

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK H. RANDLE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 33677

**FILED**

SEP 03 2002

ORDER OF AFFIRMANCE

JANETIE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying Patrick H. Randle's post-conviction petition for a writ of habeas corpus.

On August 5, 1996, Randle was convicted, pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon, and one count each of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. The district court adjudged Randle a habitual criminal and sentenced him to serve numerous prison terms, including four consecutive prison terms of life without the possibility of parole.

Randle filed a direct appeal, which this court dismissed as untimely.<sup>1</sup> On February 4, 1998, Randle filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and the district court appointed counsel. After conducting an

---

<sup>1</sup>Randle v. State, Docket No. 29468 (Order Dismissing Appeal, June 18, 1997).

evidentiary hearing, the district court denied the petition.<sup>2</sup> Randle filed the instant appeal.

Randle first contends that the district court erred in rejecting his claim that his counsel was ineffective in failing to file a timely appeal on Randle's behalf. In particular, Randle claims that his conviction should be reversed and he "must be released" because his counsel deprived him of his right to appeal. We conclude that Randle's contention lacks merit. In Lozada v. State,<sup>3</sup> this court held that the appropriate remedy where counsel has deprived a defendant of his right to appeal is to allow the defendant an opportunity with the assistance of counsel "to raise in a petition for a writ of habeas corpus any issues which he could have raised on direct appeal, and then to appeal any decision of the district court denying relief to this court."<sup>4</sup> Here, Randle received the remedy set forth in Lozada. Randle raised his appellate claims in a post-conviction petition with the assistance of counsel, the district court considered and rejected the substance of those claims, and Randle has now appealed the district court's decision to this court. Randle is not entitled to further relief arising from his counsel's failure to file a timely appeal.

Randle next contends that his trial counsel was ineffective in waiving juror misconduct occurring during the penalty phase. We disagree. To state a claim of ineffective assistance of counsel sufficient to

---

<sup>2</sup>Although Randle's petition was untimely, the district court found that he had shown good cause to overcome the procedural bar. We conclude that the district court did not abuse its discretion in finding good cause. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

<sup>3</sup>110 Nev. 349, 871 P.2d 944 (1994).

<sup>4</sup>Id. at 359, 871 P.2d at 950.

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 were so severe that they rendered the jury's verdict unreliable.<sup>5</sup> Tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."<sup>6</sup>

In the instant case, the district court found that trial counsel's decision to waive juror misconduct in the penalty hearing was a tactical decision, and was not unreasonable. We conclude that the district court's findings are supported by substantial evidence and are not clearly wrong.<sup>7</sup> At the penalty hearing, the State sought the death penalty against Randle. In light of Randle's significant criminal history and the nature of the charged crimes, defense counsel made a tactical decision to seek a sentence of life without the possibility of parole, rather than a life sentence with parole, because counsel thought that request would be more credible to the jury. After the jury returned its verdict, the district court informed counsel that there had been juror misconduct, but that the jury had not returned a death verdict. Prior to waiving any objections based on juror misconduct occurring in the penalty phase, counsel was aware that the jury had not returned a death verdict. Therefore, counsel knew that the jury decided on either the sentence Randle had requested, life without parole, or a lesser sentence of life with the possibility of parole. Under

---

<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>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), overruled on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

<sup>7</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

these circumstances, we conclude that the district court did not err in finding that counsel acted reasonably and strategically in waiving any objections based on juror misconduct during the penalty phase.

Finally, Randle contends that the district court erred in denying his motion for a new trial. Randle moved for a new trial based on two instances of juror misconduct that occurred in the guilt phase, namely, that a juror wrote a letter expressing his condolences to one of the victims and brought a Bible into deliberations. We conclude that the district court did not err in finding that Randle was not prejudiced by that juror misconduct.

The denial of a new trial based upon juror misconduct will not be disturbed on appeal in the absence of a clear showing of abuse.<sup>8</sup> This court has held that "[n]ot every incidence of juror misconduct requires the granting of a motion for [a] new trial."<sup>9</sup> In considering whether juror misconduct constituted harmless error, the factors are "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."<sup>10</sup> Here, there was overwhelming evidence of Randle's guilt, including: (1) testimony from three eyewitnesses, two of whom had been shot or assaulted by Randle, that Randle was the perpetrator of the crimes; (2) evidence that Randle's fingerprints had been found on objects connected to the crime scenes; and

---

<sup>8</sup>Lane v. State, 110 Nev. 1156, 1163-64, 881 P.2d 1358, 1363-64 (1994), vacated on other grounds on rehearing, 114 Nev. 299, 956 P.2d 88 (1998).


<sup>9</sup>Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979).

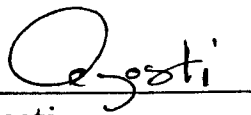
<sup>10</sup>Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989) (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).


(3) evidence that the same gun was used at both crimes. Although the gravity of the crimes charged is significant, the juror misconduct alleged is not egregious because Randle has not alleged that the jurors conducted independent factual or legal investigation to augment the evidence admitted at trial.<sup>11</sup> On balance, we conclude that the district court did not err in rejecting Randle's claim that he was entitled to an evidentiary hearing or a new trial based on juror misconduct.

Having considered Randle's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Leavitt

---

<sup>11</sup>See McNair v. State, 706 So. 2d 828 (Ala. Crim. App. 1997), Ackerman v. State, 737 So. 2d 1145 (Fl. Dist. Ct. App. 1999), People v. Vigil, 718 P.2d 496 (Colo. 1986), and State v. Barnes, 481 S.E.2d 44 (N.C. 1997) (holding there is no presumption of prejudice where jurors read the Bible during the guilt phase of a trial, and thus the defendant must specify facts showing how the misconduct affected a factual or legal issue of the case); cf. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989), and People v. Mincey, 827 P.2d 388 (Cal. 1992) (jurors' consideration of Bible in penalty phase of capital case was presumptively prejudicial because it was relevant to issue of whether defendant should be sentenced to death).

cc: Hon. John S. McGroarty, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Carmine J. Colucci & Associates  
Clark County Clerk