

SUPREME COURT OF LOUISIANA

No. 16-KH-0505

STATE EX REL. LUIS RODRIGUEZ-HERNANDEZ

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE TWENTY-SECOND
JUDICIAL DISTRICT COURT, PARISH OF ST. TAMMANY**

PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the remaining claims, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. We attach hereto and make a part hereof the district court's written reasons denying relator's application.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

LUIS STARLYN RODRIGUEZ-HERNANDEZ NO. 465867-3 "B"

VERSUS

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

N. BURL CAIN, WARDEN

STATE OF LOUISIANA

FILED:

October 13, 2015 Sheri P. Viviano

DEPUTY CLERK

JUDGMENT ON POST-CONVICTION
WITH INCORPORATED REASONS

On August 31, 2015, petitioner Luis Starlyn Rodriguez-Hernandez ("Rodriguez" or "petitioner") filed a timely pro se application for Post-Conviction Relief. The application was mistakenly filed in Washington Parish, which is also within the 22nd Judicial District. The application was transferred to and was subsequently filed in St. Tammany Parish, the parish of Rodriguez' conviction. See La. C.C.P. art. 925. After considering the application and the applicable law, the Court finds the application may be dismissed upon the pleadings pursuant to La. C.Cr.P. art. 928.

The record shows Rodriguez was charged by grand jury indictment with first degree murder, a violation of La. R.S. 14:30. Carlos Rodriguez (no relation to the petitioner), Erly Montoya and Gina Scramuzza were charged with first degree murder in the same indictment. The state severed the charges against the petitioner and tried him separately. The state elected not to pursue the death penalty. Following a jury trial, the petitioner was found guilty as charged. He was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.

Rodriguez appealed. In his sole assignment of error, Rodriguez claimed his trial counsel was ineffective for failing to object to the prosecutor's expression of his personal opinion as to petitioner's guilt in closing argument. The appellate court found no merit to this claim and affirmed Rodriguez's conviction and sentence in an unpublished opinion. *State v. Rodriguez-Hernandez*, 2012-1040 (La. App. 1 Cir. 9/13/13). The Louisiana Supreme Court denied writs. *State v. Rodriguez-Hernandez*, 2013-2476 (La. 5/23/14); 140 So.3d 722 (Mem.).

In his post-conviction application, Rodriguez raises three claims: (1) the evidence was insufficient to convict and appellate counsel was constitutionally ineffective for failing to assign this as an error in the direct appeal; (2) the trial court abused its discretion by admitting evidence

of Melvin Gonzales' prior statement as impeachment evidence and trial counsel was constitutionally ineffective for failing to object to its admission; and (3) his constitutional rights were violated when he was denied the right to testify on his own behalf. Each of these claims will be addressed separately.

Evidence Sufficiency

Although more often raised on appeal, timely free-standing claims challenging the sufficiency of the evidence are cognizable on collateral review. *State ex rel. Montgomery v. State*, 2012–2116 (La. 3/15/13), 109 So.3d 371. "In reviewing the sufficiency of the evidence to support a conviction, an appellate court in Louisiana is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)... [T]he appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Captville*, 448 So.2d 676, 678 (La.1984).

First degree murder is the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of certain enumerated felonies, including robbery or kidnapping. La. R.S. 14:30(A)(1). First degree murder is also the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing. La. R.S. 14:30(A)(4). The state argued to the jury that the evidence proved beyond a reasonable doubt the petitioner committed first degree murder under both of these theories.

Rodriguez contends there was no evidence linking him to the killing of the victim, Mario Scramuzza, Jr. He argues the state failed to prove he had the requisite specific intent to commit first degree murder, second degree murder, or manslaughter, or to be a principal to any of those crimes. Rodriguez maintains he was hired to help only with an insurance scam, which involved removing items from the Scramuzza household. He claims Carlos Rodriguez committed the murder of Mr. Scramuzza, and that he had no knowledge Carlos Rodriguez and Gina Scramuzza planned to kill Mr. Scramuzza. He claims only circumstantial evidence links him to the killing.

In *State v. Taylor*, 2014-0432, p. 7-8 (La. 3/17/15); 166 So.3d 988, 993, the Louisiana

Supreme Court discussed the standard of review in a circumstantial evidence case:

In cases involving circumstantial evidence, when "the jury reasonably rejects the hypothesis of innocence presented by the defendant [], that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt." *State v. Captville*, 448 So.2d 676, 680 (La.1984). The alternative hypothesis is not one that merely "could explain the events in an exculpatory fashion," but one that, after viewing *all* of the evidence in a light most favorable to the prosecution, admissible as well as inadmissible, "is sufficiently reasonable that a rational juror could not 'have found proof of guilt beyond a reasonable doubt.'" *Captville*, 448 So.2d at 680 (quoting *Jackson*); see *State v. Hearold*, 603 So.2d 731, 734 (La.1992) ("[W]hen the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial.").

The appellate court summarized the facts of the case, as follows:

On February 28, 2009, Detective Alvin Hotard with the St. Tammany Parish Sheriff's Office reported to a home in Covington belonging to the victim and his wife, Gina Scramuzza, where the victim's body was found in the laundry room. The home had been ransacked, and many items were missing. As police investigated the scene, Gina made statements confirming her involvement in the victim's murder. The subsequent investigation led officers to identify Carlos Rodriguez, Erly Montoya, and defendant (as well as Gina) as all having been involved with the murder.

Defendant gave two taped statements after he was arrested, and both were played at trial. According to his second statement, Gina drove defendant, [Carlos] Rodriguez, and Montoya to the home where she and the victim lived, and the three men waited for the victim to arrive. Defendant indicated that he and Montoya planned to take the six-foot-two-inch tall, 236-pound victim down to the ground "for [[Carlos]Rodriguez]." When the victim arrived, Montoya pointed a gun at him and told him to get on the ground. According to the defendant, he and Montoya grabbed the victim. However, as the victim went to the ground under his own volition, Montoya and defendant fell with him. Defendant stated that [Carlos] Rodriguez then tied up the victim. Defendant further indicated that he seized several items from the house and placed them into a vehicle that was parked in the garage. While loading the vehicle, defendant heard a noise, reentered the house, and saw the victim kicking. According to defendant's statement, after he moved the victim's legs, he went back into the garage. Minutes later, [Carlos] Rodriguez exited the home and the three men left. Many of the items taken from the home were subsequently located in defendant's apartment.

Dr. Michael Defatta, Chief Deputy Coroner with the St. Tammany Parish Coroner's office, testified that the victim's cause of death was asphyxia due to strangulation and blunt-force trauma. He also testified that abrasions and bruises on the victim's body were consistent with binding of the wrists. *Rodriguez*, 2012-1040, p. 2-3.

The petitioner admitted to being in the Scramuzza residence and to participating (he argues) in an insurance scam which involved removing belongings from the house. Although Rodriguez denied touching the victim in his first statement, he was more forthcoming in his second statement after police questioned him about inconsistencies between his first statement

and information they received from Rodriguez's roommate, Melvin Gonzales. Given the inconsistencies between Rodriguez' first statement and his second statement, and considering the other evidence presented, the jury was entitled to believe that Rodriguez's second statement was not entirely honest and to reject Rodriguez's claim that he was not involved with the plan to kill or inflict great bodily injury on the victim. In addition to the evidence described by the appellate opinion, the following evidence was introduced at trial.

In his first statement, Rodriguez admitted that Gina Scramuzza picked him up, along with Carlos Rodriguez and Montoya at a Wal-Mart and took them to her house. But Gina Scramuzza left at some point, so the men would have had no way to take items out of the house in furtherance of any insurance scam. Rodriguez also admitted in his first statement that he knew they would be loading up the items taken into a truck that belonged to Mr. Scramuzza. He and the other men waited around in the house from daylight until it became dark, waiting on Mr. Scramuzza to come home. In the second statement, the petitioner admitted that his part in the plan, along with Montoya who was armed with a gun, was to "take down" Mr. Scramuzza and incapacitate him for Carlos Rodriguez.

The state introduced a statement taken by Melvin Gonzales, Rodriguez's roommate. Gonzales was arrested at the same time as Rodriguez and was charged with possession of cocaine which was found in the sofa he was sleeping on. Gonzales told the officers several details which Rodriguez had disclosed to him, including the fact that Rodriguez held down the victim's legs while Carlos Rodriguez strangled the victim. Armed with the new details gleaned from Gonzales's statement, the officers again questioned Rodriguez. Rodriguez admitted in his second statement that he grabbed Mr. Scramuzza's bound legs at some point, but minimized his involvement by stating he did so to move the victim's legs to prevent the victim from kicking an object and making noise. The state argued persuasively there was no need for Rodriguez to hold down the victim's legs which were already bound. The state argued persuasively there was no need to prevent the victim from making noise as the Scramuzza house was not close to other dwellings and the doors and shutters on the house were closed.

The state introduced forensic DNA evidence which showed the petitioner could not be excluded as a person who had been in contact with the victim's neck. DNA evidence also showed the petitioner and the other men drank beer at the Scramuzza residence. The state

argued persuasively that waiting around for the homeowner to show up without means of a getaway, ambushing the homeowner while armed with a weapon, and tying up the homeowner who clearly was not in on the alleged "scam" were all inconsistent with Rodriguez's claim that he was at the Scramuzza house only to assist with an insurance scam. The jury chose not to believe Rodriguez's attempts to minimize his involvement and the evidence showed Rodriguez's alternative explanation of his involvement was unworthy of belief.

Instead, the evidence presented by the state clearly showed that the petitioner participated in an armed robbery in connection with the murder.¹ Armed robbery is the taking of anything of value belonging to another from the person of another by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64(A). The victim's son testified that some of the items recovered from Rodriguez's home belonged to him or his father. Rodriguez in his statement confirmed that he and Montoya, who was armed with a gun, were tasked with forcing the victim to the ground. Once on the ground, the victim was incapacitated and the men began to remove items out of the house and put them into the victim's truck.

Even if the jury believed that Rodriguez did not know about the intended murder, a rational juror could have found proved beyond a reasonable doubt by Rodriguez's own statements that he had the requisite specific intent to inflict great bodily harm on the victim. He and Montoya ambushed the victim in the narrow hallway leading from the garage so the victim could be "taken down" and incapacitated for Carlos Rodriguez. Even if the petitioner only moved the victim's legs, and did not hold them down when the victim was being strangled as the evidence suggests, he did so knowing the victim was fighting to get away. The coroner testified there were bruises and abrasions and evidence of blunt force trauma on the victim's body. Viewing the evidence in the light most favorable to the prosecution, the court finds the evidence was sufficient to convince a rational trier of fact that all of the elements of La. R.S. 14:30(A)(1) were proved beyond a reasonable doubt and that the killing of a human being occurred while the offender had specific intent to kill or to inflict great bodily harm while engaged in the perpetration or attempted perpetration of armed robbery.

¹ The state also argued the murder was committed in connection with an aggravated kidnapping. Aggravated kidnapping is the imprisoning or forcible secreting of any person with the intent to force the victim to give up anything of apparent or present value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control. La. R.S. 14:44(A)(3). The court pretermits discussing whether the evidence satisfied the requirement of proving the elements of aggravated kidnapping, as the state needed only to prove beyond a reasonable doubt the elements of one of the underlying felonies perpetrated or attempted in connection with the killing in order to prove the petitioner's guilt under La. R.S. 14:30(A)(1).

In one of his statements, the petitioner admitted he was paid \$500 with money that came from Gina Scramuzza. Although Rodriguez claims the money was for his assistance in the alleged insurance scam, the jury could infer from the evidence that the payment by Gina Scramuzza was for Rodriguez's assistance in the murder of her husband. Considering the evidence already discussed about Rodriguez's specific intent, the court finds the evidence was also sufficient to convince a rational trier of fact that all of the elements of La. R.S. 14:30(A)(4) were proved beyond a reasonable doubt and that the killing of Mario Scramuzza, Jr. occurred and the perpetrators received money for the killing. The court finds the petitioner is not entitled to post-conviction relief on this ground.

In connection with this issue, Rodriguez claims his appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of evidence sufficiency on appeal. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, falling below an "effective standard of reasonableness," and (2) the deficient performance prejudiced the petitioner. *Id.*, 466 U.S. at 687-688, 104 S.Ct. at 2065. In order to show prejudice, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. In order for a claim of ineffective assistance of counsel to be successful, both prongs of the analysis must be shown.

Assuming (for the sake of argument) the court found the performance of appellate counsel was deficient, Rodriguez would be unable to satisfy the prejudice prong of the *Strickland* analysis. Rodriguez has raised this issue in post-conviction. This court has reviewed the claim of evidence insufficiency and has found it to be without merit. Thus, Rodriguez has not been denied the opportunity to have a court review the constitutional sufficiency of the evidence used to convict him. Rodriguez is unable to show ineffective assistance of counsel and this subsidiary claim is found to have no merit.

Impeachment Evidence

The petitioner argues the trial court erred in allowing the state to use an unsworn statement given to police by his roommate, Melvin Gonzales, as a prior inconsistent statement to impeach Gonzales' credibility at trial. Initially, the court notes the claim itself is waived, as

there was no defense objection at trial to the introduction of the prior statement. The law is clear that an error cannot be availed of after verdict unless it was objected to at the time of occurrence. La. C.Cr.P. art. 841. In addition, the issue raised is not cognizable on post-conviction as it deals only with the violation of a statutory rule. Thus, the issue is not one of the specific grounds stated for post-conviction relief. See La. C.Cr.P. art. 930.3.

The petitioner seeks to circumvent the waiver of this issue by raising a companion argument that trial counsel was ineffective for failing to object. As previously stated, in order for a claim of ineffective assistance of counsel to be successful, both the deficient performance and prejudice prongs of the *Strickland* analysis must be shown. In order to determine whether defense counsel's performance was deficient, the merits of the issue must be addressed.

