

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARRITTE FUNCHES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39036

FILED

NOV 21 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying Marritte Funches' post-conviction petition for writ of habeas corpus.¹ On appeal, Funches asserts that the district court erred in rejecting his claims of ineffective assistance of trial and appellate counsel. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A jury convicted Funches of first-degree murder and possession of a firearm by an ex-felon. Evidence at trial indicated that, on the night of March 27, 1991, in Reno, Nevada, Funches and Edward Shafer entered a taxicab operated by Kevin Jones; Funches sat in the rear seat and Shafer in the front. When Jones refused to drive them to a remote area north of Reno, Funches shot Jones in the back of the head, using a .25 caliber handgun. The Secret Witness program led police to Shafer, who implicated Funches in the homicide.

The State charged Funches with first-degree murder and possession of a firearm by an ex-felon. Shafer testified at Funches' preliminary hearing that Funches shot Jones and to other significant details about the crime. On cross-examination, Shafer denied any overt involvement in the murder and asserted complete ignorance as to

¹See NRS 34.575(1).

Funches' prior possession of a weapon, the potential occurrence of any crime, and denied that either he or Funches took any money from the cab driver.

A month before Funches' trial, Shafer admitted to State investigators that he knew Funches was carrying a gun and Funches wanted to rob the cab driver. He also admitted he obtained money from the cab driver at Funches' insistence, but denied knowing Funches would shoot the cab driver. Following this reinterrogation, the State charged Shafer with robbery and first-degree murder.

The district court joined the two cases for trial. At trial, the State read, over objection, Shafer's preliminary hearing testimony to the jury, complete with the cross-examination by Funches' counsel. The district court ruled the State could only admit Shafer's later statements against Shafer and ordered redaction of the statements. While the redactions removed the specific references to Funches, the State substituted the word "he" in place of those references to add context to the information in the statements concerning the other perpetrator. Further, the district court restricted questioning concerning Shafer's out-of-court statements as to Funches' role in the homicide. With these conditions, the State introduced Shafer's redacted later inconsistent statements.

In addition to Shafer's testimonial evidence from the preliminary hearing, the State introduced ample independent evidence inculcating Funches. First, that Funches owned a .25 caliber handgun and practiced with it. Second, that a .25 caliber shell casing found by police in the rear seat of the taxi matched the ammunition found in Funches' gun. Third, expert opinion that Funches' gun fired the shell recovered from the taxi. Fourth, Funches' fingerprints on documents

located with the gun. Fifth, the presence of unmatched human bloodstains in the barrel of the murder weapon and on Funches' jacket.

Although the jury convicted Funches of first-degree murder and of possession of a firearm by an ex-felon, it acquitted Shafer. The district court sentenced Funches to two consecutive terms of life imprisonment without the possibility of parole for first-degree murder with the use of a deadly weapon, and to a concurrent six-year term of imprisonment for possession of a firearm by an ex-felon.

This court affirmed Funches' conviction on direct appeal.² Subsequently, on July 7, 1998, Funches filed a petition for post-conviction relief in the district court, asserting he was denied effective assistance of trial and appellate counsel. Funches alleged that his trial counsel failed to conduct proper investigation and seek severance of the trial, and that his appellate counsel failed to raise several meritorious issues before this court on appeal. On October 1, 1999, the district court held an evidentiary hearing on the petition, in which Funches and his attorneys testified.

Carl Hylin, Funches' trial counsel, testified that he investigated an alibi defense for Funches, but discarded it, as he concluded Funches' witnesses were unreliable. Thus, he determined the best strategy was to discredit or exclude Shafer's out-of-court statements and, thus, chose not to sever the trials. He believed it was critical to have Shafer as a co-defendant because Schafer would claim his Fifth Amendment protection against self-incrimination and be unavailable to testify. By keeping Shafer as a co-defendant at the trial and filing motions

²Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997).

under Bruton v. United States,³ Richardson v. Marsh,⁴ Lemberes v. State,⁵ and LaPena v. State,⁶ Hylin planned to exclude Shafer's preliminary hearing testimony and other out-of-court statements. In fact, it was Shafer who sought severance of the trial proceedings, not Funches. Had counsel been successful in preventing admission of the preliminary hearing testimony, there would have been no eyewitness account of Funches' involvement, by way of testimony or redacted statements.

