IN THE SUPREME COURT OF THE STATE OF NEVADA

GONZALO VILLALOBOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48079

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon (count 1), four counts of attempted murder with the use of a deadly weapon (counts 2, 4, 6, 8), and five counts of discharging a firearm out of a motor vehicle (counts 10 through 14). Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Gonzalo Villalobos was sentenced to life imprisonment with the possibility of parole after serving ten years for the second-degree murder conviction, plus an equal and consecutive term for the use of a deadly weapon, to run consecutively to all other counts; for each attempted murder conviction, he was sentenced to a maximum of five years with a minimum parole eligibility after two years, plus equal and consecutive terms for the use of a deadly weapon, counts 2 and 4 to run consecutively and counts 6 and 8 to run concurrently; for each conviction of discharging a firearm out of a motor vehicle, he was sentenced to a maximum of five years with minimum parole eligibility after two years, to run concurrently. Counts 3, 5, 7 and 9 were dismissed.

On appeal, Villalobos argues: (1) his statement to the police in New York was admitted in violation of his state and federal rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), (2) improper prior

bad act evidence was introduced against him, and (3) he received ineffective assistance of counsel with regard to the admission of the prior bad act evidence. For the reasons set forth below, we conclude that Villalobos' contentions fail, and therefore, affirm the judgment of conviction.

The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

New York statement

Villalobos argues that his statement to the police, "I'll have to get one," made while the police were giving him his Miranda warnings, was an invocation of the right to counsel. Therefore, according to Villalobos, his subsequent statements that were made without an attorney present were in violation of his right to counsel and should therefore be suppressed.

This court will not disturb a district court's determination of whether a defendant requested counsel prior to questioning if substantial evidence supports the district court's ruling. Harte v. State, 116 Nev. 1054, 1065, 13 P.3d 420, 427-28 (2000). An invocation of the right to counsel requires an unambiguous and unequivocal request for an attorney. Davis v. United States, 512 U.S. 452, 461-62 (1994). Without such a request, officers have no obligation to stop questioning. Id. A request for counsel must be, at a minimum, "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

Villalobos, in response to his Miranda rights, stated "I'll have to get one"; he now asserts this was an invocation of his right to counsel. We disagree.

An invocation of the right to counsel requires more than "I'll have to get one." When taken in context, it is clear that Villalobos was not unambiguously and unequivocally requesting an attorney. A reasonable person hearing this statement would not have understood Villalobos to be asking for an attorney. Accordingly, we conclude that there was substantial evidence to support the district court's ruling that Villalobos was not requesting the assistance of an attorney. Thus, Villalobos' statement to the police was properly admitted.

Character evidence

Villalobos next argues that the State's examination of a witness alleging that Villalobos shot someone in the chest in 1992 was error, as there was no proof that he shot someone and the State did not demonstrate a good-faith basis for its belief that Villalobos had committed the act. We disagree.

"This court will overturn a district court's decision to admit or exclude evidence only when there has been an abuse of discretion." Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (citing Greene v. State, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997)).

Admissible character evidence is governed by statute. Under NRS 48.045(1)(a), if the defendant offers evidence of his own character trait, the State may offer similar evidence to rebut the defendant's evidence. NRS 48.055(1) provides that the evidence must be in the form of reputation or opinion testimony and allows a party to test such testimony on cross-examination by inquiry into the witness's knowledge of specific instances of conduct. See Daniel v. State, 119 Nev. 498, 512, 78 P.3d 890, 899-900 (2003). This court stated in Daniel v. State, "before allowing inquiry into facts harmful to the defendant's character that are not

otherwise in evidence, the trial court must determine, outside the presence of the jury, whether the prosecution has a reasonable, good-faith basis for its belief that the defendant committed the acts subject to the inquiry." Id. at 513, 78 P.3d at 900.

In this instance, Villalobos placed his character at issue on cross-examination of a witness by asking the witness whether, in her opinion, Villalobos was a "nice guy." Therefore, the State was permitted to offer similar evidence to rebut Villalobos' evidence pursuant to NRS 48.045(1)(a). The State rebutted Villalobos' character evidence by asking the witness whether she was aware that Villalobos had "shot somebody in 1992 in the chest." Defense counsel failed to object to the question regarding this specific instance of conduct.

While the district court arguably should have conducted a more thorough hearing under Daniel v. State before allowing testimony regarding the 1992 shooting, our review of the record indicates the parties did discuss the 1992 incident and the defense understood what happened in 1992 and was not surprised by the State's questioning. Furthermore, defense counsel did not dispute the truth of the specific act referred to, as evidenced by the failure to object or argue that this was a mischaracterization of the events of 1992. Therefore, the district court did not abuse its discretion by admitting this evidence because the State had a good-faith basis for its belief that Villalobos shot someone in the chest in 1992. However, we note that to eliminate confusion on review, the better practice would have been to place the full discussion on the record, and we expect the parties and the district court to do so in the future.

Ineffective assistance of counsel

Finally, Villalobos argues that defense counsel was ineffective for not properly objecting to the prior bad act evidence and that allowing this evidence, without objection, was not sound strategy. Furthermore, Villalobos contends that counsel's representation fell below an objective standard of reasonableness and that his deficient performance prejudiced the defense. We disagree.

This court has determined that "[a] claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Accordingly, claims of ineffective assistance of counsel should be presented in a timely post-conviction petition for a writ of habeas corpus because such claims necessitate an evidentiary hearing and are generally not appropriate for review on direct appeal. See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). This court has consistently declined to entertain claims of ineffective assistance of counsel on direct appeal because they are more appropriately raised in a post-conviction relief proceeding. Pellegrini v. State, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Feazell, 111 Nev. at 1449, 906 P.2d at 729; Ewell v. State, 105 Nev. 897, 900, 785 P.2d 1028, 1030 (1989); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981). This court has also stated that where "the issue presented is purely one of law, and an evidentiary hearing below would be of little value" then the court will address the issue on direct appeal. Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

Villalobos has not presented a single argument about why his claim of ineffective assistance of counsel should be reviewed on direct appeal. Furthermore, he admits there needs to be an evidentiary hearing to develop the record. Defense counsel's actions at trial do not present, on the record, a pure question of law as to his ineffectiveness. Therefore, this issue is better addressed in Villalobos' first post-conviction petition for a writ of habeas corpus and we decline to address it here. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Eighth Judicial District Court Dept. 7, District Judge
Law Offices of C. Conrad Claus
Legal Resource Group
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk