

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER CONNORS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46552

FILED

APR 06 2007

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Appellant Christopher Connors was convicted, pursuant to a jury verdict, of first-degree murder and robbery. He was sentenced to serve a term of life in prison with the possibility of parole for the murder and a consecutive term of 15 years for the robbery. This court dismissed his direct appeal from the judgment of conviction and sentence.¹ The remittitur issued on May 21, 1996. Connors's timely postconviction petition for a writ of habeas corpus was denied by the district court on December 14, 2005. This appeal followed.

Connors argues that he received ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must

¹Connors v. State, Docket No. 25877 (Order Dismissing Appeal, May 1, 1996).

demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness. The petitioner also must demonstrate prejudice such that trial counsel's errors were so severe that they rendered the jury's verdict unreliable.² To show prejudice based on appellate counsel's performance, the petitioner must show that the omitted issue had a reasonable probability of success on appeal.³

First, Connors claims counsel were ineffective in regard to the admission at trial of evidence of Connors's prior bad acts.⁴ Connors's codefendant was asked by the State if the victim carried a gun. He testified that the victim and Connors "used to steal stereos together" and the victim would carry a gun at those times. Trial counsel successfully objected, and the district court gave a cautionary jury instruction. Counsel were therefore not deficient.

Connors also complains that a witness testified that he saw Connors's codefendant picking up a package of marijuana and assumed someone was with him because the codefendant was not driving the car he got out of to pick up the package. The witness did not place Connors there and said he did not know who was with the codefendant at that time. Thus, no evidence of a prior bad act by Connors was elicited. Further,

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

³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁴See NRS 48.045.

counsel's cross-examination tended to show that the victim, not Connors, was with the codefendant at that time. We therefore conclude that trial counsel was not deficient in this respect.

For these reasons, we also conclude that this issue had no reasonable probability of success on appeal and appellate counsel was therefore not ineffective. Further, even assuming it was error to admit the evidence, it was not prejudicial.⁵ Other evidence was admitted at trial that Connors may have been involved in prior crimes; at least some of this evidence was elicited by the defense. Moreover, there was significant evidence supporting the jury's verdicts, including witness testimony that Connors said before the killing that he intended to assault and rob the victim. Accordingly, the district court did not err in denying this claim.⁶

Second, Connors claims trial counsel was ineffective for failing to seek severance of Connors's trial based on the introduction of evidence of his codefendant's numerous prior bad acts. Counsel did move for severance, but not on this ground. Connors failed to explain how a motion

⁵Cf. Rosky v. State, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005).

⁶It appears that the district court concluded that the issue of improper admission of evidence of prior bad acts was resolved by this court in Connors's direct appeal and was therefore barred by the law of the case doctrine. Our decision in Connors's direct appeal did not address the admission of such acts. Nevertheless, we conclude the district court reached the right result in denying this claim. See Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994) (holding that this court may affirm the district court's decision on grounds different from those relied upon by the district court).

based on this ground might have been successful where his other motions failed. Further, Connors cannot demonstrate prejudice. We decided in Connors's direct appeal that he suffered no prejudice from the joinder of trials. We also conclude that counsel was not ineffective for failing to challenge the joinder on this ground on direct appeal. Our ruling that the joinder was permissible is now the law of the case, and the issue will not be revisited.⁷ "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."⁸ Accordingly, the district court did not err in denying this claim.

Third, Connors argues that counsel were ineffective for failing to challenge allegedly unconstitutionally vague jury instructions on malice that referred to an "abandoned or malignant heart" and "a heart fatally bent on mischief." This court has upheld instructions using this language,⁹ and Connors fails to explain why we might have ruled differently in his case. Thus, the district court did not err in denying this claim.

Fourth, citing Byford v. State,¹⁰ Connors argues that counsel were ineffective for failing to challenge allegedly improper jury

⁷See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

⁸Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

⁹Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001).

¹⁰116 Nev. 215, 994 P.2d 700 (2000).

instructions on premeditation and deliberation. Connors's jury was given the so-called Kazalyn¹¹ instruction. In Byford, we offered new instructions on these elements, but we did not conclude that the Kazalyn instruction was erroneous or unconstitutional. We also granted no relief to Byford on this issue. Connors fails to explain why we might have ruled differently in his case had the argument been raised, and the Kazalyn instruction was proper at the time Connors's jury was given it. We therefore conclude that the district court did not err in denying this claim.

Fifth, Connors argues that appellate counsel was ineffective for failing to argue that the district court erroneously denied his motion for a mistrial based on prosecutorial misconduct. "The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion."¹² "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial."¹³ We conclude that the district court did not err in denying this claim because Connors has shown no probability that our decision on appeal would have been different if this argument had been raised.

¹¹Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

¹²Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

¹³Id. at 144, 86 P.3d at 587.

Connors complains of four instances of prosecutorial misconduct. First, in questioning a witness, the prosecutor referred to the "murder" of the victim. This remark was isolated, counsel immediately objected, and the objection was sustained.

Second, the prosecutor mischaracterized a witness's testimony when summarizing it back to her by saying that defendants had expressed an intention to "bump off" the victim, rather than "bump his weed" or "bump him for his weed" as the witness testified. Counsel immediately objected, and the district court sustained the objection and instructed the jury to disregard the prosecutor's statement.

Third, the prosecutor was nodding while her witnesses were testifying. Counsel objected out of the jury's presence. The district court instructed the prosecutor not to nod or make any gestures while witnesses were testifying, and she agreed to be more careful.

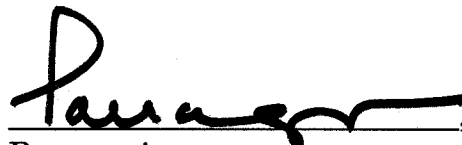
Fourth, Connors argues that the prosecutor called a rebuttal witness whose testimony was outside the scope of the defense's case in chief.¹⁴ Counsel unsuccessfully objected to this at trial. The witness was called to rebut testimony elicited on cross-examination from Connors's father during the State's case in chief. On cross-examination, Connors's father testified that Connors carried a pager because his work required him to. The State rested two days after this testimony. In its rebuttal case, the State called Connors's employer, who testified that Connors was

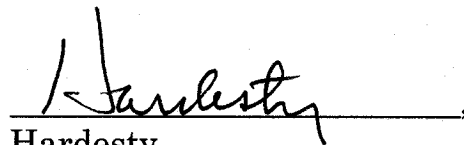
¹⁴See NRS 174.141(4).

not required to carry a pager for work. Even assuming this witness should have been called during the State's case in chief, the district court has discretion to allow a party to offer evidence on its original case during rebuttal.¹⁵ Given that the evidence being rebutted was elicited during cross-examination that occurred two days before the State rested its case in chief, we conclude the district court would not have abused its discretion in allowing the State to present the evidence during its rebuttal case.

Having reviewed Connors's arguments and concluded that the district court did not err in denying his claims, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

¹⁵Id.

cc: Chief Judge, Eighth Judicial District Court
Hon. Joseph S. Pavlikowski, Senior Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk