

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY B. KELLY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39204

FILED

MAR 16 2001

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT

JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On March 16, 2000, the district court convicted appellant Jeremy B. Kelly, pursuant to a jury verdict, of conspiracy to commit murder, burglary while in possession of a firearm and/or deadly weapon, first degree murder with the use of a deadly weapon, and robbery with the use of a deadly weapon. The district court sentenced Kelly to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole, in addition to several concurrent terms of imprisonment. This court affirmed Kelly's conviction on direct appeal.¹

On November 21, 2001, Kelly filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Kelly or to conduct

¹Kelly v. State, Docket No. 35816 (Order of Affirmance, August 10, 2001).

an evidentiary hearing. On February 26, 2002, the district court denied Kelly's petition. This appeal followed.

In his petition, Kelly raised numerous claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.² To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.³ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴ A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁵

First, Kelly raised several claims regarding counsel's effectiveness involving the preliminary hearing. Specifically, Kelly claimed counsel should have filed a motion to dismiss the criminal complaint, motions for an order to interview State's witnesses DeQuincy Taylor and Charles Dunhame, motions "to show that . . . Kelly had no weapons or did not take any property of [the victim]," a motion for a mistrial "based on the grounds that Taylor and Dunhame, "openly admit[ted] that they are lying in preliminary hearing [sic]," and that counsel failed to impeach and cross-examine these two witnesses. These

²Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 694.

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

⁵Strickland, 466 U.S. at 697.

claims are without merit. The State provided more than enough evidence to establish probable cause for the purpose of binding Kelly over for trial.⁶ The State called five witnesses. Evidence was presented that Kelly had taken part in the planning and commission of the robbery as well as the discussion about killing the victim, Terry Dixon, if he resisted, that Kelly had in his possession prior to the incident at least one of the guns that was used, that he fled from the police in the victim's truck after the shooting, that he told police he had participated in planning the robbery, was present at the time of the shooting, and had provided the murder weapon. Kelly's contention that Taylor and Dunhame admitted they were lying is misleading and belied by the record.⁷ Both admitted that they had lied in their statements to the police, but stated that their testimony at the preliminary hearing was truthful. Kelly did not state how counsel should have impeached the witnesses, or improved his cross-examination.⁸ Therefore, Kelly failed to establish that counsel was ineffective in this regard.⁹

⁶See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980)) ("[P]robable cause to bind a defendant over for trial 'may be based on 'slight,' even 'marginal' evidence because it does not involve a determination of guilt or innocence of an accused'").

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸See id.

⁹Kelly also claimed that the court lacked jurisdiction to bind him over for trial on the "uncorroborated" testimony of his co-conspirators, and that the judge abused her discretion by "knowingly allowing the perjured testimony." Kelly waived these claims by failing to raise them on direct appeal. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Furthermore, they are without merit. See Middleton, 112

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Second, Kelly claimed that counsel was ineffective for failing to file a motion for discovery and/or object to the prosecution's withholding of exculpatory evidence. Specifically, Kelly claimed that the following should have been disclosed: (1) that Kelly's fingerprints were not found at the crime scene; (2) the "defense deals" the State made with Taylor and Dunhame; (3) that State's witness Jennifer Jensen Diaz had been paid \$700.00 by the Secret Witness Program for coming forward; (4) "that the crime scene had been tainted by the vandalizing of kids" prior to the arrival of the police; and (5) a videotape and other evidence "relating to the character" of Mr. Dixon. Regarding Kelly's first three claims, this information was presented to the jury, therefore Kelly did not demonstrate that the defense was prejudiced. Kelly's claim that the crime scene was vandalized is unsupported by any specific factual allegation.¹⁰ Regarding Kelly's final claim, even assuming the State failed to disclose evidence that Mr. Dixon had molested his son Sean Dixon,¹¹ and other children, this was not material evidence favorable to the defense.¹² Therefore, Kelly failed to establish that counsel was ineffective in this regard.

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Nev. at 961, 921 P.2d at 285-86 (quoting Hodes, 96 Nev. at 186, 606 P.2d at 180).

¹⁰See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹¹Sean Dixon is referred to in the record as both Mr. Dixon's son and stepson.

¹²See Roberts v. State, 110 Nev. 1121, 1127, 881 P.2d 1, 5 (1994) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) ("A prosecutor must disclose evidence favorable to an accused when that evidence is material either to guilt or to punishment.")).

Third, Kelly claimed that counsel was ineffective for failing to file a motion to suppress statements he made to the police. Kelly conceded that counsel joined in a motion to suppress made by one of Kelly's co-defendant's, but contended that when doing so, counsel was "totally unprepared." Kelly did not state how filing a separate motion would have benefited his defense, or specify how counsel was unprepared.¹³ Therefore, Kelly did not establish that counsel was ineffective in this regard.

Fourth, Kelly claimed that counsel was ineffective for failing to investigate whether Kelly was armed with a gun when the incident took place. The State presented two witnesses who testified that Kelly did have a gun a few days prior to the incident, and one witness who testified that Kelly was armed with a gun during the robbery and murder. Moreover, because the State proceeded under the alternate legal theories of aiding and abetting, conspiracy, felony murder, as well as the theory that Kelly was the shooter, it was unnecessary for the State to prove that he had possession of a gun.¹⁴ Therefore, Kelly failed to show that the defense was prejudiced.

Fifth, Kelly claimed that counsel should have investigated additional defenses and any information in possession of the prosecution. These claims are unsupported by specific factual allegations, which would, if true, entitle Kelly to relief.¹⁵ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁴See NRS 199.480.

¹⁵See Hargrove, 100 Nev. 498, 686 P.2d 222.

Sixth, Kelly claimed that counsel was ineffective for failing to interview witnesses. Specifically, Kelly argued that counsel should have interviewed: (1) Taylor and Dunhame, who would have corroborated that Kelly was not armed, was not the shooter, and did not take anything from Mr. Dixon's apartment; (2) Carrie Booth, who would have undermined the testimony of Jennifer Jensen Diaz; and (3) Elliot Richard Cerezo, Michael David Chaddock, James E. Brown, Mark House, and Shawn Payne, who would have testified that they had heard Kelly's co-defendant Sean Dixon repeatedly state that he intended to shoot and kill Mr. Dixon. Kelly's claims regarding Taylor, Dunhame and Booth are belied by the record.¹⁶ Both Taylor and Dunhame stated under oath that Kelly was armed. Neither testified that Kelly was the shooter or that he took anything from the victim's apartment. Booth was called by the State and her testimony at trial was consistent with that of Diaz. Both Booth and Diaz also testified that they had heard Kelly participate in a conversation in which it was discussed that the group would kill the victim if he resisted during the robbery. Regarding the other potential witnesses, Kelly failed to show that had the jury been presented with evidence that Sean had previously stated he wished to kill his father it would have changed the outcome of the trial. Therefore, Kelly did not show that the defense was prejudiced.

Seventh, Kelly claimed that counsel was ineffective for failing to present a theory of defense to the jury during opening and closing arguments. This claim is belied by the record.¹⁷ During opening argument, counsel told the jury that Kelly was just "in the wrong place at

¹⁶See id.

¹⁷See id.

the wrong time with the wrong people," and did not participate in any of the crimes that were committed. During closing argument, counsel argued that the State had failed to prove beyond a reasonable doubt that Kelly was guilty of the crimes charged.¹⁸ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Eighth, Kelly claimed that counsel was ineffective for failing to effectively cross-examine witnesses. Kelly failed to specify which witnesses should have been more effectively cross-examined and how the cross-examination was deficient.¹⁹ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Ninth, Kelly claimed that counsel was ineffective for failing to object to Taylor's "false testimony." Kelly's argument is based on the premise that because Taylor admitted to lying to the police and at the preliminary hearing, it necessarily follows that he lied at the trial. During cross-examination, Taylor admitted he had lied to the police and at the preliminary hearing,²⁰ but stated his testimony at trial was the truth. Kelly's attorney cross-examined Taylor regarding the discrepancies, but had no basis upon which to object to "false testimony," and it was the

¹⁸Kelly contended that counsel's closing argument consisted of apologizing to the jury for wasting its time, and that the State "had to object to his continued apologizing to the jury." This is belied by the record. See id.

¹⁹See id.

²⁰Taylor admitted that he lied at the preliminary hearing about how long he had known Kelly, how many days Kelly had the gun prior to the incident, who had flipped over Mr. Dixon's bed after the shooting, and who had fled in the victim's truck after the shooting.

jury's function to determine if and when Taylor told the truth.²¹ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Tenth, Kelly claimed that counsel was ineffective for failing to object to "the prosecutor mak[ing] a mockery out of" him during his testimony. Kelly did not state how the prosecutor made a mockery of his testimony, or specifically to what his counsel should have objected to.²² Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Eleventh, Kelly claimed that counsel was ineffective for failing to object to the prosecutor's misstatement during Kelly's testimony that he did not have a right to put on a defense. In affirming Kelly's judgment of conviction, this court determined that the statement did not deny Kelly a fair trial.²³ Kelly cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."²⁴

²¹See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function . . . to assess the weight of the evidence and determine the credibility of witnesses").

²²See Hargrove, 100 Nev. 498, 686 P.2d 222.

²³See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985) ("A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.")).

²⁴See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Twelfth, Kelly claimed that counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, Kelly complained that during closing argument the prosecutor presented "prejudicial and false" statements that it was Kelly who supplied the murder weapon which he had stolen in an unrelated burglary, and told the jury Kelly would use the prison law library "for the sole purpose of learning how to lie to the court and jury." The prosecutor properly referenced evidence presented during the trial that Kelly supplied the murder weapon which had been stolen from Kelly's neighbor.²⁵ Kelly misrepresented the prosecutor's remark about Kelly's use of the law library. Moreover, we conclude that, in light of the entire record, the statements, even if they had risen to the level of prosecutorial misconduct, would have been harmless error.²⁶ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Thirteenth, Kelly claimed that counsel was ineffective for failing to file a motion for special jury instructions. Kelly argued that the jury should have been given an instruction that the prosecutor's closing argument was improper and an instruction that the prosecution's witnesses were Kelly's accomplices. As previously discussed, the State's closing argument was not improper, and the jury knew that one of the

²⁵See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989) (holding that counsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial); State v. Teeter, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948) (holding that during closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence); overruled on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. ___, 59 P.3d 477 (2002).

²⁶See Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997) (holding that prosecutorial misconduct is subject to harmless error analysis).

State's witnesses had participated in the incident. Therefore, Kelly did not establish that counsel was ineffective in this regard.

Fourteenth, Kelly claimed that counsel was ineffective for assisting the prosecution. Specifically, Kelly argued that counsel adopted a prosecutorial role when he attempted to "push" Kelly into accepting the plea bargain offered by the State. This claim is unsupported by any specific factual allegation.²⁷ Moreover, Kelly did not enter into a plea agreement; he went to trial and was found guilty by a jury. Accordingly, even if counsel tried to "push" Kelly into entering a plea agreement, Kelly cannot show that he was prejudiced. Therefore, Kelly failed to establish that counsel was ineffective in this regard.

Fifteenth, Kelly claimed that counsel was ineffective for failing to present mitigating circumstances at sentencing. Kelly did not specify what mitigating circumstances should have been presented.²⁸ Therefore, Kelly did not establish that counsel was ineffective in this regard.

Sixteenth, Kelly claimed that counsel was ineffective for failing to object to the district court adjudging him guilty of conspiracy to commit murder rather than conspiracy to commit robbery. We are aware of no authority in support of Kelly's argument that, under these circumstances, it was improper for the district court to sentence him on the conspiracy to commit murder.²⁹ Therefore, Kelly failed to establish that counsel was ineffective in this regard.

²⁷See Hargrove, 100 Nev. 498, 686 P.2d 222.

²⁸See id.

²⁹Cf. Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987); distinguished on other grounds by State of Nevada v. Dist. Ct., 116 Nev. 127, 994 P.2d 692 (2000) (holding that a defendant cannot be convicted of

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Kelly also raised eleven claims of ineffective assistance of appellate counsel. 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 petitioner was prejudiced by the deficient performance.³⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.³¹ This court has noted that appellate counsel is most effective when every conceivable issue is not raised on appeal.³² To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.³³

First, Kelly claimed that counsel was ineffective for failing to argue that Kelly's statements to the police were improperly admitted. Specifically, Kelly argued that he was not Mirandized³⁴ and that his statements were coerced by the police. The district court held an evidentiary hearing on this issue and found that the statements were admissible. We conclude that the district court's finding that Kelly's

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separate charges that cover the same course of conduct); Braunstein v. State, 118 Nev. ___, ___, 40 P.3d 413, 421 (2002) (holding that redundant convictions will be reversed and the charge that most accurately conveys what crime has been committed remains as a conviction).

³⁰Strickland, 466 U.S. at 687.

³¹Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

³²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

³³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

³⁴See Miranda v. Arizona, 384 U.S. 436 (1966).

statements were voluntary is not clearly untenable.³⁵ Therefore, Kelly did not show that this issue would have had a reasonable probability of success on appeal.

Second, Kelly claimed that counsel was ineffective for failing to argue that his conviction was invalid because it was based solely on the uncorroborated and inconsistent testimony of accomplices. This claim is belied by the record.³⁶ Only one of Kelly's accomplices, Taylor, testified at trial. The remaining witnesses for the State were three Las Vegas Metropolitan police officers, a detective, two crime scene analysts, two criminalists, a fingerprint analyst, a forensic pathologist, a friend of the defendant, and the defendant's ex-girlfriend. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Third, Kelly claimed that counsel was ineffective for failing to argue that his prosecution was vindictive. Kelly provided no specific facts to support his claim that the State chose to prosecute him because he refused to testify against his co-defendants or otherwise cooperate with the State.³⁷ Kelly's contention that "vindictiveness can be inferred by the prosecutor's delay tactic[s] [and] stalling" is of insufficient specificity to support this claim.³⁸ Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

³⁵See Elvik v. State, 114 Nev. 883, 893, 964 P.2d 281, 288 (1998).

³⁶See Hargrove, 100 Nev. 498, 686 P.2d 222.

³⁷See id.

³⁸See id.

Fourth, Kelly claimed that appellate counsel was ineffective for failing argue that his prosecution was selective. "[T]he selection of particular cases for prosecution is within the discretion of the district attorney," as long as the decision to prosecute is not "based on some impermissible criteria such as race or religion."³⁹ Kelly failed to show that the State's decision to prosecute him was based on some impermissible criteria.⁴⁰ Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Fifth, Kelly claimed that appellate counsel was ineffective for failing to argue that the amended information filed by the State approximately three and one-half years after the original information was improper. According to Kelly, information was amended to include the charge of murder with the use of a deadly weapon. This claim is belied by the record.⁴¹ The original information was filed on August 9, 1996, charging Kelly and his two co-defendants with various crimes, including murder with the use of a deadly weapon. The amended information was filed on December 13, 1999, containing the same charges against Kelly, but dropping one charge. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

³⁹Junior v. State, 107 Nev. 72, 77, 807 P.2d 205, 208 (1991).

⁴⁰See also Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973) ("The matter of the prosecution of any criminal case is within the entire control of the district attorney, and the fact that not every law violator has been prosecuted is of no concern to appellant, in the absence of an allegation and proof that he is a member of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute.") (citations omitted).

⁴¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

Sixth, Kelly claimed that appellate counsel was ineffective for failing to argue that certain statements made by the prosecutor during the trial and closing argument constituted prosecutorial misconduct. Specifically, Kelly maintained that the prosecution allowed Taylor and Dunhame to perjure themselves during the trial and preliminary hearing, respectively, and that "this was the only evidence the prosecution had to obtain a conviction." As discussed, though the record reflects that Taylor and Dunhame were not always truthful, there is nothing in the record to indicate that the State suborned their perjury. Additionally, as also discussed, the State presented evidence other than Taylor and Dunhame's testimony at both the trial and the preliminary hearing. Kelly also claimed that the State shifted the burden of proof during closing argument by stating that Kelly was the shooter. As discussed, the State presented alternative legal theories as to Kelly's culpability in the shooting. Arguing that Kelly was the shooter did not shift the burden of proof. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Seventh, Kelly claimed that counsel was ineffective for failing to argue that the State withheld exculpatory evidence. As discussed, this claim is without merit. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Eighth, Kelly claimed that counsel was ineffective for failing to argue that the district court committed misconduct by allowing "tainted" evidence. Apparently, Kelly was referring to the testimony of Taylor. As discussed, this claim is without merit. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Ninth, Kelly claimed that counsel was ineffective for failing to argue that there was insufficient evidence to support his conviction of first-degree murder and robbery. "The standard of review in a criminal case 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.'"⁴² "This court will not disturb a jury verdict where there is substantial evidence to support it, and circumstantial evidence alone may support a conviction."⁴³ Based on our review of the record, we conclude that there is substantial evidence to support the verdict. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Tenth, Kelly claimed that counsel was ineffective for failing to argue that the district court improperly adjudged him guilty of conspiracy to commit murder rather than conspiracy to commit robbery. As discussed, this claim is without merit. Therefore, Kelly failed to show that this issue would have had a reasonable probability of success on appeal.

Eleventh, Kelly claimed that counsel was ineffective for failing to argue that trial counsel was ineffective. Claims of ineffective assistance of counsel are appropriately raised in a post-conviction proceeding.⁴⁴ Therefore, the district court did not err in denying this claim.

⁴²McNair, 108 Nev. at 56, 825 P.2d at 573 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

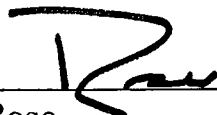
⁴³Hernandez v. State, 118 Nev. ___, ___, 50 P.3d 1100, 1112 (2002) (citing Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000)).


⁴⁴See Feazell v. State, 111 Nev. 1146, 1149, 906 P.2d 727, 729 (1995).


Having considered Kelly's claims and concluded they are without merit, we affirm the judgment of the district court. However, our review of the judgment of conviction reveals a clerical error. The judgment of conviction states that Kelly was convicted of both conspiracy to commit robbery and conspiracy to commit murder when, in fact, he was convicted only of conspiracy to commit murder. Therefore, we remand this matter for a corrected judgment of conviction to be entered.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁴⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to district court for the limited purpose of entering a corrected judgment of conviction.⁴⁶


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁴⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁴⁶We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein.

cc: Hon. John S. McGroarty, District Judge
Jeremy B. Kelly
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk