STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1906

Fredy Rene Palma Espinal,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 3, 2009
Affirmed
Crippen, Judge[*]

Washington County District Court
File No. K2-03-1908

Fredy Rene Palma Espinal, MCF-Rush City, OID# 211305, 7600 – 525th Street, Rush City, MN 55069 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert J. Molstad, Assistant Washington County Attorney, 14949 – 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Bjorkman, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

In this pro se appeal, appellant Fredy Rene Palma Espinal challenges the district court's denial of his petition for postconviction relief. Because the court did not err in denying relief based on appellant's claims of ineffective assistance of trial counsel, prosecutorial misconduct, and trial court error, and because appellant was not denied the effective assistance of appellate counsel, we affirm.

FACTS

In 2003, a jury found appellant guilty of attempting to escape custody. At the time of his attempted escape, he had been an inmate in the Washington County Jail awaiting sentencing on a second-degree felony murder conviction.[1] Following his appeal, this court affirmed appellant's escape conviction. *See State v. Espinal*, No. A03-1967 (Minn. App. Sept. 21, 2004), *review denied* (Minn. Dec. 14, 2004) (providing factual background of appellant's attempted escape). The immediate appeal arises from the district court's May 2007 order dismissing appellant's postconviction petition.

D E C I S I O N

"When reviewing a district court's denial of postconviction relief, we review issues of law de novo; on factual matters our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Brocks v. State*, 753 N.W.2d 672, 674 (Minn. 2008).

[1] This court upheld appellant's murder conviction. *State v. Espinal*, No. A03-1967 (Minn. App. Aug. 3, 2004), *review denied* (Minn. Oct. 19, 2004).

Claims that have been raised on direct appeal, or that could have been raised when the direct appeal was taken, may not be considered in a petition for postconviction relief. *State v. Knaffla,* 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Two exceptions to this *Knaffla* rule permit review when the failure was not deliberate and the interests of justice require review, or when a claim is so novel that its legal basis was not available on direct appeal. *Perry v. State,* 731 N.W.2d 143, 146 (Minn. 2007). To the ends of insuring justice, this review includes appellant's *Knaffla*-barred claims.

1. Prosecutorial Misconduct

Appellant alleges that the prosecutor committed misconduct by showing "malice" towards him and making inappropriate arguments to the jury. "The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields,* 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor commits misconduct when he or she engages in acts that materially undermine the fairness of the trial or violate clear and established standards of conduct. *Id*. Although prosecutors may not disparage a defense in the abstract, they are free to argue that a particular defense has no merit. *State v. Griese,* 565 N.W.2d 419, 428 (Minn. 1997).

Absent contemporaneous objections, prosecutorial misconduct is analyzed under the plain-error standard. *Fields,* 730 N.W.2d at 783. Alleged misconduct does not prejudice a defendant's substantial rights when there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *State v. Race,* 383 N.W.2d 656, 664 (Minn. 1986). Where the credibility of the defendant and his explanation of events is

at issue, we give "special attention" to allegations of prosecutorial misconduct. *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997).

Besides alleging that the prosecutor had a "vendetta" against him, appellant can point to no conduct in the record that substantiates his claims of bias and malice. Nothing in the trial transcript confirms appellant's claims that the prosecutor made inappropriate gestures or used body language in an effort to persuade the jury.

During his opening statement, the prosecutor told the jury, "In this trial you are going to learn a few things about the jail across the street, one that's paid with your tax dollars." Appellant does not explain how the prosecutor's "tax dollars" statement prejudiced his case, and it does not constitute plain error.

During his closing argument, the prosecutor asserted that the defense was full of holes, concluding: "So don't get hung up on it. But if you do believe it, acquit him and make it quick." Appellant takes issue with the prosecutor's effort to diminish his defense, but the comment is within the parameters of an appropriate argument on the credibility of testimony. The statement does not constitute plain error.

The prosecutor also made reference to a movie during closing, stating: "Tom Hanks appears in the movie Castaway, talks to a volleyball; [appellant] has been in there for nine months, he wants to make a dummy. He wants to talk to. It's explainable. All right." The prosecutor was not comparing appellant to a "dummy" as appellant claims. The allusion to a popular-culture theme did not prejudice appellant's defense and is not error.

On this record, appellant's claims of prosecutorial misconduct are without merit. Moreover, even if the prosecutor made improper comments, it is not evident that they occurred as part of a design to unfairly disparage appellant, and the record indicates that these comments did not persuade the jury to convict in a case established by strong evidence. *See Race*, 383 N.W.2d at 664 ("[E]ven if the comments by the prosecutor can be reviewed as improper, when the conduct is unintentional, the test we apply is to determine whether the statements likely played a substantial role in influencing the jury's decision."). The district court did not err in denying appellant postconviction relief on his claims of prosecutorial misconduct.

2. Ineffective Assistance of Trial Counsel

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law, which this court reviews de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To establish ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, meaning that counsel failed to exercise the customary skills and diligence of a reasonably competent attorney. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). Generally, "there is a strong presumption that an attorney acts competently." *Dukes*, 621 N.W.2d at 252. If a defendant can show that counsel was deficient, he must also show a reasonable probability that the outcome of the trial would have been different but for the deficiency. *Strickland*, 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068.

An attorney's decisions regarding what evidence to present and whether to call certain witnesses are matters of trial strategy not subject to appellate review for competency. *See Opsahl*, 677 N.W.2d at 421 (stating that appellate courts will generally not review claims of ineffective assistance of counsel based on trial strategy). Although appellant may disagree with the outcome of the strategies employed by his trial counsel, his claims based on counsel's trial decisions do not establish that counsel's decisions fell below an objective standard of reasonableness or that he was prejudiced by his counsel's performance such that the outcome would have been different.

An attorney's "level of investigation and [decisions regarding] whether to object are matters of trial strategy that the court generally will not review." *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001). Appellant has not established that his trial counsel failed to investigate his version of events surrounding his attempted escape. The record contains a letter from appellant's trial counsel responding to one of appellant's requests for copies of his letters. And an "Incoming Legal Mail Report" from the Stillwater jail shows that he received numerous letters from his trial counsel before and after trial. This record also conflicts with appellant's general complaint that counsel neglected to make sufficient contacts with him.

Appellant claims that his trial counsel told the jury that he was "satisfied" with the state's case. A review of the trial transcript indicates that counsel stated, outside the presence of the jury, that he was "satisfied" that the prosecutor had completed required disclosures. This reference included an allusion to trial exhibits defense counsel had reviewed at the prosecutor's office, an opportunity the prosecutor was "kind enough" to

invite. This is not evidence suggesting that trial counsel aided the prosecutor in obtaining a conviction.

During trial, the district court asked trial counsel, "do you wish to have the jury voir dire recorded," and counsel responded that he did not, without explanation. The district court noted: "It is common practice to waive recording of voir dire, and there is no showing this was an inappropriate tactic." Appellant does not explain how his counsel's failure to record the voir dire prejudiced him, or what such a recording would have revealed.

Appellant argues that his attorney should have objected when the prosecutor struck jurors who indicated that they "live in State [sic] with Hispanic population." If appellant is claiming that his counsel failed to object, nothing in the record establishes such a failure. Even if it did, we must defer to counsel's trial strategy. If appellant is claiming that the prosecutor committed misconduct in choosing the jury so as to exclude Hispanic jurors, nothing in the record allows us to address this issue. Appellant's concern over the lack of diversity of the jury does not support a prima facie showing of racial bias or discrimination by the prosecutor. *See State v. Reiners*, 664 N.W.2d 826, 831 (Minn. 2003) ("[T]he use of a peremptory challenge to remove a member of a racial minority does not necessarily establish a prima facie case of discrimination.").

Neither the underlying record nor any offer of proof by appellant establishes a case of ineffective assistance of trial counsel. The district court did not err in denying appellant postconviction relief on his claims of ineffective assistance of trial counsel.

3. Ineffective Assistance of Appellate Counsel

Because it could not be known at the time of direct appeal, a claim of ineffective assistance of appellate counsel may be brought in a petition for postconviction relief after disposition of the direct appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

A defendant's right to the effective assistance of counsel extends to the initial review of his conviction, whether by direct appeal or postconviction petition. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006). The *Strickland* standard noted above also applies to a claim of ineffective assistance of appellate counsel. *See Swenson v. Stat*e, 426 N.W.2d 237, 240 (Minn. App. 1988) (concluding that reasonably effective assistance is the standard for claims of ineffective appellate counsel).

Appellant's claim rests on the assertion that appellate counsel argued a different issue than the one appellant wished to raise on appeal. But when a defendant and appellant counsel disagree about which issues to raise on appeal, "counsel has no duty to include claims which would detract from other more meritorious issues." *Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997) (quotation omitted).

The record contains a letter from counsel to appellant. In the letter, appellate counsel responded to appellant's concerns regarding issues presented on appeal. Counsel wrote, "I did receive your first letter, and took those things into account when we were writing the brief in your appeal. . . . The issues you sent me in the earlier letter are not really issues in an appeal; we raised two issues in your appeal, and they were both well written."

Appellant asserts no facts tending to contradict what is shown in the letter assuring appellant his claims were duly weighed. Examined in light of the record and appellant's claims, there is nothing to rebut the presumption of counsel's reasonable competence. Moreover, appellant has not shown that the theory of his choice, if it had been presented, would have changed the result of the appeal. Appellant's ineffective-assistance-of-appellate-counsel claim is without merit.

4. District Court Errors

Appellant claims that his due-process right to a fair trial was violated and his defense prejudiced because of trial court abuses of discretion. We are mindful that the constitutional guarantee of a fair trial does not mandate a trial which is perfect in every detail. *State v. Billington*, 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954).

Appellant claims that during trial, the district court erred by telling the jury that appellant's trial counsel was "a good and excellent attorney," and that they should "take his phone number and address." Nothing in the record supports this claim.

Appellant claims that the district court told the jury his full name after the parties agreed "not to mention [his] name in a suspicious way," and as a result, the jurors realized that he had been previously convicted of murder, resulting in prejudice to his case. The record shows the court's announcement of appellant's name and appellant's wish to be referred to as Mr. Palma. "So, even though his name may be Palma Espinal, we are going to talk about him as Mr. Palma." The district court did not inform the jury that appellant had been convicted of second-degree felony murder. And if the jurors somehow were aware of this fact, nothing indicates that it affected their verdict.

Appellant contends that the district court should have prevented his murder victim's family from crying and screaming that he was guilty in earshot of the jury. Nothing in the record substantiates this claim.

Appellant argues that his trial interpreters were not qualified and made many translation mistakes during trial, but neither the record nor appellant's assertions show any mistakes by the interpreters.

Appellant claims that the district court failed to provide him with an interpreter during sentencing. During the sentencing hearing, the district court asked: "Do we have an interpreter? Let me ask [appellant's counsel], is your client going to proceed without the services of an interpreter, or does he wish to have an interpreter present to assist him?" Appellant's attorney conferred with appellant, and then said, "I have had an opportunity to confer with my client and he is prepared to proceed." Appellant's claims regarding interpretation are without merit.

Nothing in the record or claims of fact suggested by appellant show that he was denied a fair trial. He has not otherwise demonstrated error in the district court's denial of his petition for postconviction relief.

Affirmed.