

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN M. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37084

FILED

JUL 10 2002

JAMETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On June 24, 1996, the district court convicted Castillo, pursuant to a jury verdict, of first-degree murder with the use of a firearm. The jury sentenced Castillo to life imprisonment without the possibility of parole with a single consecutive life term without the possibility of parole as an enhancement for the use of a firearm and for the commission of an offense to promote gang activity. This court dismissed Castillo's direct appeal from his judgment of conviction and sentence.¹

On July 12, 1999, Castillo filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court appointed counsel to represent Castillo. On October 29, 1999, through appointed counsel, Castillo added two supplemental claims to his original writ petition. In total, Castillo raised seventeen issues of ineffective assistance of trial or appellate counsel in his petition. As to trial counsel,

¹Castillo v. State, Docket No. 29169 (Order Dismissing Appeal, July 28, 1998).

Castillo alleged that trial counsel failed to: (1) adequately investigate the statements of Falcia Duran concerning a prior shooting incident between Castillo and a rival gang; (2) object to alleged improper use of the prior bad act evidence by the prosecutor in his opening statements and closing arguments; (3) investigate and call Michelle Pena as a witness to authenticate a photograph illustrating Castillo's appearance on the day of the shooting; (4) investigate or prepare for witness Elizabeth Ryan's testimony; (5) investigate, properly call or properly question witnesses Lisa and Riccardo Hernandez regarding Castillo's roll as a peacemaker; (6) present evidence that the Romero brothers had committed prior incidents of violence against Castillo's gang; (7) investigate and call Amy Hernandez as a witness to rebut the testimony of Veronica Rodriguez and Leanna Fielding; (8) call Marcos Sandoval as a witness; (9) object to references by the State to witness intimidation; (10) object to the trial court's characterization of the reasonable doubt standard during voir dire; (11) consult with co-counsel before stipulating to the admission of a map drawn by Castillo depicting his movements during the shooting incident; and (12) raise constitutional objections to the trial court's discovery order. As to appellate counsel, Castillo alleged counsel was ineffective for failing to: (1) raise the impropriety of the implied malice instruction; (2) argue prosecutorial misconduct during closing argument when the prosecutor allegedly called a witness a liar; (3) communicate with Castillo prior to filing briefs; and (4) raise the admissibility of the prior shooting incident.

In addition to his allegations of ineffective assistance of counsel, Castillo also claimed that the discovery of new evidence warranted a new trial. Castillo claimed that Duran was now recanting her trial testimony regarding the prior bad act. Duran was now allegedly

denying that she saw Castillo commit the prior shooting act and that she had been threatened by the rival gang to make up the story to hurt Castillo's defense.

On October 20, 2000, the district court held an evidentiary hearing on Castillo's petition pursuant to NRS 34.770. During the evidentiary hearing, Castillo presented evidence regarding eight of his original seventeen claims for relief: (1) failure to investigate Duran's testimony; (2) Duran's recantation regarding the bad act evidence; (3) the reasonable doubt characterization given by the trial court during jury voir dire; (4) improper opening statements by the prosecutor; (5) failure to challenge the admissibility of the bad act evidence on appeal; (6) failure to communicate with co-counsel regarding the admission of the map; (7) failure of appellate counsel to communicate with Castillo, and (8) improper closing argument by the State amounting to prosecutorial conduct where the State referred to the testimony of Octavio Ojeda as lies.²

On November 29, 2000, the district court denied Castillo's petition. The district court concluded that Duran's testimony at the evidentiary hearing was "incredible" and that her recantation of her trial testimony was unbelievable. The district court found there was

²At the evidentiary hearing, counsel for Castillo stipulated that the asserted errors regarding the malice instruction and discovery order were controlled by this court's decisions in Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000) and Binegar v. State, 112 Nev. 544, 915 P.2d 889 (1996), respectively. Therefore, no evidence or testimony was presented at the evidentiary hearing on these issues. Counsel abandoned the discovery order claim because he had determined that no improper materials had been given to the State. On the malice instruction, counsel did not abandon the claim, but acknowledged that the issue was resolved by the Cordova decision.

insufficient evidence presented to find Castillo factually innocent of the prior shooting incident. Therefore, the use of the prior shooting incident was still proper and not grounds for a new trial.

In addition, the district court found that trial counsel was not ineffective in investigating Duran. The district court concluded that counsel vigorously objected to the admission of the prior bad act evidence and cross-examined Duran. Finally, the district court found that there was no evidence to support Castillo's contention that a lengthier pre-trial interview would have caused Duran to reveal the alleged threats to her life by a rival gang or that she allegedly made up the testimony regarding the prior shooting incident.

Further, the district court concluded that neither trial nor appellate counsel were ineffective for failing to object to, or raise on appeal, the issues regarding the characterization of the reasonable doubt instruction during voir dire or the prosecutor remarks during opening statements and closing arguments. The trial court determined that the remarks of the trial court and the prosecutor were not error, and even if they could be construed as error, trial and appellate counsel made reasonable strategic decisions not object to or include these issues on appeal.

Finally, the district court found that appellate counsel, after thoroughly reviewing the evidence and record, declined to appeal the admission of prior bad act evidence or the admission of Duran's prior inconsistent statements. The district court concluded that appellate counsel had made reasonable strategic decisions concerning which claims of error to raise on appeal, and the record supported the trial court's

decision to admit the bad act evidence, thus reducing the likelihood that such an issue would have succeeded on appeal.

As to the remaining claims, the district court concluded that they were not supported at the hearing by evidence or argument and that Castillo failed to sustain his burden of proof on the remaining claims. This appeal followed.

On appeal, Castillo asserts nine claims of error. Castillo contends that the district court erred by: (1) refusing to grant a new trial on the basis of Duran's recantation; (2) concluding that trial counsel conducted an adequate investigation of Duran prior to the Petrocelli hearing and trial; (3) determining trial counsel was not ineffective when he stipulated to the admission of the map without consulting co-counsel; (4) finding that trial counsel were not ineffective for failing to object to the prosecutor's comments regarding Ojeda's testimony; (5) finding that trial counsel were not ineffective for failing to challenge the trial court's characterization of the reasonable doubt instruction during voir dire; (6) concluding that Duran's original trial testimony and recorded statements were admissible and that appellate counsel was not ineffective for failing to raise these claims on appeal; (7) finding appellate counsel was not ineffective for failing to challenge the prosecutor's comments regarding Ojeda as plain error; (8) finding appellate counsel's lack of communication with Castillo was not ineffective or prejudicial; and (9) finding appellate counsel was not effective for failing to raise on appeal the alleged

impropriety of the trial court's comments on reasonable doubt during voir dire.³

Castillo pursued two theories of defense at trial. He contended that the bullet that killed an innocent bystander during a shoot-out between rival gangs did not come from his gun. In addition, Castillo asserted that even if the bullet came from his gun, he was acting in self-defense because the other gang started shooting first. Castillo asserts that the admission of Duran's testimony, together with other instances of ineffective assistance of counsel, deprived him of a fair trial.

First, Castillo contends, by inference, that Duran's recantation of her trial testimony and statements to the police is sufficient new information to warrant reversal of his conviction. We disagree.

In her statements to the police, Duran identified Castillo as the person who fired shots at a car containing rival gang members days before the confrontation at Horseman's Park. During the Petrocelli hearing and at trial, Duran stated she didn't actually see Castillo fire any shots, but she heard shots and saw Duran at the scene. She said she didn't tell the police the truth, and that she had been told by a third person that Duran fired the shots. Her previous statements to the police were admitted at the hearing and the trial as prior inconsistent statements.

At the evidentiary hearing on the post-conviction petition, Duran stated that she made up her statements and trial testimony because a rival gang threatened her. She testified they wanted her to

³Castillo does not contend that the district court erred with respect to any other findings and does not challenge the denial of the remaining issues raised in his petition.

make up the story to make Castillo look bad. The district court rejected this testimony. The district court noted that Duran was a friend of Castillo's and had always been a hostile witness. Moreover, she stated the threats took place before the incident at Horseman's Park, so her story was internally inconsistent. We find substantial evidence supports the district court's conclusion that Duran was not telling the truth at the evidentiary hearing and that this information did not warrant a new trial.

As to the issues of ineffectiveness of trial counsel, to state a claim of ineffective assistance of trial 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 counsel's errors were so severe that they rendered the jury's verdict unreliable.⁴ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁵

Castillo argues that trial counsel were ineffective where they failed to conduct adequate pretrial investigation regarding the proposed testimony of Duran. Castillo asserts that if adequate investigation had occurred regarding Duran's testimony, Castillo would have been able to conduct a more competent cross-examination of Duran. Moreover, Castillo argues that adequate pretrial investigation would have revealed that Duran was prevaricating in response to threats from rival gang members.

