

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY HUGHES WALKER, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43939

FILED

FEB 17 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Johnny Walker, Jr.'s post-conviction petition for a writ of habeas corpus, motion for appointment of counsel, motion for a continuance, motion to attach supplemental exhibits, and motion to amend petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant and his cousin Christian Walker were charged with the murder of Maureen McConaha and tried separately. On May 5, 2000, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after twenty years. This court affirmed appellant's judgment of conviction and sentence on direct appeal.<sup>1</sup> The remittitur issued on November 8, 2002.

On September 26, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant also filed a motion for appointment of counsel, motion for a

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<sup>1</sup>Walker v. State, Docket No. 36252 (Order of Affirmance, September 10, 2002).

continuance, motion to attach supplemental exhibits, and motion to amend his petition for a writ of habeas corpus. The State opposed the petition and motions. Appellant filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court conducted an evidentiary hearing on August 27, 2004, and subsequently denied appellant's petition and motions. This appeal followed.<sup>2</sup>

In his petition for a writ of habeas corpus, appellant raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>3</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup> The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>6</sup>

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<sup>2</sup>We conclude that the district court did not err in denying appellant's motion for appointment of counsel, motion for a continuance, motion to attach supplemental exhibits, and motion to amend petition for a writ of habeas corpus.

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Id.

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant contended that his trial counsel were ineffective for failing to interview and subpoena Dean Jahn. Jahn was incarcerated at the Clark County Detention Center (CCDC) during the same time period as appellant and his cousin Christian. Appellant claimed that Jahn would have been able to impeach jailhouse informant Mark Smith, who testified that appellant admitted to killing McConaha. Appellant attached an affidavit from Jahn in support of this claim.

We conclude that appellant failed to demonstrate that his counsel were ineffective for failing to interview Jahn. Appellant's trial counsel, Dayvid Figler and Daniel Bunin, testified during the evidentiary hearing that they were not aware that Jahn possessed information that would impeach Smith. Further, appellant stated that he did not know that Jahn had this information prior to trial. Because appellant did not establish that his attorneys' failure to interview Jahn was objectively unreasonable, the district court did not err in denying this claim.<sup>7</sup>

Second, appellant claimed that his trial counsel were ineffective for failing to interview and subpoena Jesus Lopez. Appellant contended that Lopez would have impeached witness Josh Martinez, who testified that Christian was in possession of a .25 caliber gun weeks before the murder. Appellant attached an affidavit from Lopez, in which Lopez asserted that Christian had a .22 caliber gun and that Martinez's trial testimony was inaccurate.

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<sup>7</sup>To the extent that appellant argued that his counsel were ineffective for failing to interview other inmates who shared his module at the CCDC, we conclude that he failed to adequately support his claim with specific facts. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

During the evidentiary hearing, appellant's trial counsel testified that although Lopez's first name was mentioned in a police report, they were unable to locate him based on his first name alone. Additionally, they had numerous discussions with appellant about potential witnesses, and he never provided them with Lopez's name. Finally, we note that counsel vigorously questioned Martinez on cross-examination concerning Christian's weapon. We therefore conclude that appellant did not establish that his counsel were ineffective for failing to interview and subpoena Lopez.

Third, appellant asserted that his trial counsel were ineffective for failing to interview and subpoena Danielle Hoop. Appellant contended that Hoop would have testified that Christian was upset and crying when she and Tawsha Orillo visited appellant and Christian a few days after McConaha was murdered. Appellant argued that this would have impeached Orillo's trial testimony that appellant and Christian made expressions of guilt when she and Hoop visited them.

A review of the record reveals that Orillo testified at trial that she asked Christian if he killed McConaha, and he responded by looking at the ground. Orillo then asked appellant if Christian killed McConaha, and he "got jumpy and said no, no, no, that he didn't." We conclude that Hoop's testimony that Christian was upset and crying would not have altered the outcome of appellant's trial. Moreover, appellant's trial counsel testified during the evidentiary hearing that an investigator spent many hours attempting to locate Hoop, but was unable to do so. Because appellant failed to demonstrate that his attorneys' conduct was unreasonable, or that he was prejudiced by their actions, the district court did not err in denying this claim.

Fourth, appellant contended that his trial counsel were ineffective for failing to investigate and interview any of the guests at the party that appellant, Christian, and McConaha attended the night of the murder. Appellant claimed that party guests could have impeached Dana Eichar and Timothy Roche's testimony concerning the approximate times they attended the party. However, appellant failed to include specific facts to support his assertion that other party guests would have impeached Eichar and Roche's testimony.<sup>8</sup> Therefore, we affirm the district court's denial of this claim.

Fifth, appellant argued that his trial counsel were ineffective for failing to impeach Eichar with her prior statement to police that appellant and Christian returned to the party between 12:30 and 1:00 a.m. A review of the record reveals that Eichar testified at trial that appellant and Christian returned to the party at 12:30 a.m. Appellant failed to demonstrate that the outcome of his trial would have been altered if his trial counsel had questioned Eichar about her previous statement. Consequently, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel were ineffective for failing to interview Sarah Hendricks concerning the three figures she saw the night of the murder. Appellant asserted that if his trial counsel had interviewed Hendricks prior to trial, they would have been able to demonstrate that the three figures were actually residents of a nearby house. However, Hendricks testified at trial that it was dark and she could only see the shapes of three individuals. Appellant failed to articulate how interviewing Hendricks prior to trial would have altered

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<sup>8</sup>See id.

her trial testimony. Therefore, appellant did not demonstrate that his counsel were ineffective.

Seventh, appellant contended that his trial counsel were ineffective for failing to impeach Hendricks with her prior statement to police that the figures were juveniles. During trial, Hendricks did not testify that the figures she saw were juveniles. A review of the record reveals that Hendricks admitted on cross-examination that her view of the figures lasted no more than two seconds, and that it was very dark outside. Attorney Figler testified during the evidentiary hearing that he believed they were effective in cross-examining Hendricks, and it was not necessary to question her about her previous statement. We conclude that the district court's denial of this claim was supported by substantial evidence and was not clearly wrong.<sup>9</sup> Accordingly, the district court did not err in denying this claim.

Eighth, appellant argued that his trial counsel were ineffective for failing to obtain the GameWorks game card that was in Christian's possession when he was arrested. Appellant asserted that GameWorks personnel could have analyzed the game card to determine the date, time, and games played on the card. This would have bolstered appellant's defense that he and Christian were at GameWorks the night of the murder.

Attorney Figler testified that his investigator spent a lot of time attempting to find the card, but was unable to track it down. He further testified that he asked Christian's attorney about the game card, but was not given any helpful information in that regard. We note that an analysis of the game card would not have provided the name of the person

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<sup>9</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.

using it, and its ultimate value in supporting appellant's alibi defense was therefore limited. Because appellant did not demonstrate that his trial counsel failed to exercise reasonable diligence in attempting to locate the game card, the district court did not err in denying this claim.

Ninth, appellant alleged that his trial counsel were ineffective for failing to interview and subpoena Samantha Hopkins and Clifton Clark. Appellant asserted that Hopkins and Clark would have testified that they saw appellant and Christian at GameWorks before midnight the night of the murder. Appellant claimed that this would have impeached Eichar and Roche's testimony that appellant and Christian returned to the party at midnight or 12:30 a.m.

We conclude that appellant is not entitled to relief on this claim. Figler testified that his investigator attempted to locate every person appellant saw at GameWorks. The only person able to testify to seeing appellant and Christian was Jennifer Benedict, who stated that she saw them at GameWorks at 11:45 p.m. Further, appellant failed to establish that Hopkins and Clark's testimony would have altered the outcome of his trial, in light of the fact that Benedict provided substantially the same testimony. Consequently, we affirm the district court's denial of this claim.

Tenth, appellant claimed that his trial counsel were ineffective for failing to interview and subpoena Heidi Bowers and Christopher Isaacson. Appellant stated that Bowers and Isaacson would have corroborated the testimony of defense witnesses Benedict, Kyan Anderson, and Glen Howes. We conclude that appellant failed to demonstrate that testimony from Bowers or Isaacson would have altered the outcome of his trial, because other defense witnesses provided substantially the same testimony at trial. Further, appellant admitted during the evidentiary

hearing that he did not provide Bowers and Isaacson's names to his counsel prior to trial. For these reasons, appellant did not establish that his trial counsel were ineffective for failing to interview these witnesses.

Eleventh, appellant contended that his trial counsel were ineffective for failing to investigate the black Pizza Hut apron found in Christian's bedroom. The State's theory was that McConaha had the apron with her the night she was murdered. Appellant argued that an investigation would have revealed: (1) that the apron had been washed the week before and was not in possession of McConaha the night she was murdered; or (2) that the apron belonged to a neighbor who frequently visited Christian's residence.

We conclude that appellant failed to demonstrate that he was prejudiced by any failure to investigate the black Pizza Hut apron. The defense never disputed the State's assertion that McConaha was with appellant and Christian prior to going to the party. Therefore, even if further investigation had revealed that McConaha did not have the apron in her possession the night she was murdered, appellant did not demonstrate that the outcome of his trial would have been different. As such, the district court did not err in denying this claim.<sup>10</sup>

Twelfth, appellant argued that his trial counsel were ineffective for failing to investigate the black backpack and blue backpack discovered during a search of Christian's bedroom. The State asserted that one of the backpacks belonged to McConaha. Appellant contended that a thorough investigation would have revealed that neither backpack

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<sup>10</sup>For the reasons stated above, we similarly affirm the district court's denial of appellant's claim that his counsel were ineffective for failing to have a DNA test performed on blond hair discovered on the apron.



belonged to McConaha. However, even assuming that an investigation had produced such evidence, appellant failed to establish that the outcome of his trial would have been different. As stated above, the defense never disputed that McConaha was with appellant and Christian prior to going to the party. Therefore, the presence or absence of McConaha's backpack was of minimal evidentiary value, and we affirm the order of the district court with respect to this claim.

Thirteenth, appellant alleged that his trial counsel were ineffective for failing to investigate incoming pages made to McConaha's pager. Appellant contended that Christian paged McConaha for several days after she was murdered, and this information would have aided his defense.

We conclude that appellant did not demonstrate that this evidence would have altered the outcome of his trial. The State presented evidence at trial that Christian left messages on McConaha's answering machine after she was killed. Appellant's trial counsel testified that they did not believe evidence that Christian also paged McConaha would have added anything to the defense. The district court's denial of this claim was supported by substantial evidence and was not clearly wrong.<sup>11</sup> Consequently, we affirm the order of the district court with respect to this claim.

Fourteenth, appellant contended that his trial counsel were ineffective for failing to have a toxicology test conducted on a blood sample withdrawn from him eight days after the murder. Appellant argued that a toxicology test would have revealed that he had no illegal substances present in his blood. Initially, we note that appellant failed to

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<sup>11</sup>See id.

demonstrate that a toxicology test conducted eight days after the murder would have any relevance to the night of the murder. Moreover, appellant did not establish how evidence that he was not under the influence of illegal drugs would have altered the outcome of his trial. Therefore, he failed to demonstrate that his trial counsel were ineffective, and we affirm the district court's denial of this claim.

Fifteenth, appellant asserted that his trial counsel were ineffective for failing to have a DNA test performed on an empty bottle of Bud Light discovered near McConaha's body. The State elicited testimony that Bud Light was served at the party that appellant, Christian, and McConaha attended the evening of the murder.

We conclude that appellant failed to establish that he was prejudiced by his trial counsel's failure to have a DNA test performed on the beer bottle. Testimony at trial revealed that many people had access to the area where McConaha's body was discovered. Therefore, even assuming there was adequate DNA on the beer bottle to perform a test that excluded appellant as a source, he did not demonstrate that the outcome of his trial would have been different. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant contended that his trial counsel were ineffective for failing to secure expert testimony concerning the effects of drugs. Specifically, appellant asserted that expert testimony would have been useful to impeach Orillo and Smith, as they both admitted to using drugs.

A review of the record reveals that appellant's trial counsel extensively cross-examined both Orillo and Smith concerning their drug use. During the evidentiary hearing, attorney Figler stated that they did not secure expert testimony because they did not believe that the effects of

various illegal drugs were beyond the jury's understanding. We conclude that appellant did not establish that his trial counsel acted objectively unreasonably in failing to procure an expert witness, and we affirm the district court's denial of this claim.

Seventeenth, appellant claimed that his trial counsel were ineffective for failing to investigate Douglas Ackley as a possible suspect. Appellant attached a memorandum written by an investigator working for Christian's attorney. The memorandum noted that Ackley told the investigator that he walked through the same desert area where McConaha's body was located a few hours after it was believed she was murdered.

During the evidentiary hearing, Figler testified that they investigated Ackley in order to determine if he was a viable alternative suspect. After conducting the investigation, however, Figler and Bunin decided on a strategy of presenting the jury with one alternative suspect—Orillo. We conclude that this was a reasonable tactical choice, and as such was entitled to deference.<sup>12</sup> Further, appellant failed to demonstrate that presenting Ackley as a possible suspect would have altered the outcome of his trial, as the only piece of evidence connecting Ackley to McConaha's murder was his statement that he walked through the area where her body was discovered. Consequently, appellant did not establish that his counsel were ineffective, and we affirm the order of the district court in this regard.

Eighteenth, appellant claimed that his counsel were ineffective for failing to adequately investigate Orillo as a possible suspect and present evidence that Orillo had threatened McConaha in the past.

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<sup>12</sup>See *id.* at 653, 878 P.2d at 281-82.

However, appellant's trial counsel questioned various witnesses, including Orillo herself, about Orillo's threatening behavior toward McConaha and others. Appellant's claim is therefore belied by the record,<sup>13</sup> and we affirm the district court's denial of this claim.

Nineteenth, appellant contended that his trial counsel were ineffective for failing to investigate McConaha's involvement in counterfeiting money. Appellant asserted that this information would have demonstrated that McConaha was involved with dangerous people. However, appellant failed to adequately demonstrate that McConaha was involved in counterfeiting money, or that his counsel were aware of this activity. Moreover, appellant failed to establish that the outcome of his trial would have been different if the jury had been informed that McConaha was involved in counterfeiting money. Thus, the district court did not err in denying this claim.

Twentieth, appellant claimed that his trial counsel were ineffective for failing to present testimony from Nearie Howes. Appellant contended that Howes would have testified that she and McConaha used illegal drugs and would ingest drugs with strangers. A review of the record reveals that various witnesses testified to McConaha's drug habit. Figler testified that Howes was about to give birth at the time of appellant's trial, and because her testimony was cumulative and of minimal importance, they did not call her as a witness. Because appellant did not establish that his counsel acted unreasonably in this instance, he failed to demonstrate that his counsel were ineffective.

Twenty-first, appellant alleged that his trial counsel were ineffective for failing to procure testimony from Alicia Jiminez. Appellant

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<sup>13</sup>See Hargrove, 100 Nev. at 503, 686 at 225.

included a written statement from Jiminez in which she claimed that McConaha showed her letters written by an ex-boyfriend in which he threatened to kill McConaha if she did not break up with Christian.

At the evidentiary hearing, appellant's trial counsel testified that they were not aware of these letters. Further, the substance of these letters was hearsay, and appellant failed to demonstrate that they would have been admissible.<sup>14</sup> Consequently, the district court did not err in denying this claim.

Twenty-second, appellant argued that his trial counsel were ineffective for failing to object to the State's questioning of Orillo about an incident of witness intimidation.<sup>15</sup> Specifically, the prosecutor asked Orillo whether she did something to prevent a witness from testifying in appellant and Christian's previous trial for the attempted murder of David Dimas.

We conclude this claim is without merit. Prior to trial, the district court conducted a Petrocelli hearing<sup>16</sup> and ruled that evidence of the Dimas shooting was admissible in appellant's trial. Appellant failed to articulate a valid basis on which his trial counsel should have objected to Orillo's testimony. Further, he did not establish that the outcome of his trial would have been affected if his counsel had objected. Accordingly,

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<sup>14</sup>See NRS 51.035.

<sup>15</sup>Appellant additionally raised the following four issues independently from his ineffective assistance of counsel claim. They should have been raised on direct appeal and are waived because appellant did not demonstrate good cause for failing to do so. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>16</sup>See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

appellant failed to demonstrate that his counsel were ineffective on this issue.

Twenty-third, appellant claimed that his trial counsel were ineffective for failing to object to Smith's testimony concerning the Dimas shooting. However, as previously stated, evidence of the Dimas shooting was admissible in appellant's trial. He therefore did not establish that his counsel acted unreasonably in failing to object to this testimony.

Twenty-fourth, appellant contended that his trial counsel were ineffective for failing to object to the State's attempt to elicit testimony concerning Christian's trial. A review of the record reveals that outside the presence of the jury, appellant's trial counsel objected to references to Christian's trial. Therefore, this claim is belied by the record.<sup>17</sup> We further note that although several witnesses made a reference to Christian's trial, nothing was said to indicate whether Christian was found guilty.

Twenty-fifth, appellant argued that his counsel were ineffective for failing to object to Detective Tremel's testimony that he found a rifle or shotgun while searching Christian's storage locker. Trial counsel did object to this testimony, and this claim is therefore belied by the record.<sup>18</sup> Thus, district court did not err in denying appellant relief on this claim.

Twenty-sixth, appellant claimed that his trial counsel were ineffective for failing to object to the testimony of the substitute coroner. A review of the record reveals that trial counsel vigorously objected to

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<sup>17</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.


<sup>18</sup>See id.

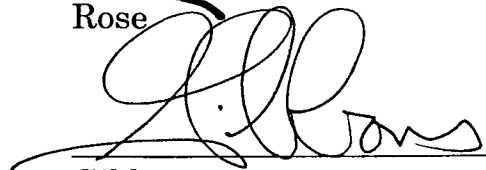
testimony from Dr. Giles Green. Therefore, this claim is also belied by the record,<sup>19</sup> and we affirm the district court's denial of this claim.

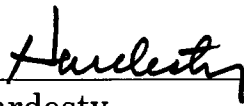
Finally, appellant contended that the cumulative effect of his trial counsel's errors rendered his trial unfair. However, because appellant did not demonstrate that his trial counsel erred, he necessarily failed to establish a claim of cumulative error.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>20</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Donald M. Mosley, District Judge  
Johnny Hughes Walker Jr.  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>19</sup>See id.

<sup>20</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).