IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER A. LIBBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40362

FILED

NOV 04 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Roger Libby's post-conviction petition for a writ of habeas corpus in a capital case.

In April 1990, a jury found appellant guilty of two counts of murder, one count of robbery, all with the use of a deadly weapon, and five counts of grand larceny. It sentenced him to death on both murder counts following a penalty hearing. This court affirmed appellant's conviction and sentence.[1] Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus. Counsel was appointed and filed two supplements. The district court conducted an evidentiary hearing before denying appellant relief. This appeal followed.

Appellant claims that his trial counsel were ineffective in a number of ways. These claims are properly presented because this is a timely, first post-conviction petition for a writ of habeas corpus.[2] A claim

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[1]Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993), vacated by 516 U.S. 1037 (1996); see also Libby v. State, 113 Nev. 251, 934 P.2d 220 (1997); Libby v. State, 115 Nev. 45, 975 P.2d 833 (1999).

[2]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[3] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[4] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[5] Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[6]

Appellant first appears to contend that the district court erred in rejecting the following allegations of ineffective assistance of trial counsel: (1) contributing to prejudicial delay in his case; (2) failing to insist on a preliminary hearing; (3) inappropriately using the term "loopholes" in the opening statement; (4) failing to keep detailed time slips; (5) failing to object when a juror saw appellant in shackles during a recess; (6) improperly offering an instruction "listing the specific aggravators [sic] the sentencing jury could consider, thus improperly limiting what the jury could consider as mitigation"; (7) failing to explore whether jurors excused by court personnel without notice were actually not eligible jurors; and (8) failing to provide appellant with discovery. Appellant is not entitled to relief on these claims; he does not support

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[3]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[5]Id. at 988, 923 P.2d at 1107.

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

them with citation to relevant authority, and/or he has failed to support the claims with specific factual allegations, identify any alleged flaw in the district court's analysis, or demonstrate that an erroneous decision on these issues resulted in prejudice. "Contentions unsupported by specific argument or authority should be summarily rejected on appeal."[7]

Second, appellant alleges that his trial counsel (1) failed to advise him concerning plea offers or to memorialize such communications; (2) failed to argue for a life sentence; and (3) improperly stipulated to testimony. These claims lack merit. First, at the evidentiary hearing on the petition, trial counsel testified that he had advised appellant concerning the possibility of a plea bargain and that he had, for tactical reasons and in consultation with appellant, argued for a sentence of life with the possibility of parole. Moreover, with respect to the third contention, trial counsel presented tactical reasons for stipulating to testimony. Appellant does not contest any of his attorneys' assertions. We therefore conclude that he has failed to demonstrate that trial counsel's performance was deficient. Additionally, appellant has not demonstrated that he was prejudiced by counsel's performance.

Third, appellant argues that trial counsel should have filed the following pretrial motions: a written discovery request; for daily transcripts and for transcription of all hearings; and to suppress evidence collected from the crime scene. He additionally appears to complain that trial counsel waited until the eve of trial to file a motion to suppress statements made by appellant. This claim lacks merit. Appellant has failed to demonstrate that any exculpatory evidence was not received as a

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[7]Mazzan v Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

result of counsel's failure to file a written discovery request, and he "presents absolutely no basis for this court to fear that a substantial or significant portion of the record was omitted or that he has been prejudiced in any way."[8] Finally, appellant has not identified any admitted evidence that might have been suppressed, and he has not established any basis for concluding that the allegedly delayed filing of the motion to suppress appellant's statements prejudiced him. In fact, trial counsel successfully prosecuted the motion to suppress.

Appellant next argues that his trial counsel failed to investigate (1) the residence where the crimes occurred and the site where the bodies were found; (2) the identity of someone allegedly seen checking a mailbox at the victims' residence after the murders and after appellant had left Nevada; (3) fingerprint evidence on a beer bottle that could not be matched to either the victims or appellant; (4) evidence that another person might have been the perpetrator, although trial counsel identified such a defense and attempted to argue that another person committed the crimes; and (5) the victims' alleged involvement in controlled substances and the possibility that they owed money as a result of their procurement of illicit drugs. This claim fails because appellant does not demonstrate that any of the suggested investigation would have discovered evidence beneficial to the defense.

Next, appellant contends that his trial counsel unreasonably failed to hire a number of expert witnesses. This claim does not warrant relief because appellant has failed to establish the prejudice required by Strickland. Even assuming trial counsel did not but should have at least

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[8]Evans v. State, 117 Nev. 609, 645, 28 P.3d 498, 522 (2001).

consulted with any of these experts, appellant fails to establish what testimony may have been provided by the experts and how that testimony would have been material to the defense.

Appellant argues that trial counsel should have objected to the charging document because it did not specify the facts constituting felony murder. He apparently cites Alford v. State[9] in support of this contention. Appellant additionally complains that trial counsel should have offered an instruction distinguishing felony murder and first-degree murder. These claims do not warrant relief. First, at the evidentiary hearing, post-conviction counsel conceded that Alford was decided after appellant's trial but argued that trial counsel should nevertheless have brought the challenge because other counsel thought to mount it some years later. However, he cites no authority in support of this basis for challenging counsel's failure. Moreover, this court has held that the "failure to anticipate a change in the law does not constitute ineffective assistance."[10] Further, appellant has not shown that he suffered the kind of prejudice suffered by Alford: appellant offers nothing to suggest that the defense was "ambushed" by an unforeseeable change in the prosecution's theory,[11] and the fact that appellant was charged with robbery and with an

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[9]111 Nev. 1409, 906 P.2d 714 (1995).

[10]Doyle v. State, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000).

[11]Cf. Alford, 111 Nev. at 1411-13, 906 P.2d at 715-17 (holding that where the information charged only that Alford killed with malice aforethought and the prosecutor in his opening statement only characterized the murder as premeditated, it was unfair for the prosecution to bring in charges of felony murder based on burglary after the close of the case).

aggravating circumstance based on robbery[12] strongly indicates that trial counsel had notice that the State would advance a felony murder theory. Finally, appellant has failed to cite relevant authority in support of his contention regarding the suggested instruction, and he has not even attempted to show that he was prejudiced by its absence.

Appellant seems to contend that the district court erred in rejecting the claim that trial counsel should not have called a victim's ex-wife to testify at the guilt phase of trial without having personally interviewed her. In its order, the district court found that eliminating the witness's testimony would not have changed the outcome of appellant's trial because another witness provided similar testimony regarding the victim's habit as to his wallet and keys. A district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong.[13] Appellant does not specifically address any alleged impropriety in the district court's conclusion, much less provide cogent argument regarding any alleged error,[14] nor did he include any of the trial transcript in his appendix.[15] He has therefore failed to provide this court with any reason

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[12]Libby, 109 Nev. at 909, 918, 859 P.2d at 1053, 1058; see also NRS 200.033(4) (providing, in pertinent part, that first-degree murder is aggravated where the murder was committed during the course of a robbery).

[13]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[14]See Mazzan, 116 Nev. at 75, 993 P.2d at 42.

[15]See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) ("It is the appellant's responsibility to provide the materials necessary for this court's review."); see also NRAP 30(b)(3) (providing that it is

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to question the district court's conclusion that the witness's testimony did not result in prejudice.

Appellant contends that, in light of his history of alcohol use, alcoholic blackouts, erratic behavior, drug use, and head injuries, trial counsel should have presented evidence or otherwise argued that the jury could find appellant guilty of second-degree murder or a lesser offense. This claim lacks merit. First, at the evidentiary hearing, both of appellant's trial attorneys recalled appellant's insistence on maintaining his innocence and seeking nothing less than acquittal on the charges. Appellant does not contest their assertions. Second, lead counsel at the guilt phase expressed his concern with regard to the presentation of inconsistent defenses. Appellant has not addressed trial counsel's tactical decision much less demonstrated that it was unsound. Moreover, given that the murders were committed in an execution-like manner,[16] a conclusion appellant questions but has failed to refute with contradictory evidence, it is unlikely that the jury would have found the murders other than premeditated.[17] Finally, to the extent appellant claims that trial counsel should have offered an instruction on voluntary manslaughter, he

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. . . continued

appellant's responsibility to provide this court with "the record essential to determination of issues raised in appellant's appeal").

[16]Libby, 109 Nev. at 918, 859 P.2d at 1058.

[17]See NRS 200.030(1)(a) (providing that murder in the first degree is murder "[p]erpetrated by . . . any . . . kind of willful, deliberate and premeditated killing").

has failed to provide any facts even tending to show a basis for such an instruction.[18]

Appellant contends that trial counsel failed to advise him of his right to pursue a three judge panel at the penalty hearing. This claim is meritless; appellant could not have had a three judge panel impose sentence where a jury determined his guilt.[19]

Appellant seems to argue that the district court improperly rejected his contention that trial counsel did not but should have advised him of his right to testify and of allocution. First, the evidence contradicts appellant's claim regarding the alleged failure to inform him of his right to testify. At the evidentiary hearing, lead counsel at the guilt phase testified that he had a number of discussions with appellant regarding his right to testify and that appellant agreed that it was not advisable for him to take the stand, assertions that appellant does not dispute. Second, even assuming trial counsel unreasonably failed to inform appellant of the right of allocution, appellant has not demonstrated that he was prejudiced by the omission.[20] Unlike the right to testify, which is of constitutional

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[18]Cf. NRS 200.050 (providing that in cases of voluntary manslaughter, "there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing").

[19]See 1977 Nev. Stat., ch. 585, § 7 at 1543 (providing that the penalty hearing "shall be conducted in the trial court before the trial jury, or before a panel of three district judges if the trial was without a jury").

[20]We reject appellant's reliance on United States v. Adams, 252 F.3d 276, 287 (3rd Cir. 2001), for the proposition that prejudice may be presumed.

dimension,[21] the right of allocution derives from the common law.[22] Further, the district court at the evidentiary hearing allowed appellant to state what he would have said in allocution and found that his statement would not have resulted in imposition of a sentence less than death. We agree with the district court, lacking as appellant's statement was in any convincing expression of remorse. Finally, on direct appeal, this court concluded that there was overwhelming evidence of appellant's guilt and characterized the instant double homicide as "heinous."[23] Thus, it is not reasonably probable that a statement in allocution would have altered the jury's sentencing decision.

Appellant argues that trial counsel failed to object to several alleged prosecutorial statements that he contends constituted misconduct, were prejudicial, and otherwise denied him a fair penalty hearing. Appellant then string cites eight cases that ostensibly support his claim. Appellant is not entitled to relief because he provides no analysis of the cited cases, and he fails to explain how they compel granting him relief. Moreover where, as here, "there is overwhelming evidence of guilt

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[21]U.S. Const. amend. V; Nev. Const. art. 1, § 8; see also Phillips v. State, 105 Nev. 631, 632, 782 P.2d 381, 382 (1989) ("Criminal defendants have the right to testify on their own behalf under the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment and the fifth amendment's privilege against self-incrimination.") (citing Rock v. Arkansas, 483 U.S. 44, 49 (1987)).

[22]See, e.g., Echavarria v. State, 108 Nev. 735, 743-44, 839 P.2d 589, 596 (1992) ("Capital defendants in the State of Nevada enjoy the common law right of allocution.").

[23]Libby, 109 Nev. at 919, 859 P.2d at 1059.

presented to the jury, even aggravated misconduct may be deemed harmless error."[24]

Appellant contends that trial counsel should have objected to an instruction permitting the sentencing jury to consider executive clemency. Appellant does not include the instruction in his appendix, and although he cites two cases, he fails to provide any analysis of them or explain their applicability to his case. He has therefore not shown that the claim has merit.

Appellant asserts that trial counsel failed to hire an investigator to interview jurors after the verdict despite evidence indicating that "the jury may have improperly considered inadmissible evidence such as a confession not admitted at the trial." This claim is meritless. On direct appeal, appellant contended that the district court erred in refusing to permit individual voir dire to determine the extent of juror exposure to publicity.[25] This court determined that although the district court should have allowed individual voir dire, it "performed a thorough examination and admonishment of the jurors."[26] This court concluded that there was no indication of juror prejudice against appellant.[27] Appellant has failed to present anything in this proceeding to suggest that a post-verdict investigation of this issue would produce a different conclusion. In fact, at the evidentiary hearing, the one juror

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[24]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).

[25]Libby, 109 Nev. at 913, 859 P.2d at 1055.

[26]Id. at 914, 859 P.2d at 1056.

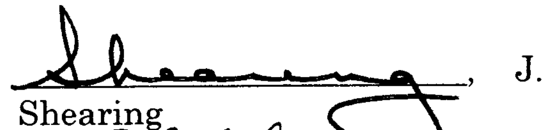
[27]Id.

asked about this testified that she did not recall appellant's confession entering into the jury's deliberations.

Finally, appellant alleges that the effects of cumulative error mandate vacation of his conviction and sentence. This claim is without merit because appellant has repeatedly failed to demonstrate that trial counsel provided ineffective assistance. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[28]

Becker, J.



Shearing, J.

Gibbons, J.

cc: Hon. John M. Iroz, District Judge
Rick Lawton
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk

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[28]To the extent appellant contends that his conviction violates the Fourth, Fifth, and Eighth amendments to the United States and Nevada Constitutions and the presumption of innocence, we conclude that appellant waived these claims by failing to raise them in his direct appeal and by failing to plead specific facts that demonstrate good cause for failing to raise them in the prior proceeding. See NRS 34.810(1)(b)(2),(3); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding that claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).