

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD W. COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41194

FILED

APR 14 2004

ORDER OF AFFIRMANCE

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

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

On October 25, 2000, the district court convicted Collins, pursuant to a jury verdict, of one count of first-degree murder with use of a deadly weapon. The district court sentenced Collins to serve a term of life in the Nevada State Prison with the possibility of parole, plus an equal and consecutive term for the use of a deadly weapon. On appeal, this court affirmed the conviction.¹ The remittitur issued on June 4, 2002.

Collins filed a timely 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 Collins or to conduct an evidentiary hearing. On April 14, 2003, the district court denied Collins' petition. This appeal followed.

In his petition, Collins made numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of

¹Collins v. State, Docket No. 37061 (Order of Affirmance, May 10, 2002).

counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."² "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."³ To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."⁴

First, Collins contended that trial counsel were ineffective for failing to investigate the El Cortez Casino, a convenience store, and people at the Elks Bar and a RV trailer park.⁵ Collins argued that surveillance videotapes from the El Cortez would have shown the victim exiting the front entrance of the casino and approaching Collins. Collins claimed that the surveillance videotapes from the convenience store would have shown Collins buying beer and the victim using the phone and getting into Collins' truck. And, Collins contended that by interviewing people at the Elks Bar and the RV trailer park, trial counsel would have determined whether the victim was known to the bar patrons and trailer park inhabitants and whether a vehicle or property had been reported

²Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

³Id. (citing Strickland, 466 U.S. at 697).

⁴Id. at 988, 923 P.2d 1107; see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) (providing that "[p]rejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt").

⁵Initially, Deputy Public Defender Shane Emerick was appointed to represent Collins. However, he later was replaced by Deputy Public Defender Joseph Sciscento. With regard to this first contention, Collins claimed that both attorneys provided ineffective assistance of counsel.

damaged. Trial counsel has an obligation to conduct a reasonable investigation or make a determination that a particular investigation is unnecessary.⁶ Here, however, we note that Collins' trips to the casino, the convenience store, and the Elks Bar occurred prior to the victim's murder. Collins did not establish that surveillance videotapes existed and that witnesses were available, nor did he demonstrate that the videotapes and witnesses would have provided exculpatory evidence.⁷ As such, Collins failed to show that the result of the trial would have been different.⁸ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Second, Collins contended that trial counsel was ineffective for failing to object to his late appointment as counsel. To this end, Collins argued that counsel did not have time to properly investigate and obtain surveillance videotapes from the El Cortez and the convenience store, or to locate witnesses from the Elks Bar and RV trailer park. Collins claimed that the surveillance videotapes and witnesses would have substantiated his version of events. However, as discussed above, Collins did not establish that surveillance videotapes existed and that witnesses were available, nor did he demonstrate that the videotapes and witnesses would have provided exculpatory evidence.⁹ As such, Collins failed to show that the result of the trial would have been different if the objection had been

⁶Colwell v. State, 118 Nev. ___, ___, 59 P.3d 463, 467 (2003) (citing Strickland, 466 U.S. at 691).

⁷See Colwell, 118 Nev. at ___, 59 P.3d at 467.

⁸See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

⁹See Colwell, 118 Nev. at ___, 59 P.3d at 468.

sustained.¹⁰ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Third, Collins contended that trial counsel was ineffective for stipulating that the victim was a prostitute. By doing so, Collins argued, the defense was prevented from showing the victim's true character. Trial counsel's decision to stipulate that the victim was a prostitute was a tactical decision. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."¹¹ Collins did not present any extraordinary circumstances. Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Fourth, Collins contended that trial counsel was ineffective for failing to investigate the victim's criminal history. Collins argued that the victim's arrest record would have shown that she routinely carried a knife to cut her crack cocaine before smoking it, thereby supporting his claim that the victim had a knife in her possession on the night she died. However, four knives were found in the truck after the victim's murder. Collins did not demonstrate that police reports would have identified the knife carried by the victim. Nor did he show that the fact that the victim routinely carried a knife would have made a difference at trial. As such, Collins failed to show that if trial counsel had obtained the victim's arrest records the result of the trial would have been different.¹² Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

¹⁰See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

¹¹Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072, n.6, 13 P.3d 420, 432 n.6 (2000).

¹²See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Fifth, Collins contended that trial counsel was ineffective for failing to investigate the facts surrounding his prior felony convictions, and for opening the door for the prosecution to question him about the facts of these convictions. Our review of the record on appeal reveals that the prosecution questioned Collins about his felony conviction for "endangerment." On cross-examination, Collins admitted that he was arrested for assault with a deadly weapon and testified that he told his trial counsel that he was drag racing. Trial counsel was not ineffective for determining that investigation of Collins' prior felony convictions was unnecessary after Collins informed him of their existence and basis.¹³ Trial counsel's decision to question Collins about the convictions on direct examination was a tactical decision. Because Collins did not present any extraordinary circumstances, trial counsel's decision cannot be successfully challenged.¹⁴ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Sixth, Collins contended that trial counsel was ineffective for failing to investigate character witnesses. Collins claimed that he provided trial counsel with the names of witnesses who could testify on his behalf. However, Collins failed to provide any specific facts showing that the testimony of these witnesses would have changed the result of the trial.¹⁵ Therefore, Collins therefore failed to demonstrate that counsel was ineffective on this issue.

Seventh, Collins contended that trial counsel was ineffective for failing to investigate and interview Blaireen "Nicki" Knouf. Collins

¹³See Colwell, 118 Nev. at ___, 59 P.3d at 467.

¹⁴See Howard, 106 Nev. at 722, 800 P.2d at 180.

¹⁵See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

claimed that Knouf's testimony would have supported his claim that he had gone to the El Cortez to visit neighbors. However, even if his claim were true, Collins failed to address how this testimony would have changed the result of the trial.¹⁶ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Eighth, Collins contended that trial counsel was ineffective for failing to investigate Michael Roche. Collins claimed that Roche's testimony would have rebutted a prosecution witness' testimony that there was a disturbance at the Collins residence before the arrival of the police. However, even if his claim were true, Collins failed to address how this testimony would have changed the result of the trial.¹⁷ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Ninth, Collins contended that trial counsel was ineffective for failing to object to the State's use of Officer Kenneth Mead's perjurious testimony. Mead testified that the Collins home appeared to have been ransacked and torn through, whereas police evidence photographs taken immediately after Collins' arrest exhibited otherwise. Based on our review of the record, we find that trial counsel's performance did not fall below an objective standard of reasonableness.¹⁸ Trial counsel appropriately sought to impeach Mead's testimony through cross-examination of Mead and other prosecution witnesses.¹⁹ Collins was not prejudiced by the testimony complained of because it was not "material to

¹⁶Id.

¹⁷Id.

¹⁸See Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

¹⁹See NRS 50.075.

the issue or point in question."²⁰ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Tenth, Collins contended that trial counsel was ineffective for failing to investigate Alan Schilde and Jason Piper. Collins argued that Schilde and Piper would have testified that the three ornamental knives were in Collins' truck prior to the night of the murder. Collins claimed that this testimony "would have bolstered his testimony that he did not take the knives to go hunting for a victim." However, even if his claim were true, Collins failed to address how this testimony would have changed the result of the trial.²¹ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Eleventh, Collins contended that trial counsel was ineffective for failing to obtain an expert to examine the victim's wounds and determine whether a serrated-edged or a straight-edged knife made the incisions. Collins argued that such a determination would have supported his pre-trial motion to suppress the admission of the straight-edged knives as being prejudicial. However, Collins' pre-trial motion did not address the knives found at the murder scene, which evidently included the murder weapon. Instead, the motion addressed knives that were found by the police inside Collins' residence. The district court concluded that these knives were admissible to establish that the police conducted a proper investigation and "to support arguable inferences dealing with the defendant's state of mind and intent." Because expert opinion regarding the nature of the victim's knife wounds was not relevant to Collins' pre-

²⁰NRS 199.120(2); see also Colle v. State, 85 Nev. 404, 455, P.2d 917 (1969).

²¹See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

trial motion, trial counsel was not deficient for failing to obtain an expert to examine the victim's wounds. Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Twelfth, Collins contended that trial counsel was ineffective for failing to investigate his truck for physical evidence. Specifically, Collins argued that he told trial counsel about a sales receipt that he left in his truck. Collins claimed that the sales receipt would have supported his testimony that he stopped at a store to purchase beer. However, Collins failed to state how evidence that he stopped at a store to purchase beer would have changed the result of the trial.²² Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Thirteenth, Collins contended that trial counsel was ineffective for failing to inform Dr. Mortillaro of the defense's theory of the case. However, Collins failed to address how Dr. Mortillaro's knowledge of the defense's theory of the case would have changed the result of the trial.²³ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Fourteenth, Collins contended that trial counsel was ineffective for failing to have Dr. Mortillaro interview and evaluate Collins in a timely manner so that a report could have been prepared and introduced into evidence at trial. We note that Dr. Mortillaro testified extensively regarding his clinical interview with Collins, Collins' previous head injury, and the results of Collins' psychological tests. Dr. Mortillaro further testified as to the expert opinion he had formed regarding Collins' behavior. In light of this testimony, we conclude that Collins failed to

²²Id.

²³Id.

demonstrate that a report would have changed the result of the trial.²⁴ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Fifteenth, Collins contended that trial counsel was ineffective for failing to object to Officer Collingwood's testimony. Collingwood's testimony conflicted with the testimony offered by Collins as to the cause of his head injury.²⁵ As such, Collins argued that this testimony was prejudicial and was a deliberate attempt by the prosecutor to confuse the jury. "[E]vidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."²⁶ However, "[t]o merit exclusion, the evidence must unfairly prejudice [a defendant], typically by challenging the emotional and sympathetic tendencies of a jury, not the jury's intellectual ability to evaluate evidence."²⁷ Based on our review of the record on appeal, we conclude that Collins was not unfairly prejudiced by Collingwood's testimony. As such, the jury was entitled to decide the credibility of the witnesses and determine the weight to be attached to their testimony as it pertained to Collins' head injury.²⁸ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

²⁴Id.

²⁵Collingwood testified that it was possible that his knife caused the wound to the back of Collin's head. Whereas, Collins claimed that someone struck him on the head while he was talking with the victim.

²⁶NRS 48.035(1).

²⁷Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996).

²⁸See Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972).

Sixteenth, Collins contended that trial counsel was ineffective for offering into evidence the medical report of Dr. Jennings. Collins argued that the medical report contained prejudicial and contradictory evidence against how Collins received the head wound. Based on our review of the record on appeal, we conclude that trial counsel's decision to offer Dr. Jennings' medical report into evidence was a tactical decision. Because Collins did not present any extraordinary circumstances, trial counsel's decision cannot be successfully challenged.²⁹ Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Seventeenth, Collins contended that trial counsel was ineffective for failing to object to the prosecution's closing argument, which drew attention to and commented on Collins' post-arrest silence while being questioned by police officers. A prosecutor's comment on a defendant's post-arrest silence may constitute a reversible error.³⁰ However, the two statements that Collins quoted in support of his contention directly referenced Collins' testimony at trial and neither statement contained a direct or an indirect reference to Collins' post-arrest silence.³¹ As such, Collins' contention is belied by the record,³² and he was

²⁹See Howard, 106 Nev. at 722, 800 P.2d at 180.

³⁰See Murray v. State, 105 Nev. 579, 583-84, 781 P.2d 288, 290-91 (1989).

³¹Collins quoted the following statements from the prosecutor's closing argument:

This story is nonsense and you know it, just like the story that Ronald Collins fabricated on the witness stand.

* * *

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not prejudiced by trial counsel's performance.³³ Collins therefore failed to demonstrate that counsel was ineffective on this issue.

Eighteenth, Collins contended that trial counsel was ineffective for failing to object to the jury instructions addressing reasonable doubt, premeditation, and malice. However, this court reviewed these jury instructions on direct appeal. We concluded that the district court did not abuse its discretion in giving its premeditation instruction and that the reasonable doubt and malice instructions were constitutional. As such, trial counsel was not deficient for failing to object to these jury instructions. Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Nineteenth, Collins contended that trial counsel was ineffective for failing to offer a jury instruction on self-defense that properly defined that defense according to the prevailing law at the time. Collins specifically claimed that Jury Instruction 29 misstated the law on self-defense.³⁴ Our review of Jury Instruction 29 reveals that it is

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One of the things that you have to do, though, is take a look at the story that he told on the witness stand and decide if it makes sense to you.

³²See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

³³See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

³⁴Jury Instruction 29 provided:

The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:

1. That there is an imminent danger that the other person will either kill him or cause him great bodily injury; and

continued on next page . . .

substantially similar to a sample jury instruction we provided in Runion v. State.³⁵ As such, we conclude that trial counsel was not deficient for failing to offer a different jury instruction. Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

Twentieth, Collins contended that trial counsel was ineffective for failing to replace Juror Number 9 with Alternative Juror Number 2. Collins claimed that trial counsel should have requested the dismissal of both Juror Number 9 and Alternate Juror Number 1 and the appointment of Juror Number 2. However, Collins failed to show that he was prejudiced by trial counsel's decision to accept Alternate Juror Number 1 as a replacement for Juror Number 9. Therefore, Collins failed to demonstrate that counsel was ineffective on this issue.

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2. That it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm.

³⁵116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000).

Collins also raised a claim ineffective assistance of appellate counsel. He contended that his appellate counsel, David Schieck, was ineffective for failing to phrase his direct appeal claims as violations of his rights under the United States Constitution. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance test' set forth in Strickland v. Washington."³⁶ Appellate counsel is not required to raise every non-frivolous issue on direct appeal.³⁷ Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.³⁸ "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."³⁹ Collins failed to demonstrate that the out come of his direct appeal would have been different if his counsel had raised his claims as violations of his rights under the United States Constitution. Therefore, Collins failed to demonstrate that appellate counsel was ineffective.

Collins further contended that the accumulation of errors resulting from ineffective assistance of trial and appellate counsel deprived him of a fair trial and due process of law. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."⁴⁰ However, none of

³⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1113 (quoting Strickland, 466 U.S. 668).

³⁷Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

³⁸Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


³⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.


⁴⁰Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

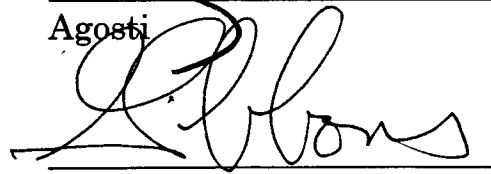
Collins claims have merit. Therefore, we conclude that counsel did not deprived Collins of a fair trial and due process of law.

Having reviewed the records on appeal and for the reasons set forth above, we conclude that Collins is not entitled to relief and that briefing and oral argument are unwarranted.⁴¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴²


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Ronald W. Collins
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁴¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁴²We have reviewed all documents that Collins has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Collins has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.