IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID STANLEY DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38588

FILED

OCT 0 7 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of David Stanley Davis' petition for writ of habeas corpus. Davis was charged and convicted of battery with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted robbery with use of a deadly weapon, robbery with use of a deadly weapon, and assault on an officer with use of a deadly weapon. Davis, in his writ petition, alleges several instances of ineffective assistance of counsel at the preliminary hearing, at trial, and on direct appeal.

In Strickland v. Washington,[1] the United States Supreme Court enunciated the "reasonably effective assistance" standard for reviewing claims of ineffective assistance of counsel.[2] Under this standard, "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in

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[1]466 U.S. 668 (1984).

[2]State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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criminal cases.'"[3] We have adopted that standard.[4] This standard also applies to claims of ineffective assistance of appellate counsel.[5]

A defendant, challenging the effectiveness of his counsel, must show "(1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency."[6] To determine whether counsel's performance was deficient, courts should be highly deferential, avoid "the distorting effects of hindsight," and evaluate counsel's conduct under the circumstances and perspective that existed at the time.[7] "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[8] This presumption "may only be overcome by '"strong and convincing proof to the contrary."'"[9]

To show prejudice based on trial counsel's performance, "[t]he defendant must show that there is a reasonable probability that, but for

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[3]Strickland, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

[4]Love, 109 Nev. at 1138, 865 P.2d at 323 (citing Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984)).

[5]Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992) (citing Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)).

[6]Love, 109 Nev. at 1138, 865 P.2d at 323 (citing Strickland, 466 U.S. at 687).

[7]Strickland, 466 U.S. at 689.

[8]Id. at 690.

[9]Love, 109 Nev. at 1141, 865 P.2d at 325 (quoting Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

counsel's errors, the result of the proceeding would have been different."[10] To show prejudice from appellate counsel's performance, the defendant must "show that the neglected claim would have had a reasonable probability of success on appeal."[11]

A court deciding an ineffective assistance claim need not address counsel's performance prior to addressing prejudice. "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'"[12]

Davis first argues that his counsel at the preliminary hearing was ineffective because he made the following argument:

> As to Count II, I would argue the evidence shown here today amounts to battery with use of a deadly weapon. During this entire time, Mr. Davis did not specifically intend to kill either one of these people. As a matter of fact, there came a time when he was telling them he didn't want to kill them, anything but kill them, he just wanted to get the money and leave.
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> . . . .
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> The battery with deadly weapon, I believe, meets the evidence. But he certainly, if he intended to kill him, could have killed him along with Carolyn. I will submit that to the Court.

We have previously held that where trial counsel concedes the defendant's guilt during the guilt phase of the trial, despite the client's

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[10]Id. at 1139, 865 P.2d at 324 (citing Strickland, 466 U.S. at 694).

[11]Duhamel, 955 F.2d at 967 (citing Heath v. Jones, 941 F.2d at 1132).

[12]Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (quoting Strickland, 466 U.S. at 697).

testimony that he was not guilty, this constitutes ineffective assistance of counsel.[13] However, we expressly limited this decision to the situation where such a concession was made during the guilt phase of trial.[14] It does not apply to a preliminary hearing.

In this case, counsel was making a proper attempt to get the charges reduced before Davis was bound over to the district court for trial. Thus, it was not ineffective assistance of counsel for Davis' counsel to agree that there was evidence sufficient to sustain a charge of battery with use of a deadly weapon.

Davis next argues that because he was still suffering from the effects of being shot in the face at the time of the preliminary hearing, he was denied due process.

NRS 178.400(1) provides that "A person may not be tried or adjudged to punishment for a public offense while he is incompetent." However, "incompetence only prevents a criminal defendant from being tried or punished and has no bearing on whether a defendant can be charged with a crime."[15] Further, "[a defendant's] competency is not within the scope of the preliminary hearing."[16]

As we have previously stated, "A preliminary examination is not a trial."[17] The purpose of a preliminary hearing is to determine

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[13]Jones v. State, 110 Nev. 730, 739, 877 P.2d 1052, 1057 (1994).

[14]Id.

[15]Woerner v. Justice Court, 116 Nev. 518, 523, 1 P.3d 377, 380 (2000).

[16]Id. at 525, 1 P.3d at 381.

[17]Overton v. State, 78 Nev. 198, 201, 370 P.2d 677, 679 (1962).

whether there is probable cause "to find that an offense has been committed and that the defendant has committed it."[18] If such probable cause is found, the defendant is bound over for trial in the district court.[19]

We conclude that because Davis had no due process right to a competency evaluation prior to the preliminary hearing, his attorney was not ineffective for failing to request one.

In a "laundry-list" of ways that trial counsel was allegedly ineffective, Davis includes a claim that counsel failed to file a formal discovery motion. He, however, does not give any indication of how failure to file a formal discovery motion caused him prejudice. Because "[t]he defendant carries the affirmative burden of establishing prejudice,"[20] and Davis has failed to meet this burden, there is no ineffective assistance of counsel on this issue.

Davis next contends that counsel's failure to interview and subpoena two police officers, who were present during the investigation of this crime, but were not called as witnesses during the State's case, was detrimental to his case. He claims these witnesses would have provided conflicting testimony to the testimony of the two officers who did testify at trial. Davis contends that the 9-1-1 dispatch transcript shows that there is a discrepancy between the testimony of the officers and what is evidenced in the transcript regarding when they entered the residence. He further claims that the officer who admits that he shot Davis was not, in fact, the actual officer who did the shooting.

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[18]Woerner, 116 Nev. at 525, 1 P.3d at 381.

[19]Id.

[20]Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994).

Even if Davis' assertions have validity, trial counsel's failure to obtain this testimony is not prejudicial and would not have affected the outcome of the trial. At best, the testimony from the other officers would be marginally relevant impeachment material. It would not have met the requirement that there be a reasonable probability that, but for counsel's errors, the result would have been different.[21] Here, there was overwhelming evidence of Davis' guilt. Both victims gave eyewitness accounts of the attack. The physical evidence corroborated their testimony. Therefore, Davis was not prejudiced by trial counsel's failure to call additional officers to testify.

Next, Davis makes the allegation that his trial counsel failed to interview even one witness that testified. There is nothing in the record to show whether this is true and Davis again fails to show how this prejudiced him, even if it is true. As we have stated, pure speculation and implication, not supported by the record, are assumed to be without support.[22]

Next, Davis claims that his trial counsel was ineffective because he failed to communicate with Davis for a ninety-day period and failed to develop a working relationship with Davis. Although this court has held that "failure to communicate with a client warrants disciplinary action," it does not rise to the level of ineffective assistance of counsel

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[21]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (2000) (citing Strickland, 466 U.S. at 687-89, 694).

[22]Riley, 110 Nev. at 656, 878 P.2d at 284.

where, as here, the defendant fails to show how this lack of communication caused him prejudice.[23]

Next, Davis makes the allegation that his trial counsel failed to adequately prepare for trial, without showing how he was prejudiced. This is nothing more than speculation and implication, not supported by the record.[24]

Davis also claims that his trial counsel was ineffective for failing to call a physician to testify regarding one of the victim's injuries. However, during the trial, the State sought to bring in a medical doctor to testify regarding the seriousness and severity of the wounds that were inflicted on the male victim. The court ruled that if the victim could sufficiently testify to the location of the wounds, the depth of them, and the severity of them, further testimony was not necessary in a criminal case and such testimony would be cumulative.

Trial counsel need not make every conceivable motion, without regard to the possibility of success, in order to safeguard against allegations of deficiency.[25] Here, since the trial judge ruled that the State could not bring in a physician to testify regarding the victim's injuries, because such testimony would be cumulative, it is unlikely that the court would have allowed the defense to bring in a physician for the same purpose. Moreover, Davis has again failed to show how he was prejudiced or that the results of the trial would probably have been different if a

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[23]McNelton, 115 Nev. at 411, 990 P.2d at 1273.

[24]Riley, 110 Nev. at 656, 878 P.2d at 284.

[25]Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977)).

physician had testified.[26] Therefore, there was no ineffective assistance of counsel based on this claim.

Davis next claims that both trial counsel and appellate counsel were ineffective for failing to object to or raise the issue of prosecutorial misconduct.

In closing arguments, the prosecutor stated, "You know that self-defense is not an issue. We've proved it beyond a reasonable doubt. We didn't even have to prove it beyond a reasonable doubt, our case says so." Davis claims that this was "clearly burden shifting for a prosecutor to express to the jury that there was no need for the State to prove that this was not self defense."

It is undisputed that the "prosecution bears the burden of proving all elements of the offense charged."[27] "One of the elements incumbent upon the State to prove under NRS 200.481, battery with the use of a deadly weapon, is that the defendant acted unlawfully. Because self-defense is justifiable, it negates the unlawfulness element."[28] Therefore, the state is required to prove beyond a reasonable doubt that a defendant did not act in self-defense or defense of others.[29]

In this case, the defense theory was based on self-defense. However, the prosecutor was not saying that the burden of proof was on

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[26]At trial, in addition to Richard's testimony regarding his wounds, Carolyn and two officers also testified that Richard received multiple stab wounds.

[27]Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993).

[28]Id.

[29]Id. at 781, 858 P.2d at 29.

the defendant to show self-defense. The prosecutor was arguing that, in this case, self-defense was not actually an issue. The prosecutor also stated:

> [T]his is not a self-defense case. This case has nothing to do with a self-defense case. In order for there to be self-defense, as you'll see in Instruction 19, there has to be an attack on the person claiming self-defense. There has to be an attack on the defendant. And you know as well as I know, that the facts show there's no attack on the defendant. The defendant is the attacker.

In addition, unlike in Barone v. State,[30] where the court refused to give the proffered jury instruction regarding self-defense, in this case, the jury was properly instructed on self-defense and the State's burden of proof. When a jury is properly instructed, "[i]t must be presumed by this court that the jury followed the evidence in the case, and the law given by the court."[31]

In this case, due to the substantial evidence presented against Davis, it is extremely unlikely that the jury would have reached a different verdict in the absence of the prosecutor's comment. Therefore, Davis fails to meet the requirements of Strickland, so there was no ineffective assistance of either trial or appellate counsel based on this issue.

Davis next argues counsel should have objected to the prosecutor's following statements made during closing argument:

> When the defense claims that some evidence of blood should have been tested, some

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[30]109 Nev. 778, 858 P.2d 27.

[31]State v. Sheeley, 63 Nev. 88, 97, 162 P.2d 96, 100 (1945).

> fingerprints should have been taken, that's unnecessary. It's absurd. They are trying to put ink. They are trying to clutter the situation. We don't need the blood tested. There's no indication it wasn't tested; number two, we know whose blood it is. It's the blood of Richard Mecchi, maybe some blood of Carolyn, she had stab wounds too. But primarily the blood of Mr. Mecchi. You know this because, number one, he had 16 stab wounds. Number two, Carolyn saw the blood spurting out of Mr. Mecchi while he was being stabbed by the defendant at the kitchen sink. You'll see in the photograph the pool of blood on the kitchen counter. We don't need the blood tested. We don't need the fingerprints taken either.
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> The defense claimed fingerprints should have been readily available, but I submit to you if somebody has their hands on a knife and they are moving it back and forth, there aren't going to be any fingerprints on it.
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> Furthermore, we have eyewitnesses. We have the eyewitnesses of Carolyn Mecchi and Richard Mecchi. Eyewitness testimony is the best evidence there can be.

Prosecutors are "free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom."[32] However, they cannot argue facts or inferences not supported by the evidence.[33] In cases of prosecutorial misconduct, "[t]he relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to

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[32]Moore v. State, 116 Nev. 302, 306, 997 P.2d 793, 795 (2000).

[33]Leonard v. State, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1998) (citing Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)).

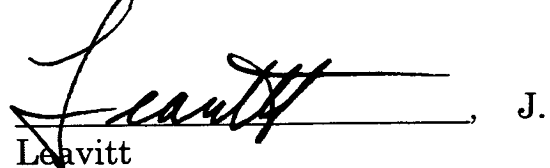
make the results a denial of due process."[34] Further, the court will not overturn a criminal conviction based only on a prosecutor's comments.[35]

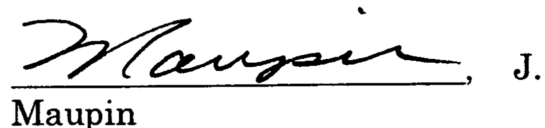
In this case, the prosecutor's arguments were based on the record. Therefore, the statements are not misconduct. Further, even if the prosecutor's statements regarding the blood and fingerprints were improper, Davis has failed to meet the Strickland test for ineffective assistance of counsel, because he has not shown that there is a reasonable probability that, absent the prosecutor's statements, the result of the proceeding would have been different.[36] As previously stated, the evidence against Davis was overwhelming.

Based on the foregoing, we conclude that Davis' claims of ineffective assistance of counsel are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Rose


_______________, J.
Leavitt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Maupin

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[34]Hernandez v. State, 118 Nev. ___, ___, 50 P.3d 1100, 1107 (2002).

[35]Id. (citing State of Nevada v. Dist. Ct., 116 Nev. 127, 139 n.10, 994 P.2d 692, 700 n.10 (2000)).

[36]Love, 109 Nev. at 1139, 865 P.2d at 324 (citing Strickland, 466 U.S. at 694).

cc: Hon. Sally L. Loehrer, District Judge
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