

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY MICHAEL STIEGLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51016

FILED

SEP 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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; James M. Bixler, Judge.

On October 6, 2005, the district court convicted appellant, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after 10 years. Appellant's judgment of conviction and sentence were affirmed on appeal. Stiegler v. State, Docket No. 46245 (Order of Affirmance, January 10, 2007). The remittitur issued on February 7, 2007.

On August 21, 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 conduct an evidentiary hearing. On December 31, 2007, the district court denied appellant's petition. This appeal followed.

Ineffective Assistance of Trial Counsel

In his petition, appellant raised 15 claims of 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 resulting prejudice such that there was a reasonable probability of a different outcome in the proceedings. 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). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

1. Jury Panel

Appellant claimed that trial counsel was ineffective for failing to request that Juror 3 be removed from the jury panel because he violated his oath by talking about the case prior to it being resolved. Juror 3, after being chosen for the jury but prior to any testimony being taken, was at a bar and told his companion that he had been chosen for a murder trial. The district court, trial counsel, and the State questioned him and determined that he did not discuss anything about the case except that it was a murder case. The district court admonished the juror and reminded him that he was not to discuss the case with anyone, but allowed the juror to remain on the jury.

In order to demonstrate that he was prejudiced by trial counsel's performance, appellant must establish that his claim was meritorious and that there was a reasonable likelihood that had trial counsel challenged the juror for cause, the challenge would have been

successful. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (recognizing that to demonstrate prejudice for the failure to file a motion to suppress, the petitioner must demonstrate that the motion would have been successful.). Appellant failed to demonstrate that had trial counsel challenged the juror for cause, the challenge would have been successful because appellant failed to demonstrate that misconduct occurred and that the misconduct prejudiced appellant. See Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003). To show prejudice, appellant must prove that “there is a reasonable probability or likelihood that the juror misconduct affected the verdict.” Id. at 564, 80 P.3d at 455. The conduct of Juror 3 occurred prior to opening statements and the conduct was not serious enough to affect the verdict because the juror merely stated that he was chosen for a murder trial. Appellant failed to allege how this conduct affected the jury’s verdict. Therefore, the district court did not err in denying this claim.

Appellant also claimed that trial counsel was ineffective for failing to request that Juror 10 be removed from the jury panel. Appellant claimed that trial counsel should have requested Juror 10’s removal because Juror 10 failed to disclose that he previously had a business relationship with appellant’s wife. Juror 10, on the second day of trial, realized that he knew appellant’s wife, and appellant’s wife was one of the potential witnesses. He informed the district court that he worked with appellant’s wife in 2000, five years previously, and that they were only business associates. After questioning from the district court, trial counsel, and the State, he informed the district court that nothing in their business relationship would prejudice him one way or another as to the

testimony she would give and that it would not affect his opinion as to her credibility.

Appellant failed to demonstrate that he was prejudiced. Under the standard stated above, appellant failed to demonstrate that had trial counsel challenged Juror 10 for cause, the challenge would have been successful. See Meyer, 119 Nev. 554, 80 P.3d 447. Appellant failed to demonstrate that Juror 10's conduct affected the jury's verdict because appellant's wife did not testify at trial and Juror 10 stated that he could be impartial. Therefore, the district court did not err in denying this claim.

2. Motion in Limine

Appellant claimed that trial counsel was ineffective for failing to file a motion in limine regarding the use of the word "crypt." In the opening statement, the State referred to the area where the body was found as a "crypt." Trial counsel did not object until he noticed that the State's demonstrative exhibit labeled the location where the body was found as a "crypt." Prior to this exhibit being presented to the jury, trial counsel objected and the district court sustained the objection.

Appellant failed to demonstrate that he was prejudiced. The word "crypt" was only used during opening statements and the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Further, appellant failed to allege how the use of the word "crypt" was prejudicial. Appellant confessed to hitting the victim over the head with a pipe, dragging him downstairs, placing the victim in the hole in the floor, pouring concrete on the victim, and laying carpet over the top. Given this evidence, appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel

objected to the use of the word "crypt" during opening arguments. Therefore, the district court did not err in denying this claim.

3. Victim's Character Evidence

Appellant claimed that trial counsel was ineffective for agreeing to limit the scope of evidence relating to the character of the victim. Specifically, appellant contended that trial counsel should not have agreed to exclude evidence that the victim molested young boys. He also contended that the victim's racist comments should have been presented.

Appellant failed to demonstrate that trial counsel's performance was deficient. Appellant failed to demonstrate that the evidence was admissible. In order to be admissible, evidence must be relevant. NRS 48.025. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Although evidence may be relevant, "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

Appellant failed to demonstrate that the molestation evidence was relevant or that the probative value substantially outweighed the danger of unfair prejudice, or that it would not cause confusion of the issues or that it would not mislead the jury. Appellant failed to demonstrate that the molestation evidence related to the crime he was charged with. Further, according to the record, the victim may have been arrested for child molestation, but he was not prosecuted on the charges. Because the molestation evidence did not relate to the crime, was highly

inflammatory, the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury.

Appellant also failed to demonstrate that the racist comments by the victim were relevant or that the probative value of the evidence substantially outweighed the danger of unfair prejudice, or that it would not cause confusion of the issues or that it would not mislead the jury. Appellant did not allege that racism played any role in the death of the victim nor is there any evidence in the record on appeal to support racism's role in the death. The racism evidence did not relate to the crime, was highly inflammatory and the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. Further, the witness who was going to testify about the racist comments testified that he knew that the victim had a gun and had threatened to use it.¹ The racist comments were therefore unnecessary. Accordingly, the district court did not err in denying this claim.

4. Failing to Adequately Cross-examine Witnesses

Appellant claimed that trial counsel was ineffective for failing to adequately cross-examine the victim's family, Detective Hardy, and the medical examiner. Appellant claimed that trial counsel should have cross-examined them more extensively about the victim's medical history and drug use and should have utilized the medical records of the victim.

¹The racist comments were made in relation to using a gun.

Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The victim's sister, Detective Hardy, and the medical examiner testified that they knew the victim had hepatitis C, heart problems, and used drugs.² In addition, drugs were found in the victim's system during the autopsy and subsequent toxicology tests. The victim's medical history and drug use were not disputed at trial. Appellant did not identify anything in the victim's medical records that should have been presented but was not. Appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel cross-examined these witnesses more extensively. Therefore, the district court did not err in denying this claim.

5. Jerry Honnert

Appellant claimed that trial counsel was ineffective for failing to cross-examine Jerry Honnert about being an informant and the parameters of the deal he may have made with the State. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not provide any evidence that Honnert was an informant or that he was offered a deal in exchange for his testimony. Appellant relied solely on the fact that Honnert had an outstanding warrant for his arrest on a burglary charge at the time that the victim was killed. Appellant failed to support this claim with specific facts that if true would have entitled him to relief. See Hargrove v. State, 100 Nev. 498,

²To the extent that appellant claimed that trial counsel should have cross-examined the victim's brother regarding the victim's medical history and drug use, this evidence was presented through several other witnesses and appellant failed to demonstrate that he was prejudiced because the victim's brother's testimony on these issues would have been cumulative.

502, 686 P.2d 222, 225 (1984). Appellant failed to demonstrate that cross-examination on any of these matters would have had a reasonable probability of altering the outcome at trial. Therefore, the district court did not err in denying this claim.

6. Failing to Object to Hearsay

Appellant claimed that trial counsel was ineffective for failing to object to hearsay statements from witnesses. Appellant failed to demonstrate that he was prejudiced. Appellant provided only one example in support of his claim, from the testimony of Agent Robel, in which he testified about his interview with Mark Hegge.³ In May of 2003, after the body was found, appellant left Las Vegas and went to work for Hegge in Arizona. Agent Robel testified that Hegge told him that when appellant began working for him, appellant informed Hegge that his name was Craig and that he left Las Vegas because he was wanted for murder. Appellant claimed that this testimony was hearsay and should not have been presented.

Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome had trial counsel objected. Here, Agent Robel's testimony regarding Hegge's statements was hearsay, see NRS 51.035 and NRS 51.067; however, the error was harmless because the evidence was previously testified to by Hegge. Hegge testified that he and appellant

³Appellant failed to specify other instances of witnesses testifying regarding hearsay and how the testimony might have affected the outcome of the trial. Therefore, the district court did not err in denying this claim. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

had conversations about appellant being wanted for murder in Las Vegas and Hegge testified that he told Agent Robel about these conversations. Thus, the challenged statements had already been admitted. Given that Hegge had already testified about these conversations, it was harmless error for Agent Robel to testify about his conversation with Hegge, and thus, any objection to the hearsay statement would not have had a reasonable probability of altering the outcome at trial. Therefore, the district court did not err in denying this claim.

Appellant also claimed that trial counsel was ineffective for failing to object to his own hearsay statements. He claimed that the only evidence regarding the ligatures and the weapon used during the attack was introduced through his confessions to the FBI and LVMPD. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's statements to law enforcement were statements of a party opponent and were not hearsay. See NRS 51.035(3)(a). Appellant failed to assert any grounds upon which the district could have excluded these statements and failed to demonstrate a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

7. Prosecutorial Misconduct Regarding Detective Hardy

Appellant claimed that trial counsel was ineffective for failing to object to the State's question, "Ultimately, Detective, I know that they asked you about the credibility of the story. You don't believe that this is a case of self defense, correct?" In the defense's case-in-chief, trial counsel called Detective Hardy to testify about appellant's confession. Appellant claimed during the confession that the victim had been killed in self defense. Trial counsel asked Detective Hardy whether he felt that

appellant was credible when he was interviewed. Detective Hardy responded that he could not make that determination because there was no physical evidence with which to compare appellant's story. Immediately following trial counsel's questions regarding credibility, trial counsel began asking whether specific aspects of appellant's story were similar to the story appellant had given to Agent Robel. Detective Hardy agreed that they were similar. On cross-examination, the State asked the allegedly objectionable question of Detective Hardy as to whether he believed this was a case of self defense.

Based upon our review of the record, appellant failed to demonstrate that he was prejudiced. The evidence against appellant was sufficient. Appellant confessed to two different law enforcement officers that he killed his roommate. He also admitted that he tried to cover up the death by hiding the victim in the floorboards of the apartment. Further, after the body was discovered, appellant fled Las Vegas and changed his name and hair color evidencing a consciousness of guilt. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected to the question, and therefore, the district court did not err in denying this claim.

8. Bank and Phone Records

Appellant claimed that trial counsel was ineffective for failing to obtain bank and phone records of the victim. Appellant claimed that these records were necessary to rebut the State's contention that the murder was committed in order to rob the victim. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to explain how the bank and phone records could have been used to rebut the claims of the State. Hargrove, 100 Nev.

at 502, 686 P.2d at 225. Moreover, trial counsel had copies of the bank and phone records at trial and used them to attempt to demonstrate that the victim died on the January 18, 2002, and not around January 1, 2002, as the State claimed.⁴ Appellant failed to demonstrate a reasonable probability of a different outcome at trial, and therefore, the district court did not err in denying this claim.

9. Failure to Move for a Mistrial or Continuance

Appellant claimed that trial counsel was ineffective for failing to request a mistrial or a continuance when the State breached a pre-trial ruling regarding witness Mark Hegge. Prior to trial, the State informed the court that it was only going to ask Hegge about the first conversation he had with appellant. In this conversation, appellant stated to Hegge that appellant left Las Vegas because there was a warrant for his arrest on a murder charge. The State told the district court that it was not going to elicit information from subsequent conversations, including a conversation where appellant told Hegge that he killed the victim in self defense. It appears that trial counsel did not intend to present self defense as a possible theory of defense in this case and therefore did not want the self defense conversation to be introduced. The district court agreed with the State's limited questioning, but warned the State that if it elicited information about the self defense conversation all evidence regarding self defense would come in. On the second day of trial, the State

⁴The timing was important to the defense theory because it was undisputed that the victim got paid at the beginning of the month and always ran out of money by the middle or the end of the month. If the victim had died later in the month, then robbery would have been a less likely motive.

informed the district court that Hegge had changed his story and was now going to testify that appellant told him about self defense in the first conversation. Appellant claimed that, at this point, trial counsel should have requested a mistrial or a continuance because the State had breached its pre-trial agreement.

Appellant failed to demonstrate that trial counsel's performance was deficient. Contrary to appellant's claim, trial counsel did request a continuance. Instead of granting the continuance, the district court reminded trial counsel that there was not going to be any court the following day, implying that trial counsel had additional time to prepare. Further, the district court ordered the State to make Hegge available to the defense. No grounds existed for trial counsel to ask for a mistrial as the State did not breach the agreement. Rather, appellant was granted the relief agreed to by the parties, namely that he was allowed to present testimony regarding self defense from Hegge. In addition, appellant presented testimony regarding self defense from Agent Robel, and Detective Hardy. Therefore, the district court did not err in denying this claim.

10. Inconsistent Defenses

Appellant claimed that trial counsel was ineffective because he presented inconsistent defenses and that these inconsistent defenses caused the jury to be misled and feel lied to. Appellant claimed that trial counsel presented three different and inconsistent defenses: insufficient evidence, natural causes, and self defense.

First, trial counsel argued at trial that the State presented insufficient evidence that the victim was murdered. Trial counsel argued that the medical examiner was not certain that the victim died either from

blunt force trauma or asphyxiation even though those were the causes of death listed on the autopsy report. According to the autopsy report, the victim suffered 14 lacerations to the head but there were no skull fractures. Because there were no skull fractures, the medical examiner testified that she did not believe that the victim died of blunt force trauma. Further, the medical examiner testified that she believed that the victim probably died of asphyxiation, however, the medical examiner testified that she could not determine whether plastic sheeting was placed over the victim's head before or after death. Based on the uncertainty in the cause of death, trial counsel argued at trial that the State failed to meet its burden that the victim was murdered.

Second, trial counsel argued at trial that the victim may have died of natural causes. Because the cause of death was uncertain, trial counsel argued that the victim may have died because he suffered from hepatitis C and heart problems. Trial counsel argued that either condition, alone or in conjunction, may have killed the victim. He also argued that the victim may have died of a drug overdose because the victim was a known heavy abuser of drugs.

Finally, trial counsel argued at trial that the victim may have been killed in self defense. Appellant confessed several times to different people that he hit the victim with a metal pipe multiple times but that he did it in self defense. Appellant claimed that the victim came into appellant's room with a gun and pointed it at appellant. Appellant claimed that to get the gun out of the victim's hand, he hit the victim several times with the pipe. At some point while hitting the victim, appellant "blacked out" and when he came to, the victim was unconscious and the gun was next to the victim on the floor.

Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced in presenting the three theories described above. Given the medical examiner's testimony, that the cause of death was not clear, it was not unreasonable to argue that the State failed to present sufficient evidence to prove that the victim was murdered. Further, the uncertainty as to the cause of death and the condition of the body at autopsy, allowed trial counsel ample room to argue that the victim died of hepatitis C, heart disease, a drug overdose, or any combination of the three. Finally, it was not unreasonable to argue that, if the jury found that the victim died because of the blunt force trauma to the head or asphyxiation, the injuries were inflicted in self defense based on appellant's story. Appellant continually confessed that he hit the victim in self defense and that the victim died sometime thereafter. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel not present all three theories of defense. Therefore, the district court did not err in denying this claim

11. Flight Instruction

Appellant claimed that trial counsel was ineffective for failing to object to the jury instruction on flight. Appellant failed to demonstrate that trial counsel's performance was deficient. A flight instruction is properly given when it is supported by the evidence. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 126 (2005). Flight is more than a "mere going away," the flight must demonstrate a "going away with a consciousness of guilt," such as for the purpose of avoiding arrest. Id. at 582, 119 P.3d at 126 (quoting State v. Rothrock, 45 Nev. 214, 229, 200 P. 525, 529 (1921)).

Our review of the record reveals that the State provided supporting evidence of flight and, therefore, trial counsel was not deficient for failing to object to the instruction. The victim died sometime in January or February of 2002 and was buried under the floorboards of the apartment appellant lived in. Appellant was evicted in late April of 2002. When the victim's body was found on May 13, 2002, appellant left Las Vegas and went to Arizona where he dyed his hair and called himself Craig. In addition, appellant told Hegge that he left Las Vegas because he was wanted for his roommate's murder. Therefore, the district court did not err in denying this claim.

12. Self-Deprecating Statements to the Jury

Appellant claimed that trial counsel was ineffective for making self-deprecating remarks in front of the jury. Appellant failed to demonstrate he was prejudiced. While questioning the medical examiner, trial counsel made statements like "that's one of the reasons I never decided to go to medical school" and "That's why I'm not a medical examiner." Trial counsel's statements appear to have been made to explain why he wanted a more detailed explanation for medical terms and to do it in a way that put the jury at ease. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel not made the statements. Therefore, the district court did not err in denying this claim.

13. Failed to Object During Rebuttal Closing Argument

Appellant claimed that trial counsel was ineffective for failing to object during the State's rebuttal closing argument. Specifically, appellant claimed that the State made the following disparaging statement:

It stuns me to stand here and listen to someone tell you that drugs killed the guy who had tape wrapped around his mouth, was bound up and had fourteen lacerations to the head. The doctor said, no way. They didn't have anything to do with it. But more importantly is it stuns me that a defense attorney would put this exhibit up there and say, oh my God, he must have been alive on the 16th because he called his bank at 7:00 p.m.

He also claimed that the State disparaged his trial counsel when arguing: "They say we haven't presented a single shred of first-degree murder. And I notice Ms. Bolten [appellant's trial counsel] over here smiling."

Appellant failed to demonstrate that he was prejudiced. On direct appeal this court concluded that the statements made by the State were made in direct response to assertions made by appellant's trial counsel and were not disparaging. Further, this court determined that the jury was instructed to only consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel and that the statements, arguments, and opinions of counsel were not to be considered as evidence. Because the underlying claims have already been determined to lack merit, appellant cannot demonstrate a reasonable probability of a different outcome at trial had counsel objected to the statements. Therefore, the district court did not err in denying this claim.

14. Forensic Pathologist

Appellant claimed that trial counsel was ineffective for failing to retain a forensic pathologist. Appellant claimed that a forensic pathologist should have been retained because the State's medical examiner could not give specifics regarding the victim's death. Specifically the medical examiner testified that: (1) she could not tell if there was bleeding from the lacerations, (2) she did not see the ligature marks on the

victim's hands until four days before trial, (3) she could not determine a certain cause of death, (4) she did not indicate any skull fractures in her report, (5) she was not provided a copy of the crime scene report, and (6) the victim may not have been asphyxiated. Appellant appeared to claim that had trial counsel called a forensic pathologist, he would have been able to give a certain time and cause of death, would have been able to tell if the victim was asphyxiated, and would have been able to explain whether there had been bleeding from the lacerations, what caused the ligature marks, and why there were no skull fractures. Appellant claimed that because there were no skull fractures, the lacerations to the head could not have caused the victim's death.

An evidentiary hearing is warranted if the petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Our review of the record reveals that this claim is not belied by the record. More importantly, the medical examiner's testimony regarding the cause of death and timing of death was fairly equivocal and this court cannot discern from the record whether trial counsel explored the option of presenting its own expert witness. Further, appellant presented three theories of defense that may have benefited from having an expert testify: that the State presented insufficient evidence, that the victim died of natural causes, and that the victim was killed in self defense. Therefore, under these circumstances, we cannot affirm the denial of this claim at this time without an evidentiary hearing and we remand this issue to the district court to conduct an evidentiary hearing on this claim.

15. Toxicologist

Appellant claimed that trial counsel was ineffective for failing to call a toxicologist. Appellant claimed that a toxicologist could have testified that the victim died because of a drug overdose or because he suffered from heart problems and hepatitis C.

Our review of the record reveals that this claim is not belied by the record. The record does not indicate that trial counsel consulted with a toxicologist. The medical examiner's testimony regarding cause of death was equivocal and a toxicologist may have provided evidence regarding appellant's defenses of natural causes, insufficient evidence, and self defense. Accordingly, had trial counsel obtained the expert opinion of a toxicologist, it may have led to a different outcome at trial. Therefore, under these circumstances, we cannot affirm the denial of this claim at this time without an evidentiary hearing and we remand this issue to the district court to conduct an evidentiary hearing on this claim.

Ineffective Assistance of Appellate Counsel

Petitioner also raised five claims of ineffective assistance of appellate counsel.⁵ To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and

⁵To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, we conclude that they are waived because they could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

1. Reasonable Doubt Instruction

Appellant claimed that appellate counsel was ineffective for failing to argue that the reasonable doubt instruction was improper. Appellant failed to demonstrate that appellate counsel's performance was deficient in this regard. This court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond [a] reasonable doubt and does not shift the burden of proof." Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991). The instruction given in this case mirrored the statutory definition.⁶ NRS 175.211. Therefore, the district court did not err in denying this claim.

⁶Both NRS 175.211 and the instruction given in this case state: "A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation."

2. Jury Panel

Appellant claimed that appellate counsel was ineffective for failing to argue that jurors 3 and 10 committed misconduct and should have been removed from the jury panel. Appellant failed to demonstrate that this issue would have had a reasonable possibility of success on appeal. As discussed earlier, appellant failed to demonstrate any juror misconduct. Therefore, the district court did not err in denying this claim.

3. Amending the Charges

Appellant claimed that appellate counsel was ineffective for failing to argue that the justice court erred in allowing the State to amend the charges against appellant to add the deadly weapon enhancement. Specifically, appellant claimed that the police told him that he would not get “double tapped” (referring to the deadly weapon enhancement) because he used a pipe. Appellant claimed that this statement induced him into confessing to the police. Because he was induced by this promise, the State should not have been allowed to amend the charges to include the enhancement.

Appellant failed to demonstrate that this claim had a reasonable possibility of success on appeal. A prosecutor has immense discretion in determining what charges to bring against a defendant. Salaiscooper v. Dist. Ct., 117 Nev. 892, 902-03, 34 P.3d 509, 516 (2001). In this case, the State determined that appellant could be charged with murder with the use of a deadly weapon because under the inherently dangerous weapon test, a pipe may meet the definition of a deadly weapon. Under the circumstances in which it was used in this case, the metal pipe was readily capable of causing substantial bodily injury or death. See 2007 Nev. Stat., ch. 525, § 13, p. 3188-89. Further, and most

importantly, the conversation regarding “double tapping” came at the end of appellant’s confession, well after he informed the police that a pipe had been used to hit the victim. While a promise from law enforcement that tricks a defendant into confessing may render the confession involuntary, in this case, appellant failed to demonstrate that his confession was the product of trickery. See Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). Because the promise came at the end of the conversation with police, after appellant confessed, the promise could not have been an inducement to confess. Therefore, the district court did not err in denying this claim.

4. Prosecutorial Misconduct

Appellant claimed that appellate counsel was ineffective for failing to argue that the State committed misconduct when it asked Detective Hardy whether he believed appellant’s self defense claim.

Appellant failed to demonstrate that this claim had a reasonable possibility of success on appeal. Because trial counsel did not object to the question, appellant’s claim was subject to plain error analysis. Plain error requires a consideration of prejudice—whether the error affected the substantial rights of the defendant. See Calvin v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006). The evidence against appellant was sufficient to convict appellant of second-degree murder, even without considering the answer elicited from Detective Hardy. As stated earlier, appellant confessed to two different law enforcement officers that he killed his roommate by hitting him with the pipe. He also admitted that he tried to cover the death up by hiding the victim in the floorboards of the apartment. Further, after the body was discovered Appellant fled Las Vegas and changed his name and hair color, evidencing

a consciousness of guilt. Therefore, the district court did not err in denying this claim.

5. Federalizing

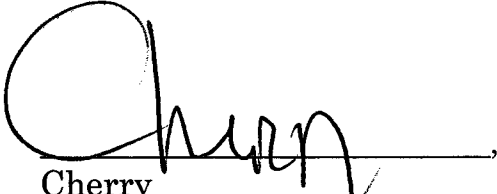
Appellant claimed that appellate counsel was ineffective for failing to “federalize” his claims on appeal. Appellant claimed that this precluded him from seeking relief in federal court. Appellant failed to demonstrate that he would have gained a more favorable standard of review on direct appeal had his appellate counsel federalized the arguments. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Therefore, the district court did not err in denying this claim.


Conclusion

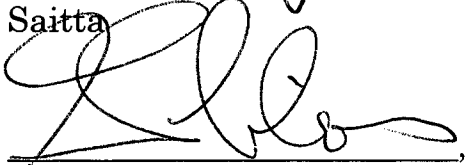
Appellant’s claims regarding whether trial counsel was ineffective for failing to secure experts to testify about forensic pathology and toxicology were not belied by the record. The testimony provided by the medical examiner regarding the cause and time of death was equivocal and experts in forensic pathology and toxicology may have provided support for appellant’s defense theories of natural causes, insufficient evidence and self defense. Therefore, we reverse the denial of these claims and remand to the district court for an evidentiary hearing. Further, given the complex nature of the issues being remanded and the fact that they require investigation of facts outside of the record, the district court shall appoint counsel pursuant to NRS 34.750 to aid appellant in litigating these claims.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁷

 J.
Cherry

 J.
Saitta

 J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Gregory Michael Stiegler
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁷This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.