

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMY EARL COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41033

FILED

MAR 17 2005

ORDER OF AFFIRMANCE

JANE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On October 24, 1996, the district court convicted Sammy Earl Collins, pursuant to a jury verdict, of three counts of burglary while in possession of a firearm; one count of battery with the use of a deadly weapon, victim 65 or older; one count of robbery with the use of a deadly weapon, victim 65 or older; five counts of robbery with the use of deadly weapon; three counts of battery with a deadly weapon; three counts of attempted robbery with the use of a deadly weapon; one count of burglary; and one count of robbery. This court affirmed Collins' judgment of conviction on direct appeal.¹

On April 19, 2001, Collins filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Collins, conducted an evidentiary hearing, and on November 1, 2002, denied Collins' petition. This appeal follows.

¹Collins v. State, Docket No. 30653 (Order Dismissing Appeal, July 7, 1999).

Collins first contends that the district court erred by determining counsel was effective even though a potential conflict of interest existed. Specifically, Collins argues that a material witness for the state was a current client of the public defender's office, where Collins' counsel was employed. However, this court considered and rejected this claim in his direct appeal. It is thus barred by the doctrine of the law of the case.²

Collins raises six additional claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors prejudiced the defense.³ To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.⁴ The court need not consider both prongs of the ineffective-assistance test if the defendant makes an insufficient showing on either prong.⁵ Whether a defendant received ineffective assistance of counsel is a mixed question of law and act and is therefore subject to independent review.⁶ However, the "purely

²Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 538 (2001); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

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 694.

⁵Strickland, 466 U.S. at 697.

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."⁷

Collins contends that trial counsel was ineffective for failing to object to the photographic lineup used at trial. Specifically, Collins contends the ability to see the Las Vegas Metro placard in the photographs used for the photo lineup prejudiced his defense.

The tactical decisions of trial counsel are reserved for their competent judgment, and such actions will be “virtually unchallengeable absent extraordinary circumstances.”⁸

The photo lineup contained pictures that indicated they were “mug shots” based on the placard reading Las Vegas Metro Police Department. Collins’ trial counsel asked questions with regard to whether the witnesses noticed these words, and the witnesses indicated they did not notice the wording. The actions of trial counsel were an attempt to discredit the photo lineup. These actions can be rightfully described as a tactical decision. We conclude that Collins has not demonstrated that counsel’s performance fell below an objective standard of reasonableness.

Collins next contends trial counsel was ineffective for failing to adequately investigate fingerprint evidence in the case. Collins contends only that defense counsel should have investigated the fingerprints

⁷Id.

⁸Doleman 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) abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

further, and that failure to do so violated Collins' right to effective assistance of counsel.

When a person makes a claim of ineffective assistance of counsel based on failure to investigate, they must be able to demonstrate prejudice.⁹ Counsel must make a sufficient inquiry into the evidence whereby he determines his strategy in proceeding with the case.¹⁰

Defense counsel did investigate the fingerprint evidence to the same extent that the prosecution did. Both the defense and the prosecution investigated the police lab report, and both structured their presentations accordingly. Collins does not indicate how further investigation would have changed the outcome of the trial. Collins has not carried his burden of demonstrating how the outcome of the trial would have been different, or how he was prejudiced by counsel's alleged failure to further investigate whether Collins' fingerprints were found in his car when the police department indicted that Collins was no longer being tested for latent prints.

Collins additionally argues trial counsel was ineffective for failing to adequately investigate Collins' alibi or allow Collins to testify. Collins testified at the evidentiary hearing that he had been at his apartment complex with his friends and neighbors all day on the day of three of the robberies. Collins contends that police surveillance took place all day long outside his apartment complex through different unmarked vehicles. There is no other evidence as to this police surveillance. Collins

⁹Thomas v. State, 120 Nev. 37, 49, 83 P.3d 818, 826 (2004).

¹⁰Doleman, 112 Nev. at 848, 921 P.2d at 280-81.

also testified that he was persuaded by his attorney not to testify based on his prior criminal history.

Collins has failed to provide sufficient evidence as to how the outcome of the trial would have been different had evidence of his alibi been admitted. Collins has only proffered the statement, “[t]here is a reasonable probability that the result at trial would have been different had this evidence been given to the jury.” There is no substantial evidence to indicate that trial counsel’s choice not to pursue an alibi defense was deficient. Similarly, there is no evidence that such a tactical maneuver caused Collins any actual prejudice.

Collins further contends trial counsel was ineffective for failing to move to dismiss the charges for battery with a deadly weapon charge as a lesser included offense of the robbery and attempted robbery counts.

“[A] Defendant may not be punished more than once for the same offense.”¹¹ “[I]f the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.”¹² The law at the time this case was decided was set forth in Owens v. State.¹³ Owens stated that a crime cannot be considered a

¹¹Woofter v. O'Donnell, 91 Nev. 756, 758, 542 P.2d 1396, 1397 (1975).

¹²Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002) (quoting Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107(2001)).

¹³100 Nev. 286, 288-89, 680 P.2d 593, 595 (1984) overruled by Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001).

separate offense if it is necessary in proving the larger case.¹⁴ In Owens, the state relied on a battery to prove an attempted robbery, and as such they were not to be considered separate offenses.¹⁵ Owens has subsequently been overruled by Barton v. State, which indicates, “battery is not a required element of the crime of robbery.”¹⁶ Collins’ actions in the instances on appeal are separate and distinct criminal acts.

During each incident, Collins made a demand for money, and then subsequently beat the victims. Collins’ actions were distinguishable from those in Owens, for in Owens, there was no verbal demand for money, there was only the beating. During one of the robberies, Collins did not make a demand for money, he just began beating the victim, who then relinquished his wallet. The facts in that instance are similar to the facts in Owens, and the district court ruled that trial counsel was ineffective for failing to move to dismiss that single count. The district court then addressed the other counts, and denied Collins’ claims of ineffective assistance of counsel.

In each of the instances currently on appeal, Collins made a demand for money, which constitutes the robbery or attempted robbery, and then proceeded to beat the victim, which constitutes the battery. As such, the crimes for which Collins was convicted are all separate and do not constitute violations of the Double Jeopardy clause. There was no error by trial counsel for failing to move to dismiss the claims in question

¹⁴Id.

¹⁵Id. at 289-90, 680 P.2d at 595.

¹⁶117 Nev. 686, 694-95, 30 P.3d 1103, 1108-09 (2001).

as lesser included offenses, and therefore counsel's performance was not deficient.

Collins next argues trial counsel was ineffective for failing to object to the prosecutor's closing arguments. During closing arguments, the prosecutor indicated that the defendant's voice was unknown.

A prosecutor's comment that refers to a defendant's failure to testify is reviewed to determine 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 comment on the defendant's failure to testify."¹⁷ The statement of the prosecutor must be taken in context.¹⁸ A criminal conviction should not be "lightly overturned on the basis of a prosecutor's comments standing alone."¹⁹ "Indeed, where 'the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel,' there is no constitutional violation."²⁰

Here, during closing arguments defense counsel questioned the consistency of the witnesses' descriptions of the person who committed these crimes. Defense counsel pointed out discrepancies in the witnesses' testimony as to the voice of the perpetrator. The prosecution, in its

¹⁷Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

¹⁸Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000).

¹⁹Id. at 144-45, 993 P.2d at 71 (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

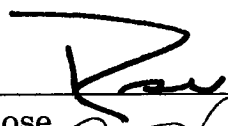
²⁰Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000) (quoting United States v. Robinson, 485 U.S. 25, 32 (1988)).

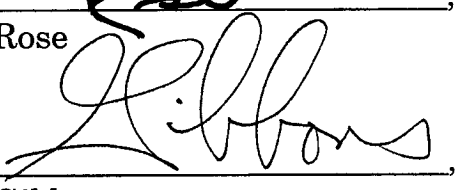
closing, addressed the differences in the voices among the alleged perpetrators. In doing this, the prosecutor made the statement in question, indicating “[t]he defendant, who — We don’t know of the defendant’s voice.” Further, every victim identified Collins as the perpetrator. The statement by the prosecution was not “manifestly intended” to be a comment on Collins’ silence during trial. Therefore, we conclude its admission was not in error. The statement was not of such a character that it would be naturally and necessarily interpreted by the jury as a comment on the defendant’s failure to testify.

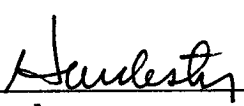
Finally, Collins contends trial counsel was ineffective based on cumulative error. There has not been a sufficient showing of error to violate Collins’ constitutional right to a fair trial.²¹

Accordingly we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

²¹Evans v. State, 117 Nev. 608, 647, 28 P.3d 498, 524 (2001).

cc: Hon. Michael A. Cherry, District Judge
Carling & Whipple, LLC
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk