

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK BINEGAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38351

FILED

MAR 17 2003

ORDER OF AFFIRMANCE

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

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

A jury convicted Mark Binegar for the first-degree murder of his wife, Christine. Binegar was sentenced by a three-judge panel to life with the possibility of parole after twenty years' imprisonment. This court dismissed Binegar's direct appeal. On December 7, 1998, Binegar filed a post-conviction petition for a writ of habeas corpus. The district court held two evidentiary hearings and on June 28, 2001, dismissed Binegar's petition for post-conviction relief. This timely appealed followed.

In his petition, Binegar claimed that he received ineffective assistance of counsel. This court independently reviews such claims.<sup>1</sup> However, purely factual findings of a district court concerning a claim of ineffective assistance of counsel are entitled to deference.<sup>2</sup> To establish a claim of ineffective assistance of trial counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of

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<sup>1</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

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

reasonableness, and that the deficient performance prejudiced the defense.<sup>3</sup> To establish prejudice, a defendant must show that but for counsel's errors there is a reasonable probability that the result of the proceeding would have been different.<sup>4</sup> Courts presume that counsel's representation was effective in order to eliminate the distorting effects of hindsight.<sup>5</sup> This presumption can only be overcome by strong and convincing evidence.<sup>6</sup> A court need not consider both prongs if the defendant makes an insufficient showing on either prong.<sup>7</sup>

Binegar raised several claims that his trial and appellate counsel rendered ineffective assistance. First, Binegar claims he requested trial counsel to call additional witnesses to testify regarding Christine's ability to enrage others, thereby, establishing his heat of passion defense. In order to render effective assistance, defense counsel must make reasonable investigations of potential witnesses.<sup>8</sup> Binegar's trial counsel, Donald Green, testified that every potential witness furnished by Binegar was investigated. Green further testified that he and co-counsel Patricia Erickson contacted police officers, neighbors, appellant's family, Binegar's insurance agent, examined evidence, and

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<sup>3</sup>Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984); see also Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

<sup>4</sup>Strickland, 466 U.S. at 694.

<sup>5</sup>Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992).

<sup>6</sup>Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996).

<sup>7</sup>Strickland, 466 U.S. at 697.

<sup>8</sup>State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

executed an on-scene investigation. Green and Erickson also convened a mock jury to test the manslaughter defense theory, screening over two hundred applicants and using personal finances to pay for the test.

After trial counsel sufficiently investigates the client's case, counsel may make reasonable strategy decisions, such as whom to call as a witness.<sup>9</sup> Such strategy decisions are tactical and unchallengeable absent unusual circumstances.<sup>10</sup> Green testified at the evidentiary hearing that he chose not to call Christine's ex-husband, Charles Russell, because he would have presented to the jury "more dirt on the victim's background" and deflected from Binegar's heat of passion defense. Counsel is under no obligation to call witnesses if doing so might hurt, rather than help, the client's case.<sup>11</sup> Binegar also argues counsel should have called Rita Russell, Charles Russell's mother, as a witness. Yet, Rita was called to the stand. When counsel attempted to pursue the line of questioning that Binegar claims counsel failed to do, the court directed counsel to stop such questioning. Therefore, Binegar failed to demonstrate counsel was unreasonable by failing to call additional witnesses or by failing to pursue certain lines of questioning.

Binegar asserts that trial counsel was ineffective by revealing to the State all possible defense witnesses. Prior to trial, the district court granted the State's motion pursuant to NRS 174.089(1) for reciprocal discovery. NRS 174.089(1) required the defense to submit to the State a

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<sup>9</sup>Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

<sup>10</sup>Id.

<sup>11</sup>McNelson v. State, 115 Nev. 396, 407-408, 990 P.2d 1263, 1271 (1999).

list of all defense witnesses. The district court found part of the statute unconstitutional and ordered Erickson to provide the State only a list of prospective witnesses for trial. Erickson, however, yielded a complete list of witnesses. She testified at the evidentiary hearing that she supplied each witness' name because a strong possibility existed that she would be precluded from calling any unmentioned witnesses and she did not want to place Binegar in that position.

Before providing the witness list to the State, Erickson sought an order from this court staying the application of NRS 174.089(1) to Binegar pending a decision by this court. This court granted the stay on October 17, 1995.<sup>12</sup> Erickson was not notified of the stay until after she had provided the list to the State. Immediately upon learning of the stay, Erickson contacted the district attorney's office and requested the immediate return of the list. On May 1, 1996, this court held NRS 174.089(1) unconstitutional.<sup>13</sup> Therefore, Binegar failed to demonstrate that counsel was ineffective as she diligently pursued means to defer application of NRS 174.089(1) to Binegar. Further, he suffered no prejudice as Terry Sullivan, an investigator for the district attorney's office, testified he only interviewed a few of the witnesses from the list and never discussed the interviews with State attorneys, as the district court ordered him to turn over his interview notes.

Binegar contends that counsel was ineffective by failing to object to prejudicial victim impact testimony presented at trial and by

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<sup>12</sup>Binegar v. District Court, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996).

