

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN RAY HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41065

**FILED**

JAN 02 2004

ORDER OF AFFIRMANCE

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

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 June 18, 1996, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and concurrent terms totaling forty years. On direct appeal, this court reversed appellant's conviction and remanded the matter for a new trial.<sup>1</sup>

After conducting a new trial, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and concurrent terms totaling forty years. This court

---

<sup>1</sup>Holmes v. State, 114 Nev. 1357, 972 P.2d 337 (1998).

affirmed the judgment of conviction on appeal.<sup>2</sup> The remittitur issued on July 12, 2001.

On April 26, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 19, 2003, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first claimed: (1) his right to a speedy trial was violated; (2) the prosecutor improperly commented on the presumption of innocence; (3) the trial court "gave improper commentary"; (4) double jeopardy was violated when he was retried on an open murder charge; (5) the prosecutor's opening statement contained improper argument; (6) the prosecutor improperly elicited excessive details about a prior stabbing incident; (7) the charging information impermissibly allowed the State to switch theories; (8) the charging information was duplicitous; and (9) he was denied the right to counsel during a photographic line-up. These claims were waived because appellant failed to raise them on direct appeal and failed to demonstrate good cause for his failure to so.<sup>3</sup> Therefore, we conclude that the district court did not err in denying these claims.

---

<sup>2</sup>Holmes v. State, Docket No. 35367 (Order of Affirmance, May 21, 2001).

<sup>3</sup>See NRS 34.810(1)(b).

Next, appellant raised numerous claims of ineffective assistance of trial counsel.<sup>4</sup> To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>5</sup> The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, appellant claimed that his trial counsel was ineffective for failing to object to the State's use of prior bad act evidence that appellant was dealing drugs. We conclude that appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if trial counsel had objected to the introduction of this evidence. The failure to conduct a Petrocelli<sup>7</sup> hearing is grounds for reversal unless either the record is sufficient for this court to determine that the evidence is admissible as bad act evidence or where the result

---

<sup>4</sup>To the extent that appellant raised any of the underlying claims independently, we conclude that appellant waived these claims by failing to raise them on direct appeal. See NRS 34.810(1)(b). However, we will consider the claims to the extent that they were raised as claims of ineffective assistance of counsel.

<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>6</sup>See Strickland, 466 U.S. at 697.

<sup>7</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

would have been the same had the court not admitted the evidence.<sup>8</sup> In the instant case, prior bad act evidence was admissible. Evidence of the fact that appellant was dealing drugs was relevant pursuant to NRS 48.045(2) as proof of motive. The record is further sufficient to determine that the remaining Tinch factors for admissibility have been met. Alternatively, the result would have been the same had the district court not admitted testimony that appellant was dealing drugs because appellant's guilt was supported by sufficient evidence of guilt. The victim of the attempted murder and an eyewitness identified appellant as the shooter. Therefore, we conclude that the district court did not err in determining that appellant's trial counsel was not ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to request a limiting jury instruction relating to prior bad act evidence. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient in this regard. The jury did receive a limiting jury instruction relating to prior bad act evidence. Therefore, we conclude that the district court did not err in determining that appellant's trial counsel was not ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to advise appellant of the defense of voluntary intoxication. We conclude that appellant failed to demonstrate that his counsel's performance was deficient or that there was a reasonable probability that the outcome at trial would have been different had trial counsel advised

---

<sup>8</sup>Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997).

appellant about the voluntary intoxication defense. Although a jury is permitted to consider evidence of voluntary intoxication to negate specific intent, a defense of voluntary intoxication would have been inconsistent with the defense theory presented at trial.<sup>9</sup> Appellant further failed to provide specific facts in support of this claim, which if true, would have entitled him to relief.<sup>10</sup> Therefore, we conclude that the district court did not err in determining that trial counsel was not ineffective in this regard.

Fourth, appellant claimed that his trial counsel was ineffective for failing to subpoena phone records that would establish appellant's alibi and failed to investigate appellant's alibi witness. Appellant claimed that he placed a series of phone calls from Hamburger Heaven and the New Town Tavern at the time of the incident. We conclude that appellant failed to demonstrate a reasonable probability that the result of the trial would have been different if trial counsel had conducted further investigation. Testimony at trial indicated that appellant was at the New Town Tavern the day of the murder and was seen walking towards Hamburger Heaven on the day of the murder. Both the New Town Tavern and Hamburger Heaven were in close proximity to the location of the shooting. Appellant failed to provide any specific facts relating to the timing of the phone calls, any facts about his alleged alibi witness, or any facts about his whereabouts for the entire day of the murder. Appellant was identified by the victim of the attempted murder and an eyewitness as

---

<sup>9</sup>See NRS 193.220; Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985); King v. State, 80 Nev. 269, 392 P.2d 310 (1964).

<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

the shooter. Therefore, we conclude that the district court did not err in determining that trial counsel was not ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the State's use of the felony murder theory at trial and failed to object to jury instructions concerning felony murder and robbery. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. In deciding appellant's original direct appeal, this court held that the State could prosecute appellant for murder based on theories of premeditation and felony-murder, even though the underlying felony had been dismissed by the justice's court.<sup>11</sup> Appellant failed to provide any specific argument relating to the jury instructions. Therefore, we conclude that the district court did not err in determining that appellant's counsel was not ineffective in this regard.

Sixth, appellant claimed that his trial counsel was ineffective for failing to request cautionary jury instructions relating to the weight and credibility to be given to the testimony of a drug addict. Appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if trial counsel had requested a cautionary jury instruction. Testimony was presented throughout the trial that certain witnesses were using drugs either the day before and/or the day of the murder. Jury instruction number twenty-five cautioned the jury that the credibility of a witness should be determined by "his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his

---

<sup>11</sup>Holmes, 114 Nev. at 1364, 972 P.2d at 342.

recollections." Therefore, we conclude that the district court did not err in determining that appellant's counsel was not ineffective in this regard.

Finally, appellant claimed that his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the justice's court error in determining probable cause, failing to request special verdict forms and failing to file a timely motion to suppress evidence taken from the crime scene. Appellant failed to support these claims with any facts.<sup>12</sup> Therefore, we conclude that the district court did not err in determining that his trial counsel was not ineffective in this regard.

Next, appellant claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."<sup>13</sup> "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."<sup>14</sup>

Appellant claimed that his appellate counsel was ineffective for failing to file a petition for rehearing. Appellant failed to indicate the basis for a petition for a hearing.<sup>15</sup> Appellant further failed to demonstrate that a petition for rehearing would have had a reasonable

---

<sup>12</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>13</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).


<sup>14</sup>Id. at 998, 923 P.2d at 1114.


<sup>15</sup>See generally NRAP 40(c).

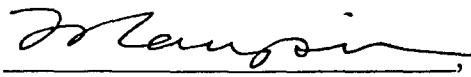
probability of altering the outcome of the appeal. Therefore, we conclude that the district court did not err in determining that appellate counsel was not ineffective in this regard.

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.<sup>16</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>17</sup>

  
\_\_\_\_\_, C.J.  
Agosti

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. Jackie Glass, District Judge  
Kevin Ray Holmes  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

<sup>16</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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