

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ZACHARY KELSEY,
Respondent.

No. 70155

FILED

FEB 27 2017

ELIZABETH L. TROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

The State of Nevada appeals from an order of the district court granting in part and denying in part, a postconviction petition for a writ of habeas corpus filed on September 15, 2014. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

The State argues the district court erred by granting the postconviction petition when it found trial counsel was ineffective for waiving respondent Zachary Kelsey's right to present a closing argument. In its order, the district court concluded counsel's decision to waive closing argument was deficient and not a tactical decision and Kelsey demonstrated prejudice because there was a possibility of a different outcome at trial had counsel presented a closing argument.

We conclude the district court erred by granting Kelsey's claim that counsel was ineffective for waiving closing argument. To prove ineffective assistance of counsel, 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 is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466

17-900372

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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

"A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted). Tactical decisions of counsel "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The decision to waive closing argument is a tactical decision. See *Bell v. Cone*, 535 U.S. 685, 701-702 (2002). An appellate court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an appellant's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks, alterations, and citations omitted).

At the evidentiary hearing, counsel testified he decided to waive closing argument because he did not believe the State's closing argument was very vigorous and believed the State's rebuttal closing argument would be much more persuasive. Counsel testified he was prepared to present a closing argument, but decided not to after hearing the State's closing argument and discussing the strategy with Kelsey's codefendants' counsels, and all defense counsel agreed to waive closing

argument. He also testified he had observed the prosecutor's rebuttal closing arguments in other cases and found the prosecutor to be very vigorous and persuasive. This was a tactical decision, and cannot be challenged outside of extraordinary circumstances, which are not present here.¹ While the choice to forgo closing argument may not have been the best option, it was a tactical decision and did not place counsel's representation "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690-91. Accordingly, we conclude the district court erred by determining counsel was deficient for waiving his closing argument.

We also conclude the district court erred by determining Kelsey suffered prejudice by counsel waiving closing argument. While the district court found Kelsey "suggest[ed] a manner in which counsel could have argued in closing that could have affected a reasonable probability of a different outcome for the Petitioner at trial," the district court also stated there were "arguments available to the Petitioner from which the jury could possibly conclude the Petitioner was guilty of the lesser charged offenses as offered in the jury instructions." Based on the evidence presented at trial, Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel not waived closing argument. Kelsey punched the victim in the head twice and may have kned him the in the head as well. After being pulled out of the fight, Kelsey continued to yell and try to get at the victim. After the fight, the victim stood up,

¹The district court relied on *Ex parte Whited*, 180 So.3d 69 (Ala. 2015), to conclude Kelsey demonstrated counsel was ineffective. Trial counsel in *Whited*, however, could not articulate his strategic reason for waiving closing argument. 180 So.3d at 81-82. In the instant case, counsel articulated his reason for waiving, and therefore, the instant case is distinguishable.

had blood streaming from his mouth, and told his friend he had been "rocked." An expert who testified at trial stated the first blow to the victim's head may have been the death blow and another expert testified the injuries to the victim were likely cumulative. Accordingly, we conclude the district court erred by granting this claim.

Kelsey argues, even if this court concludes the district court erred by granting his claim that counsel was ineffective for waiving closing argument, the district court reached the right result by granting the petition, albeit for the wrong reasons. *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the judgment of district court if it reached the correct result for the wrong reason). Kelsey argues the other claims raised in his petition had merit and the district court should have granted his petition on those grounds.

First, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to consult with and present an expert at trial to provide a contrary and exculpatory opinion regarding the probable cause of the victim's death. After holding an evidentiary hearing, the district court concluded Kelsey failed to demonstrate prejudice. The district court found Kelsey failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented an expert because the expert presented at the evidentiary hearing could not establish which arteries caused the hemorrhaging in the victim's brain and her testimony could not be differentiated from that of the experts presented by the State at trial. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

Second, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to interview and present the testimony of three witnesses. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. The district court concluded Kelsey failed

to demonstrate counsel's decision not to interview these witnesses was unreasonable or the witnesses would have provided testimony such that there was a reasonable probability of a different outcome at trial had they testified. Substantial evidence supports the decision of the district court. At the evidentiary hearing, evidence was adduced that these three witnesses, while they gave statements to the police, never told the police they had witnessed this particular fight at the party. Therefore, it was reasonable for counsel not to have sought to interview these witnesses. *See Ford*, 105 Nev. at 853, 784 P.2d at 953. Further, the testimony presented by these witnesses was duplicative of testimony provided by other witnesses who testified at trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial when Kelsey's codefendant's counsel asked Kelsey whether he knew he was a member of a racist group. At the evidentiary hearing, counsel testified he did not object because he believed Kelsey handled the question well on the stand and he did not want to call the jury's attention to the questions. Kelsey failed to demonstrate counsel was deficient because this was a tactical decision by counsel. *See id.* Kelsey also failed to demonstrate resulting prejudice because the jury was instructed the statements and questions of attorneys are not evidence and "[a] jury is presumed to follow its instructions." *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected or moved for a mistrial. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to object and move for a mistrial

when Kelsey's codefendant's counsel thanked the medical examiner and told her "You remain as brilliant as usual." Kelsey claims this was improper vouching of a witness. Kelsey failed to demonstrate counsel was deficient or resulting prejudice. Kelsey failed to demonstrate this statement was vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) ("vouching occurs when the prosecution places the prestige of the government behind a witness by providing personal assurances of the witness's veracity" (internal quotation marks and alterations omitted)), or that it was a comment on the veracity of the witness. Therefore, we conclude the district court did not err by denying this claim.

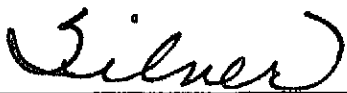
Finally, Kelsey claims the district court erred by denying his claim counsel was ineffective for failing to move for severance when it became clear the codefendants had antagonistic and mutually exclusive defenses. Kelsey claims the defenses were antagonistic because each of the codefendants accused the others of causing the death of the victim. Merely demonstrating defenses are antagonistic is not enough to require the granting of a motion to sever. *Marshall v. State*, 118 Nev. 642, 648, 56 P.3d 376, 380 (2002). Instead, Kelsey "must show that the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence." *Id.* Further, "it is not prejudicial for a codefendant to introduce relevant, competent evidence that would be admissible against the defendant at a severed trial." *Id.* at 647, 56 P.3d at 379. Severance is not warranted simply because it would have made acquittal more likely. *Id.*


We conclude Kelsey fails to demonstrate counsel was deficient or resulting prejudice because counsel was not deficient for failing to file futile motions. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). While we agree the defenses in this case were antagonistic, Kelsey failed to demonstrate the joint trial compromised a specific trial right or

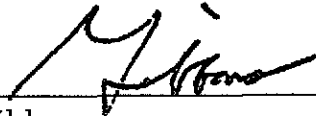
prevented the jury from making a reliable judgment regarding guilt or innocence. Further, unobjected to evidence elicited from other percipient witnesses regarding Kelsey's use of brass knuckles and his bragging about killing the victim was evidence that would have been admissible against Kelsey at a severed trial. Accordingly, we conclude the district court did not err in denying this claim.

For the reasons discussed above, 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.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Elliott A. Sattler, District Judge
Attorney General/Carson City
Washoe County District Attorney
Richard F. Cornell
Washoe District Court Clerk