

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER M. CHAMBERS,

No. 36008

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**JUL 12 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT

BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

Appellant Roger M. Chambers was convicted of first-degree murder with the use of a deadly weapon and sentenced to death. This court affirmed his conviction but vacated the sentence, imposing prison terms of life without possibility of parole.<sup>1</sup> Chambers petitioned for habeas relief, and the district court denied the petition after holding an evidentiary hearing.

Chambers asserts that his trial and appellate counsel were ineffective in a number of ways. Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.<sup>2</sup> A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject

<sup>1</sup>Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997).

<sup>2</sup>See, e.g., Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

to independent review.<sup>3</sup> To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.<sup>4</sup> To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>5</sup> Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.<sup>6</sup>

Chambers claims that his appellate counsel was ineffective in not challenging the jury instruction on deliberation and premeditation. If counsel had raised the issue, Chambers conjectures that this court might have used his appeal to announce the decision that we made two and a half years later in Byford v. State,<sup>7</sup> where we abandoned the Kazalyn instruction on premeditation and set forth instructions for future use. This conjecture is groundless, and it erroneously assumes that this court would have reversed Chambers's conviction even though we did not reverse Byford's. Our decision in Byford, of course, provides no relief to Chambers because "with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides

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<sup>3</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>4</sup>Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

<sup>5</sup>Id. at 988, 923 P.2d at 1107.

<sup>6</sup>Strickland, 466 U.S. at 689.

<sup>7</sup>116 Nev. 215, 994 P.2d 700, cert. denied, 121 S. Ct. 576 (2000).

grounds for relief."<sup>8</sup> We also reject Chambers's contention that the evidence here was insufficient for the jury to reasonably find that he committed deliberate and premeditated murder.

The jury was instructed that malice "may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." This instruction is correct.<sup>9</sup> But Chambers argues that it created a presumption requiring additional jury instructions, pursuant to NRS 47.230(3), which his counsel should have requested. This claim is meritless because the instruction did not create a presumption but simply defined implied malice.<sup>10</sup>

Chambers contends that jury instructions 21 and 27 created a presumption that the use of a deadly weapon establishes the intent to kill, requiring instructions pursuant to NRS 47.230(3) which his counsel failed to request. As a preliminary matter, Chambers notes that the jury instruction defining "deadly weapon" was incorrect and claims that this added to the error. Although in an earlier proceeding this court concluded that the instruction was incorrect, the instruction had no prejudicial effect because

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<sup>8</sup>Garner v. State, 116 Nev. \_\_\_, \_\_\_, 6 P.3d 1013, 1025 (2000), cert. denied, 121 S. Ct. 1376 (2001).

<sup>9</sup>See Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 483 (2000).

<sup>10</sup>See Doyle v. State, 112 Nev. 879, 901, 921 P.2d 901, 915 (1996).

we also concluded that the knife Chambers used was deadly as a matter of law.<sup>11</sup>

NRS 47.230(3) provides that when "the existence of a presumed fact . . . is submitted to the jury," the jury must be instructed it "may regard the basic facts as sufficient evidence of the presumed fact" but is not required to do so, and when the presumed fact is an element of the offense, the jury must be instructed that it requires proof beyond a reasonable doubt. Thus, the statute applies to instructions that set forth "basic facts" which, if proven, can establish a "presumed fact." The basic facts in instructions 21 and 27 were not definitively spelled out. Instruction 21 required the jury to consider generally "the facts and circumstances of the killing," such as the use of a deadly weapon. Instruction 27 was more specific, but still left it to the jury to determine whether the circumstances "show[ed] no considerable provocation." Thus, the instructions allowed the jury considerable discretion to determine and weigh the relevant factual circumstances in deciding if someone acted with an intent to kill.

Even assuming that instruction 27 was full and specific enough that it submitted the existence of a presumed fact to the jury as contemplated by NRS 47.230(3), we conclude that the failure to request the additional instructions did not prejudice Chambers because the jury received other instructions which set forth the same law. First, instruction 27 itself used permissive language, and any reasonable juror would have understood that he or she was not required to find

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<sup>11</sup>See State v. District Court, Docket No. 31578 (Order Granting Petition for Writ of Mandamus, July 29, 1998).

the presumed fact simply because the basic facts were found. Second, other instructions informed the jurors that the State had to prove every element of the crime, including intent, beyond a reasonable doubt.

Chambers claims that his counsel acted ineffectively in not developing and presenting evidence at trial that the victim had been convicted of a violent crime in California about ten years earlier. This claim warrants no relief because Chambers failed to develop and present such evidence at his evidentiary hearing. Chambers has not even specified the nature of the prior conviction or alleged a single detail about it, let alone explained how evidence of it would have made any difference in his trial.

Chambers faults his counsel for advising him not to testify during the guilt phase of the trial. At the trial, the district court apprised Chambers of his right to testify, and he chose not to "under the advice of counsel." He now says that the advice was unsound and "made a significant difference" in presenting his case of self-defense. First, Chambers fails to show that he was prejudiced: he does not describe what his testimony would have been or explain how its omission prejudiced him. Second, trial counsel offered at least one sound reason for not wanting Chambers to testify. After arresting Chambers, police videotaped his statement, in which he maintained that he killed Chacon in self-defense. Counsel testified that Chambers showed a "calm demeanor" during that statement, and counsel felt it was safer to rely on that evidence to support Chambers's defense than to have him testify. Counsel feared that during cross-examination the prosecutor would be able to make Chambers "look angry and

aggressive in front of the jury." Chambers fails to overcome the presumption that this was sound strategy by counsel. Although he complains that he was intoxicated when he spoke to police, he does not articulate in what way his trial testimony was necessary to supplement or correct the earlier statement, nor does he address counsel's fear that his demeanor on cross-examination might have harmed him.

Chambers mentions that his trial counsel sought but was unable to obtain testing of the victim's clothing to see if Chambers's blood was on it. To the extent that Chambers alleges that his counsel was ineffective in this regard, we conclude that he shows neither that counsel's performance was deficient nor that he was prejudiced.

Chambers contends that his counsel should have objected when the prosecutor told the jury that Chambers was a murderer and stated, "Find him guilty of first-degree murder and it stops." Chambers claims that this was improperly inflammatory because it implied to jurors that by convicting him "they would stop the killing." Regardless of the propriety of such an implication, the prosecutor's actual argument was quite different. After the language quoted by Chambers, the prosecutor immediately said: "You don't go any further. You return a verdict of first-degree murder, you don't even consider any other crime." Thus, in saying "it stops," the prosecutor was referring to the jury's deliberation. Counsel had no reason to object to this argument.

Chambers argues that he was unfairly prejudiced because juries qualified to sit on capital cases are more prone to convict and he was judged by such a jury even though

his case, he asserts, was not a capital case. A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.<sup>12</sup> We will assume that this claim did not exist until after Chambers's death sentence was vacated on direct appeal and so could not have been presented at trial or on direct appeal, but we conclude that the claim has no merit.

The Supreme Court upheld a defendant's conviction by a death-qualified jury in a case which was "noncapital" by Chambers's terms.<sup>13</sup> In Lockhart v. McCree, the prosecution sought the death penalty and convicted McCree, but the jury rejected the requested death penalty.<sup>14</sup> The Court assumed that death-qualified juries are somewhat more prone to convict than non-death-qualified juries, but concluded that the death-qualification of the jury did not violate McCree's rights.<sup>15</sup>

Chambers suggests that prosecutors sought the death penalty against him without grounds for doing so simply to be able to obtain a death-qualified jury for his trial. Such prosecutorial action would no doubt be improper.<sup>16</sup> However, Chambers offers no evidence showing that prosecutors acted with an improper motive. He relies on the fact that this

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<sup>12</sup>See NRS 34.810.

<sup>13</sup>See Lockhart v. McCree, 476 U.S. 162 (1986).

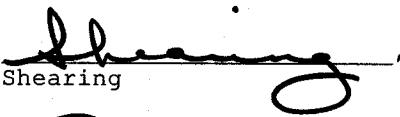
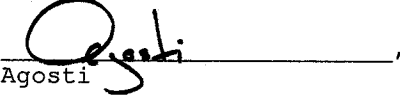
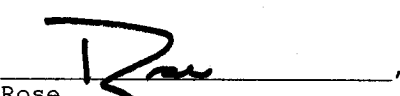
<sup>14</sup>Id. at 166.

<sup>15</sup>Id. at 173-84; see also Buchanan v. Kentucky, 483 U.S. 402, 414-20 (1987) (holding that the rights of a noncapital defendant were not violated by joint trial with a capital defendant before a death-qualified jury).

<sup>16</sup>Cf. Buchanan, 483 U.S. at 420 n.19.

court concluded in his direct appeal that evidence did not support the aggravating circumstance of torture and that his death sentence was excessive.<sup>17</sup> The single remaining aggravator was based on crimes that occurred eighteen years earlier and did not show "a pattern of violence sufficient to justify the death penalty."<sup>18</sup> This court's decision does not mean that prosecutors had no grounds to seek death against Chambers. One aggravating circumstance was still valid, and this is a sufficient basis to seek a death sentence.<sup>19</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Shearing J.  
  
Agosti J.  
  
Rose J.

cc: Hon. Steven P. Elliott, District Judge  
Attorney General  
Washoe County District Attorney  
Scott W. Edwards  
Washoe County Clerk

<sup>17</sup>Chambers, 113 Nev. at 984-85, 944 P.2d at 811-12.

<sup>18</sup>Id. at 985, 944 P.2d at 811.

<sup>19</sup>See NRS 200.030(4)(a).