclude that trial counsel acted reasonably in deciding not to pursue this potentially unreliable witness for the limited purpose of challenging testimony of the

⁶See Riley, 110 Nev. at 653, 878 P.2d at 281-82.

⁷Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)) (internal quotation marks omitted).

⁸See id.

defendant's demeanor. Therefore, the district court did not err in denying this claim.

Third, Walker argues that trial counsel was ineffective for failing to call Orillo's sister, Angel Davies, to rebut Orillo's testimony regarding Walker's violent intentions toward the victim. Walker fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that there was something about the witness's "demeanor, her lucidity, her sobriety or something that struck me as not wanting to call her." The prosecutor recalled that Davies "was incredibly high" and was falling out of her chair when he interviewed her. The decision not to call Davies was a tactical decision and Walker fails to demonstrate any extraordinary circumstances permitting a challenge to the decision.⁹ Therefore, we conclude that trial counsel did not act unreasonably in deciding against calling Davies at trial. Moreover, Orillo's testimony of Walker's ill will toward the victim was cumulative—other witnesses testified of Walker's violent acts towards her. Accordingly, we conclude that Walker failed to demonstrate that had Davies been called at trial, the results would have been different. Therefore, Walker failed to show that he was prejudiced, and the district court did not err in denying this claim.

Fourth, Walker argues that trial counsel was ineffective for failing to investigate a backpack, apron, receipt, and several hairs found at Walker's residence, and for failing to preclude the use of this evidence at trial. During trial, the State argued that the backpack and apron

⁹See id.

belonged to the victim. Walker argues that this was crucial evidence and that further investigation by trial counsel would have revealed that the backpack belonged to him, that the apron belonged to a friend, and that the hairs were not the victim's but were animal hairs. Appellant fails to demonstrate that trial counsel's performance was deficient. Walker presented no evidence conclusively establishing ownership of the backpack or apron. The receipt was a cash receipt with no identifiers. DNA analysis of the three hairs revealed that two of them were animal hairs and the third was a human hair that was too damaged for further analysis. Moreover, trial counsel testified that he made a strategic decision to argue that there was nothing unusual about the victim's belongings being at Walker's house because they had a friendly relationship. The district court found that the backpack and apron were not pivotal evidence and that there was a tactical decision to use the evidence in this manner. Because Walker fails to demonstrate any extraordinary circumstances regarding this decision,¹⁰ we agree, and conclude that the district court did not err in denying this claim.

Fifth, Walker argues that trial counsel was ineffective for failing to obtain alibi evidence and interview corroborating witnesses. Specifically, Walker contends that trial counsel failed to obtain recorded information about the use of his MGM Gameworks game card, failing to obtain video surveillance footage from Gameworks, and failing to investigate several witnesses who had seen him at Gameworks on the night of the murder. Walker fails to demonstrate that counsel's

¹⁰See id.

performance was deficient or that he was prejudiced. First, the district court found that the game card could not necessarily establish an alibi because anyone who possessed the card could have used it. Further, neither the information nor the surveillance footage was still available when trial counsel started on the case. Therefore, failure to obtain this evidence did not render counsel's performance deficient. Second, six or seven alibi witnesses, the "best of the lot available," were presented at trial. Therefore, the alibi witnesses named by Walker would have been cumulative, and he has failed to demonstrate that trial counsel's decision not to call these particular witnesses was prejudicial to the defense. Walker fails to demonstrate any extraordinary circumstances permitting a challenge of trial counsel's tactical decision.¹¹ Therefore, the district court did not err in denying this claim.

Sixth, Walker argues that trial counsel was ineffective for failing to obtain a general expert witness to testify to the effects of alcohol and drugs on the human body. Trial counsel submitted a jury instruction stating that "the testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not use drugs or alcohol." The district court rejected the instruction. Walker argues that the district court did so "because there was no testimony at trial from an expert to explain the effects of drugs upon an individual." Walker fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced.

¹¹See id.

Our review of the record indicates that the district court's decision not to give the proposed instruction was based on the district court's conclusion that (1) it was not proper to instruct the jury how to view or evaluate testimony, (2) consideration of how drug or alcohol abuse might affect the credibility of a witness was a matter of common sense, and (3) almost every witness appearing at trial admitted using drugs and thus the distinction offered by the instruction was unnecessary. Accordingly, the district court's rejection of the instruction was not the result of the failure to call an expert witness and Walker fails to demonstrate that trial counsel's performance was deficient. In addition, Walker does not specifically identify any particular expert nor present any potential testimony.¹² Lastly, practically all of the witnesses at trial admitted to drug use, and thus even if trial counsel had offered the proposed expert testimony it would have reflected equally on the credibility of defense witnesses as well as those for the State. We note that the jury was instructed to weigh the credibility of the witnesses based on their testimony and demeanor.¹³ Accordingly, Walker fails to show

¹²See Evans v. State, 117 Nev. 609, 645, 28 P.3d 498, 522 (2001); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹³Jury Instruction No. 26 read in part:

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 statements and the strength or weakness of his recollections.

that he was prejudiced, and the district court did not err in denying this claim.

Seventh, Walker argues that trial counsel was ineffective for failing to investigate other persons. Specifically, Walker claims that trial counsel was ineffective for failing to conduct further investigation into three persons who may have been involved in the murder: Douglas “Chance” Ackley, Nearie Jenetta Howes, and Alicia Jiminez. Walker fails to demonstrate that trial counsel’s performance was deficient or that he was prejudiced. Walker did not present any specific evidence that someone else committed the murder or specify what additional evidence would have been discovered through further investigation.¹⁴ Walker also fails to demonstrate a reasonable probability that investigation of any of these three witnesses would have led to a different result at trial. Therefore, the district court did not err in denying this claim.

Eighth, Walker argues that trial counsel was ineffective for failing to present evidence that the victim was engaged in criminal activity and associated with persons committing crimes. Specifically, Walker claims that Emily Reidhead and Taneal Rice would have testified that the victim was part of a counterfeiting ring and associated with dangerous criminals, and asserts that evidence of this association would have supported the defense theory that someone else committed the murder. Walker fails to demonstrate that trial counsel’s performance was deficient. As stated above, in the context of claims of ineffective assistance of counsel, “a tactical decision . . . is virtually unchallengeable absent

¹⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

extraordinary circumstances.”¹⁵ Trial counsel was concerned that attempts to paint the victim in a bad light would backfire with the jury. The victim was a young female with a job, friends, and a relationship with her parents, and trial counsel concluded that this was not the type of victim to try and paint as a nefarious individual. Walker has not demonstrated extraordinary circumstances here. Therefore, the district court did not err in denying this claim.

Ninth, Walker argues that trial counsel was ineffective for failing to interview several witnesses who were at a party with Walker and the victim on October 3, 1997. Specifically, Walker contends that Tobin Roche provided a list of at least ten names of individuals who had attended the party, and that counsel’s failure to interview all of them constituted ineffective assistance of counsel. Walker fails to demonstrate that trial counsel’s performance was deficient. Trial counsel testified that he went to the house where the party took place and, in the course of the investigation, interviewed dozens of persons including people who were at the party. Witnesses testified at trial that they saw Walker, the victim, and Walker’s cousin at the party. According to Walker, at least 50 people attended the party. Walker failed to specify what additional evidence would have been uncovered had counsel specifically interviewed the ten witnesses listed by Roche.¹⁶ Therefore, the district court did not err in denying this claim.

¹⁵Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)) (internal quotation marks omitted).

¹⁶See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Tenth, Walker argues that trial counsel was ineffective for failing to object to prosecutorial misconduct and failing to propose a limiting instruction regarding the admission of evidence of prior bad acts. Walker fails to demonstrate that trial counsel's performance was deficient. The prosecutor's alleged misconduct was the elicitation of the details of Walker's prior attempted murder of David Dimas and Walker's acts of graffiti. However, the district court admitted evidence of these crimes after a proper Petrocelli¹⁷ hearing, and Walker failed to demonstrate that the prosecutor introduced evidence outside the scope of the district court's ruling. Further, the jury received a limiting instruction regarding Walker's prior bad acts.¹⁸ Therefore, the district court did not err in denying this claim.

Eleventh, Walker argues that trial counsel was ineffective for failing to impeach the State's witnesses with prior inconsistent statements. Specifically, Walker asserts that trial counsel was ineffective for failing to cross-examine Sarah Hendricks and Dana Eichar regarding

¹⁷Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985).

¹⁸Jury Instruction No. 24 read:

Evidence which tends to show that the defendant committed offenses other than that for which he is on trial, if believed, was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the defendant's preparation, intent, motive, plan, knowledge, identity or the absence of mistake or accident.

statements that they made to police. This claim was not raised in the district court and is not properly raised for the first time on appeal.¹⁹ Therefore, we decline to consider it.

Twelfth, Walker claims that the cumulative effect of the various alleged errors of ineffective assistance support the reversal of his conviction. In reviewing Walker's petition we have not found any instances of ineffective assistance of counsel. Therefore, we conclude that Walker's claim is without merit.

Other claims of error

Next, Walker contends that the district court erred in failing to allow a "full and fair" evidentiary hearing when it declined Walker's requests to call various witnesses. Walker's claim is without merit. The district court repeatedly informed Walker that it was not interested in retrying the case, and that the purpose of the evidentiary hearing was to address Walker's claims of ineffective assistance of counsel, rather than permit Walker another opportunity to present a defense. Accordingly, Walker's trial counsel was called to the stand and was thoroughly cross-examined. As to the other proffered witnesses, there was little, if any, dispute at the hearing about the probable content of their testimony. In fact, most of them had submitted sworn affidavits reflecting the testimony that they intended to offer. Rather, the inquiry at the hearing was whether trial counsel had been ineffective for failing to investigate these witnesses or failing to call them at trial. Under these circumstances, we

¹⁹See McNelson v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

conclude that the district court did not err in precluding these witnesses from testifying at the evidentiary hearing.

Next, Walker challenges this court's prior determination on direct appeal that there was overwhelming evidence of his guilt. Based on his post-trial investigation and the witnesses discussed above, Walker contends that he has called into question the evidence that this court concluded was overwhelming. Thus, he argues that this court should reconsider its prior determination that certain trial errors were harmless. In its order denying Walker's petition, the district court found that "much of what Mr. Walker presents is speculative." The district court described the evidence discussed above as "bits of evidence of little cumulative value and certainly nothing which could be construed as sufficient to overcome the substantial weight of evidence presented against the defendant." We agree, and decline to revisit our prior affirmance of Walker's conviction.

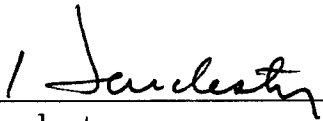
Finally, Walker raises two issues that were already addressed on direct appeal, but were not previously presented in the context of federal law. Specifically, Walker asserts that the district court's decision to admit prior bad acts and the fact that the jury viewed evidence that was not admitted at trial were both violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. These legal grounds were available at the time Walker filed his direct appeal, and he has not demonstrated good cause or prejudice sufficient to overcome the procedural bars.²⁰ Further, the doctrine of the law of the case prevents

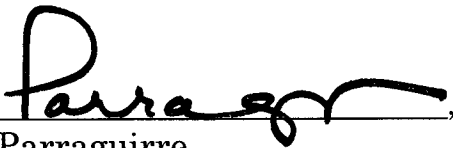
²⁰See NRS 34.810(1)(b)

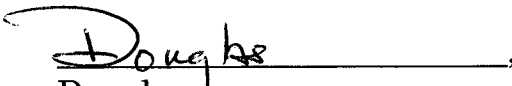
further litigation of these claims,²¹ and therefore, we decline to address them.

Having reviewed Walker's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Kirk T. Kennedy
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²¹See Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); Mitchell v. State, 122 Nev. 1269, 1274-75, 149 P.3d 33, 36 (2006).