

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL VELAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36378

**FILED**

**MAY 18 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was convicted of voluntary manslaughter with a deadly weapon, pursuant to a jury verdict, and sentenced to serve 48 to 120 months in prison for the manslaughter count and an additional consecutive 48 to 120 months in prison for the use of the deadly weapon. Appellant filed an appeal, which was dismissed as untimely.<sup>1</sup>

Appellant then filed a post-conviction petition for a writ of habeas corpus, arguing that he had been deprived of his right to a direct appeal due to the ineffective assistance of counsel. Because counsel for appellant had neglected to file a timely appeal after appellant expressed a desire to appeal, the district court appointed counsel for post-conviction proceedings pursuant to Lozada v. State.<sup>2</sup> After conducting a hearing, the district court denied appellant's petition. Appellant filed this timely appeal.

Appellant's sole contention is that the district court erred in giving a jury instruction on voluntary

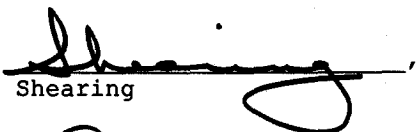
<sup>1</sup>See Velas v. State, Docket No. 31762 (Order Dismissing Appeal, May 8, 1996).

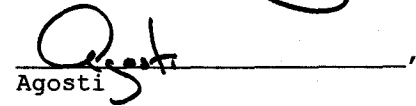
<sup>2</sup>110 Nev. 349, 871 P.2d 944 (1994).


manslaughter. Specifically, the instruction on voluntary manslaughter omitted the "heat of passion" element, and provided, "The crime of manslaughter is the unlawful killing of a human being without malice aforethought." This instruction was erroneous because it did not include the statutory requisite that appellant killed in the "heat of passion."<sup>3</sup> However, we conclude that appellant did not properly preserve this error for appeal because he affirmatively argued that the court should not correct the erroneous instruction to include the "heat of passion" element set forth by statute.<sup>4</sup> Having made a tactical decision to advocate for a particular erroneous instruction, appellant may not subsequently argue for a reversal of his conviction based on the very same instruction for which he advocated.<sup>5</sup>

Having considered appellant's contention and concluded that it was not properly preserved for appellate review, we conclude that the district court did not err by denying appellant's petition. We therefore

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Rose

<sup>3</sup>See NRS 200.040-.050; see also *Roberts v. State*, 102 Nev. 170, 173-74, 717 P.2d 1115, 1116-17 (1986) (discussing the elements of the crime of voluntary manslaughter).

<sup>4</sup>See *Bridges v. State*, 116 Nev. \_\_\_, \_\_\_, 6 P.3d 1000, 1007 (2000) (holding that there was no plain or constitutional error where defendant made a tactical decision not to object to a particular error).

<sup>5</sup>See *id.*

cc: Hon. Joseph T. Bonaventure, District Judge  
Attorney General  
Clark County District Attorney  
David J. Pancoast  
Clark County Clerk