IN THE SUPREME COURT OF THE STATE OF NEVADA

DION WINSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50807

FILED

NOV 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person 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; Valerie Adair, Judge.

On October 24, 2005, the district court convicted appellant, pursuant to a jury verdict, of three counts of attempted murder with the use of a deadly weapon and one count of discharging a firearm at or into a structure, vehicle, aircraft or watercraft. The district court sentenced appellant to serve a total of two consecutive terms of 96 to 240 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal.[1] The remittitur issued on October 10, 2006.

On September 4, 2007, 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

[1]Winston v. State, Docket No. 45818 (Order of Affirmance, September 14, 2006).

conduct an evidentiary hearing. On December 7, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial 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 jury's verdict unreliable.[2] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[3]

First, appellant claimed that his trial counsel was ineffective for failing to request an instruction for the lesser-included offense of aiding and abetting. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. For purposes of principal liability, Nevada does not distinguish between the actor who directly commits the act constituting the offense and the actor who aids or abets in the commission of the act constituting the offense.[4] The jury was correctly instructed regarding principal liability and instructed that in order to convict a person of aiding and abetting an attempted murder, the person must have aided or abetted the attempt

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[2]Strickland 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 test in Strickland).

[3]Strickland, 466 U.S. at 697.

[4]See NRS 195.020.

with the specific intent to kill. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate whether Robert Labelle was shot by one of the other victims. Appellant noted that Labelle testified that he was shot by someone on the balcony, and appellant claimed that his trial counsel should have investigated Labelle's injuries and medical records and interviewed Labelle. Appellant claimed that such an investigation would have led trial counsel to discover that the caliber of the weapon alleged to have been used by appellant was different from the caliber of the bullet lodged in Labelle's back. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had further investigation been conducted. The bullet was still lodged in Labelle's back at the time of trial, and thus, appellant failed to demonstrate that his trial counsel would have been able to ascertain the caliber of the bullet that Labelle was shot with. The testimony at trial indicated that appellant was with at least one other person at the time of the shooting, and one witness testified that she saw both appellant and the second person pull guns out of their waist bands after jumping over the wall. Thus, testimony regarding a different caliber weapon would not have had a reasonable probability of altering the outcome of the trial given the State's theory that appellant was liable as the shooter or for aiding and abetting the shooter. Trial counsel referenced Labelle's testimony during closing arguments, however, the jury convicted appellant of the attempted murder of Labelle. It was for the jury to determine the weight and credibility of

the testimony and evidence.[5] Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to request an express malice jury instruction and/or failing to oppose an implied malice jury instruction. Appellant failed to demonstrate that he was prejudiced. "Attempted murder . . . is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill."[6] Attempted murder cannot be committed with implied malice.[7] Jury instruction number 4 correctly set forth the definition of attempted murder.[8]

However, jury instruction 5, in attempting to define malice aforethought, also incorrectly included language relating to implied malice.[9] Specifically, jury instruction 5 stated:

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[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[6]Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988); see also NRS 200.020(1) (defining express malice as the "deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.").

[7]Id.

[8]Jury instruction 4 stated, "Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely the deliberate intention unlawfully to kill."

[9]See NRS 200.020(2) ("Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.").

> Malice aforethought, as used in the definition of Attempted Murder, means the intentional attempt to kill another human being without legal cause, legal excuse or what law considers adequate provocation. The condition of mind described as malice aforethought may rise, not alone from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty.

This language refers to the malice aforethought for the offense of murder, in which malice aforethought may include express or implied malice, but does not correctly define malice aforethought as it relates to attempted murder, which may only be committed with express malice.[10] Thus, the inclusion of language relating to implied malice, in particular the language regarding the adequacy of the provocation and the "reckless disregard of consequences and social duty" was error.

Nevertheless, appellant failed to demonstrate that there was a reasonable probability of a different outcome in the instant case had trial counsel objected to this language in jury instruction 5. Substantial evidence was presented that appellant, either as the shooter or aiding and abetting the shooter, shot at Newman, Young and Labelle with the intention to kill—express malice. Testimony was presented at trial that prior to the shooting appellant had an argument with Clifton Newman over the payment of $5 for a radio that appellant had sold to Newman. The argument became physical and Newman and Jovan Young chased

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[10]See Keys, 104 Nev. at 738, 740, 766 P.2d at 271, 273; Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582-83 (1992).

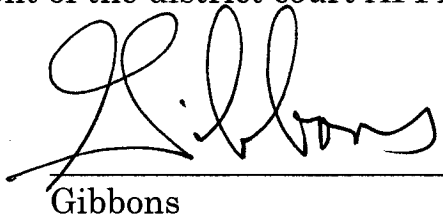
appellant to the street. Pamela Zarder, who was with appellant after the chase, testified that appellant appeared upset and scared. While outside of Zarder's son's residence, appellant's father and another man stopped and talked to appellant. Zarder heard appellant's father say, "You let them jump you" and "You let them disrespect you." Appellant's father and the other man left, and Zarder testified that appellant appeared even more upset. Appellant's father returned with appellant's shoe, which he lost during the chase, and the two walked together towards the apartments. About five to eight minutes later, Zarder testified that she heard gunshots. One witness saw appellant and another man jump over the wall and pull guns from the waist area, while a second witness saw appellant and two men jump over the wall and pull something out from their waistbands. Newman, Young and Labelle were on the balcony when approximately 18 shots were fired at the balcony. Just before the shooting, Young testified that he heard guns being cocked, saw two individuals, and heard someone state, "There them niggers go," before the shooting began. Newman heard appellant state, "There they go right there," and then Newman heard gunshots. Based on this evidence to express malice, appellant cannot demonstrate prejudice as a result of counsel's error. Labelle was struck in the back and was paralyzed from the chest down as a result of his injury. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the consecutive sentence for the use of a deadly weapon violated double jeopardy. Appellant waived this claim by failing to raise it on direct appeal and failed to demonstrate

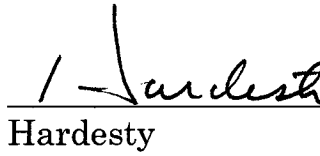
good cause for his failure to do so.[11] Moreover, as a separate and independent ground to deny relief, we conclude that this claim lacked merit. This court has previously determined that the deadly weapon enhancement imposed pursuant to NRS 193.165 does not violate double jeopardy.[12] Therefore, we conclude that 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.[13] Accordingly, we

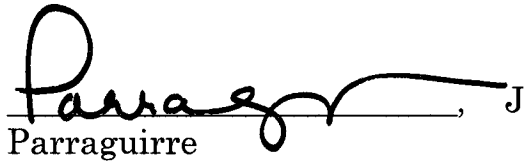
ORDER the judgment of the district court AFFIRMED.



_____, C. J.
Gibbons



_____, J.
Hardesty



_____, J.
Parraguirre

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[11]See NRS 34.810(1)(b).

[12]See Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975).

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

cc: Hon. Valerie Adair, District Judge
Dion Winston
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk