

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD LAWRENCE MORTENSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51648

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an 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; Douglas W. Herndon, Judge.

On December 28, 1996, following several hours of drinking in celebration of his 31st birthday, appellant Ronald Mortensen and another off-duty Las Vegas police officer drove to an area known for gang activity, where Mortensen fired a handgun into a group of people, killing 21-year-old Daniel Mendoza. A jury convicted Mortensen of first-degree murder with the use of a deadly weapon and sentenced him to life in prison without the possibility of parole.

After trial, Mortensen filed three separate motions for new trial based on newly discovered evidence; all were denied by the district court. This court affirmed Mortensen's conviction and the denial of the motions. Mortensen v. State, 115 Nev. 273, 986 P.2d 1105 (1999) (affirming judgment of conviction and denial of first two motions for new trial); Mortensen v. State, Docket No. 35316 (Order of Affirmance, October 5, 2001) (affirming denial of third motion for new trial). The remittitur from Mortensen's direct appeal issued on January 12, 2000.

On December 13, 2000, Mortensen filed a post-conviction petition for a writ of habeas corpus. After an evidentiary hearing, the district court denied the petition. This appeal followed.

In addition to claims that his trial and appellate counsel were ineffective, Mortensen claims that (1) an instruction on deliberation and premeditation given at his trial was improper, (2) the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), (3) the district court erred by limiting the evidentiary hearing on his petition, and (4) cumulative error warrants reversal of his convictions. We conclude that Mortensen's claims lack merit and affirm the judgment of the district court.

Kazalyn instruction

Mortensen claims that the instruction on premeditation and deliberation given at his trial, known as the Kazalyn¹ instruction, was improper and warrants a new trial. This claim could have been raised previously and is procedurally barred absent a showing of good cause and prejudice. See NRS 34.810(b). We conclude that this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), provided good cause for Mortensen to raise the claim in a first, timely post-conviction petition.² However, we conclude that he failed to show prejudice.³

¹Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

²The parties appear to agree that Mortensen's direct appeal was final at the time Byford was decided. However, we denied rehearing of Mortensen's direct appeal on December 27, 1999. Because Mortensen's time for filing a petition for certiorari to the United States Supreme Court had not yet expired, his conviction was not final when Byford was decided

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The defense theory at trial was that Mortensen's companion, Christopher Brady, was the shooter. In order not to undermine this defense, trial counsel made no attempt to challenge the premeditation instruction or otherwise argue that Mortensen lacked the requisite intent for first-degree murder. Furthermore, the evidence presented at trial showed that Mortensen and Brady were driving around and harassing the populace when their truck pulled up near a group of people. Mortensen motioned for the people to approach, brought his weapon out of the window, and fired. In light of this evidence that the murder was premeditated, willful, and deliberate and the fact that the key issue at trial was not intent but the identity of the shooter, we conclude that the erroneous instruction on premeditation and deliberation was harmless.

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on February 28, 2000. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (stating that “[a] conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired”); Sup. Ct. R. 13(3) (stating that petition for writ of certiorari to United States Supreme Court must be filed within 90 days after entry of judgment or denial of rehearing). Because Mortensen's convictions were not final when Byford was decided, Byford applies to him. Nika v. State, 124 Nev. __, __, 198 P.3d 839, 842 (2008), cert. denied, __ U.S. __, 130 S. Ct. 414 (2009).

³We also reject Mortensen's claims that trial and appellate counsel were ineffective for failing to challenge this instruction. The instruction was a correct statement of Nevada law until five months after this court affirmed Mortensen's convictions on direct appeal, and thus counsel were not unreasonable in failing to challenge it. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Because Mortensen has not demonstrated prejudice, his claim is procedurally barred.

Brady claim

Mortensen claims that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding evidence uncovered in a concurrent federal grand jury proceeding that would have been useful to impeach State witnesses Christopher Brady and Ruben Ramirez. This court has already concluded that the evidence at issue would not have affected the outcome of trial. See Mortensen, 115 Nev. at 286-289, 986 P.2d at 1113-1115; Mortensen, Docket No. 35316 (Order of Affirmance, October 5, 2001), at 3-5. Because the evidence was not material, Mortensen's Brady claim fails. See Browning v. State, 120 Nev. 347, 369, 91 P.3d 39, 54 (2004).

Limited evidentiary hearing

Mortensen claims that the district court erred by limiting the evidentiary hearing on his petition and denying him the opportunity to present (1) evidence that the wrong size shoulder holster was produced at trial, (2) a ballistic expert to refute an expert at trial, (3) evidence that Brady had changed his appearance before trial, (4) evidence that Brady was in a supervisory position over him at the time of the shooting, and (5) a number of character witnesses. We conclude that the district court did not abuse its discretion in precluding this evidence because Mortensen's claims were belied by the record.⁴ See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

⁴The jury was made aware that the shoulder holster at trial was the wrong size, Mortensen testified at trial that his gun was the murder
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Ineffective assistance of trial counsel

Mortensen claims his trial counsel was ineffective. To state a claim of ineffective assistance of counsel 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 deficient performance prejudiced the defense such that there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). While we independently review a claim of ineffective assistance of counsel, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993), the "purely factual findings" of the district court "are entitled to deference on . . . review," Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Failure to investigate and prepare for trial

Mortensen argues that trial counsel was ineffective for failing to investigate the eyewitnesses to the crime and Brady's background and for proceeding to trial only four months after the crime. He failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The record supports the district court's findings that trial

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weapon, pictures of Brady taken before trial were presented to the jury and they could decide for themselves whether he had been tanning, testimony at trial established that Brady was not Mortensen's supervisor at the time of trial, and the character evidence was unnecessary to the disposition of Mortensen's claims as the decision not to call those witnesses was a strategic decision by defense counsel and Mortensen failed to demonstrate extraordinary circumstances. See Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005).

counsel conducted an effective investigation and had tactical reasons for proceeding to trial quickly.⁵ Furthermore, because this court has already determined that none of the evidence discovered later would have been reasonably likely to change the results of trial, see Mortensen, 115 Nev. at 286-289, 986 P.2d at 1113-1115; Mortensen, Docket No. 35316 (Order of Affirmance, October 5, 2001), at 3-5, Mortensen failed to show prejudice.

Failure to request jury instructions

Mortensen argues that trial counsel was ineffective for failing to request jury instructions on mere presence, eyewitness identification, credibility of drug users, and intoxication as negating an element of the crime. He failed to demonstrate that counsel's performance was deficient or that he was prejudiced.

Counsel was not ineffective for failing to request an instruction on mere presence because Mortensen was not charged under a theory of aiding and abetting but as the principal actor, see U.S. v. Reed, 575 F.3d 900, 925 (9th Cir. 2009), cert. denied, ___ U.S. ___, 130 S. Ct. 1729 (2010), and there was overwhelming evidence that he was the shooter.

Counsel was not ineffective for failing to request an eyewitness identification instruction because there was no dispute that Mortensen was the passenger in the vehicle and the percipient witnesses

⁵Mortensen testified that he and his family wanted to proceed to trial as quickly as possible and that he never asked trial counsel to request a continuance. Trial counsel testified that he was fully prepared to go to trial and that there was a tactical advantage in doing so because (1) the defense possessed favorable evidence that had not been discovered by the State and (2) the case had just been assigned to a new prosecutor.

all agreed that the passenger was the shooter. See Lee v. State, 107 Nev. 507, 509, 813 P.2d 1010, 1011 (1991) (eyewitness identification instruction not called for where identification evidence is overwhelming).

Counsel was not ineffective for failing to request the instruction on the credibility of drug users or addicts because there was no evidence introduced at trial that any of the witnesses used drugs on the night of the shooting or at the time they testified.⁶

Finally, counsel was not ineffective for failing to request an instruction on intoxication negating an element of a crime because, as previously stated, any argument that Mortensen lacked the requisite intent would have undermined his defense that he was not the shooter.

Ineffective assistance of appellate counsel

Mortensen claims his appellate counsel was ineffective. This claim is reviewed under the Strickland standard, and, to establish prejudice, the defendant must show that the omitted issues would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

Failure to appeal denial of motion for mistrial

Mortensen claims that appellate counsel was ineffective for failing to appeal the district court's denial of a motion for mistrial based on the questioning of defense witness Jose Caiberiro regarding Mortensen's ownership and use of firearms and past employment as a

⁶The submitted instruction states: "The testimony of a witness who was using drugs at the time of the events he is testifying about, or who is using drugs at the time of his testimony, may be less believable because of the effect the drugs may have on his ability to perceive or relate the events in question."

security guard at Dillard's. Mortensen failed to show that he was prejudiced by the questioning and a challenge to the denial of the motion for mistrial did not have a reasonable probability of success on appeal.

Prosecutorial misconduct

Mortensen claims that appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct based on the prosecutor's (1) impugning of the defense's strategy, (2) sarcastic statement, (3) reference to Mortensen's former employment at Dillard's, and (4) improper questioning of defense witnesses. Mortensen failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The district court sustained objections to the conduct in question. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 479 (2008) (finding no prejudice where district court sustained objection and instructed prosecutor to move on). None of the conduct was egregious, and misconduct cannot be inferred from the fact that the district court sustained a number of objections during a 12-day trial. And in light of the overwhelming evidence of his guilt, Mortensen failed to demonstrate that the proposed claims of prosecutorial misconduct had a reasonable probability of success on appeal.

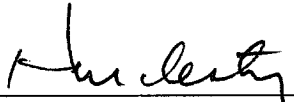
Cumulative error

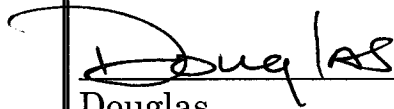
Mortensen's claim of cumulative error at trial is procedurally barred because it could have been raised previously and he has failed to show good cause or prejudice. See NRS 34.810(1)(b). And based on the foregoing discussion of Mortensen's claims of ineffective assistance of counsel, we conclude that any deficiencies in counsels' performances in this case, when considered either individually or cumulatively, do not

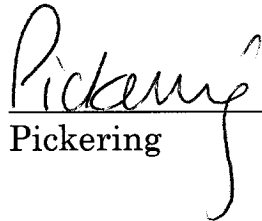
warrant relief. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Having considered Mortensen's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk