IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE JOSEPH MCCOLLUM, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 37233 FILED DEC 05 2001 JANETTE M. BLOOM CLERK OF SUPREME COURT BY [signature] CHIEF DEPUTY CLERK

ORDER AFFIRMING AND REMANDING

This is an appeal from a district court order denying appellant Dale Joseph McCollum's post-conviction petition for a writ of habeas corpus.

On February 2, 1996, McCollum was convicted, pursuant to a jury verdict, of one count of second-degree murder. The district court sentenced McCollum to life with the possibility of parole. McCollum appealed, and this court affirmed his conviction.[1] Thereafter, McCollum filed a post-conviction petition for a writ of habeas corpus, arguing that his trial counsel was ineffective. After conducting an evidentiary hearing, the district court denied McCollum's petition. McCollum filed the instant appeal.

McCollum claims that the district court erred in denying his petition because his counsel was ineffective. Particularly, McCollum claims that his counsel was ineffective in failing to request a lesser-included offense jury instruction, in failing to object to prosecutorial misconduct, and in failing to argue that the victim died from medical complications unrelated to the injuries caused by McCollum.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's deficient performance fell below an objective standard of reasonableness; and (2) that but for counsel's deficient performance, the outcome of the

---

[1]McCollum v. State, Docket No. 28575 (Order Dismissing Appeal, April 9, 1998).

01-20349

proceedings would have been different.[2] Judicial review of a lawyer's representation is highly deferential, and a "defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'"[3] Here, we conclude that the district court did not err in ruling that trial counsel was not ineffective. We will discuss each of McCollum's claims of ineffective assistance in turn.

First, McCollum claims that his trial counsel was ineffective in failing to request a jury instruction on involuntary or voluntary manslaughter as a lesser-included offense. We disagree.

In the instant case, McCollum signed a memorandum of understanding confirming that he instructed counsel not to request jury instructions on the lesser-included offenses of voluntary or involuntary manslaughter. Additionally, trial counsel testified that he thought the decision to forego the lesser-included instructions was imprudent, but that he did not request the instructions because McCollum explicitly advised him not to.

Assuming without deciding that trial counsel was required to request lesser-included offense instructions over his client's objection, we conclude that McCollum has failed to show that he was prejudiced by trial counsel's failure to proffer such instructions. Because there was sufficient evidence to find McCollum guilty of second-degree murder beyond a reasonable doubt, we cannot say that the outcome of the proceeding would have been different had a lesser-included offense instruction been given.

Second, McCollum claims that his trial counsel was ineffective in failing to object to prosecutorial misconduct. Specifically, McCollum claims that the prosecutor engaged in prejudicial misconduct when he implied that one of McCollum's key witnesses was a liar when he stated: "[h]ow many people could they bring in like [McCollum's witness] to make up a story like she made up."

Assuming without deciding that the prosecutor engaged in an isolated instance of misconduct, we again conclude that McCollum has failed to show that he was prejudiced by his trial counsel's failure to object

[2]Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

to the comment.[4] We cannot say that the prosecutor's comment infected McCollum's trial with unfairness as to warrant reversal. At trial, at least two witnesses testified that they saw McCollum repeatedly punch the victim in the head as he stood against a brick wall. Both witnesses further testified that the victim was not fighting back. In light of this evidence, we cannot say that McCollum was prejudiced by his trial counsel's failure to object to an alleged isolated instance of prosecutorial misconduct.

Finally, McCollum contends that his counsel was ineffective in failing to argue that the victim's demise could have been the result of medical problems unrelated to the injuries caused by McCollum. Particularly, McCollum points to medical records indicating that the victim had other physical ailments, including high blood pressure, a clot in the femoral vein, and other heart and abdominal problems, and argues that the victim died only after his relatives made the decision to withdraw life support. We conclude that trial counsel's decision to forego the theory that the victim died from a cause unrelated to the injuries he sustained in the fight with McCollum was not objectively unreasonable.

At the evidentiary hearing, trial counsel testified that he reviewed the victim's medical records, and that the records indicated that the victim was brain dead as a result of the injuries allegedly caused by McCollum. Moreover, trial counsel testified that he researched the issue of causation of death thoroughly and found no legal basis to argue that the victim's relatives were an intervening cause of his death when they removed the life support mechanisms. Finally, McCollum's post-conviction counsel failed to present any medical evidence or expert testimony that would support an argument that the victim died from an intervening cause, rather than at the hands of McCollum. Accordingly, the district court did not err in finding that trial counsel was not ineffective in failing to raise an intervening cause argument.

Although we conclude that the district court did not err in denying McCollum's post-conviction petition, we remand this matter to the district court so that it may amend the judgment of conviction to comply

---

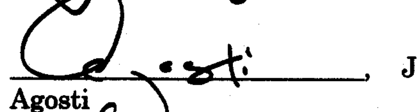
[4]See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

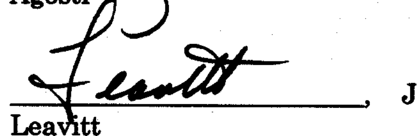
with NRS 176.105. Subsection 1(c) requires that the judgment of conviction include "a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute." The judgment of conviction in the instant case should be amended: (1) to specify the degree of murder, including reference to NRS 200.030(5); and (2) to clarify the fact that McCollum is eligible for parole on his life sentence after serving 10 years.[5] Such clarification is necessary in the instant case because it is not apparent from the face of the judgment of conviction whether McCollum was convicted of first or second-degree murder, and when McCollum will be eligible for parole. Accordingly, the judgment of conviction must be amended.

Based on the foregoing, we[6]

ORDER the judgment of the district court AFFIRMED, but we REMAND this matter to the district court for proceedings consistent with this order.

_______________, J.
Young


_______________, J.
Agosti


_______________, J.
Leavitt

cc: Hon. Brent T. Adams, District Judge
Nathalie Huynh
Attorney General/Carson City
Washoe County District Attorney
Washoe County Clerk

[5]See 1995 Nev. Stat., ch. 443, § 44, at 1182.

[6]We have considered all proper person documents filed or received in this matter, and we conclude that no further relief is warranted.