IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD EDWARD GRAFF,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
JOHN IGNACIO,
Respondent.

No. 38507

FILED

APR 21 2003

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

ORDER OF AFFIRMANCE

This is an appeal from the district court's order denying Richard Graff's petition for a writ of habeas corpus in which Graff contends that he was provided ineffective assistance of counsel in various instances at trial and on appeal.[1] We conclude that Graff's trial and appellate counsel's performance did not fall below an objective standard of reasonableness, and thus, we affirm the district court's order denying Graff's petition for a writ of habeas corpus.

We review claims of ineffective assistance of counsel under the "reasonably effective assistance" standard set forth in Strickland v. Washington.[2] Under Strickland, to prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient assistance prejudiced the defense, i.e., that but for counsel's error, the result of trial would probably

[1]Graff was convicted of attempted murder with the use of a deadly weapon.

[2]466 U.S. 668 (1984); see also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (applying the Strickland standard).

have been different.[3] Judicial review of a lawyer's representation is highly deferential, and an appellant must overcome the presumption that a challenged action might be considered sound strategy.[4]

Graff first argues that his trial counsel provided him with ineffective assistance by not moving to change venue because pretrial publicity effectively prevented him from receiving a fair trial. Because an impartial jury was selected despite alleged pretrial publicity, we conclude that trial counsel's decision not to move for change of venue was reasonable.[5]

Graff next argues that trial counsel provided him with ineffective assistance by conceding Graff's guilt during his opening statement. We disagree. Trial counsel was merely presenting the defense's theory of the case—Graff lacked the specific intent to murder Deputy James Neff despite the fact that he shot him. Because the weight of the evidence against Graff was overwhelming, we conclude that it was reasonable for trial counsel to concede that Graff shot Deputy Neff, while maintaining that he did not intend to kill the deputy.[6]

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[3]Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (citing Strickland, 466 U.S. at 687-88, 694).

[4]State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).

[5]See NRS 174.455(2) (requiring that the court not grant an application for removal of a criminal matter until after voir dire examination has been conducted, and it is apparent that a fair and impartial jury cannot be selected in the county).

[6]See United States v. Bradford, 528 F.2d 899, 900 (9th Cir. 1975) (concluding that counsel was not ineffective when, in an attempt to persuade the jury to find the defendants guilty of the lesser included offense, counsel conceded that the evidence identifying the defendants as

continued on next page . . .

Graff next argues that trial counsel provided him with ineffective assistance by failing to consult with him regarding his right to testify on his own behalf. Trial counsel interviewed Graff and investigated his drug use on the night of the incident, but decided that Graff could not answer questions on cross-examination in a manner that would further his defense, so recommended that Graff not testify. Because there is no evidence that trial counsel coerced Graff to waive his Fifth Amendment right to testify, we conclude that trial counsel was not ineffective in this instance.[7]

Graff next argues that trial counsel provided him with ineffective assistance by failing to present his only viable defense of intoxication. Likewise, Graff argues that trial counsel was ineffective for failing to offer a jury instruction on the defense of intoxication. Trial counsel presented the lack of specific intent defense, which was a viable defense. Thus, we conclude that trial counsel's decision not to pursue an intoxication defense and related jury instruction was a sound trial strategy not subject to retroactive attack.[8]

. . . *continued*
the perpetrators was overwhelming, but that the other elements of the crime were not proved).

[7]See Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989) (concluding that reversal is not mandated when there was no evidence in the record that defense counsel or the trial judge coerced or misled the defendant into not testifying).

[8]See Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) (concluding that counsel's decision to pursue an alternate defense was not unreasonable because "strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable"(quoting Strickland, 466 U.S. at 690)).

Graff next argues that trial counsel provided him with ineffective assistance by failing to object to the admission of an altered version of the original videotape of the incident. Because both the original and enhanced versions of the videotape were shown to the jury, we conclude that Graff failed to demonstrate any prejudice.[9]

Graff next argues that trial counsel provided him with ineffective assistance at the sentencing hearing by failing to offer mitigating evidence, namely the testimony of his family members and unidentified military personnel. However, trial counsel believed that the pre-sentencing report, coupled with Graff's statements during the hearing, sufficiently described Graff's background and present status. Once again, we conclude that trial counsel's decision does not provide the grounds for an ineffective-assistance claim because the decision of whom to call as a witness is "virtually unchallengeable" unless there are "extraordinary circumstances," which are not present here.[10]

Graff next argues that appellate counsel provided ineffective assistance of counsel by failing to argue that the admittance of certain hearsay statements violated the Confrontation Clause. On direct appeal, appellate counsel argued that the statements were improperly admitted hearsay.[11] Indeed, we ruled on the admissibility of the statements, concluding that the district court did not err in admitting them because

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[9]See LaPena, 114 Nev. at 1166, 968 P.2d at 754 ("To establish prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding would have been different.").

[10]Strickland, 466 U.S. at 691.

[11]Graff v. State, Docket No. 26805 (Order Dismissing Appeal, February 12, 1999).

they qualified as statements made by a co-conspirator in furtherance of a conspiracy and as an adoptive admission.[12] Because statements made by a co-conspirator in furtherance of a conspiracy and adoptive admissions have been defined as "firmly rooted hearsay exceptions," they have the requisite indicia of reliability to overcome the Confrontation Clause requirements.[13] Accordingly, we conclude that Graff was not prejudiced by appellate counsel's failure to argue the Confrontation Clause issue on appeal.[14]

Graff next argues that appellate counsel provided him with ineffective assistance by failing to confer with him regarding issues on appeal. We conclude that appellate counsel's strategic decision to appeal just two issues, without consulting Graff, did not fall below an objective standard of reasonableness.[15]

Finally, Graff argues that both his trial and appellate counsel provided ineffective assistance by failing to challenge the deadly weapon enhancement. NRS 193.165 provides for a sentencing enhancement when

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[12]Id.

[13]See Bourjaly v. United States, 483 U.S. 171, 183 (1987) (holding that the co-conspirator exception to the hearsay rule is firmly enough rooted to have sufficient indicia of reliability to overcome the Confrontation Clause requirements); People v. Silva, 754 P.2d 1070, 1080 (Cal. 1988) (concluding that "by reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions, and are admissible on that basis as a well-recognized exception to the hearsay rule" despite the Confrontation Clause) (emphasis in original).

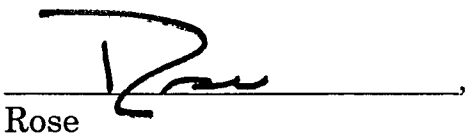
[14]See LaPena, 114 Nev. at 1166, 968 P.2d at 754.

[15]Strickland, 466 U.S. at 690 (observing that counsel is strongly presumed to have rendered adequate assistance and exercised reasonable professional judgment in making decisions related to the case).

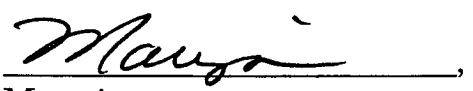
the defendant uses a deadly weapon in the commission of the crime, provided that such weapon is not a "necessary element" of the crime.[16] Because we have previously held that this enhancement is constitutional,[17] we conclude that counsel's failure to object to the enhancement or argue the issue on appeal was reasonable.

Having concluded that all of Graff's contentions on appeal lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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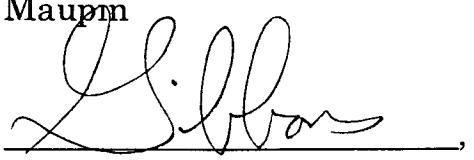

_____, J.
Gibbons

cc: Hon. J. Michael Memeo, District Judge
Marvel & Kump, Ltd.
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

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[16]NRS 193.165(1), (3).

[17]Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983) (concluding that a deadly weapon is not a "necessary element" of murder or attempted murder because both offenses can be committed without the use of a deadly weapon).