IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER G. WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39426

FILED

DEC 10 2002

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

ORDER OF AFFIRMANCE

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

On September 24, 1992, appellant Christopher G. Williams was convicted, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon and sentenced to death. Williams appealed, and this court reversed his conviction and remanded for a new trial.[1]

On April 16, 1998, after a second jury trial, Williams was again convicted of first-degree murder with the use of a deadly weapon, and sentenced to serve two consecutive life prison terms without the possibility of parole. Williams appealed, and this court affirmed his conviction.[2] The remittitur issued on April 30, 2001.

On December 4, 2001, Williams, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. The

[1]Murray v. State, 113 Nev. 11, 930 P.2d 121 (1997).

[2]Williams v. State, Docket No. 32253 (Order Dismissing Appeal, June 9, 2000).

State opposed the petition. After hearing arguments from counsel, the district court denied Williams' petition. This appeal followed.

In his petition, Williams raised several claims of ineffective assistance of trial and appellate counsel. To establish ineffective assistance of trial or appellate counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.[3] To establish prejudice with regard to trial counsel, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[4] To establish prejudice with regard to appellate counsel, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[5]

First, Williams contended that his trial and appellate counsel were ineffective for failing to raise the issue of prosecutorial misconduct during voir dire. In particular, Williams points to two instances, occurring during the questioning of prospective jurors Woodward and Meager, where the prosecutor impermissibly attempted to remove the presumption of innocence by informing the prospective jurors that Williams committed the charged crime and deserved the death penalty. We conclude that the district court did not err in rejecting Williams' contention.

Williams' contention about his trial counsels' failure to object is belied by the record. Additionally, Williams has failed to show he was

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[3]Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

[4]Strickland, 466 U.S. at 694.

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

prejudiced by his counsels' allegedly deficient conduct involving voir dire. With regard to the voir dire of prospective juror Woodward, the record reveals that Williams' trial counsel lodged an objection, and the district court advised the prospective jurors that all three possible penalties must be considered equally. With regard to the voir dire of prospective juror Meager, although a formal objection was not lodged, Williams' co-defendant's counsel reminded the prospective jurors that Williams and his co-defendant, Robert Byford, were presumed to be innocent and that the prosecutor misspoke when he said that they committed the crimes. Prospective juror Meager then responded: "I understand that they are presumed innocent and they're allegedly guilty." Finally, at the beginning of voir dire, the district court advised the prospective jurors that "it's incumbent upon the State of Nevada to prove a defendant guilty upon a reasonable doubt" and that "the defendants sit here cloaked with the presumption of innocence." In light of the district court's advisements, Williams failed to show that the prosecutor's isolated comments during voir dire permeated the proceedings with unfairness resulting in a denial of due process.[6] Accordingly, the district court did not err in finding that Williams was not prejudiced by counsels' allegedly deficient conduct during voir dire.

Second, Williams claimed that his trial and appellate counsel were ineffective by failing to challenge the prosecutor's exercise of a

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[6]See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

peremptory challenge to remove a juror. Williams alleged that the juror was removed by the State merely because she stated she would consider all three possible penalties equally and, therefore, did not indicate a predisposition to impose the death penalty. We conclude that the district court did not err in rejecting Williams' contention because counsel were not deficient in failing to challenge the State's use of the peremptory challenge. Williams failed to allege and, there is no indication in the record, that the prosecutor exercised his peremptory challenge based on gender or race.[7] Moreover, Williams' claim that the prosecutor engaged in misconduct by attempting to select a jury predisposed to imposing the death penalty lacked merit. The record of the voir dire reveals that the prospective jurors were repeatedly advised by the district court and by counsel that all three possible sentences should be considered equally. Accordingly, counsel were not ineffective in failing to raise the issue of the prosecutor's use of the peremptory challenge.

Third, Williams contended that trial and appellate counsel were ineffective for failing to challenge the admissibility of Todd Smith's testimony about threats made by Williams.[8] In support of his contention that Smith's testimony about prior threats was inadmissible, Williams

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[7]See Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a prosecutor may exercise a preemptory challenge for any reason, except that a potential juror may not be removed based solely on race or gender).

[8]Smith testified that Williams and Byford motioned to him that they were going to slit his throat and, also, told other individuals in a holding cell that Smith was a snitch, resulting in the group retaliating against him.

cited Lay v. State.[9] We conclude that the district court did not err in rejecting Williams' claim.

In Lay, this court recognized that it is improper for the prosecutor to make repeated references to witness intimidation by the defendant unless the State "produces substantial credible evidence that the defendant was the source of the intimidation."[10] Here, unlike the prosecutor's allegedly unfounded references in Lay, there was substantial and credible evidence that Williams was the source of the intimidation, namely, Smith's testimony. Therefore, counsel acted reasonably in deciding not to challenge Smith's testimony about prior threats because that testimony was admissible, and also relevant to show consciousness of guilt and explain Smith's prior inconsistent statements.[11]

Fourth, Williams contended that trial counsel was ineffective for failing to present a voluntary intoxication defense during the guilt phase. Specifically, Williams contended that his trial counsel should have presented evidence that Williams smoked marijuana prior to the shooting and, therefore, lacked the necessary intent to commit first-degree murder. We conclude that the district court did not err in rejecting Williams' claim. The decision not to present a voluntary intoxication defense was a

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[9]110 Nev. 1189, 886 P.2d 448 (1994).

[10]Id. at 1193, 886 P.2d at 450-51.

[11]See id. at 1194, 886 P.2d at 451 (noting that evidence of witness intimidation is relevant to explain why a witness made a prior inconsistent statement); see also NRS 48.015.

reasonable tactical decision.[12] Williams' defense at trial was that Smith shot the victim, whom Smith had been dating, and then falsely accused Williams and Byford of the killing for a favorable plea bargain. We conclude that trial counsel was not ineffective for failing to raise the intoxication defense because it was inconsistent with Williams' defense theory that he was not the shooter. Moreover, even assuming an alternative defense theory would have been appropriate, we conclude that the voluntary intoxication theory had no reasonable likelihood of success in light of the overwhelming evidence presented against Williams. In particular, at trial, Smith testified that Williams shot the victim, and several witnesses testified that Williams made direct or implicit incriminating admissions. Accordingly, trial counsel was not ineffective for failing to present a voluntary intoxication defense during the guilt phase.

Finally, Williams contended that trial and appellate counsel were ineffective in failing to challenge the admissibility of Connie Hillman's statement as violating the Confrontation Clause of the United States Constitution. The recorded telephone conversation between Williams and Hillman was read to the jury at the penalty phase. In that conversation, Williams and Hillman discussed a plan where Hillman would smuggle methamphetamine into the prison and pass it to

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[12]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

Williams.[13] Williams alleged that the reading of Hillman's statement violated the Confrontation Clause because Hillman was not a witness at the penalty hearing. We conclude that the district court did not err in rejecting Williams' allegation.

In Wade v. State, this court held that the admission of taped conversations between a charged defendant and a police informant did not violate the Confrontation Clause of the United States Constitution.[14] In so holding, this court reasoned that the informant's statements were nonhearsay because they were not admitted to prove the truth of the matter asserted, "but only for the limited purpose of providing a context for [the defendant's] statements."[15] Like the recorded informant's statements in Wade, Hillman's statements were admitted merely to provide a context for Williams' statements about the conspiracy, not for their truth. Therefore, Williams' right to confront the witnesses against him was not violated by the admission of Hillman's statement because her statement was not admitted for its truth. Accordingly, counsel were not ineffective for failing to challenge the admissibility of Hillman's statement as violating the Confrontation Clause because that challenge would have been unsuccessful.

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[13]Hillman was arrested outside the prison, and admitted to possessing seventeen grams of methamphetamine that she intended to pass to Williams.

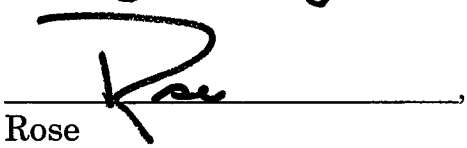
[14]114 Nev. 915, 917, 966 P.2d 160, 162 (1998), modified on denial of rehearing, 115 Nev. 290, 986 P.2d 438 (1999); see also United States v. Inadi, 475 U.S. 387, 398 n. 11 (1986); United States v. McKneely, 69 F.3d 1067 (10th Cir. 1995); United States v. Tangeman, 30 F.3d 950 (8th Cir. 1994).

[15]114 Nev. at 918, 966 P.2d at 163.

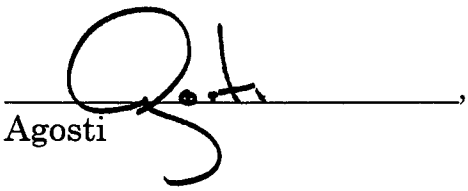
Having reviewed the record on appeal, we conclude that Williams is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

_____, C.J.
Young



_____, J.
Rose



_____, J.
Agosti

cc: Hon. Valorie Vega, District Judge
Christopher G. Williams
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[16]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[17]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.