IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY DALE MCCASKILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49824

FILED

NOV 14 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On April 18, 2003, appellant Jeremy Dale McCaskill was convicted, 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 with parole eligibility after ten years in the Nevada State Prison. This court affirmed appellant's conviction on direct appeal.[1] The remittitur issued on September 21, 2004.

On June 8, 2005, 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

[1]McCaskill v. State, Docket No. 41404 (Order Affirming and Remanding for Correction of Judgment of Conviction, August 25, 2004).

district court elected to appoint counsel to represent appellant and to conduct an evidentiary hearing. On May 31, 2007, the district court denied appellant's petition. This appeal followed.[2]

In this appeal appellant contends that the district court erred in denying his claims that trial and appellate counsel were ineffective. 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 deficient performance prejudiced the defense.[3] To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.[4] The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.[5]

Likewise, "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)."[6] Appellate counsel is not required to raise every non-frivolous issue on appeal.[7] This court has held

---

[2]We note that appellant is represented by counsel in this appeal.

[3]Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[4]Id. at 694.

[5]Id. at 697.

[6]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

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

that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[8] "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."[9]

First, appellant claims that trial counsel was ineffective for failing to object to jury instructions guiding the transition from consideration of the primary offense to lesser-included offenses. Specifically, appellant claims that the district court erred in giving an "acquittal first" instruction rather than an "unable to agree" instruction. Appellant also claims that appellate counsel was ineffective for failing to challenge the instruction on appeal. Appellant failed to demonstrate that trial counsel's performance was deficient. In Green v. State, we adopted the "unable to agree" approach to transition instructions and precluded the use of the "acquittal first" instruction.[10] Our review of the record reveals that the jury was given an appropriate "unable to agree" instruction.[11] Likewise, because appellant thus failed to demonstrate that this claim had a reasonable probability of success on appeal, appellant

---

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

[9]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[10]Green v. State, 119 Nev. 542, 547-48, 80 P.3d 93, 96-97 (2003).

[11]Jury Instruction No. 15 stated, in pertinent part, "[i]f you can not [sic] agree that the defendant is guilty of [the primary offense], you should then examine the evidence as it applies to [the lesser offense]."

failed to demonstrate that appellate counsel's performance was deficient. Therefore, the district court did not err in denying this claim.

Second, appellant claims that trial counsel was ineffective for eliciting testimony that appellant invoked his Fifth Amendment right to counsel during an interview with police, and for failing to object when the State cross-examined him on this testimony. Appellant also claims that appellate counsel was ineffective for failing to raise this issue on appeal. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At trial, appellant took the stand in his own behalf and during direct examination mentioned that he had invoked his right to counsel. Review of the trial transcript, the evidentiary hearing in the district court, and the district court's findings of fact,[12] reveals that trial counsel did not suggest that appellant comment on his invocation of the right to counsel but that appellant "said it on his own." To the extent that appellant complains of trial counsel's failure to object to cross-examination, we note that appellant "opened the door" in this regard and thus it is not reasonably probable that trial counsel's objection would have been sustained. Further, appellant failed to demonstrate that an objection would have had a reasonable probability of leading to a different outcome at trial.

---

[12]See Means v. State, 120 Nev. 1001, 1012-14, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (stating that the factual findings of the district court are entitled to deference).

To the extent that appellant claims his appellate counsel was ineffective for failing to argue that trial counsel was ineffective, we conclude that appellant fails to demonstrate that this claim had a reasonable probability of success on direct appeal.[13] This court has consistently declined to entertain claims of ineffective assistance of counsel on direct appeal and held that the proper vehicle for review of counsel's effectiveness is a post-conviction relief proceeding.[14] Further, in light of the fact that appellant opened the door, appellant failed to demonstrate that any direct appeal claim had a reasonable probability of success. Therefore, the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for failing to further litigate the district court's exclusion of evidence of the victim's violent nature.[15] Specifically, appellant contends that trial counsel should have done more to admit testimony that on the night before the incident in question, the victim had kneed his wife in the

---

[13]See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[14]Pellegrini v. State, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Ewell v. State, 105 Nev. 897, 900, 785 P.2d 1028, 1030 (1989); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

[15]To the extent that appellant is raising a claim that the district court erred in precluding this evidence, the issue should have been raised on direct appeal and appellant failed to demonstrate good cause for failing to raise the claim earlier. See NRS 34.810(1)(b).

stomach, as that was further evidence that the victim was violent and that appellant acted in self-defense. Appellant also claims that appellate counsel was ineffective for failing to raise this issue on direct appeal. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The record reflects that trial counsel tried twice to admit the evidence: once in a pre-trial motion and again during the testimony of Michelle Cummings. Therefore, inasmuch as appellant claims that trial counsel failed to pursue this issue in the district court, his claim is belied by the record. Moreover, the district court's decision was based on established Nevada law that, while evidence of a victim's violent reputation is admissible, a prior act of violence by a victim is not admissible to show the state of mind of a defendant claiming that he acted in self-defense unless the accused demonstrates that he had actual knowledge of that act.[16] After the evidentiary hearing, the district court found that appellant did not know of this specific act prior to his altercation with the victim, and this finding is entitled to deference.[17] Accordingly, appellant failed to demonstrate a reasonable probability that had trial counsel raised this issue a third time the result would have been different. Inasmuch as appellant seeks a change in the law, we decline to revisit our prior decisions. And to the extent that appellant claims his

---

[16]See Daniel v. State, 119 Nev. 498, 515-16, 78 P.3d 890, 902 (2003); Petty v. State, 116 Nev. 321, 325-27, 997 P.2d 800, 802-03 (2000); Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986).

[17]Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

appellate counsel was ineffective, we conclude that appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that trial counsel was ineffective in failing to ensure that the district court understood the consequences of the available sentences. Specifically, appellant claims that trial counsel should have corrected the district court when it became apparent that the court misapprehended the way in which good time credits would affect appellant's sentence. Appellant claims that he received life sentences rather than two definite terms of 10 to 25 years because the district court misunderstood the length of time that appellant would be under supervision after being paroled. Appellant also claims that appellate counsel was ineffective for failing to review the sentencing transcript or raise this issue on direct appeal. Appellant failed to demonstrate that he was prejudiced. The district court heard testimony at the evidentiary hearing regarding appellant's sentences. The district court found that its sentence would have been the same even if the evidence and argument presented in the evidentiary hearing had been presented at sentencing.[18] Moreover, appellant's sentence is within the statutory guidelines.[19] Therefore, appellant failed to demonstrate a reasonable probability that further argument by trial counsel at sentencing would have led to a

---

[18]See Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[19]NRS 200.030(5)(a).

different result or that a direct appeal claim had a reasonable likelihood of success. Accordingly, the district court did not err in denying this claim.

Finally, appellant claims that trial counsel was ineffective for failing to cross-examine a witness about her motivation to lie at trial. Specifically, appellant argues that trial counsel should have cross-examined Nikki Batemon, the mother of appellant's child, about custody proceedings regarding their child and Batemon's possible motivation to implicate the appellant. Appellant failed to demonstrate that he was prejudiced. First, Batemon did not testify at the evidentiary hearing on his petition, and thus appellant has failed to provide specific evidence of the testimony that would have resulted from cross-examination.[20] Further, our review of the record reveals that Batemon was not a witness to the stabbing and that her testimony did not conflict with the appellant's in any material way. Accordingly, appellant failed to demonstrate a reasonable probability that cross-examination of Batemon on this subject would have produced a different result at trial. Finally, trial counsel testified that he was aware of appellant's custody battle with Batemon, but considered it irrelevant. To the extent that trial counsel made a tactical decision not to question Batemon about her custody battle, we note that in the context of claims of ineffective assistance of counsel, "'a tactical decision . . . is virtually unchallengeable absent extraordinary

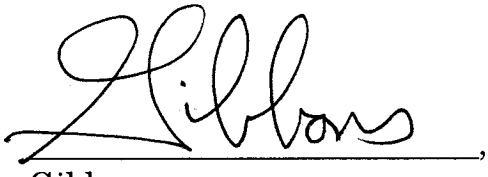
---

[20]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

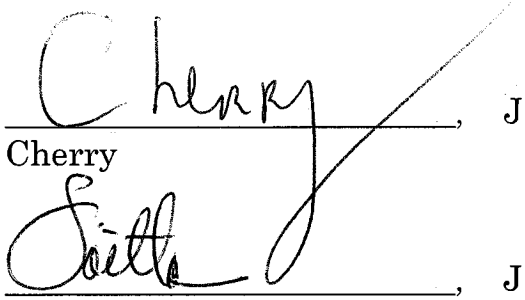
circumstances.'"[21] Appellant did not demonstrate extraordinary circumstances here. Therefore, the district court did not err in denying this claim.

Having considered appellant's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



, C. J.
Gibbons



, J.
Cherry

, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

---

[21]Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)) (internal quotations omitted).