IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KELLY CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37759

FILED

FEB 04 2003

ORDER OF AFFIRMANCE

This is an appeal from a district court's denial of appellant Charles Chavez's post-conviction petition for a writ of habeas corpus. After a four-day jury trial, Chavez was convicted of first-degree murder, robbery, and unlawful use of card for withdrawal of money. Chavez was sentenced to life with parole eligibility after a minimum of twenty years for the murder, a concurrent term of 72-180 months for the robbery, and a concurrent term of 48-120 months for the unlawful use of a card. Having reviewed the briefs and record, we affirm the district court's order.

Chavez alleges that the district court erred by denying his petition because his counsel was ineffective. The question of whether a petitioner received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is, therefore, subject to independent review by this court.[1] In reviewing the district court's decision, however, this court gives deference to the district court's findings of fact regarding ineffective assistance of counsel.[2] In order to succeed on a claim of ineffective assistance of counsel, the petitioner must

[1]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

[2]Id.

overcome the presumption that trial counsel was effective by "strong and convincing proof to the contrary."[3]

This court evaluates claims of ineffective assistance of counsel under the two-part test set forth in Strickland v. Washington.[4] Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[5] 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.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[7]

Chavez claims that during opening argument, the prosecutor improperly stated his opinion of the case and attacked Chavez's character, to which counsel did not object. Chavez states that the prosecutor used phrases such as "I believe," "I suppose," and "I think." For example, with reference to the victim, the prosecutor said, "[s]he lived right next door, just a couple doors over, at the apartment complex, and her life was, I suppose, her job," and "[s]he was rather, I think, vulnerable, particularly vulnerable to the likes of the defendant." Although this court has held that it is prosecutorial misconduct for the prosecutor to interject his or her beliefs into an argument, such comments are not improper when they

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[3]Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981).

[4]466 U.S. 668 (1984).

[5]Id. at 687.

[6]Id. at 694.

[7]Id.

reflect deductions from the evidence introduced at trial.[8] Here, the comments the prosecutor made during opening argument were nothing more than reasonable deductions from the evidence that he would later introduce at trial.[9] Therefore, counsel was not ineffective for not objecting to these comments.

The prosecutor also said, "I think you will see, through the witnesses, that there is a pattern of use. He's a charming fella, manipulative and a user." The prosecutor made several other similar comments during opening argument. However, the State presented evidence at trial regarding Chavez's history with women, which supported its characterization of him as a manipulator and user of women.[10] Thus, the comments were not improper and counsel was not ineffective for failing to object.

Chavez also argues that counsel was ineffective by failing to object to the prosecutor's admission of character evidence during trial. Chavez claims that the prosecutor violated NRS 48.045[11] when the prosecutor asked Chavez's ex-wife whether or not Chavez was employed

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[8]Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993).

[9]See id. (holding that the prosecutor's statement that "suppose just to punctuate his acts," to dispel any idea that this was something other than murder of the first degree, assailant "plunged a kitchen knife to the hilt" did not constitute prosecutorial misconduct).

[10]Cf. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990) (holding that a prosecutor may demonstrate to a jury that a witness is untruthful through inferences from the record).

[11]See NRS 48.045(2) (stating that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but that it may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

while they were married, and when the prosecutor asked her if Chavez was manipulative. Counsel did object, but not on character grounds. Further, the evidence was not improper character evidence under NRS 48.045 because it went to establishing Chavez's motive, intent, and/or plan. Therefore, counsel was not ineffective.

Chavez contends that counsel failed to call and adequately question several witnesses. Chavez argues that counsel should have called Debbie Goldasich, Chavez's friend, as a witness. At the evidentiary hearing, the district court found that counsel was ineffective by not calling Goldasich. However, the district court concluded counsel's failure was not prejudicial because the evidence of Chavez's guilt was overwhelming.[12] This court gives deference to the district court's finding of fact regarding ineffective assistance of counsel,[13] and therefore, we agree with the district court. Because there was overwhelming evidence of Chavez's guilt, counsel's failure to call Goldasich was not prejudicial.

Chavez argues that counsel was ineffective because he failed to call Linda Pirolli as a witness. At the evidentiary hearing, counsel testified that he investigated the possibility of calling Pirolli as a witness, but, as a matter of strategy, decided against it. Counsel has an obligation to make a reasonable investigation of potential witnesses. However, he is under no obligation to call certain witnesses if, as a tactical matter, he decides that doing so might hurt, rather than help, his client's case.[14]

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[12]Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 110 (1998) (holding "that although a portion of the prosecutor's argument was improper, the improper portion did not unfairly prejudice [defendant] in light of the overwhelming evidence of his guilt").

[13]McNelton, 115 Nev. at 403, 990 P.2d at 1268.

[14]See McNelton, 115 Nev. at 408, 990 P.2d at 1271 (holding that the decision whether or not to call a witness whose testimony could have

continued on next page . . .

Here, counsel's decision not to call Pirolli as a witness was tactical. Therefore, the district court did not err in determining that counsel was not ineffective.

Chavez claims that counsel was ineffective by failing to more extensively question his ex-wife on cross-examination. Chavez fails to allege what exactly might have been gained by further cross-examination of his ex-wife or what counsel's cross-examination failed to uncover. Further, at the evidentiary hearing, counsel indicated his decision not to further examine Chavez's ex-wife on cross-examination was strategic.[15] Thus, counsel was not ineffective for not more extensively questioning Chavez's ex-wife.

Chavez contends that counsel was ineffective by not asking Stacey Bell, his ex-girlfriend, about the jewelry Chavez admittedly took from the victim's apartment. Chavez admitted that he took the jewelry from the victim's apartment, but claimed it belonged to Bell. It is irrelevant to whom the jewelry belonged, and further, the district court found that Chavez failed to advise counsel about the jewelry before trial. Therefore, counsel was not ineffective by not asking Bell about the jewelry.

Chavez alleges that counsel was ineffective by eliciting from witness Larry Kobina that Chavez had stolen jewelry from the victim, and asking Bell whether Chavez had been violent toward her. The record

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. . . *continued*
either helped or hurt the defendant was a tactical one, and therefore, not subject to challenge on appeal); State v. LaPena, 114 Nev. 1159, 1171, 968 P.2d 750, 758 (1998) (holding that counsel's decision not to call several witnesses was based upon strategic reasoning after a reasonable investigation and was, therefore, not subject to challenge by defendant on appeal).

[15]McNelton, 115 Nev. at 403, 990 P.2d at 1268.

reveals that counsel was not responsible for these errors. The line of questioning that led to the prejudicial testimony resulted from Chavez's failure to provide counsel with full and accurate information. Counsel is not ineffective when his failure to prepare an adequate defense is due to his client's misrepresentations.[16] Therefore, counsel's questioning of Bell and Kobina was not ineffective.

Chavez claims that counsel was ineffective for failing to file a motion to preclude the State from introducing evidence of the victim's vaginal bruising. During trial, Dr. Buklin, the coroner, testified that the victim had a severe vaginal abrasion that had been there for some time before her death. The State also introduced evidence that sperm matching Chavez's DNA was found in the victim's vagina and on her underpants. During closing argument, the State used this evidence to argue that the victim would not have consented to sex with Chavez on the night of the murder. Chavez contends that because he was not charged with sexual assault, this argument was improper and counsel should have objected. The district court found that the failure to object to this evidence was a tactical decision and not ineffective assistance. Even if the failure to object can be considered ineffective assistance, in light of the overwhelming evidence, the failure cannot be considered prejudicial and fails to meet the second prong of Strickland.[17]

Chavez argues that counsel was ineffective because he failed to elicit testimony from Dr. Bucklin that, in addition to injuries around her neck, the victim sustained abrasions and bruises that may have resulted from a fall before death. Dr. Bucklin testified both at the

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[16]See Strickland, 466 U.S. at 691.

[17]466 U.S. at 687.

preliminary hearing and at trial that the cause of death was strangulation. Therefore, counsel's failure to elicit testimony from Dr. Bucklin regarding Dr. Bucklin's assessment that the victim may have sustained injuries from a pre-death fall was not prejudicial and did not constitute ineffective assistance of counsel.

Chavez contends that the prosecutor made several inappropriate comments during closing argument, to which counsel should have objected. Chavez argues that the prosecutor inappropriately argued "[l]adies and gentlemen, you've all been in relationships that you break up with an individual. That's not the sudden heat of passion that we're talking about here. That doesn't give anyone the right – it's simply not present." Generally, prosecutors are not to use inflammatory arguments and should not attempt to place jurors in the position of the victim.[18] However, the prosecutor's comment was not inflammatory enough to prejudice the outcome of the case.[19] Therefore, counsel's failure to object was harmless.

Chavez also alleges that, during closing argument, the prosecutor made several inappropriate derogatory comments regarding his character. The prosecutor argued that "[y]ou know, I suggest to you that the evidence shows, and it has been fairly clear throughout this trial, that this was a control freak, a very possessive man, a manipulator, an abuser." He also described Chavez as having a "devious corrupt, flawed brain" and

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[18]See Williams v. State, 103 Nev. 106, 109-10, 734 P.2d 700, 702-03 (1987).

[19]See Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that although the "State's warning that [defendant's] weapons could have been meant for inflicting harm on the jurors themselves" was inflammatory, "the statement did not unfairly prejudice [defendant] in light of the overwhelming evidence of his guilt").

as being a "habitual liar." Although it is improper for the prosecutor to condemn the defendant as a liar, use of the word "lying" or "truth" does not automatically constitute misconduct.[20] Some of these comments were inappropriate; however, they were not so excessive as to prejudice the outcome of the trial. Similarly, the statements of personal opinion the prosecutor made during closing arguments, using phrases such as "I'm sure," or "more telling to me," were all reasonable inferences from the evidence and further non-prejudicial. Consequently, counsel's failure to object was ineffective as to some of the comments, but altogether harmless.

Chavez claims the prosecutor's argument comparing what Chavez allegedly did to what "many of these macho men, who think they are God's gift" do to "some of these very lonely, desperate women" was inappropriate because there was no evidence introduced at trial to support this statement. Prosecutors are not allowed to argue facts not in evidence,[21] thus, this line of argument was improper. However, the evidence of guilt against Chavez was overwhelming and this comment was not so egregious as to call into question the outcome of the trial.[22] Therefore, counsel should have objected to this argument, but his failure to do so was harmless.

Chavez alleges that the use of improper malice and premeditation jury instructions violated his rights under the due process clause. NRS 34.810 states that any issue that could have been raised on appeal cannot be raised on a petition for writ of habeas corpus absent a

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[20]Rowland v. State, 118 Nev. ___, ___, 39 P.3d 114, 119 (2002).

[21]Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

[22]See Strickland, 466 U.S. at 694.

showing of good cause and prejudice to the petitioner. Chavez's argument could have been raised on direct appeal. Chavez waived his right to direct appeal. To the extent that Chavez is arguing ineffective assistance of counsel, his argument is without merit because this court has already considered the jury instructions Chavez challenges and this court's decisions do not provide any relief for Chavez.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Lee A. Gates, District Judge
David M. Schieck
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[23]See Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. __, 56 P.3d 868 (2002); Doyle v. State, 112 Nev. 879, 900-02, 921 P.2d 901, 915-16 (1996); Ruland v. State, 102 Nev. 529, 533, 728 P.2d 818, 820-21(1986)