John Reese Petty, Funches' direct appeal counsel, testified concerning his argument on appeal that the trial judge violated NRS 171.198 by admitting Shafer's preliminary hearing testimony. He supported this position with the cases of Lemberes and LaPena, which he believed were directly on point. Petty fully expected a reversal based upon these cases, however, this court overruled both LaPena and Lemberes in Funches' direct appeal. He stated that if he were able to reargue Funches' appeal, the only thing he would have done differently would have been to provide the district court with an option to reverse Funches' conviction without the need to reverse both LaPena and Lemberes.

Petty further testified that a constitutional claim under Bruton would not likely have changed the result on appeal because Bruton violations are reviewed under a harmless error standard. Petty explained

³391 U.S. 123 (1968).

⁴481 U.S. 200 (1987).

⁵97 Nev. 492, 634 P.2d 1219 (1981), overruled by Funches, 113 Nev. 916, 944 P.2d 775.

⁶96 Nev. 43, 604 P.2d 811 (1980), overruled by Funches, 113 Nev. 916, 944 P.2d 775.

that the admission of Shafer's redacted out-of-court statements would likely have constituted harmless error because those statements were cumulative of the admission of Shafer's preliminary hearing testimony. In short, Petty's view was that, if he was correct under Lemberes and LaPena, reversal was mandated; but given that this court overturned the two prior cases in Funches' direct appeal and affirmed admission of the preliminary hearing transcript, Bruton was implicated but did not require reversal because the statements merely confirmed the inculpatory evidence in the preliminary hearing transcript.

At the conclusion of the post-conviction hearing, Funches addressed the district court and stated that videotapes from the Circus Circus casino in Reno would have shown he was not with Shafer on March 27, 1991, but that his attorney did not present this evidence at trial. Following this statement, Funches' post-conviction counsel represented to the district court that the parties stipulated at trial that the videotapes did not "establish anything."

On December 21, 2001, the district court ruled that Funches was not deprived of his right to effective assistance of counsel at trial or on direct appeal. Accordingly, the district court denied Funches' petition, and this appeal followed.

DISCUSSION

Funches alleges that the district court erred in determining that his trial and appellate counsel were effective. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review."⁷ The benchmark for evaluating an ineffectiveness

⁷Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

claim is whether the proper functioning of the adversarial process was so undermined by counsel's conduct that a reviewing court cannot trust that the trial produced a just result.⁸ The constitutional right to effective assistance of counsel also applies to direct appeal.⁹

To prevail on a claim of ineffective assistance of trial counsel under Strickland,¹⁰ a claimant must make two distinct showings. First, "that counsel's performance was deficient," i.e., that counsel's representation fell below an objective standard of reasonableness.¹¹ The inquiry on review must be whether, in light of all the circumstances, counsel's assistance was reasonable.¹² Second, that counsel's "deficient performance prejudiced the defense."¹³ Specifically, the claimant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁴

"Judicial review of [counsel's] representation is highly deferential."¹⁵ To fairly assess counsel's performance, the reviewing court

⁸Strickland v. Washington, 466 U.S. 668, 686 (1984).

⁹Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁰Strickland, 446 at 687.

¹¹Evans, 117 Nev. at 622, 28 P.3d at 508.

¹²Strickland, 466 U.S. at 690.

¹³Evans, 117 Nev. at 622, 28 P.3d at 508.

¹⁴Strickland, 466 U.S. at 694.

¹⁵Evans, 117 Nev. at 622, 28 P.3d at 508.

must make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct based on counsel's perspective at the time.¹⁶ Additionally, the court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.¹⁷

We also review a claim of ineffective assistance of appellate counsel under Strickland.¹⁸ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁹ Rather, appellate counsel is most effective when counsel refrains from raising every conceivable issue.²⁰ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."²¹

We conclude that Funches obtained effective representation from both his trial and appellate counsel.

Trial counsel

Funches argues that his trial counsel was ineffective for failing to seek a trial severance, as well as failing to investigate Shafer's truthfulness, develop eyewitness testimony and obtain the surveillance videos.

¹⁶Id.

¹⁷Strickland, 466 U.S. at 697.

¹⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

¹⁹Jones v. Barnes, 463 U.S. 745, 751, 754 (1983).

²⁰Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

²¹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

We conclude that trial counsel described an acceptable trial strategy in his testimony at the evidentiary hearing held on Funches' post-conviction petition. After trial counsel concluded Funches' alibi defense was flawed, he determined the best strategy would be to attack the admission of Shafer's preliminary hearing testimony and his extra-judicial statements. Counsel adopted a sound strategy to this end based upon Lemberes and LaPena, both still presumptively valid decisional authorities as of the time of trial. While the strategy neither resulted in the preclusion of Shafer's statements nor Funches' acquittal, we conclude that Funches' trial counsel was not ineffective; rather, he presented a well-strategized defense to a strong case.

First, the decision not to seek a severance was sound. There was ample authority under Nevada law suggesting that Shafer's preliminary hearing testimony was not admissible and that any extra-judicial statements made by Shafer to police would have to be redacted under Bruton. Accordingly, with Shafer in the courtroom as a co-defendant, there would be no direct eyewitness testimony implicating Funches.²² That the district court determined to admit the preliminary hearing testimony does not undermine the strategy, as counsel was able to explore the inconsistencies between the testimony and the statements before the jury.

Second, aside from Shafer's preliminary hearing testimony linking Funches to the crime, other circumstantial evidence closely linked

²²The State correctly notes that had Shafer been tried first and acquitted, he would have enjoyed no Fifth Amendment protection against testifying against Funches at a subsequent separate trial. Accordingly, Funches would have been faced with live testimony implicating him.

Funches to the murder. Also, the surveillance tapes, according to the record, could have been productively argued as favoring both the defense and the prosecution.²³ It was therefore reasonable for trial counsel to take the risk that the preliminary hearing testimony would be excluded and, failing that, simply attack Shafer, the only eyewitness, based upon his poor credibility and to rely on the fact that the videotape did not support the State's factual assertion of Funches' involvement in Jones' murder.

As we have stated before, "[a] strategy decision . . . is 'virtually unchallengeable absent extraordinary circumstances.'"²⁴ Funches' petition does not present circumstances that warrant reversal of his conviction; he has failed to prove either that trial counsel's performance fell below an objective standard of reasonableness or that his trial counsel's performance prejudiced his defense.²⁵

²³Contrary to Funches' claims, his counsel did investigate the Circus Circus videos, but determined they were inconclusive.

²⁴Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

²⁵While Funches' proper person post-conviction habeas petition alleges his trial counsel was ineffective for failing to investigate Shafer's psychological deficiencies, Funches presented no evidence at the evidentiary hearing regarding whether trial counsel investigated this information. Additionally, Funches did not present the information contained in the appellate record regarding Shafer's psychological history to the district court in connection with the post-conviction proceedings.

Funches also contends that counsel was ineffective for not presenting the testimony of William Margrave. This claim was also not raised at the evidentiary hearing and Mr. Margrave did not testify. Thus, the district court was unable to consider whether counsel investigated this information, or whether the information would have assisted in the original defense. Even if this information was presented to either the jury

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Appellate counsel

Funches argues that he has been denied effective assistance of appellate counsel because his counsel failed to assert the following claims on appeal: (1) violation of his right to confrontation pursuant to Bruton; (2) improper joinder; (3) invalidity of the convictions based upon uncorroborated accomplice testimony; and (4) invalidity of the convictions based upon perjured testimony. We disagree.

Funches' appellate counsel was not ineffective for omitting an appellate argument based upon Bruton. First, counsel represented Funches at the preliminary hearing and fully cross-examined Shafer. Since the Bruton court was concerned about the abilities to confront and cross-examine, both of which appear to have been adequate here, Funches' Sixth Amendment rights were not violated by the admission of the transcript. Second, Shafer's subsequent out-of-court statements were admitted at trial against Shafer, not against Funches. The statements were redacted to remove reference to Funches, and primarily used to point out the inconsistencies between Shafer's earlier statements and to show his involvement in the crime, namely, that he took the money from the cab driver. In the State's case-in-chief, the State avoided any questions concerning Shafer's statements that would have elicited incriminating evidence about Funches. We conclude that the district court's limited admission of the statements would not have required reversal had

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or the district court, it is unlikely the result of Funches' trial or post-conviction habeas proceeding would have been different. We conclude these issues lack merit on appeal.

appellate counsel raised a Bruton issue as an alternative grounds of attack of the original judgment entered below.

We again note that no error occurred in the admission of Shafer's preliminary hearing testimony. That being the case, we recognize that the redaction of the out-of-court statements and the substitution of the word "he" to add context to the redacted references to Funches impliedly implicated Funches when considered together with the preliminary hearing transcript. Accordingly, Funches correctly notes that Bruton was implicated because he was unable to cross-examine Shafer concerning the changes between the preliminary hearing testimony and the subsequent out-of-court statements. However, reversal would not have been mandated because the disparities between the testimony and the statements were apparent and the changes in the account of the homicide applied, with the one exception noted above, primarily to Shafer's involvement, leaving the preliminary hearing evidence against Funches essentially unaltered. We also note that Shafer's counsel cross-examined the detective who took Shafer's out-of-court statements on whether they were consistent with the preliminary hearing transcript. While this also implicates Bruton, reversal is likewise not required. In short, the discrepancies between Shafer's preliminary hearing testimony and his subsequent statements concerning Funches' role in the killing were de minimus, and primarily concerned Shafer's knowledge of the events in question.

Because the Bruton claim would not have resulted in reversal, and because of the potential success of the appeal under Lemberes and LaPena, counsel's failure to raise this issue on appeal was reasonable under prevailing professional norms. Petty testified that his strategy was

to attack use of the preliminary hearing testimony under LaPena and Lemberes. That we chose to overturn those cases as precedent does not render the approach ineffective under Strickland. Thus, we conclude that Funches was not denied effective assistance of appellate counsel in his approach to issues under LaPena, Lemberes and Bruton.²⁶

Accomplice corroboration

Funches contends that the State elicited only limited independent evidence apart from Shafer's testimony to link him to the murder in violation of NRS 175.291,²⁷ and that his appellate counsel was

²⁶Funches claims that he was denied effective assistance of appellate counsel because appellate counsel failed to raise the issue of severance. This court has held that it will not consider an issue raised for the first time on appeal. Funches' appellate counsel could not have properly raised the issue of severance on appeal because trial counsel did not raise this issue. In fact, trial counsel's strategy was to keep Shafer in the trial as a codefendant. Therefore, Funches' direct appeal counsel was not ineffective for failing to raise this issue.

²⁷NRS 175.291 states:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

ineffective for not raising this issue on appeal. We conclude that this assertion lacks merit. Circumstances and evidence as a whole may provide sufficient corroboration of accomplice testimony to satisfy NRS 175.291; corroboration evidence need not be a single fact or circumstance.²⁸ Additionally, “[c]orroboration evidence also need not in itself be sufficient to establish guilt, and it will satisfy the statute if it merely tends to connect the accused to the offense.”²⁹

Even if Shafer was Funches’ accomplice,³⁰ the State presented sufficient evidence linking Funches to the crime absent Shafer’s statements, such as his ownership and possession of the weapon that killed the cab driver on both the day of the murder and when he was arrested, and the blood in both the gun and on Funches’ jacket. Appellate counsel’s failure to brief the accomplice corroboration issue was reasonable under prevailing professional norms; this issue would not have been successful on appeal.³¹

²⁸Cheatham v. State, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988).

²⁹Id. at 504-05, 761 P.2d at 422.

³⁰Because the jury acquitted Shafer, it can be inferred that the jury concluded that he was not Funches’ accomplice.


³¹We have considered Funches’ other arguments on appeal and conclude that they lack merit. Funches’ claim that he was convicted upon perjured testimony is without merit, given that, as noted, the disparities between the preliminary hearing transcript and the statements related primarily to Shafer’s discrete knowledge of what was going on in the course of Jones’ murder. Again, the discrepancies concerning Funches’ involvement were minimal, but apparent from a comparison between the testimony and the statements. Additionally, we conclude that there were no “cumulative errors” at trial warranting reversal of Funches’ conviction.


CONCLUSION

We conclude that trial and appellate counsel provided Funches with constitutionally effective assistance. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. James W. Hardesty, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk