

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN MANUEL VALENZUELA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40839

FILED

JAN 27 2004

ORDER OF AFFIRMANCE

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

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

On August 11, 1999, the district court convicted Valenzuela, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Valenzuela to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison. This court affirmed Valenzuela's conviction on direct appeal.¹ The remittitur issued on April 9, 2002.

On September 19, 2002, Valenzuela 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 34.770, the district court declined to appoint counsel to represent Valenzuela or to conduct an evidentiary hearing. On November 19, 2002, the district court denied Valenzuela's petition. This appeal followed.

¹Valenzuela v. State, Docket No. 34830 (Order of Affirmance, March 13, 2002).

In his petition, Valenzuela raised various allegations of ineffective assistance of trial counsel.² To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.³ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴

First, Valenzuela contended that his trial counsel was ineffective for failing to challenge the inadequate notice he received concerning the grand jury proceedings. Valenzuela attached a copy of the notice of intent to seek indictment to his petition. The notice did not specify the date, time, or place of the hearing. Furthermore, the certificate of service was not signed. However, it advised Valenzuela that he must respond, in writing, to the Clark County District Attorney if he wished to testify. The notice provided an address and phone number at which the District Attorney could be reached.

Notice to a person whose indictment is being sought is adequate if it is given to the person or his attorney and gives the person at

²Valenzuela additionally alleged ineffective assistance of appellate counsel on several of the following claims. Consistent with the reasoning discussed below, we find that Valenzuela failed to demonstrate that his appellate counsel was ineffective on these issues.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 697.

least five days to submit his request to testify to the district attorney.⁵ Further, notice is adequate if it advises the person that he may testify before the grand jury only if he submits a written notice to the district attorney stating that he wishes to testify.⁶ The notice in this case appears to meet these requirements. Although the certificate of service was not signed, nowhere in his petition did Valenzuela allege that he did not receive actual notice of the intent to seek indictment. Rather, he argued that the notice did not contain the required information. Therefore, Valenzuela failed to demonstrate that his trial counsel was ineffective on this issue.

Second, Valenzuela argued that his trial counsel was ineffective for failing to object to the flawed grand jury proceedings. He claimed that the district attorney failed to present facts to the grand jury concerning the murder and did not properly instruct the grand jury on premeditation elements. Our review of the record on appeal reveals that this claim is without merit. The grand jury has power to issue an indictment when there is probable cause to believe that the defendant committed a crime.⁷ Valenzuela was eventually convicted of first-degree murder beyond a reasonable doubt. Therefore, any error in the grand jury proceedings, as measured by the eventual verdict of guilty beyond a reasonable doubt, was harmless.⁸ Thus, Valenzuela failed to demonstrate that trial counsel was ineffective on this issue.

⁵NRS 172.241(2).

⁶Id.

⁷NRS 172.155(1).

⁸See Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998); United States v. Mechanik, 475 U.S. 66, 70 (1986).

Third, Valenzuela claimed that his trial counsel was ineffective for failing to challenge the sufficiency of his indictment. Valenzuela argued that his indictment was indefinite because it did not allege the means by which the murder was committed. An indictment "must be a plain, concise and definite written statement of the essential facts constituting the offense charged."⁹ A review of the indictment in this case reveals that it alleged a means by which the crime of murder was committed. The indictment stated that Valenzuela killed James Paciolla by shooting him with a firearm. Therefore, Valenzuela's claim is belied by the record.¹⁰ Further, the indictment included all of the information contained in the example indictment form set forth at NRS 179.370. Thus, Valenzuela failed to demonstrate that counsel was ineffective for failing to challenge the indictment.

Fourth, Valenzuela argued that his trial counsel was ineffective for failing to object to the prosecutor's impeachment of witness Rebecca Yost with her own grand jury testimony. Out-of-court statements that would otherwise be inadmissible hearsay are admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [a] transcript of testimony given under oath . . . before a grand jury."¹¹ Here, Yost testified at trial and was subject to cross-examination. Therefore, the prosecutor properly questioned Yost about her statements to the grand

⁹NRS 173.075(1).

¹⁰See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

¹¹NRS 51.035(2)(d).

jury, and Valenzuela did not demonstrate that trial counsel was ineffective on this issue.

Fifth, Valenzuela contended that his trial counsel was ineffective for failing to object to the improper replacement of two impartial jurors with biased alternate jurors. Valenzuela alleged that the two alternate jurors had ties to the police department. We find that Valenzuela failed to demonstrate that he was prejudiced by the two alternate jurors, such that that the outcome of the trial would have been different if his counsel had objected. Therefore, Valenzuela did not demonstrate that trial counsel was ineffective for failing to challenge the presence of the alternate jurors.

Sixth, Valenzuela contended that his trial counsel was ineffective for failing to question witness Ted Bear about promises or inducements made to him in exchange for his testimony. The district court granted Valenzuela's motion to reveal confidential informants and any deals, promises, or inducements made to any and all witnesses. Valenzuela alleged that the prosecutor offered Bear a deal in exchange for his testimony, yet his attorney failed to question Bear about any promises or inducements made by the district attorney. Valenzuela failed to demonstrate how questioning Bear would have aided his defense such that the outcome of the trial would have been altered. Therefore, Valenzuela did not establish that trial counsel was ineffective on this issue.

Seventh, Valenzuela alleged that his trial counsel was ineffective for failing to object to remarks made by the prosecutor during his opening statement. Specifically, Valenzuela argued that there was no evidence to support the following statement made by the prosecutor:

In fact, the evidence will show that the defendant told police, that he and Kevin McGrath were walking from Steve Campbell's house when

someone told him that a murder had occurred and that he had better get out of there. The evidence will also show that the defendant could not give homicide detectives a name of this individual he spoke to.

During the opening statement, it is the duty of the prosecutor to fairly state facts that he expects to prove, and to refrain from commenting on facts that he will not be able to establish.¹² Our review of the record reveals that the State did not elicit witness testimony or otherwise introduce evidence to support this allegedly improper statement. Prior to giving his opening statement, however, the prosecutor reiterated that opening statements do not constitute evidence, and the only testimony the jurors are to consider is that of the witnesses. The jury was further instructed that arguments by counsel were not evidence.¹³ Moreover, Valenzuela failed to demonstrate that these remarks prejudiced his defense such that the outcome of the trial would have been altered if his trial counsel had objected to them. Evidence was introduced at trial concerning a motive behind Valenzuela's alleged murder of the victim. Additionally, there was testimony concerning an incident that occurred one week prior to the murder during which Valenzuela attacked the victim with a baseball bat. There was also testimony that Valenzuela and the victim had a knife fight one week prior to the murder. Most importantly, one of Valenzuela's friends testified that Valenzuela had a revolver in his waistband immediately after the murder, and confessed to the murder. Thus, Valenzuela failed to demonstrate that trial counsel was ineffective on this issue.

¹²Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962).

¹³See Lord v. State, 107 Nev. 28, 33, 806 P.2d 548, 551 (1991).

Eighth, Valenzuela contended that his trial counsel was ineffective for failing to object when the State shifted the burden of proof by drawing attention to the fact that Valenzuela did not testify at trial. During his closing argument, the prosecutor stated, "That's been supported or corroborated by other witnesses. Even the defendant, when he testified—I'm sorry, when he gave a statement to the police"

An express reference to a defendant's failure to testify is a violation of his constitutional right against self-incrimination.¹⁴ Even an indirect reference to the defendant's failure to testify is impermissible if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify."¹⁵ The prosecutor in this case misspoke and quickly corrected himself. The erroneous statement by the prosecutor was not one that the jury would "naturally and necessarily" construe as a comment on Valenzuela's failure to testify at trial. Therefore, Valenzuela did not demonstrate that his trial counsel was ineffective on this issue.

Ninth, Valenzuela alleged that his trial counsel was ineffective for failing to object to a prosecutorial remark during the opening statement of the penalty hearing. Valenzuela argued that it was unfairly prejudicial when the prosecutor stated, "You will learn that while this trial has been pending, the defendant called home, the Nevada

¹⁴Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991); see also U.S. Const. amend. V; Nev. Const. art. 1, § 8.

¹⁵Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989) (internal quotations and citations omitted); see also Deutscher v. State, 95 Nev. 669, 682, 601 P.2d 407, 416 (1979).

Department of Prisons at Indian Springs." We conclude that Valenzuela's claim is without merit. During the course of the penalty hearing, the State introduced evidence of Valenzuela's nine prior felony convictions and repeatedly called Valenzuela a "career criminal."¹⁶ Valenzuela failed to demonstrate that he was prejudiced by the prosecutorial comment that he argued was improper, such that the outcome of the penalty hearing would have been different if his trial counsel had objected.

Tenth, Valenzuela contended that trial counsel was ineffective for failing to request a curative instruction or admonishment after objecting to an improper prosecutorial comment made during the penalty hearing. During his closing argument, the prosecutor stated, "This defendant has already received a major break. The State of Nevada did not seek the death penalty in this case." Our review of the record reveals that Valenzuela's trial counsel objected to this remark, and the court sustained the objection and told the jury to disregard the statement. Therefore, Valenzuela's allegation is belied by the record¹⁷ and Valenzuela failed to demonstrate that his trial counsel was ineffective in this regard.

Eleventh, Valenzuela contended that his trial counsel was ineffective for failing to present any witnesses on his behalf at the penalty hearing. Valenzuela claimed that he requested that his sister and a friend testify at the hearing, but his trial counsel did not procure their

¹⁶See NRS 175.552 (providing that when a defendant is found guilty of first-degree murder and a penalty hearing is sought, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible").

¹⁷See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

attendance. Valenzuela did not state what testimony these two witnesses would have provided, such that the outcome of the penalty hearing would have been different if they had testified. Therefore, Valenzuela failed to demonstrate that his trial counsel was ineffective on this issue.

Valenzuela additionally raised a claim of ineffective assistance of appellate counsel. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.¹⁸ "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."¹⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁰

Valenzuela argued that his appellate counsel was ineffective for failing to raise the issue of cumulative error on appeal. The cumulative effect of harmless errors may violate a defendant's right to a fair trial.²¹ We find that because Valenzuela failed to demonstrate that errors occurred at his trial, he necessarily failed to demonstrate that a claim of cumulative error would have likely succeeded on appeal. Therefore, Valenzuela did not demonstrate that his appellate counsel was ineffective in this regard.

¹⁸See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Lyons, 100 Nev. 430, 683 P.2d 504.


¹⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

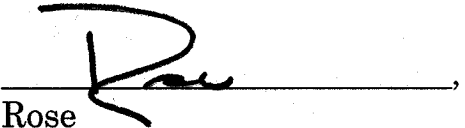
²⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).


²¹Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.²² Accordingly, we

ORDER the judgment of the district court AFFIRMED.²³


Shearing, C.J.


Rose, J.


Maupin, J.

cc: Hon. Joseph T. Bonaventure, District Judge
Juan Manuel Valenzuela
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.