IN THE SUPREME COURT OF THE STATE OF NEVADA

MANNY CHRISTOPHER VALLEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35364

FILED

JUL 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

In 1996, the district court convicted appellant, Manny Christopher Vallez, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon, battery with the use of a deadly weapon, and discharging a firearm out of a motor vehicle. The district court sentenced appellant to two consecutive terms of life in prison with the possibility of parole and to additional concurrent prison terms. We dismissed appellant's appeal from his judgment of conviction.[1]

In 1999, appellant filed a petition for habeas relief in the district court alleging numerous instances of ineffective assistance of trial and appellate counsel. The district court appointed counsel to represent appellant and subsequently denied his petition without holding an evidentiary hearing or permitting discovery. This appeal followed.

A petitioner is not entitled to an evidentiary hearing on claims that are belied by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.[2]

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[1]Vallez v. State, Docket No. 28507 (Order Dismissing Appeal, April 9, 1998).

[2]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

NRS 34.780(2) provides that discovery may be permitted in a post-conviction proceeding only for good cause and by leave of the court. A petitioner has shown "good cause" where specific allegations give the court reason to believe that, "'if the facts are fully developed,'" the petitioner may be entitled to relief.[3]

Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.[4] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[5] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[6] To establish prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[7] Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[8]

Appellant first argues that defense counsel should have impeached the State's forensic pathologist, Dr. Jordan, with his prior contradictory testimony at the preliminary hearing. At the hearing, Dr.

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[3]Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)).

[4]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[5]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[6]Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[7]Id. at 988, 923 P.2d at 1107.

[8]Strickland, 466 U.S. at 689.

Jordan testified that a microscopic examination of murder victim Matt Reynolds's gunshot wound revealed the presence of particulate matter in the surrounding skin consistent with gunpowder residue. Dr. Jordan explained that the deposition of such material suggested a close-range or contact wound. He conceded, however, that its presence could indicate the bullet carried matter into the wound from "the external surface," in which case the shot could have been fired from a considerable distance. He also acknowledged that he had asked the chief medical examiner to render an opinion and that further examination of the wound would be conducted. At trial, Dr. Jordan testified that based upon his microscopic examination of Reynolds's gunshot wound, he was convinced the particulate matter within the surrounding skin was gunpowder residue. He concluded that the wound was either a close-range or a contact wound.

Appellant argues that a close-range or contact wound increased his exposure to conviction for first-degree murder because it suggested that he killed purposefully. Appellant concludes that defense counsel should have impeached Dr. Jordan with his prior uncertainty at the preliminary hearing regarding the nature of the material in Reynolds's wound and the distance from which appellant shot Reynolds. Appellant also claims that his attorneys should have engaged an independent forensic expert to evaluate this "crucial evidence." We disagree.

First, there was additional credible evidence adduced at trial that appellant shot Reynolds at close range. In his statement to police made two days after the incident, appellant's friend James Schuette stated that appellant ran up and shot Reynolds in the stomach at point-blank range, although at trial Schuette testified that he did not see appellant shoot Reynolds. Second, defense counsel adequately challenged Dr. Jordan's trial testimony. Specifically, defense counsel asked Dr. Jordan whether Reynolds had not been propelled some distance along the ground

following the shooting and whether smudges on his body were not evident in areas distant from the gunshot wound. Defense counsel elicited that Dr. Jordan did not conduct tests of Reynolds's clothing to confirm "burning or charring around the point of [the bullet's] entry." Finally, in his closing argument, defense counsel reminded the jury that the source of the granular material in Reynolds's gunshot wound remained undetermined and need not be gunpowder residue. We conclude that appellant has not established that his counsel's performance was deficient or that he was prejudiced.

