IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Nov 30 2020 03:39 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SEAN MAURICE DEAN,

Appellant,

vs. CASE NO.81209

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

THE HONORABLE AARON D. FORD
ATTORNEY GENERAL OF NEVADA
100 N. CARSON STREET
CARSON CITY, NV 89701

TYLER J. INGRAM Elko County District Attorney's Office Mark S. Mills State Bar Number 11660 540 Court Street, 2nd Floor Elko, NV 89801 (775) 738-3101 ATTORNEYS FOR RESPONDENT	DAVID B. LOCKIE State Bar Number: 2384 919 IDAHO STREET ELKO, NV 89801 (775) 738-1928 ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Statutes

Cases

STATEMENT OF ISSUES

I. Whether Dean's trial attorney rendered ineffective assistance of counsel by addressing the issue of racial prejudice during jury selection.

II. Whether Dean's trial attorney rendered ineffective assistance of counsel during his direct examination of Dean by asking Dean about his knowledge of knife-fighting.

III. Whether Dean's trial attorney rendered ineffective assistance of counsel for failing to admit an officer's recorded interview with Dean into evidence at trial.

STATEMENT OF THE CASE

On March 24, 2016, the State filed an amended criminal information charging Appellant Dean (hereinafter "Dean") with COUNT 1: Attempted Murder With the Use of a Deadly Weapon; COUNT 2: Battery With a Deadly Weapon Resulting in Substantial Bodily Harm; COUNT 3: Battery With a Deadly Weapon (in the alternative to COUNT 2); COUNT 4: Battery Resulting in Substantial Bodily Harm (in the alternative to COUNT 2 and COUNT 3); and COUNT 5: Battery With a Deadly Weapon; and COUNT 6: habitual criminal. [Appellant's appendix (hereinafter "AA," Vol. 1, p. 1].

On June 28, 2016, a jury convicted Dean of COUNT 1: Attempted Murder With the Use of a Deadly Weapon, COUNT 2: Battery With a Deadly Weapon Resulting in Substantial Bodily Harm, and COUNT 5: Battery With a Deadly Weapon. (AA, Vol. 2, p. 73).

On October 12, 2017, Dean was sentenced to 72-180 months on COUNT 1, with a consecutive term of 48-120 for the deadly weapon enhancement; 48-120 on COUNT 2, to be served concurrently to COUNT 1; and 24-72 on COUNT 5, to be served consecutively to COUNT 1 and COUNT 2. (AA, Vol. 2, pp. 73-74).

On April 16, 2019, Dean filed a VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS. (AA, Vol. 2, p. 89). On April 22, 2019, the

State filed an opposition to Dean's petition. (AA, Vol. 2, p. 100). On April 24, 2020, the district court entered an ORDER DENYING HABEAS RELIEF. (AA, Vol. 2, p. 204).

On October 14, 2020, Dean filed his opening brief in the instant appeal. The State hereby responds.

STATEMENT OF THE FACTS

At trial, Bert Minter testified that on December 8, 2015, Minter was residing with his ex-wife, Denise Minter, at a trailer located at 764 S. 5th St. in Elko, NV. (AA, Vol. 1, p. 45). On the evening of December 8th, Denise's ex-boyfriend, Petitioner Sean Dean, showed up at the trailer, pounding on the door. (AA, Vol. 1, p. 46). Denise went outside to talk to Dean, while Bert remained inside watching TV. (AA, Vol. 1, p. 46). Bert could hear Denise and Dean talking to each other outside, but couldn't hear what they were saying. (AA, Vol. 1, p. 46). Denise and Bert started yelling at each other, so Bert walked to the door to open it to see what was going on. (AA, Vol. 1, p. 46). When Bert opened the door, he observed that Denise and Dean were on the porch outside the door yelling at each other, at which point Dean looked at Bert and said, "You want something?" (AA, Vol. 1, p. 46). Bert and Dean had a back-and-forth verbal exchange, arguing with each other, during the course of which Dean, Bert, and Denise all walked down from the porch to the ground. (AA, Vol. 1, p. 47).

Dean then punched Bert in the face with his left hand, at which point Bert hit Dean back, and they started fighting, hitting each other, and eventually ended up on the ground. (AA, Vol. 1, p. 47). There was a brief break in the fight, where they let go of each other and got up. (AA, Vol. 1, p.

47). Dean started walking away, then turned around and started saying things to Bert again. (AA, Vol. 1, p. 47). Dean then ran at Bert and hit him, and then they started fighting again. (AA, Vol. 1, p. 47).

Then Dean said, "Fuck this, motherfucker!" and reached into his pocket with his right hand, reached his left hand over to his right hand,[1] and then started giving Bert what Bert initially thought was a series of roundhouse punches to Bert's side. (AA, Vol. 1, p. 47). Bert later realized that he had been stabbed multiple times by Dean. Bert was stabbed once in the butt, three times in his left side, and three times on his arm. (AA, Vol. 1, p. 47).

After Dean stabbed Bert seven times, Dean ran away down the driveway. (AA, Vol. 1, p. 47). After Dean ran away, Bert realized that Denise also had been stabbed, when he heard Denise exclaim, "Oh my God, I got stabbed too!" (AA, Vol. 1, p. 48). Bert observed that there was a stab wound above Denise's left breast. (AA, Vol. 1, p. 48).

At trial, Denise's testimony was largely consistent with Bert's. Denise testified that her ex-boyfriend, Petitioner, showed up at her trailer on the evening of December 8, 2015. (AA, Vol. 1, p. 138). Before arriving at her

[1] The reasonable inference that can be drawn from this fact is that Dean used his left hand to open the blade of the folding knife that was used to stab Bert.

residence, she and Dean had been texting back and forth about their relationship. (AA, Vol. 1, pp. 137-138). Dean asked her about someone in a gray SUV coming to her residence. (AA, Vol. 1, p. 138). He also asked her to come see him, but she declined, and he threatened her because she would not come. (AA, Vol. 1, p. 138). She eventually got tired and wanted to go to bed, so she ended the phone call. (AA, Vol. 1, p. 138). Dean then showed up knocking at her door. (AA, Vol. 1, p. 138).

Denise left the trailer to go outside to talk to Dean, where she became upset when she realized that Dean had been drinking. (AA, Vol. 1, p. 138). Bert then came out, and Bert and Dean began "talking crap" to each other. (AA, Vol. 1, p. 138). The next thing Denise knew, Bert and Dean were in a fight. (AA, Vol. 1, p. 139). Denise testified that she believed that Dean threw the first punch, and then they started fighting. (AA, Vol. 1, p. 140). All three of them, including Denise, ended up on the ground. (AA, Vol. 1, p. 140). Bert and Dean eventually let go of each other and got up (AA, Vol. 1, p. 140). Dean initially started walking away, but then "more words were exchanged," and then Dean ran back up to Bert and punched him in the face. (AA, Vol. 1, p. 140).

Dean then pulled something from his back pocket and started hitting Bert on the side of his body. (AA, Vol. 1, p. 140-141). Dean also struck

Denise on the chest above the heart. (AA, Vol. 1, p. 141). Dean then turned around and walked off down the driveway. (AA, Vol. 1, p. 141).

Denise then realized that she and Bert had both been stabbed by Dean. (AA, Vol. 1, p. 141). She and Bert ended up going to the hospital for medical treatment. (AA, Vol. 1, p. 141-142).

Joseph Schenk also testified at trial. At the time of the crimes in this case, Schenk was engaged to be married to Bert Minter's daughter, Brittany Tice. (AA, Vol. 1, p. 86). Schenk and Tice lived in a trailer next door to Denise's trailer, outside of which the stabbings occurred.

Schenk testified that on the evening of December 8, 2015, he was inside his residence with his fiancé when he heard a female screaming. (AA, Vol. 1, p. 87). Schenk then ran outside and saw Bert Minter lying on his left side on the ground. (AA, Vol. 1, p. 87). Schenk initially thought that Bert was having a medical issue, so he went back inside, put on some glasses and shoes, and then went back outside. (AA, Vol. 1, p. 87).

Schenk ran back outside, helped Bert back up off the ground, and then noticed Denise and Dean to the left of him. (AA, Vol. 1, p. 87). It seemed to Schenk that everyone was angry and out of breath, and looked like they had been fighting. (AA, Vol. 1, p. 87).

Dean then said, "Eff this, mothereffer,"[2] and then pulled out a knife and started stabbing Bert. (AA, Vol. 1, p. 87-88). Dean had a fold-out knife in his right hand and was stabbing Bert's waist. (AA, Vol. 1, p. 87-88). Schenk ran back into the house, told his fiancé to call 911, and grabbed a gun. (AA, Vol. 1, p. 88). When Schenk came back outside a few minutes later, Dean was gone, and Schenk observed that Denise also had a stab wound on her chest. (AA, Vol. 1, p. 88).

At trial, Christina Hodges, who lived across the street from the trailer park where the stabbing occurred, testified that on the evening of December 8, 2015, she was in her residence getting ready for work, when she heard a woman screaming. (AA, Vol. 1, p. 101). Hodges went outside her residence and heard the woman screaming something to the effect of "Sean, stop stabbing me!" (AA, Vol. 1, p. 101). Hodges walked down off her front porch, walked over to her neighbor's parking spot, and looked across the street to where she had heard the screaming coming from. (AA, Vol. 1, p. 101, 104). Hodges could see some wrestling and moving across the street in the trailer park where the stabbing occurred. (AA, Vol. 1, p. 101).

After calling 911, Hodges saw a man running toward her from the

[2] It's clear from the trial transcript that Schenk used the phrase "Eff this, mother-effer" as a euphemism for what Dean really said, which was "Fuck this, motherfucker!"

trailer park toward 5th St., where Hodges was located. (AA, Vol. 1, p. 143). The man crossed 5th St. and ran into the trailer park on other side of 5th St. (the side of 5th St. where Hodge's residence was located). (AA, Vol. 1, p. 101). The man ran between the trailers and then Hodges heard a door slam. (AA, Vol. 1, p. 101). The trailer park that Hodges saw the man run into was the same one where Dean was eventually located a little while later, where he was found in the trailer of a person by the name of Lindsey Steele, who testified at trial.

On December 8, 2015, Lindsey Steele lived at a trailer with her boyfriend Clarence Thompson, at 701 S. 5th St., just across 5th St. from where the stabbing occurred. (AA, Vol. 1, p. 107). That evening, she was returning from Pizza Hut when she observed Dean walking across 5th St. back towards Lindsey's trailer. (AA, Vol. 1, p. 101). She knew who Dean was because he was friends with her boyfriend, Clarence Thompson. (AA, Vol. 1, p. 101).

Thompson and Dean walked into the trailer while Lindsey was getting her son out of the car. (AA, Vol. 1, p. 108). Lindsey had a "bad feeling something happened" because Dean had been drinking and had been upset throughout the day. (AA, Vol. 1, p. 108). When Lindsey entered the trailer, she observed a knife on the floor in the living room next to the couch. (AA,

Vol. 1, p. 108). The knife was not hers, she had not seen it before, and it had not been there when she and Clarence had left to go to Pizza Hut a while earlier. (AA, Vol. 1, p. 108).

The police arrived a short while later and took Dean into custody. (AA, Vol. 1, p. 108). Steele picked up the knife and handed it to a police officer. (AA, Vol. 1, p. 109).

Dr. Christopher Ward, a general surgeon at the Elko hospital who performed surgery on Bert Minter after the stabbing, testified that Bert had four wounds in a line on his torso, the deepest of which was three or four inches deep. (AA, Vol. 1, p. 129).

After Dean was taken into custody, he was interviewed by Detective Pete Nielson of the Elko Police Department, during the course of which Dean admitted to being in the altercation with Bert and Denise, but denied stabbing them. (AA, Vol. 1, p. 183). When asked about the stab wounds suffered by Bert and Denise, Dean claimed that Bert and Denise were the ones wielding knives, and that they must have accidentally stabbed each other. (AA, Vol. 1, p. 183).

SUMMARY OF ARGUMENT

In this appeal, Dean argues that the district court erred in denying his Petition for a Writ of Habeas Corpus in the court below. Specifically, Dean contends that his trial attorney, Gary Woodbury, was ineffective for addressing the issue of racial prejudice during jury selection, and for asking Dean questions relating to Dean's knowledge of knife-fighting. Additionally, Dean argues that Woodbury was ineffective for failing to introduce into evidence at trial an officer's recorded interview with Dean at the hospital shortly after the incident that gave rise to this prosecution.

None of these arguments has any merit. With regards to Woodbury's handling of jury selection, Dean (an African American) was concerned about being tried by an all-white jury. In order to address that concern, Mr. Woodbury effectively and competently raised the issue of racial prejudice with the prospective jury panel. That was sound trial strategy. Mr. Woodbury's decision to ask Dean about his knowledge of knife-fighting was also a trial strategy, designed to rebut the State's argument that Dean intended to kill Bert Minter when he stabbed him.

Finally, Mr. Woodbury was not ineffective for failing to introduce into evidence the video recorded interview of Dean at the hospital, as the video would have done nothing to further his defense.

Finally, even if Mr. Woodbury was ineffective in any of the ways alleged by Dean, Dean suffered no prejudice as a result of Woodbury's performance, since the evidence of Dean's guilt was overwhelming. The testimony of multiple eye-witnesses (including eye witnesses other than the direct victims) established conclusively that Dean stabbed Bert and Denise Minter with a knife.

Dean's arguments on appeal are without merit, and the order of the district court should be affirmed.

ARGUMENT

In his appeal, Dean raises two arguments. First, he argues that his trial attorney rendered ineffective assistance of counsel by (1) exhibiting racist behavior that infected the trial, and by (2) failing to introduce a recorded video of Sgt. Jason Pepper's interview of Dean at the hospital shortly after the incident that gave rise to his prosecution. Because Dean's trial attorney's performance was not deficient, and because Dean suffered no prejudice, his appeal should be denied and his convictions affirmed.

Respondent will address each of Dean's arguments in turn, but will first provide an overview of the law governing IAC claims.

I. Legal Standard for an Ineffective Assistance of Counsel Claim

Of course, the landmark case dealing with IAC claims in habeas corpus petitions is *Strickland v. Washington*, 466 U.S. 668 (1984), in which the U.S. Supreme Court set forth the legal standard for assessing IAC claims. In that case, the Court held that in order to prevail in an IAC claim, a Petitioner must make two showings. First, the petitioner "must show that counsel's performance was deficient," which requires that the petitioner demonstrate that his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Additionally, a petitioner must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984).

In deciding IAC claims, "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Strickland v. Washington, 466 U.S. 668, 689-690 (1984). As the Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 689 (1984) (citations and quotes omitted).

Basically, in assessing a trial counsel's performance, there is a strong presumption that trial counsel's decisions could be considered "sound trial

strategy." If a petitioner is not able to overcome this strong presumption, then he cannot succeed in showing that his trial counsel's performance was deficient, i.e., falling below an objective standard of reasonableness.

Second, in addition to showing that trial counsel's performance was deficient, a petitioner must also show that the deficient performance prejudiced the petitioner's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Court explained that not every error made by a trial attorney warrants reversal; rather, only those trial errors which actually prejudiced a petitioner's case entitle a petitioner to relief:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland v. Washington, 466 U.S. 668, 693 (1984).

In order to make a showing of prejudice, the petitioner must show

"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. In discussing the prejudice requirement, the Court further explained that in order to make a showing of prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (citations omitted).

The Court emphasized that a petitioner must make both showings: "Unless a defendant makes both showings, it cannot be said that the conviction…resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Court also emphasized that a district court reviewing an IAC claim may address the prejudice prong and the deficiency prong in any order; in other words, if a district court concludes that a petitioner has suffered no prejudice, the court can dispose of a habeas petition without ever even addressing the deficiency prong. The Court explained:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach

> the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697 (1984).

Finally, it is important to remember that it is the petitioner who bears the burden of proving both prongs (i.e., the deficiency prong and the prejudice prong) in a habeas petition alleging an IAC claim. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *Means v. State*, 120 Nev. 1001, 1011 (2004). Furthermore, the petitioner has the burden of proving the facts underlying an IAC claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012 (2004) ("[W]e now hold that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence").

II. Mr. Woodbury's performance was not deficient as a result of racial prejudice.

In ground one of his appeal, Dean argues that his trial attorney, Gary Woodbury, held racist views which affected his performance at trial. For the

following reasons, the State disagrees.

Dean points to three pieces of evidence in support of his argument that Woodbury held racist views that affected his advocacy: (1) Woodbury's use of an offensive racial epithet in a handwritten note to himself, (2) Woodbury's questioning of prospective jurors about racial prejudice during voir dire, and (3) Woodbury's questioning of Dean about his knowledge of knife-fighting during his direct examination of Dean.

As set forth below, none of the alleged incidents of racially-tinged advocacy constituted deficient performance on the part of Mr. Woodbury.

a. <u>Woodbury's use of an offensive racial epithet in a hand-written note to himself does not constitute ineffective assistance of counsel.</u>

First, while trial was still ongoing, Dean happened to observe a note that Woodbury had written on a notepad. The note read: "So Schenk is a ['N-word'] too"—a reference to one of the State's witnesses, Joseph Schenk, who, like Dean, was African American. (Respondent's Appendix [hereinafter "RA"], Vol. 1, p. 16). Understandably upset at his attorney's use of the offensive racial epithet, Dean wrote a letter to Woodbury after the trial, confronting him about his use of that word, and Woodbury wrote him back, addressing Dean's concerns. (RA, Vol. 1, pp. 18-28). Because of this conflict that developed between Woodbury and Dean, a new defense

attorney was appointed to represent Dean at his sentencing hearing. (RA, Vol. 1, p. 12).