The record belies Castillo's argument that trial counsel was ineffective for failing to investigate the nature of Duran's testimony.

⁴See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵See Strickland, 466 U.S. at 697.

While this court has concluded that “[a]n attorney must make a reasonable investigation in preparation for trial, or a reasonable decision not to investigate,”⁶ the record indicates that defense counsel had reasonable opportunity to investigate the nature of Duran’s proposed testimony. The district court found that counsel extensively cross-examined Duran at both the Petrocelli hearing and at trial. Duran admitted in cross-examination that she didn’t really see the previous shooting incidents but learned the details from a third party. Moreover, Duran did speak with counsel but did not indicate to either the State or defense counsel that she was inventing testimony under threat from rival gang members. Finally, Duran stated at the evidentiary hearing that the reason she was coming forward now was that she was moving and no longer feared the alleged threats. Thus, the district court did not err in dismissing this claim.

Next, Castillo claims that trial counsel was ineffective because he failed to consult with co-counsel before stipulating into evidence a map drawn by Castillo depicting events and locations of individuals at Horseman’s Park on the day of the fatal shooting. Castillo drew the map at the request of trial counsel so that counsel could use it in requesting a jury view of the scene. The map was found in Castillo’s cell.

Trial counsel stipulated to the admission because the map permitted Castillo to demonstrate where he was on the day of shooting without necessarily having to take the witness stand. In hindsight, given the extensive use that the State made of the map, he would not have

⁶Kirksey, 112 Nev. at 992-93, 923 P.2d at 1110 (citing Strickland, 466 U.S. at 691).

entered into the stipulation and would have objected to its admission as attorney work product. He also indicated that although he did not discuss it with co-counsel, co-counsel did not raise any specific objections to its admission when he found out about the stipulation, just that he was miffed that he was not consulted.

Trial counsel made a strategic decision to admit the map, and co-counsel indicated at the evidentiary hearing that he had no real objection at the time other than his consternation at not being consulted. The district court did not err in finding this to be a reasonable strategic decision and rejecting Castillo's ineffective assistance of counsel claim on this ground.⁷

Next, Castillo contends that trial counsel was ineffective for failing to object to the prosecutor's comments regarding Ojeda's testimony. Castillo contends that the prosecutor committed misconduct by calling Ojeda a "liar" during closing argument.

Specifically, during rebuttal, the State made the following comments regarding the Ojeda's testimony (emphasis added):

Prosecutor: You heard that young man, Mr. Ojeda. . . . He got up. He told you that he lied at the preliminary hearing. He didn't lie at the preliminary hearing. He got up there under oath and he lied under oath to protect his buddy. Octavio Ojeda is an MS gang member. He admitted that on cross-examination. He's a friend of [Castillo]. He admitted that on cross-examination. You should not, because you know that he has lied under oath once or twice, you should not believe what he says for a moment.

⁷Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

This court has concluded that it is improper argument for counsel to characterize a witness as a liar⁸ or to characterize a witness's testimony as a lie.⁹ In Ross, however, this court concluded "a prosecutor may demonstrate to a jury through inferences that a defense witness's testimony is palpably untrue."¹⁰ The mere use of the word "liar" is not necessarily error. Moreover, in order for error to be reversible, it must be prejudicial and not merely harmless.¹¹ "The test is whether 'without reservation . . . the verdict would have been the same in the absence of error.'"¹²

Trial counsel testified that while some of the argument may have been questionable, it was a close call, and as a matter of tactics, he did not believe there was any advantage to objecting during rebuttal argument on a matter that was so close. The district court concluded that this was not only a matter of tactics, but that the argument was not improper because it was permissible comment on the evidence. We agree, given Ojeda's admission that he lied at the preliminary hearing, the State was permitted to question whether the "lie" was really his trial testimony, not the preliminary hearing testimony. Finally, we conclude that even if

⁸Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (citing Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)).

⁹Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (citing Witherow, 104 Nev. at 724, 765 P.2d at 1155).

¹⁰Ross, 106 Nev. at 927, 803 P.2d at 1106.

¹¹Id. at 928, 803 P.2d at 1106 (internal citation omitted).

¹²Id. at 928, 803 P.2d at 1106 (quoting Witherow, 104 Nev. at 724, 765 P.2d at 1156).

the statements were prosecutorial misconduct, Castillo has failed to demonstrate that the verdict would have been different absent the alleged error. Accordingly, the district court did not err in dismissing this claim.

Finally, Castillo contends that trial counsel was ineffective for failing to object to the trial court's comments regarding reasonable doubt and requesting a mistrial based upon the comments. A review of the record indicates that, during jury voir dire, the trial court made the following statements to the prospective jurors:

Does everybody also agree that the prosecutor has the burden of proof beyond a reasonable doubt, and I will give you that instruction of law what reasonable doubt is at the end of the trial.

....

I also would like to point out, ladies and gentlemen, virtually nothing can be proved beyond all doubt. For example, I cannot prove to you that tomorrow the sun is going to come up. I can't prove that, but I think it is reasonable to assume it is going to happen. So the burden of proof here is beyond a reasonable doubt not beyond all doubt. Do you understand that? Do you appreciate that?

Trial counsel indicated that he did not object because the comments were not a mischaracterization of the reasonable doubt instruction, and he saw no strategic advantage to objecting at this early stage of the proceedings for what was, at most, a technical error.

Although trial judges, as well as counsel, should refrain from giving examples of what constitutes reasonable doubt, the remarks of the court during voir dire were not inaccurate. We conclude the remarks do not constitute error and that the district court did not err in rejecting this claim. Even if we were to conclude the remarks were improper, given the fact that this happened during voir dire and the jury received the proper

statutorily prescribed reasonable doubt instruction, any error would be harmless beyond a reasonable doubt.

Next, appellant Castillo raises four claims of ineffective assistance of appellate counsel. “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in Strickland v. Washington, 466 U.S. 668 (1984).”¹³ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁵ “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”¹⁶

Castillo’s first and second claims of appellate counsel error involve the failure to raise the admissibility of Duran’s testimony and the failure to challenge the prosecutor’s remarks concerning Ojeda’s testimony on appeal. As we have previously concluded that the trial court did not err in admitting Duran’s testimony and prior police statements, this issue did not have a probability of success on appeal, and the district court did not err in dismissing this claim. The same rationale applies to the prosecutor’s remarks regarding Ojeda. The remarks were not improper,

¹³Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

¹⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁵Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

therefore, the issue would not have a reasonable probability of success on appeal and the district court properly dismissed this claim.

Next, Castillo contends that appellate counsel did not meet with him personally. Castillo contends that the failure to communicate with him amounts to ineffective assistance of appellate counsel. While Castillo argues that this was improper, he does not provide specific instance where appellate counsel refused to meet with him. As we noted previously, a post-conviction petition must set forth specific allegations, a factual background, and other sources of evidence demonstrating entitlement to relief.¹⁷ However, even assuming appellate counsel's performance was deficient for failing to communicate with Castillo, Castillo has failed to demonstrate that any communication with counsel resulted in prejudice, or would have resulted in a different outcome on his appeal.¹⁸ Thus, the district court did not err in dismissing this claim.

Finally, Castillo argues that appellate counsel was ineffective for failing to challenge the trial court's comments on reasonable doubt. As noted above, we conclude that the remarks were not error, or were harmless beyond a reasonable doubt. We conclude that Castillo has failed to meet his burden of proof to establish sufficient prejudice to show that the omitted issue would have had a reasonable probability of success on appeal.¹⁹ Nor has Castillo demonstrated specific facts or other sources of evidence that demonstrate that appellate counsel's representation fell

¹⁷See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

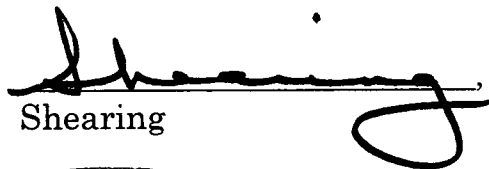
¹⁸McNelson, 115 Nev. at 411-12, 990 P.2d at 1273.


¹⁹See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (internal citation omitted).

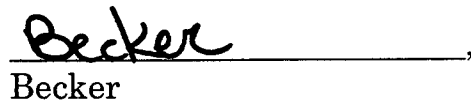
below an objective standard of reasonableness.²⁰ Moreover, counsel's decision not to raise a potentially non-frivolous issue does not, in itself, rise to the level of ineffective assistance of appellate counsel.²¹

In conclusion, we find appellant Castillo's arguments without merit and

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Rose J.


Becker J.

cc: Hon. James W. Hardesty, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²⁰See Strickland, 466 U.S. at 687-88; Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²¹Kirksey, 112 Nev. at 998, 923 P.2d at 113-14 (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)).