

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAMILLE CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48674

FILED

SEP 25 2007

ANETTE M. BLOOM
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ORDER OF AFFIRMANCE

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; Valerie Adair, Judge.

On September 1, 2005, the district court convicted appellant, pursuant to a jury verdict, of four counts of conspiracy to commit robbery, thirteen counts of robbery with the use of a deadly weapon, one count of attempted robbery with the use of a deadly weapon, and four counts of burglary while in the possession of a firearm. The district court sentenced appellant to serve terms totaling 20 to 60 years in the Nevada State Prison. This court affirmed appellant's convictions and sentences.¹ The remittitur issued on June 20, 2006.

¹Clark v. State, Docket No. 46023 (Order of Affirmance, May 24, 2006).

On September 1, 2006, 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 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 30, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that the district court erred when it improperly tried him before a white middle class jury. This claim should have been raised on appellant's direct appeal and appellant failed to demonstrate good cause for his failure to do so.² Therefore, the district court did not err in dismissing this claim.

Next, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of 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 proceeding's outcome

²NRS 34.810(1)(b)(1); NRS 34.810(1)(b)(2).

unreliable.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant claimed that his counsel was ineffective for failing to object to the composition of the jury, which he alleged contained only white middle class jurors.⁵ Appellant did not demonstrate that his trial counsel acted unreasonably in failing to object to the composition of the jury or that he was prejudiced by his counsel's failure to do so. Appellant did not have the "right to a 'petit jury composed in whole or in part of persons of his own race.'"⁶ Further, appellant did not allege, and there is nothing in the record to suggest, that the State exercised its peremptory challenges on the basis of race.⁷ The record indicated that three African-Americans were initially seated on appellant's jury; however, the district court removed one of the individuals for cause, and

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

⁴Strickland, 466 U.S. at 697.

⁵We note that nothing in the record before this court supports appellant's statement regarding the jurors' economic status.

⁶Batson v. Kentucky, 476 U.S. 79, 85 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)); see also Holland v. Illinois, 493 U.S. 474, 483 (1990).

⁷See Batson, 476 U.S. at 89.

the defense exercised its peremptory challenges to remove the other two individuals. Therefore, the district court did not err in denying this claim.

Second, appellant claims that his counsel was ineffective for failing to object to the denial of appellant's constitutional right to be tried by a jury composed of a fair cross-section of the community. Appellant asserted that "the random process used tends to more often than not contact the white middle class, which tends to result in 'all white middle class jury pools.'"

To demonstrate a prima facie violation of the fair cross-section requirement, a defendant must demonstrate that (1) the group he alleges was "excluded is a distinctive group in the community;" (2) the group's representation "in jury venires is not fair and reasonable in relation to the number of such persons in the community;" and (3) the underrepresentation is due to "systematic exclusion of the group in the jury-selection process."⁸ Appellant failed to carry the burden of establishing a prima facie violation of this doctrine.⁹ Although he sufficiently identified distinctive groups, he failed to carry his burden of establishing either underrepresentation or systematic exclusion. First, although he stated that three members of his jury panel were African-

⁸Rippo v. State, 122 Nev. ___, ___, 146 P.3d 279, 286 (2006) (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).

⁹See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996).

American, appellant did not provide the statistical data necessary for determining relative underrepresentation as required by the second prong of the Duren test.¹⁰ Second, appellant failed to demonstrate that the alleged underrepresentation was due to systematic exclusion of African-Americans or other distinctive groups in the jury selection process as required by the third prong.¹¹ Because appellant failed to establish a prima facie violation of the fair cross-section doctrine, we conclude that appellant's counsel was not ineffective for failing to object. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for advising him to waive his right to a preliminary hearing in an attempt to reach a plea bargain. Appellant asserted that his counsel's advice caused him to proceed to trial on all 22 counts of the second amended information. Appellant did not establish that he was prejudiced by his counsel's actions. The district court personally addressed appellant concerning the waiver of his right to a preliminary hearing. Appellant waived his right in open court after he was advised by the court that his waiver was unconditional and could not be withdrawn if the plea negotiations did not result in an acceptable plea bargain. Moreover, there was overwhelming evidence of

¹⁰See Duren, 439 U.S. at 364.

