IN THE SUPREME COURT OF THE STATE OF NEVADA

NERRON D. WORMLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48047

FILED

MAR 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On August 21, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of second 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. This court affirmed the judgment of conviction on direct appeal.[1] The remittitur issued on May 20, 2005.

On May 10, 2006, 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 and 34.770, the district court declined to appoint counsel to represent appellant or to

[1]Wormley v. State, Docket No. 42042 (Order of Affirmance, April 25, 2005).

conduct an evidentiary hearing. On August 18, 2006, the district court denied appellant's petition. This appeal followed.[2]

In his petition, appellant contended that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective for failing to investigate and gather witnesses for the defense. Specifically, appellant claimed that his trial counsel should have investigated and presented testimony from Mario Alonzo, Kim, Mark and Rene, who would have supported his self-defense theory at trial. He

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[2]We note that the district court found that the petition was procedurally time barred based upon a mistake of fact that the petition was filed on May 23, 2006. The petition was not untimely filed. See NRS 34.726(1). However, the district court examined the merits of the claims, and for the reasons discussed below, we conclude that the district court did not err in denying the petition.

[3]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Strickland, 466 U.S. at 697.

claimed that these individuals were present at a physical altercation at the University Club that took place approximately three months before the shooting in the parking lot of Hurricane Harry's. Appellant claimed that testimony from these individuals would have supported his theory that he was afraid of the victim and the victim's friends because of the prior physical fight at the University Club. Appellant asserted that he informed trial counsel how to locate these individuals.

Appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel investigated and presented testimony from these witnesses at trial. First, testimony was presented at trial that the altercation at the University Club involved physical violence. Further, there was no testimony presented that the victim himself committed any violent acts at the prior University Club altercation. Notably, appellant was not present during the University Club altercation and only learned about it through conversations with his friends and roommates. Thus, the potential testimony was cumulative, and the verdict returned by the jury reflected that the jury did not find that appellant was justified in killing the victim based upon the past physical altercation at the University Club.[5] The majority of the

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[5]See NRS 200.120 (stating that justifiable homicide "is the killing of a human being in necessary self-defense"); NRS 200.200(1) (stating that in a self-defense case it must appear that "[t]he danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary"); Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000) (setting

continued on next page . . .

witnesses at trial testified that appellant and his friends approached the victim's group of friends in an angry and aggressive fashion and that appellant shot the victim who was not armed with any weapon. It was for the jury to weigh the credibility of witnesses and testimony.[6] Moreover, the heart of appellant's self-defense theory at trial was that the victim had a knife and took a swing at him with the knife. Appellant acknowledged under cross-examination that if the victim did not have a knife and had not taken a swing at him that he would not have been justified in killing the victim. Finally, the evidence presented at trial indicated that appellant was the original aggressor, and the right of self-defense is ordinarily not available to an original aggressor.[7] Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for inadequately presenting the self-defense theory.

. . . continued

forth jury instructions for self-defense, including that a person has a right to defend from apparent danger to the same extent as he would from actual danger where the person is confronted with the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury, the person acts solely upon these appearances, and a reasonable person in a similar situation would believe himself to be in like danger).

[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[7]See Runion, 116 Nev. at 1051, 13 P.3d at 59.

Specifically, appellant claimed that trial counsel undercut appellant's self-defense theory when during opening statements counsel stated that appellant had made a mistake in shooting the victim. Appellant further claimed that trial counsel sabotaged his self-defense theory by asking the jury during closing arguments to imagine that appellant was a man in uniform and telling the jury that a man in uniform would not have acted differently. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel not made these statements. Self-defense may be found in situations where the person killing was mistaken about the extent of the danger.[8] In view of the fact that appellant was the only individual to testify that the victim was armed with a knife, trial counsel's statement was a reasonable statement in support of the self-defense theory. In reviewing the entirety of trial counsel's statements during closing arguments it appears that trial counsel was attempting to place appellant's actions in a positive light and emphasize the presumption of innocence. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to adequately investigate and prepare for trial. Appellant claimed that if trial counsel had followed appellant's suggestions about

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[8]See id. To the extent that appellant was attempting to claim that this trial counsel failed to investigate and present the testimony from the four individuals discussed in claim one, this claim lacked merit for the reasons discussed earlier.

self-defense that trial counsel would have been more prepared and less confused during trial. Appellant failed to provide any specific facts in support of this claim, and thus, he did not demonstrate that his trial counsel's performance was deficient or that he was prejudiced.[9] Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine the State's witnesses to bring forward the motivation behind the testimony of the State's witnesses or provide the jury with a reasonable defense to consider. Appellant failed to provide any specific facts in support of this claim, and thus, he did not demonstrate that his trial counsel's performance was deficient or that he was prejudiced.[10] Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argued that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[11] Appellate counsel is not required to raise every

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[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[10]See id.

[11]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

non-frivolous issue on appeal.[12] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[13]

Appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in failing to sustain a defense objection to underrepresentation of African-Americans on the jury venire.[14] Appellant noted that trial counsel had objected that only four out of the sixty members of the jury panel were African-American. Appellant's trial counsel objected that roughly six to seven percent of the jury panel were African-Americans where the Las Vegas Review Journal placed the African-American population at nine percent. Appellant claimed that Clark County should utilize voter registration records in addition to the DMV rolls for jury selection. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal as appellant failed to demonstrate a prima facie violation of the

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[12]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[13]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[14]The district court determined that the underlying claim should have been raised on direct appeal, and thus, appellant waived a challenge to the fair cross-section requirement. However, in answer to question number 18, appellant asserted that he was raising his fair cross-section claim because appellate counsel had refused to raise this on direct appeal. We conclude that appellant sufficiently raised this as a claim of ineffective assistance of appellate counsel, and we have reviewed it as such.

fair cross-section requirement.[15] Notably, appellant failed to demonstrate that any underrepresentation was due to the systematic exclusion of African-Americans in the jury selection process.[16] Further, we note that variations in percentages of particular communities may be constitutionally permissible in a jury venire.[17] Therefore, we conclude that the district court did not err in denying this claim.[18]

Next, appellant claimed that the district court erred in not declaring a mistrial when the State stated during closing arguments that defense counsel was surprised about the testimony that the victim had a knife. This claim was considered and rejected by this court on direct appeal. The doctrine of the law of the case prevents further litigation of

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[15]See Duren v. Missouri, 439 U.S. 357, 364 (1979); Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996).

[16]See id.

[17]See Williams v. State, 121 Nev. 934, 941, 125 P.3d 627, 632 (2005).

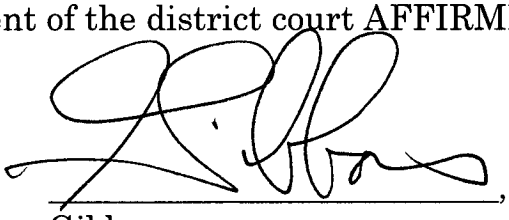
[18]To the extent that appellant claimed that his trial counsel was ineffective for failing to utilize research appellant had performed on the issue of the fair cross-section requirement, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced as he failed to identify the additional research performed by appellant or demonstrate that it would have altered the outcome of the proceedings. See Strickland, 466 U.S. 668; Lyons, 100 Nev. 430, 683 P.2d 504.

this issue.[19] Therefore, we conclude that the district court did not err in denying this claim.

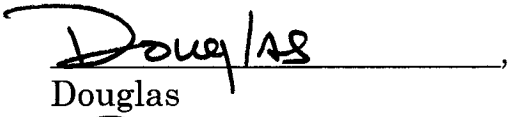
Finally, appellant claimed that there was cumulative error warranting reversal of his conviction. As appellant failed to demonstrate any prejudicial error, appellant failed to demonstrate cumulative error required the reversal of his conviction.

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.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



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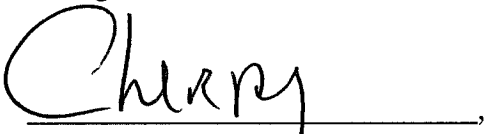
Douglas



_____, J.
Cherry

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[19]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[20]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Eighth Judicial District Court Dept. 18, District Judge
Nerron D. Wormley
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk