IN THE SUPREME COURT OF THE STATE OF NEVADA

FABIAN FUENTES ROSAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41728

FILED

JUN 22 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Fabian Fuentes Rosas' post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On November 29, 2000, the district court convicted Rosas, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon and one count each of conspiracy to commit murder, robbery with use of a deadly weapon, and conspiracy to violate the Uniform Controlled Substances Act. The district court sentenced Rosas to serve multiple terms of imprisonment, including two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed Rosas' judgment of conviction and sentence, and denied his subsequent petition for rehearing.[1] The remittitur issued on May 28, 2002.

With the assistance of counsel, Rosas filed a timely post-conviction for a writ of habeas corpus in the district court. The State opposed the petition. On June 17, 2003, the district court conducted an

[1]Rosas v. State, Docket No. 37152 (Order of Affirmance, December 17, 2001); Rosas v. State, Docket No. 37152 (Order Correcting Decision and Denying Rehearing, May 10, 2002).

evidentiary hearing and subsequently denied Rosas' petition. This appeal followed.

Rosas alleges that he received ineffective assistance of trial counsel in violation of his federal and state constitutional rights to due process and a fair trial.[2] 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 but for counsel's errors, the result of the proceeding would have been different.[3] This court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[4] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, Rosas contends that his trial counsel was ineffective for failing to object to the information on the grounds that it contained multiple theories, vague wording, and did not provide adequate notice. We conclude that Rosas did not establish that the State improperly alleged alternate theories of prosecution in the information, such that his

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[2]Rosas additionally alleged that his appellate counsel was ineffective with respect to several of the following claims. Consistent with the reasoning discussed below, we conclude that Rosas did not demonstrate that his appellate counsel was ineffective on these issues. Further, to the extent that Rosas attempted to raise any of the following claims independently from his ineffective assistance of counsel claims, we note that they are waived; Rosas did not demonstrate good cause for failing to raise these claims in his prior proceeding. See NRS 34.810(1)(b).

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

[4]Strickland, 466 U.S. at 697.

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

counsel was ineffective for failing to object.[6] Further, Rosas did not provide specific facts or a coherent argument indicating how the wording of the information was vague and did not provide adequate notice.[7] Therefore, the district court did not err in denying this claim.

Second, Rosas claims that his trial counsel was ineffective for failing to file a motion to sever the conspiracy charges from his murder and robbery charges.[8] Specifically, Rosas argues that he was prejudiced by the inclusion of the conspiracy to violate the Uniform Controlled Substances Act because it was unrelated to the murder and robbery. We disagree.

NRS 173.115(2) provides that two or more offenses may be charged in the same indictment if they are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Here, evidence was adduced at trial that several hours prior to the murders, Rosas and co-defendant Michael Freed agreed that in exchange for methamphetamine, Freed would dispose of the firearm for Rosas after the commission of the murders. Thus, we conclude that Rosas failed to adequately demonstrate that a motion to sever the charges would

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[6]See Sheriff v. Aesoph, 100 Nev. 477, 686 P.2d 237 (1984); NRS 173.075(2).

[7]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court"); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[8]To the extent that Rosas is arguing that his counsel was ineffective for failing to file a motion to sever the conspiracy to commit murder charge from the remaining charges, we note that he failed to present any facts whatsoever to support this claim. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

have been granted, and we therefore affirm the district court's denial of this claim.

Third, Rosas alleges that his trial counsel was ineffective for failing to conduct an adequate investigation and prepare for trial. Rosas failed to support this claim with specific facts, however, or articulate how he was prejudiced by his counsel's allegedly deficient performance.[9] Accordingly, we conclude that Rosas did not demonstrate that his counsel was ineffective in this regard.

Fourth, Rosas contends that his trial counsel was ineffective for failing to object to the district court's allegedly prejudicial comments during voir dire. Specifically, Rosas argues that the district court improperly asked the potential jurors to assume, hypothetically, that Rosas had been found guilty in order to question the jury regarding the penalty phase. Even assuming the district court's statement could have been perceived by potential jurors as a comment on Rosas' guilt or innocence, it was cured by the district court's first instruction to the jury, which provided, "No statement, ruling, remark or comment which I may make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts." Accordingly, we conclude that Rosas failed to demonstrate that he was prejudiced by his counsel's failure to object to the district court's comment.

Fifth, Rosas claims that his trial counsel was ineffective for failing to argue that the jury did not represent a fair cross section of the community. Rosas argues that Hispanics were underrepresented in the jury pool. However, Rosas failed to include any supporting facts whatsoever to demonstrate a prima facie violation of the fair cross-section

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[9]See id.

requirement;[10] thus, he did not establish that his trial counsel was ineffective in this regard.

Sixth, Rosas alleges that his trial counsel was ineffective for failing to advise Rosas to testify at trial or make a statement in allocution at sentencing. Rosas' trial counsel testified during the evidentiary hearing that he informed Rosas of his right to testify at trial and provide a statement during sentencing; Rosas did not provide any evidence to the contrary. Further, Rosas did not demonstrate that the outcome of his trial or sentencing hearing would have been different if he had provided such testimony. Therefore, Rosas did not establish that his counsel was ineffective in this regard, and we affirm the district court's denial of this claim.

Seventh, Rosas contends that his trial counsel was ineffective for failing to object to jury instruction 39, which concerned reasonable doubt. NRS 175.211 provides a statutory definition of reasonable doubt that the district court is required to give juries in criminal cases. The language used in jury instruction 39 was identical to that found in the statute. Further, this court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt

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[10]See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (holding that in order to demonstrate a prima facie violation the fair cross-section requirement, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process)

(quoting Duren v. Missouri, 439 U.S. 357, 364 (1979) (emphasis omitted).

beyond reasonable doubt and does not shift the burden of proof."[11] Consequently, Rosas did not establish that his counsel was ineffective for failing to object to the reasonable doubt jury instruction, and the district court did not err in denying the claim.

Eighth, Rosas appears to claim that his trial counsel was ineffective for failing to object to the jury instruction concerning malice aforethought. However, Rosas did not support this contention with a coherent argument or an adequate citation to the record.[12] Thus, we affirm the district court's denial of this claim.

Ninth, Rosas contends that his trial counsel was ineffective for failing to object to jury instruction 8, which concerned premeditation and deliberation. This court expressly approved an identical instruction in Byford v. State,[13] and Rosas' argument that this instruction somehow violated Byford is entirely without merit. As such, we affirm the district court's denial of this claim.

Tenth, Rosas claims that his trial counsel was ineffective for failing to object to penalty phase jury instruction 6. Rosas specifically argues that the following portion of the instruction was improper: "In determining which punishment shall be imposed, you are entirely free to act according to your own judgment and absolute discretion." Rosas did not establish that the outcome of his sentencing hearing would have been different if his counsel had raised this objection. Accordingly, he failed to demonstrate that his trial counsel was ineffective in this regard.

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[11]Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995).

[12]See Maresca, 103 Nev. at 673, 748 P.2d at 6.

[13]116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000).

Eleventh, Rosas argues that his trial counsel was ineffective for failing to seek a change of venue. However, this claim was not raised in the original petition and was not considered by the district court. Therefore, we need not reach the merits of this claim.[14]

Next, Rosas contends that his appellate counsel was ineffective. 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.[15] "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."[16] Appellate counsel is not required to raise every non-frivolous issue on appeal.[17]

First, Rosas claims that his appellate counsel was ineffective for failing to argue that the prosecution's use of a peremptory challenge to remove a Hispanic juror from the jury venire was improper. We conclude that Rosas did not establish that he was entitled to relief on this claim.

Batson v. Kentucky[18] and its progeny set forth the following three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a

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[14]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) overruled on other grounds by Means v. State, 120 Nev. ___, 103 P.3d 25 (2004).

[15]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[16]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[17]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[18]476 U.S. 79 (1986).

prima facie showing of racial discrimination; (2) the burden of production then shifts to the proponent to come forward with a race-neutral explanation; and (3) if a race-neutral explanation is offered, the trial court must decide whether the opponent of the strike has proved that the race-neutral explanation is merely a pretext for purposeful racial discrimination.[19]

In the instant case, the district court determined that Rosas made out a prima facie case of racial discrimination with respect to the use of the peremptory challenge to excuse potential juror Rosemarie Garcia. The prosecutor gave the following explanations for excusing Garcia: (1) law enforcement agencies did not believe Garcia would be a good juror for the State; (2) she knew a witness in the case; (3) she displayed an abnormal reaction during a discussion of reasonable doubt; and (4) there was criminal activity at her place of employment. The district court overruled Rosas' objection, noting that Garcia's reaction to the discussion of reasonable doubt, her acquaintance with one of the witnesses, and her place of employment were all non-discriminatory explanations. Because a district court's findings on the issue of discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference,[20] and will not be overturned unless clearly erroneous.[21] We conclude that Rosas did not demonstrate that the district court's findings were clearly erroneous, such that his appellate counsel

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[19]Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996) overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004) (citing Purkett v. Elem, 514 U.S. 765, 767-69 (1995)).

[20]Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

[21]Libby v. State, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999) (citing Hernandez v. New York, 500 U.S. 352, 369 (1991)).

was ineffective for failing to raise this issue on appeal.[22] We therefore affirm the district court's denial of this claim.

Second, Rosas alleges that his appellate counsel was ineffective for failing to argue that the State knowingly procured perjured testimony. However, Rosas did not adequately support this claim with specific facts,[23] and the district court therefore did not err in denying the claim.

Third, Rosas contends that his appellate counsel was ineffective for failing to argue that the following errors violated his state and federal due process rights: (1) an earlier plea agreement with the State precluded the instant prosecution; (2) the prosecutor improperly attempted to shift the burden of proof to the defense by making comments during opening and closing statements regarding Rosas' lack of an alibi and failure to testify or call witnesses; (3) the prosecutor committed misconduct in eliciting testimony regarding prior bad acts that were improperly admitted at trial; and (4) there was insufficient evidence to support his convictions. This court already considered and rejected these claims on direct appeal.[24] Rosas did not demonstrate that the outcome of his direct appeal would have been different if his appellate counsel had presented these claims as violations of his federal and state due process rights. Therefore, we affirm the district court's denial of these claims.

Finally, Rosas argues that there was insufficient evidence to support his deadly weapon enhancements. However, Rosas did not

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[22]The entirety of Rosas' argument in support of this claim was that the prosecutor's race-neutral explanations were "clearly pretextual, untrue, and hid a sinister intent—to clear the jury of any Hispanic."

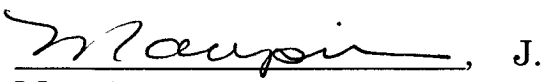
[23]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[24]See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

establish good cause for failing to raise this claim on direct appeal, and it is therefore waived.[25]

Having considered Rosas' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.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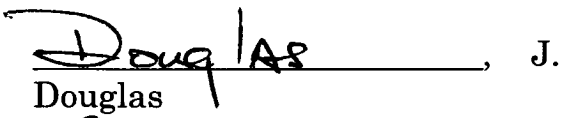
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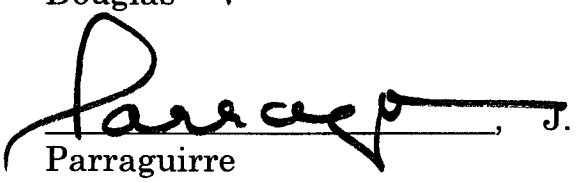
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cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

[25]See NRS 34.810(1)(b).