At the habeas corpus evidentiary hearing, Mr. Woodbury testified about his use of that word in a hand-written note he had made during jury selection.

When petitioner's attorney asked Mr. Woodbury why he made the note regarding Schenk, Woodbury explained,

> I know why I took the note regarding Mr. Schenk, if that's what you're asking…Mr. Dean was a black defendant. And the jury panel that was out there was—there were no black people on it….I was concerned, as you rationally have to be, whether or not the jury panel would attribute racial characteristics to Mr. Dean….And it was during that time [voir dire]…that it was also evident that Mr. Schenk could suffer from the same kind of prejudices that a jury panel might feel towards Mr. Dean. And that wasn't the first time I thought of it, it just happened to be the first time I wrote it down.

(AA, Vol. 2, pp. 136-137).

On cross-examination, Woodbury elaborated further: "It was also a question of putting the jury in the position of having—if they were going to take Mr. Dean down because of his race, they also had to take Schenk down because of his race." (AA, Vol. 2, p. 150).

In other words, Woodbury recognized that one of the State's key witnesses—Joseph Schenk—was also African American, and wondered whether Schenk might suffer from the same prejudices as his client. That's

the reason Woodbury wrote what he did on the notebook—and there was nothing racist in the intent of what Woodbury wrote. Rather, the inference of racism arises solely from Woodbury's choice to use a highly offensive racial epithet in describing the race of Schenk and Dean.

At the evidentiary hearing, Woodbury explained that he meant no offense by using that word. Specifically, he stated, "It was not intended to be an insult; it was something I simply wrote down. I would have proceeded at the voir dire process the same whether I wrote the note or not because it was already on my mind." (AA, Vol. 2, p. 150).

Mr. Woodbury then emphatically rejected the idea that he harbored any racial animus towards African Americans, or that any such prejudice influenced his advocacy in this case. Specifically, the exchange between Woodbury and the prosecutor is as follows:

Q. Did your use of the N-word have any particular to you?
A. No.
Q. Do you have any particular animus or dislike towards African Americans?
A. I do not.
Q. Would your represent them any less zealously because of their race?
A. I not only wouldn't because it would be immoral to do that, but also it would violate the rules of being a lawyer.
Q. So it would be immoral and in violation of the rules of being a lawyer, correct?
A. Yes.
Q. And you would not do that?
A. I would avoid it.

Q. And you did not do that in this case, correct?
A. I absolutely did not.
Q. In fact, over…the history of your life and your career as a lawyer, you've interacted with and well with people of other races; is that correct?
A. I have represented a number of African American clients and I have associated with a number of people of different races for a variety of reasons.
Q. In fact, just to give one example, are you familiar with a prosecutor by the name of Tiffany Hill that worked for the district attorney's office a number of years back?
A. Yes.
Q. And were you the district attorney at that time?
A. I was.
Q. So she worked for you?
A. Yes.
Q. Was she African American?
A. Yes.
Q. She was hired while you were district attorney, correct?
A. She was.

(AA, Vol. 2, p. 151).

Mr. Woodbury's act of writing an offensive racial epithet on a notepad was not ever communicated to the jury, nor was the note directed at or intended to be communicated to Dean. (AA, Vol. 2, p. 182). It was simply a personal note Woodbury made to himself addressing the issue of whether racial prejudice might influence the jury's perception of one of the State's witnesses (Joseph Schenk). Because the note was never disclosed to the jury, the note itself had no direct impact the trial or jury deliberation.

Furthermore, Dean himself acknowledged at the evidentiary hearing that, aside from observing that Woodbury had used the "N-word" in a personal note on a legal pad, *Dean had never heard Woodbury make a disparaging remark about African Americans*. (AA, Vol. 2, p. 181).

Nevertheless, Dean argues that Woodbury's use of that word is reflective of a racist mindset on the part of Woodbury, and that Woodbury's alleged racist tendencies influenced Woodbury's advocacy of Dean. Specifically, Dean argues that Woodbury's allegedly racist mindset manifested itself during voir dire, and then again during Woobury's direct examination of Dean. Respondent will address each of those allegations in turn.

b. <u>Woodbury's questioning of prospective jurors was sound trial strategy and did not constitute ineffective assistance of counsel.</u>

Before trial, Mr. Dean, who is African American, was highly concerned about his ability to obtain a fair trial in front of an all-white or predominantly white jury. Dean expressed this concern to his attorney, Mr. Woodbury, who took measures during jury selection to address the issue of racial prejudice.

Mr. Woodbury broached the topic in the following manner:

Q. Did anybody on the jury notice whether Mr. Dean is black or not?

Pretty clear, isn't it?

Anybody on the jury notice whether or not there is another black person in the room?

Pretty clear, isn't it?

Did you ever think you would be sitting as a juror with a black guy sitting in a defendant's box and you would be asked to be fair about him?

Anybody that thinks they can't be fair?

Are there any jurors sitting here who do not have some kind of notion that black people have certain attributes that are widely known, from your television or things that you have read or friends you have talked to?

(AA, Vol. 1, 39).

Mr. Woodbury then asked the prospective jurors about offensive racial stereotypes, such as the notion that African Americans like watermelon, "have an attribute for violence," or are "sneaky." (AA, Vol. 1, p. 39).

Woodbury then went on to explain to the prospective jurors why he was asking questions regarding offensive racial stereotypes:

What we're trying to accomplish is…we're not asking you to fall in love with black people; we not deciding anything like that. We are not asking for you to be more than fair or to fall over backward to pull Dean out of this.

But what we are asking is that when you hear evidence that triggers in your mind—just in your mind—that there is an attribute that black guys have that explains his conduct, we're asking you to do one thing: Take one second and think about

whether or not the evidence justifies that conclusion or whether you are just putting an assumption that you have heard sometime before in other circumstances and applying it to Mr. Dean.

Is there anybody that thinks they can't or wouldn't or shouldn't do something like that?...

(AA, Vol. 1, p. 39).

Mr. Woodbury then asked whether the prospective jurors agreed that everyone harbors racial assumptions in some form or another, to which one of the prospective jurors took objection, stating, "No, I—you know, we're all equal, so why would you make an assumption about somebody based on their skin color? That—that's unfair, right? All of us don't do that. I don't…have those assumptions about Hispanic, black. Don't matter where you come from, we're all equal, we all bleed red." (AA, Vol. 1, p. 39).

After some additional back and forth, the prospective juror reaffirmed, "So I can't agree that I would have an assumption. And –I can't assume based on skin color. And I won't," after which the following exchange occurred:

Q. **And you realize that that would be in accordance with the Nevada justice system? Fundamental part of justice is everybody gets gauged on their own personal state, not something like color?**

A. Yes, that's correct. I agree. It shouldn't be based on where you come from, what color are your [sic].

Q. **Conversely, you also agree that not everybody can do that, talk about it the same way you are?**

A. I wish everybody could, but I agree that everybody can't.

Q. **So then is it fair for us to ask that any assumptions that any juror makes regarding Mr. Dean based on his skin color is unfair?**

A. Yes.

(AA, Vol. 1, p. 39).

At the habeas corpus evidentiary hearing, Woodbury discussed his approach to jury selection in this case, including how he addressed the issue of representing a black defendant in front of an all-white jury. Woodbury testified that Dean had expressed the opinion to Woodbury that he didn't think he could get a fair trial in Elko because of his race. (AA, Vol. 2, p. 149). Because of this concern, Woodbury made efforts to address the issue of race during voir dire. (AA, Vol. 2, pp. 138, 149). These efforts included asking prospective jurors about offensive racial stereotypes. (AA, Vol. 2, pp. 138, 149).

Woodbury explained that he was worried about subconscious racial biases jurors might harbor, and negative first impressions that the jurors might have of his client based on his race. (AA, Vol. 2, p. 138). Woodbury further explained that he addressed the issue of offensive racial stereotypes with the jurors in order to move issues of racial bias from the subconscious to the conscious mind, to get jurors thinking about issues of racial prejudice,

so that they could "rationally and logically see that racial prejudice is kind of stupid." (AA, Vol. 2, pp. 138-139, 149).

Woodbury explained,

> It was my intent to get somebody on that jury…who would realize if somebody is sitting at the deliberation table after the trial is over, said, "there is a knife and a black guy, we don't need anything more," that—first of all, we try to prevent anyone at the table from saying that. And second of all, what I was trying to accomplish was that if somebody said that, somebody would stand up on their hind legs and say, "we're here to make a decision about Sean Dean, not about blacks and knives."

(AA, Vol. 2, p. 139).

By raising the issue of racial bias, Woodbury was moving the issue of race to the forefront of their thinking, getting them thinking about it so they would take measures to not be racist or perceived as racist, (AA, Vol. 2, p. 150).

In light of Dean's concern about getting a fair trial because of his race, Woodbury's decision to vet the issue during jury selection was sound trial strategy.

c. <u>Woodbury's questioning of Dean about his knowledge concerning knife fighting had a rational strategic purpose and did not constitute ineffective assistance of counsel</u>

Dean also alleges that Woodbury rendered ineffective assistance of counsel by asking him about his knowledge of knife fighting during his

direct examination. Here is the portion of Dean's direct examination to which he objects:

> **Q. Mr. Dean, while you were being raised in Sacramento, California, did you have…friends or associates or people that you knew that got in knife fights?**
> A. Yes.
> **Q. Did you ever get in one?**
> A. A few.
> **Q. All right. Were you the person with the knife?**
> A. No sir. Knives been pulled on me.
> **Q. Excuse me?**
> A. They were pulled on me.
> **Q. Ah. Based on that kind of knowledge, did you learn if you were going to hurt somebody real bad with a knife, maybe kill them, how you would go about doing that?**
> A. Try to puncture them and twist it and rip it, just try to—try to rip, try to rip something.
> **Q. Okay, is that something you have ever done?**
> A. No, sir.
> **Q. How do you know that's how you are supposed to do it?**
> A. That's how it has been done ever since I known people that get into knife fights.
> **Q. Okay.**
> A. Most effective way to hurt somebody.

(AA, Vol. 2, p. 38).

Mr. Woodbury testified at the evidentiary hearing about his strategic purpose in eliciting that testimony. One of the charges that Dean was facing at trial—indeed, the most serious charge—was the charge of Attempted Murder with the Use of a Deadly Weapon. In order defend against that charge, Mr. Woodbury wanted to be able to argue to the jury that Dean

never intended to kill Bert Minter, because if Dean had wanted Bert dead, Dean would have been able to kill him. When asked what the strategic purpose was of putting on that evidence, Woodbury explained: "Well, I think what I said in closing argument essentially was that if Mr. Dean had wanted Mr. Minter dead, which was the underlying charge, he would have been dead if Mr. Dean was the person with the knife. Which meant that theoretically it could turn into a not guilty verdict or at least a verdict of guilty to a lesser offense." (AA, Vol. 2, p. 149).

In eliciting that testimony, Woodbury emphasized for the jury that the reason Dean knew about knife fighting was not because Dean was ever the aggressor with a knife.

He also testified that he discussed this trial strategy with Dean before Dean testified, a fact which is corroborated by a hand-written conversation between Woodbury and Dean during trial before Dean testified. (RA, Vol. 1, p. 30).

As the district court noted in its order:

> The court concludes that (as required by his rules of professional conduct) Woodbury discussed his approach on direct examination with Petitioner before calling him as a witness. This approach had no racial aspect to it. And, Petitioner's testimony was presented to a jury that agreed to not consider racial stereotypes in deciding the case. Under the circumstances, the court fails to see how Woodbury's direct examination was objectively unreasonable or prejudiced the defense.

(AA, Vol. 2, p. 223).

In sum, Mr. Woodbury's decision to ask Dean about his knowledge of knife fighting—which Woodbury had discussed with Dean prior asking him about it in direction examination—was a trial strategy designed to rebut the State's argument that Dean intended to kill Bert Minter when he stabbed him.

III. Mr. Woodbury was not ineffective for failing to offer Sgt. Pepper's recorded interview with Dean into evidence; further, it is irrelevant whether the district court improperly ruled that Dean's statements in the video were inadmissible hearsay.

In his habeas petition filed in district court, Dean argued that Woodbury rendered ineffective assistance of counsel for failing to introduce into evidence a video that Sgt. Jason Pepper recorded of Dean at the hospital shortly after the altercation with Bert and Denise Minter. In rejecting that particular ground for Dean's petition, the district court concluded that the video would not have been helpful to the defense, as Dean gave the same basic statement to Sgt. Pepper that he did later to Detective Nielson (and Nielson's interview was admitted into evidence). Because the video wouldn't have been helpful to the defense, Mr. Woodbury was not ineffective for failing to introduce it.

In its order, the district court commented that Pepper's interview with Dean would have been inadmissible hearsay. (AA, Vol. 2, p. 225). As the court correctly noted, a party's statement is admissible only if offered against him by the other party; the party's own statement is inadmissible hearsay if offered to prove the truth of the matter asserted. NRS 51.035(3). On appeal, Dean argues that the district court erred in stating that Dean's own statements, if offered by him, would have been inadmissible hearsay, because the statements would have met the excited utterance exception to the hearsay rule. NRS 51.095.

However, assuming for the sake of argument that the statements would have been admissible, the statements would have done little, if anything, to help Dean's defense. As the district court noted, in substance Dean's statement to Sgt. Pepper was consistent with his statement to Detective Nielson, which was admitted into evidence. (AA, Vol. 2, p. 225). Mr. Woodbury cannot be said to have rendered ineffective assistance of counsel for failing to admit the statements. Aspects of the video other than Dean's statements, such as his demeanor and the possible presence of injuries on his person, likewise would have been unhelpful. In the court below, Dean argued that the video would have shown that Dean was not drunk. Whether or not Dean appears drunk in the video is debatable, but the

larger point is that whether Dean was drunk or not is irrelevant. And it hardly would have helped Dean's case to argue to the jury that he was stone-cold sober, rather than intoxicated, when he stabbed a man seven times.

Finally, as the court pointed out, the video contains no evidence to support Dean's insinuation that the video would have shown a defensive would on his hand other than the wound that was addressed at trial. (AA, Vol. 2, p. 225).

Because the video would have done absolutely nothing to advance any of Dean's defenses, Mr. Woodbury was not ineffective for offering the video into evidence.

IV. Even if Woodbury's performance was deficient in any of the ways alleged above, Dean suffered no prejudice as a result of Woodbury's allegedly deficient performance.

The evidence of Dean's guilt in this case was overwhelming. Consequently, even if Woodbury's performance was deficient, Dean suffered no prejudice because Woodbury's alleged deficient performance would did not affect the outcome of the case.

Furthermore, even if it could be shown that Mr. Woodbury's performance fell below an objective standard of reasonableness, any deficient performance on his part caused no prejudice to Dean.

Dean's interview with Detective Nielson placed Mr. Woodbury at a distinct disadvantage at trial. By telling Nielson an implausible story about Bert and Denise stabbing each other, rather than simply claiming self-defense, Dean locked his defense attorney into an untenable, implausible defense. Additionally, the physical evidence (e.g., the stab wounds to the victims) and the eye-witness testimony, when combined with Dean's interview with Detective Nielson, overwhelmingly prove that Dean committed the crimes he was convicted of. In the face of that evidence against Dean, the alleged errors in judgment made by trial counsel (if this court even concludes that errors were made), had no bearing on the outcome of the case. Petitioner suffered no prejudice. Accordingly, his petition should be denied.

CONCLUSION

The U.S. Supreme Court has held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

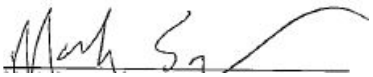
The trial in this case cannot be said to have produced an unjust result. The record reflects that Mr. Woodbury offered effective representation of Dean. In determining whether trial counsel rendered ineffective assistance, there is a strong presumption that trial counsel's performance was not deficient. In this case, Dean has not overcome that presumption. In light of Dean's concern about being tried by an all-white jury, Mr. Woodbury effectively and competently addressed the issue of racial prejudice with the panel of prospective jurors. Additionally, concerned about Dean being convicted of the attempted murder charge, Woodbury (in consultation with Dean) elicited testimony from Dean about his knowledge of knife fighting in order to rebut the State's argument that Dean intended to kill Bert when he stabbed him. Additionally, Woodbury was not ineffective for failing to introduce Sgt. Pepper's body-cam video into evidence, as that video would have done little, if anything, to bolster Dean's defenses.

Finally, even if Woodbury was ineffective in any of the ways alleged by Dean, Dean suffered no prejudice, for the outcome of the case would have been no different had Woodbury handled differently the issues raised by Dean in this appeal. The relatively uncontroverted evidence introduced at trial (by multiple eye-witnesses) was that Dean pulled a knife and stabbed Bert Minter at least seven times, and Denise Minter once.

For all of those reasons, this court should affirm the district court's order denying Dean's petition, and Dean's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of November, 2020.

TYLER J. INGRAM
Elko County District Attorney

By: 

Mark S. Mills
Deputy District Attorney
State Bar Number: 11660

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 7,119 words.

I hereby certify that I have read the Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record

///

///

///

on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2020.

TYLER J. INGRAM
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

By: 
Mark S. Mills
Deputy District Attorney
State Bar Number: 11660

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of November, 2020. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

DAVID B. LOCKIE
Attorney for Appellant

/S/ Amanda Waugh
Amanda Waugh
CASEWORKER

DA#: AP-20-01134