

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM FRENCH A/K/A MICHAEL L.  
TIPPENS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42021

**FILED**

APR 29 2004

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

ORDER OF AFFIRMANCE

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

On July 6, 2001, the district court convicted French, pursuant to a jury verdict, of one count of conspiracy to commit robbery and two counts of robbery with the use of a deadly weapon. The district court sentenced French to serve a period totaling 104 to 480 months in the Nevada State Prison. This court affirmed French's judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on October 8, 2002.

On May 29, 2003, French filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. French filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent French or to conduct an evidentiary hearing. On September 9, 2003, the district court denied French's petition.<sup>2</sup> This appeal followed.

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<sup>1</sup>French v. State, Docket No. 38249 (Order of Affirmance, September 10, 2002).

<sup>2</sup>On November 18, 2003, the district court entered specific findings of fact and conclusions of law regarding French's petition.

In his petition, French initially raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>3</sup> A petitioner must further establish there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, French claimed that his trial counsel was ineffective for failing to challenge the victims' one-on-one identification of him as prejudicial and highly suggestive. French's identification by the victims preceded formal charges, and consequently the issue is whether the identification conducted in this case "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [French] was denied due process of law."<sup>6</sup> Here, the two victims were brought to the apartment complex where French was detained by police approximately nine hours after the robberies occurred. The victims viewed French individually. French was handcuffed, and in the presence of one police officer. Only one of the two victims was able to identify French.

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

<sup>4</sup>Id.

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (quoting Stovall v. Denno, 388 U.S. 293, 301-022 (1967)).

We conclude that French did not establish that the results of his trial would likely have been different if his trial counsel had challenged French's one-on-one identification. This court determined on direct appeal that the police did not use an unnecessarily suggestive or unreliable procedure during the one-on-one identification. Consequently, French failed to demonstrate that his counsel was ineffective for failing to raise this issue, and the district court did not err in denying the claim.

Second, French contended that his trial counsel was ineffective for failing to request and review security camera videotapes from the Fiesta Casino. French argued that security videotapes would show that he was at the Fiesta Casino at midnight on the night of the robberies, and this would have supported his alibi defense. Our review of the record on appeal reveals that the robberies occurred at approximately 10:30 p.m. Therefore, a videotape showing French at the Fiesta Casino one-and-a-half hours later would not have had a reasonable probability of altering the outcome of the trial. Thus, we conclude that French failed to demonstrate that his trial counsel was ineffective on this issue, and the district court did not err in denying the claim.

Third, French claimed that his trial counsel was ineffective for failing to personally review a security camera videotape obtained from the Circle K convenience store by trial counsel's investigator. French argued that the videotape supported his alibi defense because it showed him in the convenience store at the approximate time the robberies were committed. We conclude that French failed to demonstrate that the results of his trial would have been different if his trial counsel had personally reviewed the tape. Testimony at trial indicated that French went to the Circle K at approximately 7:00 p.m.; the robberies did not occur until 10:30 p.m. French failed to provide sufficient facts to support his allegation that the videotape showed him in the convenience store at

the same time the robberies were committed. Accordingly, French did not establish that his trial counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fourth, French alleged that his trial counsel was ineffective for failing to investigate individuals that could have supported his alibi defense. French claimed that he gave his trial counsel the names of five people who were guests at the same party he was the night of the robberies, but his counsel did not contact them. A review of the record reveals that trial counsel called two witnesses who supported French's alibi defense and testified that French was at a party the night of the robberies. French failed to specify what testimony these additional witnesses would have provided, such that the outcome of his trial would have been altered. Moreover, Marion Goode, an investigator with the Clark County Public Defender's Office, testified that she spoke with four of the five individuals French claimed his trial counsel should have contacted. Therefore, French's claim is also partially belied by the record.<sup>7</sup> Thus, we conclude that French did not establish that his trial counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fifth, French claimed that his trial counsel was ineffective for failing to object to the prosecutor's improper comments regarding his post-Miranda<sup>8</sup> silence. French initially waived his Miranda rights and told detectives that he was at a party and then went to the Fiesta Casino the night of the robberies, but refused to give detectives any more specific information. French subsequently asked for an attorney, and all

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>8</sup>See Miranda v. Arizona, 384 U.S. 436 (1966).

questioning stopped. French argued that his counsel should have objected to the following statement made by the prosecutor during her closing argument:

There were issues about not reviewing the tapes at the Fiesta. You heard the detective testify that this defendant was not particularly cooperative with them. He would say things like, "I was at the party, I was at the Fiesta," and that's all he was saying. He was not pinning down what time he was at the Fiesta, where the party was at. There was no opportunity on behalf of our detectives to go out and look for this stuff. It would be a wild goose chase . . . If the defendant would have cooperated maybe that would be possible, but he did not and that's what the testimony shows.

"It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights."<sup>9</sup> A review of the record on appeal reveals that French's trial counsel argued that the State did not adequately investigate French's alibi. The prosecutor responded with the above comments, in which she attempted to explain why detectives did not review security tapes from the Fiesta Casino. We conclude that the prosecutor's statement did not improperly comment on French's post-Miranda silence. Further, even if the comments were error, French failed to articulate how he was prejudiced by the prosecutor's statement.<sup>10</sup> Therefore, French did not demonstrate that his trial counsel acted

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<sup>9</sup>McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986).

<sup>10</sup>See Washington v. State, 112 Nev. 1054, 1060, 921 P.2d 1253, 1257 (1996) (holding that "this court will not reverse a conviction when the state comments on post-arrest silence if the comments were harmless beyond a reasonable doubt").

unreasonably in failing to object, and the district court did not err in denying the claim.

French additionally 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*."<sup>11</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>12</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>13</sup>

French first claimed that his appellate counsel was ineffective for failing to appeal issues trial counsel raised in an unsuccessful motion to set aside the verdict and grant a new trial. The motion was based in part on a discussion the district court had with the jurors after the jury returned guilty verdicts. Trial counsel claimed that the verdict should be set aside because statements by the jurors indicated that they had improperly shifted the burden of proof, relied on only one of the jury instructions, and speculated beyond the scope of the evidence presented at trial.

NRS 50.065(2) expressly precludes any inquiry into internal jury deliberations. It prohibits a juror from testifying "concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or

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<sup>11</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>12</sup>Jones v. Barnes, 463 U.S. 745 (1983).

<sup>13</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

concerning his mental processes in connection therewith."<sup>14</sup> Furthermore, "[t]he affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose."<sup>15</sup> The claims of juror misconduct that trial counsel raised in the motion to set aside the verdict came within the scope of NRS 50.065 because they involved internal jury deliberations. Consequently, this issue would not have had a reasonable likelihood of success on appeal, and French did not demonstrate that his appellate counsel was ineffective for failing to appeal this issue.

The motion to set aside the verdict also contained a claim that the State failed to adequately investigate French's alibi. As there is no authority to support the proposition that the State, rather than defense counsel, had a duty to investigate French's alibi, we conclude that French did not establish that his appellate counsel was ineffective for failing to appeal this issue.

French next contended that his appellate counsel was ineffective for failing to appeal an instance of prosecutorial misconduct. French claimed that the prosecutor improperly questioned defense witness Armetrius Lewis concerning intimidation by Terrell McBride. The prosecutor again made reference to McBride's intimidation of Lewis during her closing argument.

A review of the record on appeal reveals that French's contention is without merit. We initially note that the prosecutor did not implicate French in the alleged witness intimidation; rather she argued McBride was responsible for pressuring Lewis. Further, Alexia Conger, an investigator for the State, testified that McBride interfered with an

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<sup>14</sup>NRS 50.065(2)(a).

<sup>15</sup>NRS 50.065(2)(b).

interview she conducted with Lewis. Conger additionally testified that McBride urged other potential witnesses to refrain from speaking with Conger. Therefore, the prosecutor's comments regarding witness intimidation by McBride were based on substantial evidence.<sup>16</sup> Finally, even if the prosecutor's comments amounted to misconduct, we conclude that in light of the considerable evidence introduced against French at trial, any error would be harmless.<sup>17</sup> Consequently, French did not establish that this issue would have had a reasonable probability of success on appeal, and he failed to demonstrate that his appellate counsel was ineffective on this claim.

French next claimed that his appellate counsel was ineffective for failing to file a petition for rehearing. French argued that this court mistakenly believed that his trial counsel had not objected to the rebuttal testimony of Conger. Our review of the record on appeal reveals that although French's trial counsel objected to specific questions asked of Conger, trial counsel did not object to Conger's testimony as improper rebuttal evidence. Therefore, French did not establish that this court "overlooked or misapprehended a material fact in the record,"<sup>18</sup> such that a petition for rehearing would likely have been granted, and an appeal of this claim would have been successful. Thus, French failed to establish that his appellate counsel was ineffective on this issue, and the district court did not err in denying the claim.

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<sup>16</sup>See Lay v. State, 110 Nev. 1189, 1193-94, 886 P.2d 448, 450-51 (1994).

<sup>17</sup>See id.

<sup>18</sup>NRAP 40(c)(2)(i).

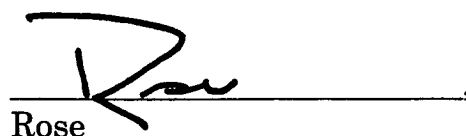



French lastly contended that the prosecutor knowingly withheld exculpatory evidence. This issue is outside the scope of a post-conviction petition for a writ of habeas corpus and French did not demonstrate good cause for failing to raise it earlier.<sup>19</sup> Consequently, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that French is not entitled to relief and that briefing and oral argument are unwarranted.<sup>20</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.  
Shearing

 J.  
Rose

 J.  
Maupin

cc: Hon. Kathy A. Hardcastle, Chief District Judge  
William French  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk  
Eighth Judicial District Court, Department 11

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<sup>19</sup>See NRS 34.810(1)(b).

<sup>20</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).