IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JAMES LISLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36949

FILED

AUG 21 2002

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 appellant Kevin James Lisle's post-conviction petition for a writ of habeas corpus.

The district court convicted Lisle, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and sentenced him to death. After this court affirmed Lisle's conviction and sentence,[1] he petitioned the district court for habeas relief. The district court appointed counsel to represent Lisle but declined to conduct an evidentiary hearing. The district court denied Lisle's petition, and this appeal followed.

Ineffective assistance

Lisle first argues that trial counsel rendered constitutionally ineffective assistance by failing to object to several statements by the prosecutor. Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in Strickland v. Washington.[2] Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient

[1]Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997), clarified on denial of rehearing by 114 Nev. 221, 954 P.2d 744 (1998).

[2]466 U.S. 668 (1984).

performance prejudiced the defense.[3] To establish prejudice based on trial counsel's deficient performance, a petitioner must show that but for counsel's errors there is a reasonable probability that the verdict would have been different.[4] A petitioner is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations not belied by the record that, if true, would entitle him to relief.[5]

In his guilt phase rebuttal closing argument, the prosecutor referenced negotiations he had with two of the State's witnesses before they pleaded guilty to lesser charges. On direct appeal, Lisle argued that the prosecutor improperly injected his personal opinion of their culpability, tendered his credentials, and vouched for these witnesses. We concluded that none of the prosecutor's remarks warranted reversal of appellant's conviction and sentence.[6] Lisle now claims that his trial counsel was ineffective for not objecting to the prosecutor's dialogue. Although counsel should have objected, it is unlikely that an objection would have changed the jury's verdict.[7] The district court properly denied relief on this ground.

Lisle next argues that trial counsel provided ineffective assistance by failing to object to the prosecutor's use of the words "we" and "us" in his penalty phase closing argument. Lisle asserts that this court

---

[3]Id. at 687.

[4]Id. at 694.

[5]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[6]Lisle, 113 Nev. at 559, 937 P.2d at 485.

[7]See Howard v. State, 106 Nev. 713-14, 719, 800 P.2d 175, 179 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

refused to address the propriety of these statements because his trial counsel did not object.

Contrary to Lisle's assertion, this court did evaluate the prosecutor's use of the words "we" and "us." We determined that:

> For the most part, the prosecutor's use of "we" and "us" is rhetorical, and therefore not improper. However, the statement, "There is only one human being in this world that causes us to be here today doing this terrible thing we have to do. And his name is Kevin Lisle," improperly suggests that the jury is aligned with the prosecution.[8]

Again, trial counsel should have objected to the prosecutor's improper statement.[9] Nevertheless, we determined that this improper statement did not prejudice Lisle.[10] The district court properly denied relief on this ground.

Lisle next argues that the prosecutor improperly implied that there is a presumption that the death penalty should be imposed. Lisle quotes several lines from the prosecutor's closing argument, including, "[Lisle's acts] deserve the death penalty. There is no mitigation that can condone that," and, "This man has earned the death penalty for everything that he has done. . . . To impose anything less would be a grave injustice." Lisle argues that trial counsel should have objected to these statements. We disagree. The prosecutor did not imply that a death sentence was presumptive. Instead, the prosecutor merely argued that a death sentence was appropriate in this case. This court has repeatedly held that it is

---

[8]Lisle, 113 Nev. at 554, 937 P.2d at 481-82.

[9]See Howard, 106 Nev. at 719, 800 P.2d at 179.

[10]Lisle, 113 Nev. at 554, 937 P.2d at 482.

appropriate for the State to ask the jury to return a sentence of death.[11] Thus, trial counsel was not deficient for not objecting to this line of argument.

Lisle next argues that the prosecutor improperly used his possible future dangerousness as a ground for imposing the death penalty. The prosecutor urged the jury to ensure that "the murder of Kip Logan [is] the last crime that this defendant can commit." Later, the prosecutor said, "Whatever verdict you come back with it can assure this community that he will never kill again, and that should be the most important consideration." Lisle argues that trial counsel was ineffective for failing to object.

Lisle attempts to liken the prosecutor's statements to the statements in Collier v. State.[12] In that case, the prosecutor informed the jury that prison does not rehabilitate and does not keep prisoners from committing crimes.[13] The prosecutor used Patrick McKenna's murder of his fellow inmate as an example.[14] This court concluded that the prosecutor's statements were improper because they addressed facts not in evidence and "divert the jury's attention from its proper purpose, which is

---

[11]See Williams v. State, 113 Nev. 1008, 1022, 945 P.2d 438, 446 (1997); Domingues v. State, 112 Nev. 683, 698-99, 917 P.2d 1364, 1375 (1996).

[12]101 Nev. 473, 705 P.2d 1126 (1985), modified on other grounds by Howard, 106 Nev. 713, 800 P.2d 175.

[13]Id. at 478, 705 P.2d at 1129.

[14]Id.

the determination of the proper sentence for the defendant before them, based upon his own past conduct."[15]

Lisle acknowledges that this court later held that when the record supports an inference of future dangerousness, the prosecutor may properly argue it.[16] But he argues that his past conduct does not support such an inference. We disagree. In Redmen v. State, this court held that a prosecutor may argue the future dangerousness of a defendant even when there is no evidence of violence aside from the murder in question.[17] Thus, the prosecutor's statements were not improper, and trial counsel was not ineffective for not challenging them.

Aggravating circumstance

Lisle argues, as he did on direct appeal, that the evidence does not support the jury's finding that he "knowingly created a great risk of death to more than one person."[18] He claims his case is indistinguishable from Leslie v. State,[19] in which this court found that the record did not support the jury's finding of the aggravator, and therefore this court should strike his aggravator.

We conclude that Lisle is not entitled to relief on this ground. First, we determined that the aggravator was supported by sufficient

---

[15]Id.

[16]See, e.g., Harte v. State, 116 Nev. at 1072, 13 P.3d at 431; Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995); Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991).

[17]Redmen, 108 Nev. at 235, 828 P.2d at 400.

[18]NRS 200.033(3).

[19]114 Nev. 8, 952 P.2d 966 (1998).

evidence on direct appeal, and that decision is now law of the case.[20] Moreover, Leslie is inapplicable. In Leslie, the State based the "knowingly created a great risk of death to more than one person" aggravator on Leslie shooting the gun into the wall above the head of the victim. There was a back room behind that wall, in which two additional people were located. There was no evidence that Leslie knew that the two people were there. In this case, Lisle shot into a vehicle traveling approximately 60 miles per hour on a freeway. He argues that his case is like Leslie because there is no evidence that he or the other van passengers could see the victim's passenger. However, that passenger testified that he could see the van passengers. Moreover, Lisle shot the driver of a vehicle traveling on a freeway. Killing the driver of a vehicle that is traveling on a freeway puts others at great risk of death. Therefore, we conclude that the district court properly denied relief on this claim.

Penalty hearing evidence

Lisle next contends that the district court erroneously admitted evidence that Lisle committed another unadjudicated murder. We considered this evidence on direct appeal and concluded that it was properly admitted.[21] That decision is the law of the case and cannot be avoided by changing the focus of an argument after subsequent reflection.

---

[20]Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[21]See Lisle, 113 Nev. at 557-58, 937 P.2d at 484.

Evidentiary hearing

Finally, Lisle contends that the district court abused its discretion by not conducting an evidentiary hearing on his claims that his attorney rendered ineffective assistance. Lisle argued that trial counsel rendered ineffective assistance by failing to object to the prosecutor's allegedly improper statements. These claims did not raise factual disputes requiring resolution at an evidentiary hearing.

Lisle also contends that he was entitled to a hearing on his claim that the record does not support the jury's finding that he knowingly created a great risk of death to more than one person by means of a weapon, device or course of action. As discussed above, we previously concluded that the record supports the jury's finding; that decision is the law of the case. Therefore, the district court properly declined to hold an evidentiary hearing on this claim.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Patti & Sgro
Clark County Clerk