

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45079

**FILED**

DEC 06 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On June 4, 2002, the district court convicted appellant, pursuant to a jury verdict, of two counts of robbery, larceny from the person, battery with a deadly weapon with substantial bodily harm, mayhem, and attempted robbery. The district court adjudicated appellant a habitual felon pursuant to NRS 207.012 for the two felony robbery counts and sentenced him to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. The district court also sentenced appellant to serve a total of fifteen to thirty-nine years on the remaining counts. On direct appeal, this court vacated the battery with a deadly weapon with substantial bodily harm conviction, but affirmed the judgment of conviction for the remaining counts.<sup>1</sup> The remittitur issued on December 2, 2003. The district court amended the judgment of conviction on January 16, 2004, vacating the battery count.

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<sup>1</sup>Stanley v. State, Docket No. 39775 (Order Affirming in Part, Reversing in Part and Remanding, November 4, 2003).

On April 19, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On May 10, 2005, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised numerous claims of ineffective assistance of trial counsel.<sup>2</sup> To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>3</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>5</sup> Further, 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>To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

<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>Strickland, 466 U.S. at 697.

<sup>5</sup>Means v. State, 120 Nev. \_\_\_, \_\_\_, 103 P.3d 25, 33 (2004).

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

First, appellant claimed that his counsel was ineffective for failing to object to inadequate notice of a possible habitual criminal adjudication. Specifically, appellant argued that the State should not have been allowed to seek a habitual criminal sentence since he was acquitted of a charge of attempted murder, and the State had specified verbally that it would only seek habitual criminal sentencing if appellant was convicted of robbery and attempted murder. Appellant has failed to demonstrate that counsel's performance was ineffective. Appellant was found guilty of two counts of robbery, which was sufficient to adjudicate appellant a habitual felon pursuant to NRS 207.012(2). Appellant was specifically noticed of the State's intent to seek habitual felon adjudication during his preliminary hearing and per amended information on February 5, 2002. The district court, in its discretion, adjudicated appellant a habitual felon. Therefore, appellant failed to demonstrate that counsel's performance was deficient, and the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to object to the lack of presentation of the judgments of his prior felony convictions, as required for habitual felon sentencing. This claim is belied by the record.<sup>7</sup> During appellant's sentencing, the State presented the district court with certified copies of both prior convictions from the State of Illinois. Pursuant to NRS 207.012, only proof of two prior convictions is required. Appellant failed to demonstrate that counsel's performance was deficient. Thus, we conclude that the district court did not err in denying this claim.

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Third, appellant claimed that counsel was ineffective for failing to investigate, prepare and present a defense to the charges. Specifically, appellant claimed that counsel did not present any witnesses. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced and the outcome would have been different with further investigation and presentation of witnesses. Counsel stated during the trial that she had tried to contact five witnesses supplied by appellant. Of those that could be contacted, counsel testified at the evidentiary hearing that she made a tactical decision not to present the witnesses because they would not have been beneficial to appellant's case. Appellant failed to state how any of these witnesses would have aided his defense. Counsel did present a defense; however, options were limited because of the substantial strength of the State's case. Appellant failed to demonstrate that counsel's performance was ineffective, and we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to present appellant's defense theory that his criminal behavior was excusable because he had a mental illness and was a drug addict. Specifically, appellant argued that counsel withdrew the originally noticed mental health expert witness and failed to contact mental health professionals from appellant's past. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has rejected the doctrine of partial responsibility or diminished capacity.<sup>8</sup> Appellant was correct that one mental health expert witness was originally noticed; however, the expert's testimony was withdrawn because, after examining appellant, he stated that he could not testify in

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<sup>8</sup>Ogden v. State, 96 Nev. 258, 262, 607 P.2d 576, 578 (1980); see also Fox v. State, 73 Nev. 241, 244-5, 316 P.2d 924, 926 (1957).

support of a mental health defense. Counsel testified during the evidentiary hearing that if she had put the expert on the stand, she felt it was probable that the jury would have determined that appellant was capable of forming intent. Even withstanding the fact that no mental health expert testified, counsel was able to convince the jury that appellant was not guilty on all of the specific intent crimes. The report that the expert wrote, and one from a past mental health provider, were supplied to the court prior to sentencing. Thus, appellant failed to demonstrate that counsel's performance was ineffective or that he was prejudiced by the lack of testimony by the mental health expert. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to impeach the State's witnesses with evidence of past felony convictions. Appellant failed to demonstrate that counsel's performance was deficient. The State originally noticed two witnesses that it later decided not to call because of their prior felony convictions. These witnesses were not made available for counsel to impeach. Appellant claimed that one of the victims had a felony conviction; however, the State explained in the evidentiary hearing that the victim only had a misdemeanor conviction, which counsel was not allowed to cross-examine the witness about.<sup>9</sup> Appellant failed to demonstrate that counsel was deficient. Thus, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective and sabotaged the trial by constantly stating that the defense rested. This claim is not supported by the record. Our review of the record discovered only one instance that counsel stated that the defense rested.

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<sup>9</sup>NRS 50.095.

Furthermore, even if counsel had stated that the defense rested, appellant failed to demonstrate that it would have prejudiced his case and that the jury's verdict would have been different had counsel never said that the defense rested. Appellant failed to demonstrate that counsel was ineffective, and we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for failing to discuss with appellant why he should or should not testify. Appellant failed to demonstrate that counsel's performance was deficient or that the jury verdict would have been different if he had testified. The district court specifically canvassed appellant on his right to testify, and explained that no inference could be drawn from not testifying. Appellant stated that he understood these rights, that he had no questions, and then decided that he would not testify. Appellant failed to demonstrate counsel was ineffective. Thus, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that counsel failed to give an opening statement. This claim is belied by the record.<sup>10</sup> Counsel did give an opening argument, even though it was brief. Appellant failed to specify what counsel should have additionally included in the opening statement, such that there is a reasonable probability of a different outcome. Appellant failed to demonstrate that counsel was ineffective, and the district court did not err in denying this claim.

Ninth, appellant claimed that counsel was ineffective in conceding his guilt to the jury. Appellant failed to demonstrate that counsel's performance was deficient. Counsel did not concede guilt,

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<sup>10</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

however, the State's case was strong. Appellant committed several different crimes within a timeframe of approximately seven hours. Two of the victims were familiar with appellant prior to the crimes. All of the victims identified appellant. Appellant dropped his wallet containing his identification at the scene of one of the crimes. Appellant left incriminating evidence at one of the scenes, on which his fingerprints had been recovered. Appellant gave a voluntary statement implicating himself in all of the crimes. Counsel gave an extensive closing argument in which she identified all of the counts and the elements that the State had to prove. The jury's verdict was consistent with counsel's argument in that they found appellant not guilty on three of the counts. Appellant failed to demonstrate that counsel's performance was deficient, and the district court did not err in denying this claim.

Tenth, appellant claimed that counsel was ineffective for failing to object to photo images of one of the victim's burn injuries, which appellant claimed prejudiced the jury. Appellant failed to demonstrate that counsel's performance was deficient. Several photographs were not admitted due to counsel's urging, and only four were admitted. We conclude that the photographs assisted the jury in understanding the nature and quality of the burns inflicted due to fire and were useful to the victim's physician to demonstrate the extent and permanence of the victim's injuries.<sup>11</sup> Appellant failed to demonstrate that the admission of the photographs of the victim's injuries prejudiced the jury as to make the jury's verdict unreliable. Therefore, we conclude that the district court did not err in denying this claim.

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<sup>11</sup>See Wesley v. State, 112 Nev. 503, 512-13, 916 P.2d 793, 800 (1996); see also Thomas v. State, 114 Nev. 1127, 1141, 967 P.2d 1111, 1121 (1998).

Eleventh, appellant claimed that counsel was ineffective for failing to remove herself as counsel. Specifically, appellant claimed that counsel was not interested in representing appellant as exhibited by counsel stating that she would not be present for the trial because of an intended medical leave. Appellant failed to demonstrate that counsel's performance was deficient, or that the outcome of the trial would have been different if he had different counsel. Counsel stated that she was taking medical leave, however, that someone from the public defender's team, who understood the case, would substitute. Furthermore, counsel was present at the trial, as the medical leave was postponed. Counsel testified at the evidentiary hearing that she never said that she was not interested in representing appellant. Appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Twelfth, appellant claimed that cumulative errors by counsel worked to prejudice his trial. As discussed above, appellant failed to establish any errors by counsel or that his case was in any way prejudiced by counsel's performance. Accordingly, the district court did not err in denying this claim.

Finally, appellant claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."<sup>12</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>13</sup> This court has held that appellate counsel will be most effective when every conceivable

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<sup>12</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>13</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

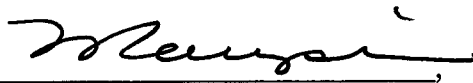


issue is not raised on appeal.<sup>14</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>15</sup>


Appellant claimed that his appellate counsel was ineffective for failing to raise errors in his adjudication as a habitual felon. Appellant failed to demonstrate that the omitted issue had a reasonable probability of success on appeal. As discussed above, appellant's adjudication as a habitual felon was proper. Thus, the district court did not err in denying this claim.

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>16</sup> Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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<sup>14</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>15</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>16</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge  
Oscar A. Stanley  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk