

IN THE SUPREME COURT OF THE STATE OF NEVADA

URICOS LAVELLE CAMPBELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38268

FILED

DEC 04 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

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

On May 23, 1997, Campbell was convicted, pursuant to a jury verdict, of conspiracy to commit murder (count I), two counts of assault with a deadly weapon (counts II-III), and second-degree murder with the use of a deadly weapon (count IV). The district court sentenced Campbell to serve a prison term of 24-72 months for count I; two concurrent prison terms of 12-48 months for counts II and III; and a concurrent prison term of 10-25 years, with an equal and consecutive term for the deadly weapon enhancement, for count IV. Campbell was also ordered to pay restitution in the amount of \$5,200.00 jointly and severally with his codefendant,<sup>1</sup>

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<sup>1</sup>Campbell was tried with his codefendant and brother, Darion Lamar Campbell. For his part in the crimes, Darion was convicted of one count of conspiracy to commit murder, two counts of attempted murder with a deadly weapon, and one count of involuntary manslaughter. See Campbell v. State, Docket No. 30448 (Order Dismissing Appeal, June 23, 1998).

and he was given credit for 416 days time served. Campbell's direct appeal from the judgment of conviction was dismissed by this court.<sup>2</sup>

On May 30, 2000, Campbell filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Campbell, and counsel filed a supplemental habeas petition. The State opposed the supplemental petition. The district court heard arguments from counsel but did not conduct an evidentiary hearing, and on July 5, 2001, denied Campbell's petition. This timely appeal followed.

Campbell contends that his trial counsel's performance was deficient and denied him effective assistance.<sup>3</sup> To state a claim of ineffective assistance of 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.<sup>4</sup> The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.<sup>5</sup> A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not

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<sup>2</sup>Campbell v. State, Docket No. 30486 (Order Dismissing Appeal, October 12, 1999).

<sup>3</sup>In his initial and supplemental habeas petitions filed in the district court, Campbell raised several additional claims regarding trial and appellate counsel's ineffectiveness. These original claims apparently have been abandoned on appeal.

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

<sup>5</sup>Strickland, 466 U.S. at 697.

clearly wrong.<sup>6</sup> 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.<sup>7</sup> Further, the tactical decisions of defense counsel are “virtually unchallengeable absent extraordinary circumstances.”<sup>8</sup>

First, Campbell argues that trial counsel was ineffective because he harassed the prosecutor with “baseless objections.” Campbell contends the objections effectively created sympathy for the State’s witnesses and served to bolster their credibility. Campbell, however, concedes that while counsel’s tactics were “distracting, irritating and antagonistic,” they were not actually instances of ineffective assistance of counsel. Therefore, because Campbell concedes that he cannot demonstrate that counsel was ineffective in this regard, we need not address each of the many instances of “baseless objections” listed.

Second, Campbell argues that trial counsel was ineffective because he failed to obtain the services of a crime scene expert. Campbell contends that an expert could have bolstered the defense theory by reconstructing the crime scene and demonstrating that the victim’s death was the result of an accidental shooting. According to Campbell, the relative positions of the shooter and the deceased victim would prove that the shooting was caused by the victim attempting to disarm him.

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<sup>6</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>7</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>8</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000); Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996).

We conclude that the district court did not err in rejecting this claim. On cross-examination by Campbell, the State's medical examiner testified that the victim could have been in any number of positions when she was shot. On appeal, Campbell has failed to demonstrate how the medical examiner's testimony, or the absence of testimony from a defense crime scene expert, regarding the positioning of the shooter and the victim, rendered the jury's verdict unreliable. Even if the shooting was accidental, it was reasonable for the jury to convict Campbell of second-degree murder.<sup>9</sup> Campbell never denied being at the crime scene or having possession of a weapon. In effect, Campbell is rearguing the issue of intent raised at trial and considered by the jury. To the extent that Campbell is arguing that the State failed to adduce sufficient evidence to sustain his convictions, we note that this argument should have been raised in his direct appeal and is therefore waived.<sup>10</sup>

Third, Campbell argues that trial counsel was ineffective because he failed to obtain the services of a ballistics expert to examine a bullet found in the murder victim's car. Campbell contends it was imperative to establish that the bullet which was shot through the hood of the Campbells' car did not ricochet and get lodged in the back glass frame of the victim's car; he argues that this shot alone resulted in his convictions for two counts of assault with a deadly weapon and conspiracy to commit murder. This contention is patently without merit. The factual

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<sup>9</sup>See NRS 200.070 ("where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder").

<sup>10</sup>See NRS 34.810(1)(b)(2); NRS 34.810(3).

allegations resulting in his convictions, as detailed in the criminal information, do not rely upon this particular gunshot. Moreover, Campbell has failed to demonstrate how the potential testimony of a ballistics expert is relevant, or would have affected the outcome of the trial in any way. Therefore, we conclude that counsel was not ineffective in this regard.

Fourth, Campbell argues that trial counsel was ineffective because he failed to obtain the services of a psychiatrist to examine him. This court has stated that “[w]here a [petitioner] fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal.”<sup>11</sup> Campbell did not raise this issue in his petitions in the district court, therefore, we conclude that it was not preserved for appeal.<sup>12</sup>

Fifth, Campbell argues that trial counsel was ineffective because he did not attempt to excuse a prospective juror “who was a friend of the victim’s father” and held him in “high esteem.” Campbell contends that the juror was biased against him, and therefore, his right to a fair trial was violated.

Our review of the voir dire transcript reveals that Campbell’s argument is belied by the record.<sup>13</sup> The juror stated that she went to high school with the murder victim’s father in Arkansas during the 1960s, and

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<sup>11</sup>McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

<sup>12</sup>See NRS 178.602; Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000) (holding that this court will address assignments of error raised for the first time on appeal if the alleged error was plain and affected appellant’s substantial rights).

<sup>13</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

that he was a star basketball player, but she never stated that he was a “friend” or that she held him in “high esteem.” The juror also stated that she could be fair and impartial. Campbell has not demonstrated how he was prejudiced by any perceived bias on the part of the juror, or how he was prejudiced by trial counsel failing to have her excused. We further note that the jury did not convict Campbell of the more serious charge of attempted murder, as they convicted the codefendant. We therefore conclude that the district court did not err in rejecting this claim.

Campbell also contends that his appellate counsel rendered ineffective assistance. “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in Strickland.”<sup>14</sup> To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel’s performance fell below an objective standard of reasonableness, and that the petitioner was prejudiced by the deficient performance.<sup>15</sup> “To establish prejudice based on the deficient assistance of appellate counsel, the [petitioner] must show that the omitted issue would have a reasonable probability of success on appeal.”<sup>16</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal,<sup>17</sup> and, in fact, will be most effective when every conceivable issue is not raised on appeal.<sup>18</sup>

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<sup>14</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>15</sup>Strickland, 466 U.S. at 687.

<sup>16</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>17</sup>Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

<sup>18</sup>Hernandez v. State, 117 Nev. 463, 465-67, 24 P.3d 767, 768-70 (2001); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Campbell argues that appellate counsel was ineffective because he failed to challenge the sufficiency of the evidence pertaining to the assault with a deadly weapon convictions. Campbell contends that there is no evidence that he shot at or struck the car of the victim. We disagree with Campbell's contention.

When reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>19</sup> Further, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."<sup>20</sup> In other words, a jury "verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court."<sup>21</sup>

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Pursuant to NRS 200.471, the jury was instructed as follows:

Assault With a Deadly Weapon is the felony offense of an unlawful attempt, coupled with the present ability, to commit a violent injury with the use of a deadly weapon on the person of another.

Evidence adduced at trial established that Campbell and his brother instigated a high-speed car chase where they fired shots at the car

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<sup>19</sup>Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

<sup>20</sup>McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

<sup>21</sup>Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972); see also Nev. Const. art. 6, § 4; NRS 177.025.

carrying the two victims, and rammed the victims' car from behind, eventually causing them to crash. Furthermore, after the two vehicles came to a stop, Campbell approached the victims, pointed a gun, and threatened to kill one of the victims. After Campbell shot one of the victims, he proceeded to join his brother, who was using a pipe, in attacking and beating the other, surviving victim. We conclude that because sufficient evidence to sustain the assault convictions was produced at trial, the omitted issue would not have had a reasonable probability of success on appeal, and therefore, appellate counsel was not deficient in failing to raise it.

Second, Campbell argues that appellate counsel was ineffective because he failed to raise the issue of the district court's error in excluding the testimony of a medical examiner. Campbell's codefendant sought to have the medical examiner testify to the codefendant's state of mind at the time of the crime. Campbell has failed to demonstrate either that the district court abused its discretion in disallowing the testimony,<sup>22</sup> that he was prejudiced by the district court's decision, or that the testimony regarding the codefendant's state of mind was even relevant to his case. Moreover, Campbell has not provided any argument or support for the proposition that the omitted issue would have had a reasonable probability of success on appeal. Therefore, we conclude that appellate counsel was not ineffective.

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<sup>22</sup>See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (holding that this court will overturn a district court's decision to exclude testimony only when there has been an abuse of discretion).

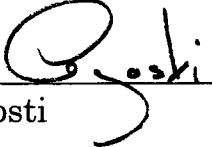


Having considered Campbell's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.<sup>23</sup>

  
\_\_\_\_\_, C.J.  
Young

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Agosti

cc: Hon. Joseph T. Bonaventure, District Judge  
Gary E. Gowen  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk

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<sup>23</sup>Although this court has elected to file the appendix submitted by appellant, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically: (1) the documents included in appellant's appendix are not sequenced in chronological order; and (2) one alphabetical index detailing the contents of all seven volumes of the appendix, prefacing each volume of the appendix, was not prepared. See NRAP 30(c)(1)-(2). Counsel for appellant is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).