

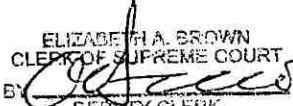
IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVADOR RICO-RIVAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 85052

FILED

MAY 25 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying Appellant Salvador Rico-Rivas's postconviction petition for writ of habeas corpus. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

On Christmas morning 2011, Marisol Galindo-Rico died in her home after being stabbed by her husband, Rico-Rivas. Rico-Rivas was charged with murder with the use of a deadly weapon and/or in violation of a temporary protection order against domestic violence. At trial, the State offered two theories of first-degree murder to the jury: (1) premeditation and deliberation, and (2) felony murder based on burglary. Rico-Rivas primarily relied on a theory of self-defense. The jury found him guilty of first-degree murder with the use of a deadly weapon and/or in violation of a temporary protection order against domestic violence. The district court sentenced Rico-Rivas to consecutive prison terms totaling 28 years to life.

This court affirmed Rico-Rivas's judgment of conviction on direct appeal. *Rico-Rivas v. State*, No. 65050, 2015 WL 3669918 (Nev. June 10, 2015) (Order of Affirmance). Rico-Rivas subsequently filed a postconviction petition in the district court. In the petition, Rico-Rivas argued that his trial counsel was prejudicially ineffective. Following a two-day hearing, the district court denied Rico-Rivas's petition. Rico-Rivas appeals, arguing that his counsel was ineffective by failing to (1) challenge the burglary aspect of the State's felony murder theory on the basis of intent

and causation, (2) enter Rico-Rivas's medical records into evidence, (3) enter the testimony and report of a crime scene analyst into evidence, (4) allow Rico-Rivas to testify, and (5) interview Rico-Rivas's children prior to trial. We conclude that the district court did not err in its denial.

### DISCUSSION

A claim of ineffective assistance of counsel is reviewed de novo. *Nika v. State*, 124 Nev. 1272, 1278-79, 198 P.3d 839, 844 (2008). "However, the district court's purely factual findings . . . are entitled to deference . . ." *Id.* at 1279, 198 P.3d at 844 (quoting *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004)).

Ineffective assistance of counsel claims are reviewed under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Lara*, 120 Nev. at 179-80, 87 P.3d at 530. To show ineffective assistance of counsel, a petitioner must prove (1) deficient performance by counsel, "and (2) that the deficient performance prejudiced the defense." *Id.* at 180, 87 P.3d at 530 (quoting *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)).

To show deficient performance, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The reasonableness of counsel's conduct must be judged based on the facts of the specific case. *Id.* at 690. The reviewing court must not use hindsight but view the counsel's conduct "as of the time of counsel's conduct." *Id.* Further, "counsel is strongly presumed to have rendered adequate assistance". *Id.* Counsel's strategic or tactical decisions in particular cannot be challenged unless extraordinary circumstances are present. *Lara*, 120 Nev. at 180, 87 P.3d at 530.

To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If the petitioner fails to show one prong, this court need not consider the other prong. *Strickland*, 466 U.S. at 697.

*Trial counsel was not ineffective in failing to challenge the burglary aspect of the felony murder theory*

First, Rico-Rivas argues that his trial counsel should have offered a jury instruction regarding the burglary allegation supporting felony murder. The proposed instruction would have allowed the jury to disregard the felony murder theory if Rico-Rivas had—or reasonably believed he had—consent to enter the home on Christmas morning.

Rico-Rivas’s argument is unavailing because the State did not use Rico-Rivas’s initial entry on Christmas morning to establish burglary. The State used Rico-Rivas’s second entry into the home to establish burglary. Trial testimony established that after his first entry into the home, Rico-Rivas chased Galindo-Rico into the yard and carried her back into the house. Further, consent is not a defense against burglary. *Barrett v. State*, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989) (“[C]onsent to the entry by [defendant] is not a defense to burglary since [defendant] was shown to have acquired the entry with felonious intent.”). We conclude Rico-Rivas’s trial counsel did not fall below an objective standard of reasonableness by failing to make an argument or proffer a jury instruction based on a theory of defense to burglary unsupported by caselaw.

Rico-Rivas’s other argument on this issue regarding continuous trespass is unsupported by legal authority or the record on appeal. The record shows that Rico-Rivas entered the home on two separate occasions. The State also did not assert a theory of continuous trespass at trial.

Second, Rico-Rivas argues trial counsel failed to challenge that a causal link existed between Rico-Rivas's burglary and Galindo-Rico's homicide. To support this argument, Rico-Rivas points to this court's jurisprudence in *Sanchez-Dominguez v. State*, 130 Nev. 85, 318 P.3d 1068 (2014). Rico-Rivas asserts counsel should have raised this issue either by pretrial motion or by offering a jury instruction.

We find this argument unpersuasive. First, *Sanchez-Dominguez* was not decided at the time of Rico-Rivas's trial in 2013. Although Rico-Rivas argues that the case should be applied retroactively, Rico-Rivas asserts no legal basis for applying retroactivity analysis to an ineffective assistance of counsel claim. Instead, Rico-Rivas argues that if this court applies *Sanchez-Dominguez* retroactively, it "could reverse the denial of habeas without finding [trial counsel] ineffective on this Ground." This is not a cogent argument because the only basis for relief that Rico-Rivas asserts relating to the retroactive application of *Sanchez-Dominguez* is that his counsel prejudicially and ineffectively failed to consider it. We therefore find this argument unavailing. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Second, Rico-Rivas does not explain how the jury instruction offered in his trial was deficient under *Sanchez-Dominguez*. In *Sanchez-Dominguez*, this court determined the phrase "in the perpetration of captures the nominal causation that felony murder requires," between the underlying felony and the killing that resulted. *Id.* at 95, 318 P.3d at 1075. The jury instruction on felony murder in Rico-Rivas's case provided, in part, that a killing must have occurred "[d]uring the defendant's perpetration or

attempted perpetration of a Burglary.” The jury instructions in Rico-Rivas’s trial aligned with this court’s reasoning in *Sanchez-Dominguez*. Rico-Rivas has failed to establish how his trial counsel erred in failing to consider a case that did not exist in 2013. Rico-Rivas has also failed to show that his trial counsel was ineffective based on the reasoning in *Sanchez-Dominguez*.

Rico-Rivas also argues his counsel was ineffective for failing to break the causal chain between his burglary and the homicide by asserting intervening causes. Rico-Rivas argues that two events broke the causal chain between Rico-Rivas’s burglary and the homicide. The first event occurred when Rico-Rivas discovered that Galindo-Rico had a male visitor at the home on Christmas morning. The second event occurred when Galindo-Rico’s parents decided to leave Rico-Rivas and Galindo-Rico alone to resolve their conflict.

The events offered by Rico-Rivas do not constitute intervening causes. See *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (“[A]n intervening cause must be a superseding cause, or the *sole cause* of the injury in order to completely excuse the prior act.”). The first event occurred before Rico-Rivas’s second entry into the home. The record shows that Rico-Rivas’s violence against Galindo-Rico escalated after this entry. Rico-Rivas’s discovery of a man in the home therefore did not intervene between his burglary and Galindo-Rico’s death. The second event does not establish an intervening cause. Rather it suggests that Rico-Rivas was not responsible for murdering Galindo-Rico because third parties failed to stop him. The record establishes that Galindo-Rico died because of stab wounds caused by Rico-Rivas. Rico-Rivas does not refute this. Therefore, we conclude Rico-Rivas has failed to establish ineffective assistance by his trial

counsel based on a purported failure to sufficiently challenge the State's felony murder theory.

*Trial counsel was not ineffective in failing to admit Rico-Rivas's medical records into evidence*

Rico-Rivas argues that his trial counsel acted ineffectively by failing to seek the admission of Rico-Rivas's medical records into evidence. Rico-Rivas argues the medical records would have supported his theory of self-defense because the records would have shown the seriousness of Rico-Rivas's injuries as a result of the fight with the victim.

The record does not support this argument. Rico-Rivas's trial counsel testified at the postconviction hearing that two experts reviewed Rico-Rivas's medical records. The experts believed that some of Rico-Rivas's wounds could have been self-inflicted. Rico-Rivas's counsel made the strategic decision to admit evidence of Rico-Rivas's wounds through other means. When reviewing an ineffective assistance of counsel claim, a trial counsel's strategic decision is "virtually unchallengeable absent extraordinary circumstances." *Lara*, 120 Nev. at 180, 87 P.3d at 530 (internal quotation marks omitted). The decision against admitting the medical records was tactical and reasonable given counsel's trial testimony. Therefore, we conclude that Rico-Rivas has failed to establish trial counsel was ineffective in choosing not to admit Rico-Rivas's medical records at trial.

*Trial counsel was not ineffective in failing to present the testimony or introduce the report of a crime scene analyst into evidence*

Rico-Rivas argues his trial counsel failed to arrange for a crime scene analyst to give expert testimony at the trial. To establish this claim of ineffective assistance of counsel, Rico-Rivas presented the district court with the report and testimony from crime scene analyst Dr. Brent E.



Turvey. The district court determined Dr. Turvey's conclusions added nothing beyond what was already presented at trial. The district court also found that Dr. Turvey's testimony at the postconviction hearing was contradictory and vulnerable to cross-examination based on credibility.

A review of the record supports the district court's findings. Dr. Turvey could not conclude whether Rico-Rivas or Galindo-Rico stabbed the other first. Dr. Turvey could also not conclude whether Rico-Rivas or Galindo-Rico was the initial aggressor. Rico-Rivas's trial counsel decided that Dr. Turvey's equivocal testimony would not have assisted his client's defense.

Review of the record corroborates the district court's finding that Dr. Turvey's credibility would have been called into question during cross-examination at trial. Dr. Turvey's report included facts that did not appear at trial. For instance, Dr. Turvey's report claimed that Luis, the victim's son, observed that his mother was visibly drunk on Christmas morning. At trial, Luis testified his mother was not drunk. When the State asked Dr. Turvey if he could identify the location of the source from which he obtained this fact, Dr. Turvey could not.

Dr. Turvey's report also omitted certain facts without explanation. For instance, Dr. Turvey's report omitted the fact that Rico-Rivas admitted to detectives that he slapped Galindo-Rico. Dr. Turvey's report also omitted the fact that Rico-Rivas and Galindo-Rico had a physical altercation. Testimony at trial and at the postconviction hearing established that Rico-Rivas and Galindo-Rico had an ongoing physical altercation on Christmas morning. A review of the record supports the district court's finding that Dr. Turvey's testimony would have been called into question on the basis of credibility at trial. Rico-Rivas has failed to

establish his trial counsel was ineffective by failing to include evidence from a crime scene analyst based on the report and testimony of Dr. Turvey.

*Trial counsel was not ineffective in advising Rico-Rivas against testifying*

Rico-Rivas argues his trial counsel improperly advised Rico-Rivas against testifying in his own defense. Rico-Rivas asserted that his testimony was necessary to establishing self-defense. At the postconviction hearing, Rico-Rivas's trial counsel testified he told Rico-Rivas that testifying in his own defense was not a good idea. Trial counsel also testified he did not remember Rico-Rivas ever expressing that he wanted to testify in his own defense. Trial counsel testified that if Rico-Rivas had insisted on testifying in his own defense, then he would have.

The district court found Rico-Rivas's postconviction hearing testimony inconsistent both internally and in comparison to the testimony of his trial counsel. The record supports the determination of the district court. For instance, Rico-Rivas initially claimed that he was not aware of his right to testify in his own defense, but later admitted that he freely waived his right to testify in front of the trial judge. Rico-Rivas also claimed that the prosecutor at his trial threatened Rico-Rivas in front of his trial counsel and two sheriffs to accept a plea offer. Trial counsel did not recall this incident. Trial counsel recalled that Rico-Rivas did not want to accept the plea offer. Trial counsel made a proper strategic decision in advising Rico-Rivas against testifying. Further, the record shows Rico-Rivas freely waived his right to testify in his own defense. Rico-Rivas has failed to establish his trial counsel was ineffective.

*Trial counsel was not ineffective in failing to interview Rico-Rivas's sons prior to trial*

Last, Rico-Rivas argues that his trial counsel was ineffective for declining to interview Rico-Rivas's then-minor sons prior to trial. Rico-

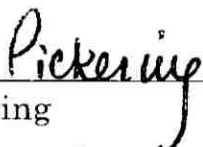



Rivas argues that his counsel should have elicited any exculpatory information from Rico-Rivas's sons prior to trial. The children were nine and twelve years old at the time of the trial. Rico-Rivas's trial counsel made strategic decisions not to interview the children prior to trial and to treat the children gently during cross-examination. The district court found that the sons' testimonies at the postconviction hearing were inconsistent and not likely to be helpful to a jury. On review, we agree with the district court and find no reason to question the strategic decisions by Rico-Rivas's trial counsel.

We conclude that Rico-Rivas has failed to establish ineffective assistance of his trial counsel. As Rico-Rivas failed to establish that counsel's performance was deficient, we need not address the prejudice prong of *Strickland*. 466 U.S. at 697 (“[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Egan K. Walker, District Judge  
Richard F. Cornell  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe Judicial District Court Clerk