Although a prior inconsistent statement may be used to attack the credibility of a witness, Rodriguez contends the state was not interested in attacking Gonzales's credibility. Instead, Rodriguez claims the prosecution wanted the statement introduced to put before the jury substantive evidence of his guilt. La. Code Evid. Art. 607 D(2) permits the introduction of a prior inconsistent statement, even though it is inadmissible hearsay, for the limited purpose of attacking the credibility of a witness. The long-standing jurisprudential rule in Louisiana recognizes "when a witness other than the defendant is impeached by the admission of a prior inconsistent statement incriminating the defendant, the statement is admissible only on the issue of credibility and not as substantive evidence of the defendant's guilt." *State v. Cousin*, 1996-2973 (La. 4/14/98); 710 So.2d 1065, 1069. *Cousin* further instructed that "a statement by a witness that merely denies making a prior statement which incriminated the accused does not, by the substance of the in-court testimony, damage the prosecutor's case ... The denial itself is non-evidence, and it is unnecessary to attack the credibility of non-evidence." *Id.*, 710 So.2d at 1071.

The record shows Gonzales, when called as a state witness, never denied making a prior statement to the authorities, either in his direct or cross-examination. Vol. 4, pp. 804, 818. In fact, Gonzales admitted: "I told the detective that Luis was by the house and they wanted to burglarize the house and that Carlos Rodriguez was choking the man. And I said Luis was holding the man's leg. That's what I said." Vol. 4, p. 805. As the prosecutor went through the substance of his prior statement, Gonzales denied, agreed or claimed not to remember other

specific details.

At trial, Gonzales testified the reason he made this statement was that he had been arrested for cocaine possession. Gonzales claimed he was scared and was promised the drug charge would go away if he cooperated and gave a statement implicating Rodriguez in the Scramuzza murder. Gonzales also testified the police told him what to say.

The court finds the situation presented here is not the same as the one at issue in *Cousin*. Here, Gonzales never denied making the prior statement. Although he claimed not to remember specific details of what he told to police, there was no need for the state to impeach Gonzales' trial testimony since Gonzales admitted he made the prior statements to police. There was no substantive violation of the rule in *Cousin*.

Defense counsel specifically asked Gonzales on cross-examination whether he denied giving a statement about Rodriguez to police. Gonzales responded that he did not deny making the statement. Defense counsel reiterated his question and Gonzales said, "no." Thereafter, defense counsel elicited from Gonzales the reason he claimed he made those statements, *i.e.* to avoid the consequences of his own pending drug possession charge. Vol. 4, p. 818. Since Gonzales did not deny making the statement to police, and in fact admitted he told the police certain facts which he later claimed at trial were untrue, there was no need for the state to try to impeach him. Since there was no violation of *Cousin*, defense counsel did not have grounds to object to the introduction of Gonzales' statement. The court holds defense counsel did not provide ineffective assistance for failing to take futile steps. *State v. Tillman*, 2015-0635, p. 1 (La. 925/15); __So.3d__ (2015 WL 5841829), *citing State v. Kenner*, 336 So.2d 824, 831 (La. 19976) and *State v. Williams*, 613 So.2d 252, 256-57 (La. App. 1 Cir. 1992).

The petitioner cannot show trial counsel provided deficient performance. Thus, Rodriguez's subsidiary claim of ineffective assistance of counsel in connection with this issue has no merit.

Right to Testify

The petitioner claims his constitutional right to testify in his own defense was violated when defense counsel refused to allow him to take the stand. Rodriguez asserts he expressed his desire to testify repeatedly but was told by defense counsel that counsel did not think Rodriguez needed to testify, as the burden of proof was the state's, and that Rodriguez should not testify


due to a prior criminal record.

Although an attorney's interference with a defendant's desire to testify may violate the defendant's constitutional rights, the law requires "that the claimant 'allege specific facts, including an affidavit from counsel' and point to record evidence to support his claim." *State v. James*, 2005-2512, p. 1 (La. 9/29/06); 938 So.2d 691, citing *State v. Hampton*, 2000-0522, p. 14-15 (La. 3/22/02); 818 So.2d 720, 729-730. The law holds that mere conclusory allegations are insufficient to rebut a presumption arising from the defendant's silence at trial that he waived his right to testify. *Id.* The court finds the petitioner has failed to satisfy the guidelines not only for prevailing on the merits of the claim raised, but also for making the claim with sufficient particularity to withstand summary denial on the pleadings without further evidentiary proceedings.

None of the grounds raised by petitioner have merit.

Accordingly, the Court denies and dismisses petitioner Luis Starlyn Rodriguez-Hernandez's Application for Post-Conviction Relief in its entirety.

Covington, Louisiana, this 15th day of October, 2015.



Hon. August J. Hand, Judge
22nd Judicial District Court, Division B