Appellant next contends that defense counsel failed to object "fully" to the premeditation and deliberation instruction. Appellant also argues that defense counsel should have challenged the malice aforethought instructions. We have rejected similar challenges to those instructions[9] and conclude that appellant cannot demonstrate prejudice based on the performance of defense counsel in this respect. Moreover, defense counsel did object to the "premeditation definition instruction," and his objection appears adequate. He also offered an alternative instruction based upon a California jury instruction. Appellant fails to articulate either the additional action that should have been taken by defense counsel in order to have objected "fully" to the instruction or the

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[9]See, e.g., Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000) (explaining that Kazalyn instruction on premeditation and deliberation is not constitutional error and that decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), is not retroactive); Leonard v. State, 117 Nev. 53, 78, 17 P.3d 397, 413 (2001) (reaffirming that statutory language comprising malice aforethought instruction is well established in Nevada); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000) (reaffirming prior decisions that upheld implied malice instruction using language in NRS 200.020(2) where jury is properly instructed on presumption of innocence and State's burden of proof).

shortcoming of defense counsel's suggested alternative. We conclude that appellant is not entitled to relief on such a bare allegation.[10]

Because appellant believes that Nevada's statutory death penalty scheme fails to narrow the class of persons eligible for the death penalty, he argues that the only mechanism remaining for the fair and just selection of death penalty cases is the sound discretion of the prosecution. Here, appellant argues that defense counsel should have sought dismissal of charges or of the notice of intent to seek the death penalty because the State charged appellant with capital murder knowing it was not warranted. In support, appellant points to the prosecutor's post-trial statement to the media that he "never expected [this] to be a death penalty case." Appellant also argues that the prosecutor, who appellant alleges was aware of a plethora of mitigation evidence, should have weighed likely mitigators against the alleged aggravator before seeking the death penalty. Appellant concludes that the prosecutor sought the death penalty solely to gain the tactical advantage of trying appellant before a death-qualified jury. Appellant cites Justice Springer's dissent in Schoels v. State[11] and Smith v. State,[12] a Florida appellate court opinion, for the proposition that a prosecutor acts in "bad faith by seeking the death penalty in a case where it is clearly not warranted."

Appellant is not entitled to relief on this claim. First, it is difficult to conceive of how the prosecutor's post-trial statement to the

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[10]See Hargrove, 100 Nev. at 502, 686 P.2d at 225 (holding that bare claims unsupported by any specific factual allegations will not entitle defendant to relief).

[11]114 Nev. 981, 966 P.2d 735 (1998), rehearing granted, 115 Nev. 33, 975 P.2d 1275 (1999).

[12]568 So. 2d 965 (Fla. Dist. Ct. App. 1990).

media should have prompted appellant's attorneys to challenge the State's pre-trial filing of charges. Second, appellant's case is not one in which a death penalty prosecution was "clearly not warranted." Appellant fired a round out of a motor vehicle into a crowded gas station. He fired two more shots during a melee and, by his own admission, hit an unintended victim. On these facts substantial evidence supported the State's charging appellant with the aggravator of knowingly creating a risk of death to more than one person.[13] Even Justice Springer in his Schoels dissent stated that this aggravator properly applies where the murderer fires into a crowd.[14] We conclude that defense counsel were not ineffective in failing to seek dismissal of charges or of the notice of intent to seek the death penalty.

Appellant next argues that gang-related evidence was improperly admitted at his trial and that defense counsel should have intervened to prevent its introduction. In the alternative, appellant contends that if trial counsel's tactic was to present this case as a dispute between gangs, then their use of gang-related evidence was "woefully inadequate," particularly in failing to present expert testimony on gang-related matters. Appellant claims that the district court contributed to this problem by prohibiting defense counsel from questioning State witnesses about possible gang involvement.

These claims lack merit. First, if defense counsel had sought to exclude this evidence, they would have failed because the evidence was admissible. Several State witnesses testified that appellant and his

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[13]See NRS 200.033(3); see also Young v. District Court, 107 Nev. 642, 650, 818 P.2d 844, 849 (1991) (holding that the prosecution properly seeks the death penalty where there is substantial evidence qualifying a defendant for capital status).

[14]Schoels, 114 Nev. at 993 n.2, 966 P.2d at 743 n.2.

friends threw gang signs and used language indicative of gang affiliation. Thus, the State would have been permitted to present gang-related evidence to establish a motive for the instant crimes.[15] Because objections to this evidence would have been unavailing, defense counsel's failure to object could not prejudice appellant.[16] Also, the record shows that defense counsel was not prevented from questioning State witnesses about their possible gang involvement. Further, we conclude that he did so effectively. Finally, appellant fails to articulate how the testimony of an expert would have affected the outcome of his trial. We therefore conclude that this claim is without merit.

Appellant next claims that defense counsel were ineffective in failing to move to suppress the testimony of various State witnesses on the ground that the State violated the federal anti-gratuity statute in procuring their testimony.[17] This claim warrants no relief. The Ninth Circuit Court of Appeals has held that the statute does not "prohibit the government from conferring benefits upon cooperating witnesses in exchange for testimony" absent some evidence that a prosecutor bribed a witness to lie on the stand.[18] The Ninth Circuit has also held that even if

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[15]See NRS 48.045(2) (providing that evidence of "other crimes, wrongs or acts" may be admissible for the purpose of proving "motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); see also Qualls v. State, 114 Nev. 900, 904, 961 P.2d 765, 767 (1998) (holding that evidence of gang affiliation is admissible under NRS 48.045 to prove motive).

[16]See Kirksey, 112 Nev. at 990, 923 P.2d at 1109 (stating that to establish prejudice based upon counsel's failure to file a motion to suppress evidence, the petitioner must demonstrate, inter alia, that the motion was meritorious).

[17]See 18 U.S.C. § 201(c)(2).

[18]United States v. Feng, 277 F.3d 1151, 1153-54 (9th Cir. 2002).

the statute generally applies to the government's use of incentives to elicit relevant testimony, "there is no basis for transforming the statute into an exclusionary rule" because the statute provides a mechanism for enforcing its provisions—criminal prosecution.[19] This court recently adopted this reasoning in Leonard v. State.[20] We therefore conclude that appellant cannot demonstrate prejudice because the underlying legal issue lacks merit.

Appellant next argues that defense counsel were ineffective in failing to impeach the State witnesses with the fact that they were not prosecuted for crimes they admitted committing (e.g., underage drinking and assault) and with their "obvious perjury." These claims warrant no relief. First, defense counsel established that the State did not charge State witness Alec Olhausen with attempted murder, although he admitted attempting to fire a gun at an apparently unarmed man fleeing the scene of the shootings. Second, appellant concedes that his counsel apprised the jury of the criminal acts of several State witnesses. Appellant fails to explain how this was insufficient impeachment or how the additional fact of the State's failure to prosecute would have altered the outcome of appellant's trial. Third, appellant has failed to identify allegedly perjured testimony with any specificity. His perjury claim actually rests upon inconsistencies in the testimony of various State witnesses. "Where conflicting testimony is presented, the jury determines the weight and credibility to give it."[21] Moreover, defense counsel argued that State witnesses "lied" to the jurors and that they must therefore

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[19]Id.

[20]117 Nev. 53, 84, 17 P.3d 397, 416-17 (2001).

[21]Middleton v. State, 114 Nev. 1089, 1102-03, 968 P.2d 296, 306 (1998) (citing Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981)).

decide whether to afford that testimony "any weight at all." Thus, we conclude that appellant has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced.

Appellant next claims that defense counsel were ineffective in failing to request an instruction advising the jury that appellant was justified in using force in defense of another if he believed that the other person would be in imminent danger. We conclude that the hypothetical jury instruction was adequately covered by an instruction issued by the district court.[22] Instruction no. 38 clearly informed the jury that homicide is justifiable when committed in the lawful defense of another.

Appellant also claims that defense counsel should have objected to the instruction on voluntary manslaughter. Specifically, appellant contends that the instruction failed to convey unambiguously that a provocation sufficient to make a homicide voluntary manslaughter did not require a direct physical assault by the victim upon the defendant. Appellant relies upon Schoels, in which this court held that the instruction in question suffered from this infirmity.[23] Even assuming appellant identifies an error in the voluntary manslaughter instruction, he fails to offer any argument that he was prejudiced. And we discern no prejudice. There was no evidence that Reynolds provoked appellant. Further, the jurors' rejection of second-degree murder demonstrates a fortiori that they would have rejected sufficient provocation for voluntary manslaughter.[24] Moreover, where the jurors rejected appellant's self-defense or defense-of-

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[22]See Middleton, 114 Nev. at 1114-15, 968 P.2d at 313.

[23]Schoels, 114 Nev. at 985-86, 966 P.2d at 738.

[24]Byford, 116 Nev. at 236 n.4, 994 P.2d at 714 n.4 ("A homicide arising from an impulse of passion can be either second-degree murder or voluntary manslaughter depending on the circumstances.")

others theories, they would have found insufficient provocation for manslaughter as a matter of law.[25] Thus, we conclude that appellant's claim lacks merit.

Appellant next argues that defense counsel were ineffective in failing to object to "numerous statements" made by the prosecutor "which are outside the bounds of acceptable advocacy." In his closing argument, the prosecutor deplored an era in which "nothing is sacred" and one in which behavior is constrained because "certain individuals" believe that the answer to every criticism, real or imagined, "is to be found inside the barrel of a gun." He argued that such resorts to violence have reached "epic proportions," and "as the representative of the State" he believed "it's time to say enough." He then exhorted the jurors "to stop the madness, to stop the senseless killing of youth." Appellant argues that these statements (1) were "designed to inflame the passions and prejudices of the jury"; (2) concerned factual matters clearly outside the record; (3) constituted an injection of the prosecutor's opinion or personal belief into his argument; and (4) improperly urged the jurors to convict appellant in order to "assist in the solution of some pressing social problem."

Appellant's allegations of misconduct largely lack merit, although we agree that the prosecutor's comments improperly urged the jurors to convict in order to solve a social problem.[26] However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's

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[25]Schoels, 115 Nev. at 37, 975 P.2d at 1278 (reaffirming on rehearing that error in the voluntary manslaughter instruction remained harmless because "the evidence did not show any provocation sufficient to excite an irresistible passion in a reasonable person, a necessary element of voluntary manslaughter").

[26]See Evans v. State, 117 Nev. ___, ___, 28 P.3d 498, 514 (2001).

comments standing alone."[27] To be reversible, the prosecutorial misconduct "must be prejudicial and not merely harmless."[28] We conclude that the isolated improper remarks did not divert the jury from its proper task of convicting appellant for his own crimes.[29] Accordingly, we conclude that any error was harmless.

Appellant next claims that his appellate counsel was ineffective for failing to raise the above issues as independent constitutional violations on appeal. Because we conclude that appellant's constitutional claims lack merit, he was not prejudiced by appellate counsel's failure to raise them on appeal.

Appellant next contends that this court improperly rejected the issues that were raised by appellant on direct appeal. He argues that our decision in Lozada v. State[30] constitutes a basis to raise them again in the instant habeas petition. This claim is meritless. In Evans v. State, we rejected this argument as an unwarranted attempt "to extend our decision in Lozada inappropriately as authority to circumvent the doctrine of the law of the case."[31]

Appellant finally contends that his conviction is invalid due to cumulative errors. We conclude that this claim is without merit because appellant has repeatedly failed to demonstrate that his counsel provided ineffective assistance.

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[27]United States v. Young, 470 U.S. 1, 11 (1985).

[28]Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.")

[29]Evans, 117 Nev. at ___, 28 P. 3d at 515.

[30]110 Nev. 349, 871 P.2d 944 (1994).

[31]Evans, 117 Nev. at ___, 28 P.3d at 521.

In sum, we conclude that appellant has failed to demonstrate that he was entitled to an evidentiary hearing because his claims are either belied or repelled by the record or are not supported by factual allegations that would, if true, entitle him to relief. We further conclude the district court did not abuse its discretion in finding that appellant did not demonstrate "good cause" to conduct discovery. Appellant fails to specify any information that he might have obtained so as to advance his case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Jack Lehman, District Judge
Attorney General/Carson City
Clark County District Attorney
JoNell Thomas
Clark County Clerk