IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE MIGUEL COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36444

FILED

DEC 05 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 28, 1996, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery and one count of battery with substantial bodily harm. The district court sentenced appellant to serve consecutive terms in the Nevada State Prison of one hundred eighty months for robbery and sixty months for battery with substantial bodily harm. This court dismissed appellant's direct appeal.[1]

On February 8, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

[1]Colon v. State, Docket No. 29274 (Order Dismissing Appeal, March 18, 1999).

represent appellant or to conduct an evidentiary hearing. On July 18, 2000, the district court denied appellant's petition.[2] This appeal followed.

In his petition, appellant first raised several claims of ineffective assistance of counsel.[3] 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 but for counsel's errors, the result of the proceeding would have been different.[4] There is a presumption that counsel provided effective assistance unless petitioner demonstrates

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[2]The June 22, 2000 minutes of the district court proceedings indicate that appellant's former trial counsel submitted a response to appellant's petition. This response is not a part of the record on appeal. This court recently held that a petitioner's statutory rights are violated when the district court improperly expands the record by accepting such evidence without conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the response submitted by appellant's former trial counsel, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

[3]To the extent that appellant attempted to raise any of the same issues underlying his ineffective assistance of trial counsel claims as ineffective assistance of appellate counsel claims, we conclude that because there is no merit to these underlying issues, appellant was not prejudiced by appellate counsel's failure to raise them on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Additionally, to the extent that appellant attempted to raise any of the issues underlying his ineffective assistance of counsel claims as independent constitutional violations, they are waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[4]See Strickland v. Washington, 466 U.S. 668 (1984).

"'strong and convincing proof to the contrary.'"[5] Further, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[6]

First, appellant contended that his trial counsel should have argued that appellant did not take any merchandise from the store, and should have elicited testimony from various witnesses to the effect that appellant was merely present at the store and not a part of the group's criminal conspiracy to steal merchandise.[7] We conclude that the district court did not err in concluding that appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced.[8] The record indicates that appellant's counsel conducted a sufficient investigation and questioned multiple witnesses in attempting to establish that appellant took no merchandise and was merely present at the store. The jury was also properly instructed with regard to the "mere presence" defense to criminal liability as an aider and abettor.[9] Further, as this court concluded on direct appeal, there was overwhelming evidence that appellant struck the store clerk, which aided the other individuals

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[5]Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

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

[7]See Skinner v. Sheriff, 93 Nev. 340, 341, 566 P.2d 80, 81 (1977) (mere presence at the scene of a crime is insufficient to establish guilt).

[8]Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); see also Hill v. Lockhart, 474 U.S. 52 (1985).

[9]See Brooks v. State, 103 Nev. 611, 747 P.2d 893 (1987).

involved in the robbery by facilitating their escape.[10] Finally, appellant failed to provide sufficient facts demonstrating that any witness would have provided testimony establishing that appellant was not guilty of robbery had his counsel engaged in further inquiry.[11]

Second, appellant contended that his trial counsel was ineffective in failing to object to the allegedly defective jury instruction on robbery and failing to argue that a definition of "escape" should have been given to the jury. We conclude that the district court did not err in denying this claim. The record reveals that the jury was properly instructed on robbery.[12] Further, appellant failed to demonstrate that an instruction on "escape" would have changed the result at trial.

Third, appellant contended that his trial counsel was ineffective for failing to confer with a psychologist to determine if diminished capacity could be a potential defense to the battery charge. Appellant failed to support this claim with any facts demonstrating a valid basis for using diminished capacity in mitigation.

Fourth, appellant contended that his trial counsel was ineffective for failing to object to comments during the prosecutor's closing argument that allegedly mischaracterized the testimony of witness Christine Brown. The record indicates that a timely interjection by appellant's counsel at trial terminated this line of argument at its

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[10]See Mitchell v. State, 114 Nev. 1417, 1427, 971 P.2d 813, 820 (1998) (stating that aiders and abettors are criminally responsible for all harms that are a natural, probable, and foreseeable result of their actions.)

[11]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[12]See NRS 200.380.

inception and corrected the erroneous characterization of the witness' testimony. Thus, appellant was not unfairly prejudiced.[13]

Fifth, appellant contended that his trial counsel was ineffective for failing to object to an improper attempt by the prosecutor to convince the jurors to place themselves in the victim's position.[14] The prosecutor asked the jury to "[i]magine the nerve of [the victim] telling this group they couldn't steal merchandise. Imagine the nerve of [the victim] standing at the front door trying to prevent this looting. Imagine the nerve of [the victim] telling this group that they had to pay for the items or she would call police." We conclude that appellant was not unfairly prejudiced by these statements in light of the overwhelming evidence of his guilt.[15]

Sixth, appellant contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court erred in denying his motion to sever his trial from the trial of his co-defendants.

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[13]See Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 109-10 (stating that an inappropriate comment by the prosecutor warrants reversal only if it so infects the proceeding with unfairness as to make the result a denial of due process).

[14]See Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987) (stating that it is improper in closing argument for the prosecutor to ask jurors to place themselves in the victim's position).

[15]See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error); Skiba v. State, 114 Nev. 612, 614-15, 959 P.2d 959, 960-61 (1998) (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant's guilt); Rippo v. State, 113 Nev. 1239, 1254, 946 P.2d 1017, 1026 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).

This court has held that "[t]he decision to sever is left to the discretion of the trial court."[16] Moreover, where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary.[17] We conclude that appellant failed to provide compelling reasons for the severance of his trial, and failed to provide sufficient factual allegations demonstrating that he suffered any prejudice from the joinder of his trial with his co-defendants.

Seventh, appellant contended that his appellate counsel was ineffective for failing to argue on direct appeal that there was insufficient evidence to support the robbery and battery charges and that the State coerced witnesses to testify against appellant. We conclude these claims lack merit. As previously discussed, this court concluded on direct appeal that there was overwhelming evidence that appellant struck the store clerk, which facilitated the escape of the other individuals involved in the robbery. Further, appellant failed to provide sufficient facts demonstrating that the State coerced witnesses to testify against appellant.

Eighth, appellant contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court diluted the reasonable doubt standard when instructing the jury. We conclude that this claim is entirely without merit. The jury was properly instructed on reasonable doubt pursuant to NRS 175.211. The additional

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[16]Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995) quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).

[17]See Jones, 111 Nev. at 853, 899 P.2d at 547 citing United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980), United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977).

instructions to which appellant objected do not "dilute" the reasonable doubt standard; rather, they advise the jurors to bring their "everyday common sense and judgment" to the consideration of the evidence, and inform the jurors that they may draw reasonable inferences from the evidence which they feel are "justified in light of common experience."

Finally, appellant contended that he was deprived of a fair trial because the judge was biased. Appellant waived this claim by failing to raise it on direct appeal.[18]

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.[19] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[20]

_____, C.J.
Young

_____, J.
Rose

_____, J.
Agosti

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[18]See Franklin, 110 Nev. 750, 877 P.2d 1058 overruled on other grounds by Thomas, 115 Nev. 148, 979 P.2d 222.

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

[20]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Andre Miguel Colon
Clark County Clerk