¹¹See id.

appellant's guilt.¹² Six witnesses from three of the four locations identified appellant as one of the men involved in the robberies. Surveillance video and photographs of all four of the robberies were shown to the jury. Appellant's uncle identified him in the surveillance photographs and testified to that effect. In addition, appellant's fingerprint was recovered from one of the crime scenes. As there was overwhelming evidence of appellant's guilt, and appellant voluntarily and unconditionally waived his right to a preliminary hearing, he did not show that he was prejudiced by his counsel's advice. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to remain in contact with him prior to trial. Appellant did not allege any specific facts in relation to his claim. A petitioner is not entitled to relief where his claims are "unsupported by any specific factual allegations."¹³ Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed his counsel was ineffective for failing to contact witnesses, obtain expert testimony regarding fingerprint and identification evidence, conduct DNA testing on a sweater purportedly

¹²See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) ("overwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel") (citing Strickland, 466 U.S. at 697).

¹³Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

worn during the robbery, and conduct a live line-up in court. Appellant did not demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify possible or potential experts on fingerprint or identification evidence or the potential testimony these experts would have offered.¹⁴ Appellant provided no support, other than his bare allegation, that his counsel did not interview the witnesses.¹⁵ Moreover, appellant did not identify the information that would have been obtained had his counsel interviewed the witnesses. Further, appellant did not show that a possible negative test for his DNA on the sweater that the State alleged he wore during the robberies would have significantly undermined the numerous witness identifications and surveillance footage of him at the robberies, and thus appellant failed to demonstrate that such evidence would have altered the outcome of the case. Lastly, appellant did not establish that a line-up in court would have undermined the testimony of all six witnesses that identified him and rendered the surveillance footage of the robberies unreliable. Thus, appellant did not show that further investigation by his counsel would have resulted in a different outcome at trial. Therefore, we conclude the district court did not err in denying this claim.

¹⁴Id.

¹⁵Id.

Sixth, appellant claimed that his trial counsel was ineffective for failing to challenge the State's evidence. Specifically, appellant claimed that counsel's cross-examinations were based on similar themes that involved commenting on the witnesses' failure to provide detailed descriptions of the assailants immediately after the crime and highlighting the fact that the police did not conduct line-ups with most witnesses. Appellant did not demonstrate that his counsel's performance was deficient or that he was prejudiced by the similar cross-examinations. Much of the victims' trial testimony, which concerned the actions of the men who robbed the four businesses, was similar. It is reasonable that the cross-examination of those witnesses would also be similar. Regardless of whether appellant's counsel's examinations were reasonable, appellant did not identify questions that his counsel neglected to ask or demonstrate that asking different questions would have had a reasonable probability of a different outcome. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to raise a claim of multiplicity. Appellant did not identify the convictions that he asserted were multiplicitous.¹⁶ Moreover, appellant did not show that he was prejudiced by his counsel's failure to raise a claim that his convictions were multiplicitous. "The Double Jeopardy

¹⁶Id.

Clause of United States Constitution protects defendants from multiple punishments for the same offense."¹⁷ "The general test for multiplicity is that offenses are separate if each requires proof of an additional fact that the other does not."¹⁸ In addition, offenses that occur at different times or places are not multiplicitous because they do not "arise out of a single wrongful act."¹⁹ Appellant's conspiracy convictions were not multiplicitous with each other because the acts occurred at different times and the agreements involved different locations. Appellant's convictions for burglary while in possession of a firearm were not multiplicitous with each other because those events occurred on different dates and at different businesses. Lastly, while the attempted robbery with the use of a deadly weapon and some of the robbery with the use of a deadly weapon convictions occurred on the same date and in the same general location, each conviction involved a different victim. The convictions were not multiplicitous merely because of the "fortuitous circumstance" that some of the victims happened to work together or go shopping at the same

¹⁷Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003); see also U.S. Const. amend. V.

¹⁸Bedard v. State, 118 Nev. 410, 413, 48 P.3d 46, 48 (2002) (quoting Gordon v. Dist. Court, 112 Nev. 216, 229, 913 P.2d 240, 249 (1996)).

¹⁹Id. (internal quotations omitted).

time.²⁰ The crimes of conspiracy to commit robbery, robbery with the use of a deadly weapon, and burglary in possession of a firearm, which occurred on the same day, were not multiplicitous, and did not violate double jeopardy because the offenses each required proof of an element not required for the other offenses.²¹ Further, the convictions were not multiplicitous as the gravamen of each offense was different.²² The gravamen of appellant's attempted robbery and robbery convictions was the taking of property from other people. The gravamen of appellant's burglary convictions was the unlawful entry into the businesses where he engaged in the robberies. Lastly, the gravamen of appellant's conspiracy to commit robbery convictions was the agreement with his compatriots to engage in the criminal behavior. Consequently, appellant failed to

²⁰See generally *id.* at 413-14, 48 P.3d at 48 (reasoning that the burglarizing of separate suites, leased by separate "tenants who had no common interest other than the fortuitous circumstance that they happened to lease office suites in the same commercial building," were separate offenses that occurred at different times and places).

²¹See NRS 199.480 (requiring proof of an agreement for conspiracy); NRS 200.380(1) (requiring proof of the use of or threat of force to facilitate the taking of property from another person); NRS 193.165 (providing an additional penalty to the primary offense when a deadly weapon is used when committing the primary offense); NRS 205.060(1), (4) (requiring proof of the entry into a shop with the intent to commit a felony therein while possessing a firearm during the commission of the crime).

²²*Salazar*, 119 Nev. at 227, 70 P.3d at 751.

demonstrate that the convictions were impermissibly multiplicitous, such that the results of his trial would have been different if his trial counsel sought the dismissal of the purportedly multiplicitous counts. Therefore, the district court did not err in denying the claim.

Eighth, appellant claimed that his counsel was ineffective based on his opening and closing arguments. In particular, appellant asserted that counsel's argument concerning the State "jumping to conclusions," was improper and unfounded. Appellant failed to demonstrate that there was a reasonable probability that the results of the trial would have been different had trial counsel not argued that the police "jump[ed] to conclusions" during the course of its investigation. The jury was properly instructed that counsel's arguments were not evidence. Appellant did not indicate what arguments counsel neglected to raise that would have affected the outcome of the trial. Thus, appellant did not establish that he was prejudiced by his counsel's arguments. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel was ineffective for failing to object to prosecutorial misconduct. This court considered and rejected an identical claim of prosecutorial misconduct on direct appeal. The doctrine of the law of the case prevents further litigation of the issues and cannot be avoided by a more detailed and precisely focused

argument.²³ Further, given the overwhelming evidence of guilt, appellant failed to demonstrate that the alleged misstatement prejudiced the outcome of the trial.²⁴ Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his counsel was ineffective in arguing at sentencing that appellant was a "loyal member of [appellant's] gang." Appellant failed to establish that he was prejudiced by his counsel's statements. At the sentencing hearing, defense counsel stated that appellant's membership in a gang may have been a driving force behind his participation in the robberies. Counsel argued that concurrent sentences were appropriate to prevent appellant from being held responsible for the actions of other robbery participants. The district court indicated that it was considering a sentence totaling 20 to 60 years based on the seriousness of the crimes. Defense counsel then stated that there were facts about the case that his client did not provide on account of appellant being "sort of a loyal soldier." The district court ultimately sentenced appellant to sentences totaling 20 to 60 years in the Nevada State Prison. While the court noted that appellant's "dangerousness is

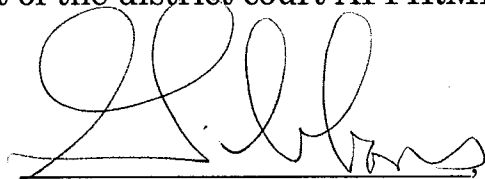
²³See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

²⁴See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding that prosecutorial misconduct may constitute harmless error when there is overwhelming evidence of guilt); Pellegrini v. State, 104 Nev. 625, 628-29, 764 P.2d 484, 487 (1988) (same).

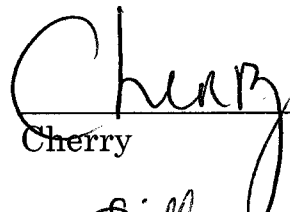
multiplied geometrically by the people that he hangs out with," there was no indication that the court based its conclusion on any gang membership beyond the individuals with whom he conducted the four armed robberies. Thus, regardless of the reasonableness of counsel's comment, appellant did not show that he was prejudiced by it - that but for the comment - he would have received a lesser sentence. Therefore, 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.²⁵ Accordingly, we


ORDER the judgment of the district court AFFIRMED.



Gibbons J.



Cherry J.



Saitta J.

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valerie Adair, District Judge
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