IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIN C. YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48305

FILED

APR 04 2007

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On March 28, 2005, appellant Erin C. Young was convicted, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced Young to serve two consecutive prison terms of 66 to 180 months. Young filed a direct appeal, and this court affirmed the judgment of conviction.[1]

On July 21, 2006, Young 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 NRS 34.770, the district court declined to appoint counsel to represent Young or to conduct an evidentiary hearing. On November 16, 2006, the district court denied Young's petition. This appeal followed.

In his petition, Young raised numerous claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel

[1]Young v. State, Docket No. 45155 (Order of Affirmance, March 16, 2006).

07-07491

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 errors prejudiced the defense.[2] To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.[3] To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.[4]

First, Young claimed that trial counsel was ineffective for failing to object to prosecutorial misconduct occurring in rebuttal closing argument. In particular, the prosecutor stated, "Don't be fooled by [the defense witness], don't be fooled by this defendant. Use your common sense and that will lead you to the correct verdict." The district court did not err by rejecting Young's claim.

Even assuming the comment was improper, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[5] "[W]here evidence of guilt is overwhelming, even aggravated

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[2]See Strickland v. Washington, 466 U.S. 668 (1984).

[3]Id. at 694.

[4]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[5]Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

prosecutorial misconduct may constitute harmless error."[6] In this case, the State presented overwhelming evidence that Young attempted to kill the victim with a deadly weapon. At trial, Young admitted that he hit the victim and that she suffered substantial bodily harm. Further, both the victim and an eyewitness testified that Young, a 6'4" male, struck the victim, a 5'3" female, in the face with a metal pipe. Several witnesses also testified that Young had recently threatened to kill the victim. Given the strength of the evidence against him, Young did not show that he was prejudiced by trial counsel's failure to object to the isolated remark by the prosecutor.

Second, Young claimed that trial counsel was ineffective for failing to object when the trial judge examined defense witness, Don Bailey. Specifically, Young argued that the trial judge's questions posed to Bailey about the manner in which Young struck the victim conveyed to the jurors her skepticism about Bailey's testimony, her partiality toward the State, and her disdain for Young. Young also argued that the judge acted as a "de facto prosecutor," completely abandoned her neutral role, and opened "a new avenue of questioning" by asking Bailey to describe Young's and the victim's clothing. The district court did not err by rejecting Young's claim.

"A trial judge has the right to examine witnesses for the purpose of establishing the truth or clarifying testimony, but in doing so [s]he must not become an advocate for either party, nor conduct [her]self

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[6]King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

in such a manner as to give the jury an impression of h[er] feelings."[7] In this case, there is no indication in the record that the trial judge acted as an advocate or conveyed her personal feelings about the case. The trial judge's examination of Bailey was limited and permissible and merely served to establish the truth or clarify Bailey's testimony describing the attack on the victim. Even assuming the trial judge acted impermissibly by questioning Bailey on an issue not addressed by the prosecutor, i.e., the victim's and Young's clothing, Young has failed to show that Bailey's testimony in response to the trial judge's inquiry was so significant that it changed the outcome of the trial. Therefore, Young did not show that trial counsel was ineffective for failing to object to the trial judge's examination of Bailey.

Third, Young claimed that trial counsel was ineffective for failing to request a jury instruction informing the jurors that the two charges-- attempted murder with use of a deadly weapon and battery with use of a deadly weapon resulting in bodily harm--were alternative charges. Young claimed that the fact that the jurors did not know the criminal counts were charged in the alternative "raises the specter of juror confusion during deliberations," and if the jurors had been properly instructed that battery was a lesser included offense of attempted murder, they would have only convicted Young of the lesser charge. We conclude that the district court did not err by rejecting Young's claim.

This court has recognized that if a defendant is convicted of two offenses for the same act and "the elements of the greater offense are

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[7]Azbill v. State, 88 Nev. 240, 249, 495 P.2d 1064, 1070 (1972).

sufficiently established, the lesser offense . . . should simply be reversed without affecting the conviction for the more serious crime."[8] In this case, the elements of the greater offense of attempted murder with the use of a deadly weapon were sufficiently established, and the district court dismissed the conviction for the lesser-included battery offense. Accordingly, Young did not show that he was prejudiced by trial counsel's failure to request an instruction informing the jurors that the counts were charged in the alternative.

Fourth, Young contended that trial counsel was ineffective during voir dire for failing to challenge the prosecutor's race-neutral explanation for the peremptory challenge of the only African-American venire member. Specifically, Young alleged that defense counsel should have argued that: (1) the potential juror's prior conviction should not be a basis for exclusion because it was twenty-five to thirty years old;[9] (2) the two other Caucasian potential jurors with criminal convictions who were also challenged had more recent or serious convictions; and (3) one other Caucasian potential juror with a substance-related conviction for driving while under the influence was not challenged. The district court did not err by rejecting Young's claim.

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[8]See Point v. State, 102 Nev. 143, 147, 717 P.2d 38, 41 (1986), disapproved of on other grounds by Stowe v. State, 109 Nev. 743, 857 P.2d 15 (1993).

[9]We note that Young's reliance on NRS 50.095 in the petition was misplaced. NRS 50.095 provides that a witness at trial may not be impeached with prior criminal convictions that are remote in time. The statute, however, does not apply at voir dire because jurors are not witnesses.

To establish that peremptory challenges were used in a racially discriminatory manner, a defendant must show that the prosecutor exercised her peremptory challenges to remove potential jurors from the venire based on race.[10] Where the prosecutor has asserted a race-neutral explanation for the challenge, the trial court must decide whether there has been purposeful discrimination.[11] In this case, the State provided several permissible, race-neutral reasons for dismissal of the potential juror, including that he had a prior criminal conviction for possession of controlled substances and had given equivocal responses with respect to whether he could sit fairly in judgment in the case. The prosecutor also explained that she had challenged two other potential jurors, who were not African-American, based on the fact that they also had criminal convictions for possession of controlled substances, and there were three prospective jurors who were minorities who were not challenged. There was sufficient evidence in the record of the voir dire supporting the prosecutor's race-neutral explanation for the peremptory challenge. Accordingly, Young did not demonstrate that he was prejudiced by trial counsel's failure to object to the race-neutral explanation proffered by the State.

Fifth, Young claimed that trial counsel was ineffective for failing to object to the admission of cumulative testimony on rebuttal. The district court did not err by denying Young's claim because it lacked

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[10]See Kaczmarek v. State, 120 Nev. 314, 332-33, 91 P.3d 16, 29 (2004).

[11]Ford v. State, 122 Nev. ___, ___, 132 P.3d 574, 578 (2006).

adequate specificity.[12] Young neither identified the witness testimony that should have been excluded nor provided any legal argument in support of his allegation that the testimony was not admissible. Further, the district court has discretion with respect to the admission of evidence and is not required to exclude testimony merely because it is cumulative.[13] Accordingly, Young did not demonstrate that he was prejudiced by trial counsel's failure to object to the admission of cumulative evidence.

Sixth, Young asserted that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel on direct appeal. The district court did not err by rejecting this claim. The issue of ineffective of assistance of trial counsel is not generally reviewable on direct appeal from the judgment of conviction.[14] Accordingly, Young did not demonstrate that he was prejudiced by appellate counsel's failure to raise claims of ineffective assistance on direct appeal because they had no reasonable likelihood success.

Seventh, Young claimed that there was insufficient evidence in support of his conviction for attempted murder and battery each with the use of a deadly weapon because he only hit the victim once, the pipe was never found, and the testimony was conflicting on whether he had previously threatened the victim. Young's claim was considered and rejected in his direct appeal from the judgment of conviction. The doctrine

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[12]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

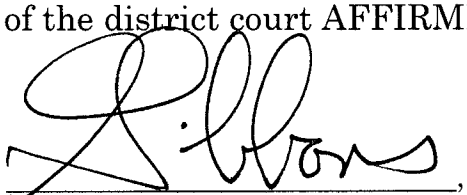
[13]NRS 48.035(2) provides that "relevant [ ] evidence may be excluded if its probative value is substantially outweighed by . . . [the] needless presentation of cumulative evidence." (Emphasis added.)

[14]Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

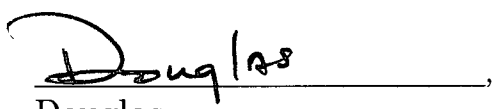
of the law of the case prevents further litigation of these claims and cannot be avoided by a more detailed and precisely focused argument made upon reflection of the prior proceedings.[15] Therefore, the district court did not err in denying his claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Young is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



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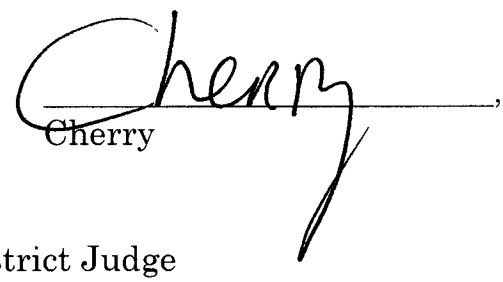
Douglas



_____, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Erin C. Young
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[15]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[16]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).