IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 36927

FILED
AUG 10 2001
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF 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. Appellant William Lester Witter claims that his trial and appellate counsel were ineffective in numerous ways. We conclude that none of his claims warrant relief.

On November 14, 1993, Witter stabbed Kathryn Cox numerous times, attempted to sexually assault her, and stabbed her husband to death when he came to her aid.[1] Witter was convicted of first-degree murder, attempted murder, and attempted sexual assault--all with use of a deadly weapon--and burglary. He received a death sentence for the murder. After this court affirmed Witter's conviction and sentence, he petitioned the district court for habeas relief. An evidentiary hearing was held, and Witter's trial and appellate counsel testified. The district court denied the petition.

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

[1]See Witter v. State, 112 Nev. 908, 913-14, 921 P.2d 886, 890-91 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700, cert. denied, 121 S. Ct. 576 (2000).

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not appropriate for review on direct appeal.[2] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[3] 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.[4] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[5] 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.[6]

First, Witter asserts that his trial counsel was ineffective during the guilt phase in failing to present evidence that he had fetal alcohol syndrome (FAS). Though the record indicates that Witter's mother drank alcohol while pregnant with him, at the evidentiary hearing Witter failed to provide evidence demonstrating that he suffers from FAS or any similar ailment. Thus we conclude that Witter shows neither deficient performance by counsel nor prejudice. Even if we assumed that evidence of FAS could have been presented, Witter fails to show that it would have made any difference. He speculates that it could have provided "a defense to the requisite mens rea of premeditated murder." Whatever the merits of this speculation, the State also charged a theory of

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[2] See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[3] Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4] Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[5] Id. at 988, 923 P.2d at 1107.

[6] Strickland, 466 U.S. at 689.

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first-degree felony murder and presented overwhelming evidence to support it.

Second, Witter maintains that his trial counsel was ineffective during the penalty phase because he did not call an expert witness "to explain away the graphic testimony about gangs and violence" and Witter's possession of a shank in prison. On direct appeal, this court rejected Witter's claim that the trial court abused its discretion when it did not grant a continuance to allow defense counsel time to respond to the State's evidence on these matters.[7] We conclude that counsel's failure to present evidence on these matters did not prejudice Witter: we already determined on direct appeal that such evidence had little mitigating value and its absence was not prejudicial.[8]

Third, Witter alleges that the prosecutor made four remarks in his opening statement referring to Witter's "evilness."[9] Witter contends that his trial counsel was ineffective because he failed to object to the remarks. At the evidentiary hearing, trial counsel testified that he did not consider the first three remarks worth objecting to at the risk of alienating the jury, and he missed the fourth remark. Witter cites no authority establishing that the remarks constituted misconduct. Even assuming the remarks were

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[7]Witter, 112 Nev. at 919-20, 921 P.2d at 894.

[8]Id. at 920, 921 P.2d at 894.

[9]Witter failed to include in his appendix the trial transcripts or other materials necessary to review several of his claims. We remind Witter's counsel that the appellant is responsible for providing the materials necessary for this court's review. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Reference to facts stated in appellant's briefs to this court or to the district court is not sufficient. See Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980); cf. NRAP 28(e). We have nevertheless accepted the facts as alleged by Witter where they are clearly

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improper, we conclude that counsel reasonably chose not to object to the first three and that none were so extreme that they prejudiced Witter.

Fourth, Witter claims that his trial counsel unreasonably failed to offer an instruction informing jurors that they could not consider character evidence until they had determined whether aggravating circumstances existed and had weighed any such circumstances against any mitigating circumstances. Witter is correct that jurors should not consider character evidence, i.e., "other matter" evidence admitted under NRS 175.552(3), until they have decided whether a defendant is death eligible.[10] The district court cited Lisle v. State[11] in concluding that a jury can consider such evidence before it has weighed aggravating circumstances against mitigating circumstances. This conclusion is incorrect, as explained in Middleton v. State.[12]

Though Witter was entitled to request such an instruction, he has not shown that not giving it violated any rule or law. Nor has he offered any reason, such as improper argument by the prosecutor, to believe that jurors relied on the "other matter" evidence in determining his death eligibility.[13] Therefore, he has failed to demonstrate either deficient performance by his counsel or prejudice.

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and fully stated and the State has accepted them in its answering brief.

[10]See Evans v. State, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 50, July 24, 2001); Byford, 116 Nev. at 239, 994 P.2d at 716.

[11]113 Nev. 679, 704, 941 P.2d 459, 475-76 (1997).

[12]114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998) (rejecting any language in Lisle that suggests that evidence admitted under NRS 175.552(3) can be used to determine death eligibility itself).

[13]Cf. Evans, 117 Nev. at ___, ___ P.3d at ___.

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Fifth, Witter contends that his appellate counsel was ineffective in failing to argue that the State violated Batson v. Kentucky.[14] Trial counsel objected to the State's peremptory challenge striking an African-American member of the venire. The prosecutor stated that he had not even noted the race of the veniremember, only his belief that she was not capable of making a decision. Because Witter was not himself black, the trial court questioned whether Batson applied and ruled against him. At the evidentiary hearing, appellate counsel said that he had not raised the issue in part because the State had given a race-neutral reason for the challenge.

The trial court erred to the extent that it based its ruling on Witter's not being black. The due process rule against striking potential jurors simply because of their race also applies to cases where the defendant is not the same race as the excluded jurors.[15] Nevertheless, we conclude that appellate counsel reasonably decided not to raise the issue since the State gave a race-neutral reason for striking the veniremember. Nothing indicates that this reason was a pretext and that the actual motive was purposeful racial discrimination. Therefore, the issue would not have been successful on appeal.[16]

Sixth, Witter asserts that his appellate counsel should have petitioned for rehearing because this court misstated a fact in affirming his conviction. Our opinion stated that "on June 20, 1995, almost a full year before the penalty hearing," the State notified defense counsel it was investigating Witter's alleged possession of a shank in

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[14] 476 U.S. 79 (1986).

[15] Powers v. Ohio, 499 U.S. 400, 402 (1991).

[16] Cf. Purkett v. Elem, 514 U.S. 765, 767-69 (1995).

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prison.[17] Therefore, we concluded that "Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing."[18] The penalty hearing actually began on July 10, 1995, which gave counsel notice of twenty days, not almost a year. However, this error was not material and did not warrant rehearing under NRAP 40(c). In concluding that Witter had adequate time to prepare for the penalty hearing, we cited similar cases deeming one week's notice and six days' notice sufficient.[19] Therefore, twenty days' notice was sufficient as well.

Seventh, Witter contends that appellate counsel was ineffective in not arguing that the prosecutor improperly shifted the burden of proof to the defense. According to Witter, during closing argument at the guilt phase the prosecutor told the jury that neither party had presented evidence as to the effects of alcohol on a person's state of mind and that there was no evidence of mental impairment. The prosecutor's remarks may have been a fair response to arguments made by the defense,[20] but neither party provides the trial transcripts necessary to be sure about this. However, even assuming that the remarks improperly shifted the burden of proof, they were not egregious, and when defense counsel objected, the trial court agreed with counsel and reiterated to jurors that the defense had no burden of proof. We

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[17] Witter, 112 Nev. at 919, 921 P.2d at 894.

[18] Id. at 920, 921 P.2d at 894.

[19] Id. at 919, 921 P.2d at 894.

[20] Cf. Lisle v. State, 113 Nev. 679, 706-07, 941 P.2d 459, 477 (1997) (State did not improperly shift burden of proof when it made general remarks about lack of expert witnesses to point out that defendant failed to substantiate his claim of abuse as a mitigator).

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conclude that appellate counsel reasonably declined to raise the issue because the remarks did not prejudice Witter.

Eighth, Witter contends that his appellate counsel was ineffective in failing to argue that the trial court erred when it denied defense counsel's challenge for cause of a potential juror. The juror told counsel that he would not consider possible mitigating evidence that Witter had a bad childhood. In response to questioning by the trial court, the juror said that he would consider such evidence. Despite defense counsel's protest that the potential juror was saying one thing to him and another to the court, the court denied a challenge for cause.

Witter cites no apposite authority for the proposition that the potential juror should have been struck for cause. However, the sentencer in a capital case cannot refuse to consider relevant mitigating evidence,[21] so we conclude that the juror should have been struck for cause if he was unable to consider evidence of Witter's childhood difficulties as a possible mitigator.

Witter cites Thompson v. State, where this court stated that detached language by a potential juror indicating impartiality cannot be considered alone: the juror's whole declaration must be considered and must show that he or she will not be influenced by partial opinions.[22] We have further stated that a trial court has broad discretion in ruling on challenges for cause, which involve factual findings of credibility.[23] If a potential juror's responses are equivocal

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[21]See Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982).

[22]111 Nev. 439, 442, 894 P.2d 375, 377 (1995).

[23]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

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or conflicting, this court defers to the trial court's determination of the juror's state of mind.[24] We conclude that Witter was not prejudiced by appellate counsel's failure to raise this issue because the trial court acted within its discretion in finding that the potential juror's statements as a whole showed that he would fairly consider the evidence.

Ninth, Witter complains that his appellate counsel did not challenge the State's use of certain evidence which trial counsel objected to at the penalty hearing. Witter fails to provide the appropriate record, specific argument, or relevant authority necessary to support his claim.[25] The evidence at issue was apparently a California Department of Corrections document which referred to a prior crime and other misconduct by Witter. Witter does not include in the record the actual document. He claims that the evidence lacked sufficient specificity or corroboration, citing only D'Agostino v. State.[26] D'Agostino is not on point; it involved unspecific evidence of alleged admissions by the defendant that he had killed other people.[27] We conclude that Witter has failed to demonstrate that the evidence here was not properly admitted.

Finally, Witter contends that his appellate counsel should have challenged the admission of photographs as unfairly prejudicial. He claims that his trial counsel objected to the photographs numerous times, but he fails to cite the record to support this claim. He also describes the photographs of the crime scene, murder weapon, and autopsy as

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[24]Id.

[25]See Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997); Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

[26]107 Nev. 1001, 823 P.2d 283 (1991).

[27]See id.

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"unnecessarily bloody and gruesome." Aside from this conclusory assertion, he provides no analysis and cites no authority for the proposition that the evidence was inadmissible. Thus, he again fails to support his claim with reference to the record, specific argument, or relevant authority. At the evidentiary hearing, appellate counsel testified that he made a strategic decision not to raise this issue because it had little chance of success. We conclude that Witter has not shown that this decision was unreasonable. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District attorney
David M. Schieck
Clark County Clerk

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