IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 37211

FILED

JUL 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying Kevin James Lisle's post-conviction petition for a writ of habeas corpus.

Lisle and Jerry Lopez were jointly tried for the murder of Justin Lusch. The jury found them guilty of first-degree murder with the use of a deadly weapon and conspiracy to commit murder. The jury also found Lisle guilty of being an ex-felon in possession of a firearm. Lisle received various prison terms and a sentence of death for the murder. 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.

Lisle first argues that trial counsel rendered constitutionally ineffective assistance. 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

[1]Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997).

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

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counsel's deficient 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 that, if true, would entitle him to relief.[5] A petitioner is not entitled to such a hearing if the factual allegations are belied or repelled by the record.[6]

Lisle claims that trial counsel was ineffective for failing to object to the prosecutor's allegedly improper statements.[7]

When addressing the jury in his closing arguments, the prosecutor repeatedly used the words "we" and "us." Lisle claims that by addressing the jury this way, the prosecutor suggested he was aligned with the jury and interjected his personal opinion.

Due to the risk that the jury will unduly rely on the prosecutor's conclusions because of his or her greater experience and knowledge, a prosecutor may not assert his personal opinions during his arguments.[8] For the same reasons, a prosecutor should not speak in a

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[3]Id. at 687-88.

[4]Id. at 694.

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

[6]Id. at 503, 686 P.2d at 225.

[7]We will not revisit Lisle's independent claims that the district court abused its discretion by not sua sponte tempering the prosecutor's statements. We rejected these claims on direct appeal. Lisle, 113 Nev. at 705-07, 941 P.2d at 476-77. The law of the case doctrine precludes reconsideration. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[8]Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985).

manner that suggests that he or she has the same duties as or is aligned with the jury in determining a defendant's guilt or punishment.[9] While this court has condemned prosecutors' use of the words "we" and "us" in this way, the use of those words is not always improper.[10] In this case, we conclude that the prosecutor's use of the words "we" and "us" did not suggest that he was aligned with the jury. Rather, the prosecutor frequently emphasized the jury's duty to decide Lisle's guilt and punishment. Because the prosecutor's rhetoric was not improper, trial counsel was not ineffective for declining to object.

As he discussed Lisle's possible punishments, the prosecutor encouraged the jury to impose a sentence of death. The prosecutor also stated that a death sentence was the only way to ensure that Lisle cannot kill again. Lisle contends that the prosecutor's statements were improper because they misled the jury to believe that death is the presumed sentence and assumed that Lisle would pose a future danger to society. We disagree. The prosecutor did not imply that a death sentence is the presumed sentence. Instead, the prosecutor properly asked the jury to return a sentence of death.[11] Also, a prosecutor may properly base that request on the defendant's possible future dangerousness.[12] Thus, the

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[9]Snow v. State, 101 Nev. 439, 447-48, 705 P.2d 632, 639 (1985).

[10]See Schoels v. State, 114 Nev. 981, 987-88, 966 P.2d 735, 739 (1998), modified on rehearing 115 Nev. 33, 975 P.2d 1275 (1999).

[11]See Williams v. State, 113 Nev. 1008, 1022, 945 P.2d 438, 446 (1997) overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Domingues v. State, 112 Nev. 683, 698-99, 917 P.2d 1364, 1375 (1996).

[12]See, e.g., Harte v. State, 116 Nev. 1054, 1071-72, 13 P.3d 420, 431 (2000); Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992), overruled on

continued on next page . . .

prosecutor's statements were not improper, and trial counsel was not ineffective for not challenging them.

Also during his penalty phase closing argument, the prosecutor asked the jury to "send a message" to society and other would-be criminals and commented on Lisle's failure to substantiate his claim that he suffered from an abusive childhood. Trial counsel objected, and Lisle challenged the prosecutor's statements on direct appeal. We determined that neither statement was improper.[13] Our decisions on direct appeal are law of the case.[14]

On direct appeal, we also considered Lisle's next argument. Lisle alleges that the district court erred by allowing the prosecutor to elicit evidence that the jury could have used to connect Lisle to another murder. Lisle's trial counsel objected and moved for a mistrial. The district court denied the motion, but diffused the problem by ordering a curative remedy. On direct appeal, Lisle argued that the district court abused its discretion by denying the motion.[15] We concluded that the district court sufficiently cured any prejudice and properly denied Lisle's motion. The doctrine of law of the case cannot be avoided by a more detailed and precisely focused argument made after reflecting on the

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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).

[13]Lisle, 113 Nev. at 705-07, 941 P.2d at 476-77.

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

[15]Lisle, 113 Nev. at 699-700, 941 P.2d at 472-73.

previous proceeding.[16] The district court properly denied relief on this ground.

Lisle next claims that his right to confront and cross-examine witnesses against him was violated when the district court admitted Lopez's out-of-court confession that inculpated Lisle. Although Lisle concedes that this court rejected this claim on direct appeal, he contends that Gray v. Maryland,[17] a recent United States Supreme Court opinion, requires us to remand for a new trial. We disagree. Gray does not alter our prior analysis of this issue.[18]

In Gray, a police detective that read the codefendant's confession into the record substituted the word "deleted" or "deletion" for the non-confessing defendants' names.[19] Immediately after the detective read the confession, the prosecutor asked, "'after he gave you that information, you subsequently were able to arrest [one of the non-confessing defendants]; is that correct?' The officer responded, 'That is correct.'"[20] The Court compared the redacted confession to the ones at issue in Bruton v. United States[21] and Richardson v. March.[22] And the Court determined that a confession with obvious deletions has the same

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[16]Hall, 91 Nev. at 316, 535 P.2d 799.

[17]523 U.S. 185 (1998).

[18]We address this issue because Lisle's direct appeal was not final when Gray was decided. See Garner v. State, 116 Nev. 770, 788 & n.8, 6 P.3d 1013, 1025 & n.8 (1999).

[19]Gray, 523 U.S. at 188.

[20]Id. at 188-89.

[21]391 U.S. 123 (1968).

[22]481 U.S. 200 (1987).

impact as a confession that names the non-confessing defendant because (1) the jury will often realize that the confession refers specifically to the defendant, (2) the obvious deletion could call the jury's attention to the removed name, and (3) they function the same way grammatically.[23] Therefore, the Court held that a confession with obvious deletions falls under Bruton's protective rule.[24]

Unlike Gray, the confession in this case was not obviously altered. Melcher testified that Lopez told him that Lopez and "another guy" drove the victim to the desert and that "the other guy" shot the victim. The jury could have reasonably thought that when discussing the crime with Melcher, Lopez omitted his accomplice's name. Thus, even under Gray's obvious alteration test, the confession alone is not incriminating.

Lisle argues that the context in which Lopez's redacted confession was admitted made it obvious that he was "the other guy." However, the Gray decision was not based on the context in which the redacted confession was admitted but the manner in which it was redacted. The Supreme Court's analysis focused on the close resemblance of the unredacted confession and the one with obvious alterations, holding that they are functionally equivalent.[25] In fact, the Supreme Court held that the obviously altered statement violated Gray's Sixth Amendment rights independently of the prosecutor's follow-up question.[26] Our prior analysis remains sound because Gray did not affect the primary holding in

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[23]Gray, 523 U.S. at 192-94.

[24]Id. at 195.

[25]Id. at 192-95.

[26]Id. at 193.

Richardson.[27] That is, it is not improper to admit a codefendant's confession redacted so that it does not facially incriminate the other defendant although the confession becomes incriminating when linked with other evidence introduced at trial.[28] Thus, we conclude that Lisle is not entitled to any relief on this ground.

Lisle also contends that counsel was ineffective for not objecting to the district court's failure to give a limiting instruction immediately prior to Melcher's testimony about Lopez's statements. The district court should have instructed the jury to apply Lopez's out-of-court statement only to him.[29] And it is not clear that it did not; Lisle neglected to include the jury instructions in the record on appeal. Nevertheless, the possible error was harmless.[30] As we concluded on direct appeal, the State presented overwhelming evidence of guilt, including four witnesses who testified that Lisle told them that he killed the victim.[31]

Finally, Lisle argues that the district court improperly failed to sever the charge of ex-felon in possession of a firearm from the murder charges. We rejected this claim on direct appeal.[32] Later, in Brown v. State,[33] we held that in "future cases where the State seeks convictions on

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[27]See generally Gray, 523 U.S. 185.

[28]See Richardson, 481 U.S. at 208-209.

[29]See generally Richardson, 481 U.S. 200.

[30]See Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998) (applying harmless error analysis to Bruton violations).

[31]Lisle, 113 Nev. at 693, 941 P.2d at 468.

[32]Id. at 693-94, 941 P.2d at 469.

[33]114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998).

multiple counts, including a count of possession of a firearm by an ex-felon pursuant to NRS 202.360, . . . severance of counts pursuant to NRS 202.360 is required." Although Brown announced a prospective rule, we applied its reasoning and granted relief in a then-pending case, Schoels v. State.[34] Lisle compares his case to Schoels and argues that Brown should be retroactively applied to him. We disagree.

The circumstances of Schoels are completely different from those in this case. Before trial, Schoels moved to plead guilty to the charge of ex-felon in possession of a firearm; the district court denied the motion because it would be "'highly detrimental to the state.'"[35] Other than the unfair prejudicial effect of informing the jury that Schoels was an ex-felon, we saw no support in the record for the district court's finding.[36] Thus, we concluded that the district court abused its discretion in refusing to accept Schoels's guilty plea and that the error undermined the reliability of the first-degree murder verdict.[37]

Although the district court also denied Schoels's motion to sever the charge, we reached the issue independently of Brown and granted relief based on the district court's refusal to accept the guilty plea. Here, Lisle did not attempt to plead guilty, he only requested severance. Thus, Schoels does not apply. Moreover, on direct appeal we determined that Lisle was not prejudiced by the jury being informed that he was previously convicted of conspiracy to sell a controlled substance and, therefore, the district court did not abuse its discretion in denying Lisle's

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[34]115 Nev. 33, 975 P.2d 1275 (1999).

[35]Id. at 35-36, 975 P.2d at 1277.

[36]Id. at 37, 975 P.2d at 1277.

[37]Id. at 37-38, 975 P.2d at 1277-78.

motion to sever.[38] Because Brown announced a prospective rule, it does not apply to Lisle. The district court properly denied relief on this ground.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Patti & Sgro
Clark County Clerk

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[38]Lisle, 113 Nev. at 694, 941 P.2d at 469.