<sup>13</sup>Id. at 550, 915 P.2d at 893.

failing to raise the issue on appeal. Victim impact testimony occurs when the witness or prosecutor “refer[s] to the effects of the murders on the victims’ families and how much they are grieving their losses.”<sup>14</sup> We find no such testimony occurred at trial. Thus, counsel was not ineffective for failing to object or raise the issue on appeal.

Binegar alleges that trial counsel was ineffective for failing to strike the death penalty being sought in violation of his constitutional rights and that appellate counsel was deficient in failing to raise the issue on appeal. Binegar argues that counsel’s failure forced him to be tried in front of a death-qualified, guilt-prone jury. Even if counsel was ineffective in this regard, Binegar fails to establish he was prejudiced by any error. The Nevada death penalty scheme is constitutional.<sup>15</sup> Further, the United States Supreme Court has held that death-qualified juries can be fair and impartial.<sup>16</sup> This court has also rejected the presumption that death-qualified juries are more conviction prone.<sup>17</sup>

Binegar claims that counsel was ineffective for failing to object to, as well as raise on appeal, the State’s quantification of reasonable

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<sup>14</sup>Greene v. State, 113 Nev. 157, 171, 931 P.2d 54, 63 (1997); see also Homick v. State, 108 Nev. 127, 136, 825 P.2d 600, 606 (1992) (holding that victim impact evidence includes testimony regarding the emotional impact of the murder on the victim’s family).

<sup>15</sup>Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 416 (2001).

<sup>16</sup>Lockhart v. McCree, 476 U.S. 162, 176-178 (1986). Even if death-qualification does produce somewhat more conviction-prone juries, the United States Constitution does not prohibit the States from using such juries. Id. at 173.

<sup>17</sup>McKenna v. State, 101 Nev. 338, 344, 705 P.2d 614, 618 (1985).

doubt during closing argument. We conclude that counsel was deficient for failing to object, however, Binegar was not prejudiced by counsel's deficiency. Improper quantifications of reasonable doubt may be harmless error unless coupled with an incorrectly defined reasonable doubt jury instruction.<sup>18</sup> In NRS 175.211, the legislature defined reasonable doubt and mandated that the court not provide any other definition of reasonable doubt to juries during criminal actions. Here, the jury instruction replicated the legislature's definition of reasonable doubt. Thus, the jury instruction correctly defined reasonable doubt and the State's improper remarks constitute harmless error.<sup>19</sup>

During jury selection, a prospective juror came forward, stating that she heard Green make a derogatory remark about another juror. Both jurors were removed from the jury panel prior to trial. Binegar alleges that trial counsel was ineffective for failing to question other jurors regarding the remarks, and therefore, he was tried by a hostile jury. Binegar bears the burden of demonstrating he suffered prejudice as a result of counsel's error,<sup>20</sup> and this burden cannot be met through speculation.<sup>21</sup> Binegar only speculates that such prejudice

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<sup>18</sup>McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1158 (1983).

<sup>19</sup>See Randolph v. State, 117 Nev. \_\_\_, \_\_\_, 36 P.3d 424, 431 (2002) (improper quantification of reasonable doubt not prejudicial because jury given reasonable doubt instruction according to NRS 175.211(1)).

<sup>20</sup>Strickland, 466 U.S. at 694.

<sup>21</sup>Wood v. Bartholomew, 516 U.S. 1, 8 (1995); see also Mazzan v. State, 105 Nev. 745, 749, 783 P.2d 430, 432 (1989) (holding that speculation as to prejudice caused by counsel's deficiency does not support a claim of ineffective counsel).

occurred, producing no evidence to support his claim. Facts alleged in Binegar's briefs will not correct a deficiency in the record.<sup>22</sup> We conclude, therefore, that Binegar failed to prove he suffered any prejudice.

Binegar asserts that trial counsel failed to request a jury instruction specifying that a physical injury is not required for a voluntary manslaughter conviction. Yet, the jury was specifically instructed in the manslaughter jury instruction that "[t]he serious and highly provoking injury need not be a direct physical assault on the defendant." Later the instruction refers to an "assault or provocation." Thus, Binegar was provided effective assistance of counsel in this regard.

Finally, Binegar claims the prosecutor committed misconduct by stating in closing argument that Binegar concocted his testimony after two years of waiting for trial. Binegar argues counsel was ineffective for not raising this prosecutorial misconduct on appeal. The United States Supreme Court has held that when a defendant testifies, the State may impeach his credibility, even in closing argument.<sup>23</sup> Appropriate impeachment includes references that defendant had time to tailor his testimony.<sup>24</sup> Thus, the prosecutor's statements were appropriate because Binegar testified, and therefore, Binegar's counsel was not ineffective for failing to raise this issue on appeal.

Having reviewed the record, and for the reasons set forth above, we conclude Binegar is not entitled to relief. As the district court

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<sup>22</sup>Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969).

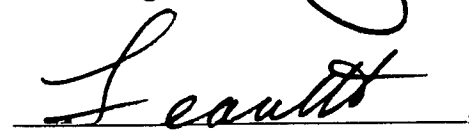
<sup>23</sup>Portuondo v. Agard, 529 U.S. 61, 69 (2000).

<sup>24</sup>Id. at 73.

pointed out, Binegar's counsel "performed well above the level required of competent counsel." 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 Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk