

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN RANKIN, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50277

**FILED**

MAR 03 2009

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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; Donald M. Mosley, Judge.

On July 8, 2005, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery (Count 1), robbery with the use of a deadly weapon (Count 2), and two counts of attempted robbery with the use of a deadly weapon (Counts 3 and 4). The district court adjudicated appellant a habitual criminal pursuant to NRS 207.010 and sentenced appellant to serve four terms of life in the Nevada State Prison with the possibility of parole after ten years. The sentences for Count 1 and Count 2 are to be served consecutively. The sentences for Count 3 and Count 4 are to be served concurrently to Count 1 and Count 2. This court affirmed appellant's judgment of conviction on direct appeal. Rankin v. State, Docket No. 45697 (Order of Affirmance, November 13, 2006). The remittitur issued on December 8, 2006.

On June 7, 2007, 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. After conducting an evidentiary hearing, the district court denied the petition on October 2, 2007. This appeal followed.

In his petition, appellant raised twenty claims of ineffective assistance of trial counsel.<sup>1</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 was deficient in that it fell below an objective standard of reasonableness, and prejudice such that but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

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<sup>1</sup>To the extent appellant raised any of the underlying claims independently from the ineffective assistance of counsel claims, the claims are waived, as appellant failed to raise these claims on direct appeal and appellant failed to demonstrate good cause. See NRS 34.810(1)(b); see generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post- conviction petition).

First, appellant claimed that his trial counsel was ineffective because counsel was court appointed and paid for at State expense. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that the outcome of the trial would have been different had his trial counsel not been appointed or paid out of State coffers. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object to the in-court identification testimony of Jesus Lera, Victor Sangines and Mario Sangines. Appellant claimed that the show-up identification by Victor Sangines was impermissibly suggestive and thus the in-court identifications by all three victims were also impermissibly suggestive. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. This court considered and rejected the underlying claim on direct appeal. Because this court has rejected the merits of the underlying claim, appellant cannot demonstrate that his trial counsel was deficient or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for not objecting to prosecutorial misconduct in failing to preserve exculpatory evidence. Appellant claimed that the State failed to conduct a paraffin test for gunpowder residue and to preserve his clothing. Appellant claimed that this evidence would have been exculpatory because there would not have been gunpowder residue on either his hands or his clothing. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Sanctions may be warranted when the State fails to gather evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). The defendant must prove that the evidence was

material and the failure to gather it was due to negligence, gross negligence or bad faith. Id. Evidence is material if the defendant can demonstrate with “reasonable probability” that the outcome of the trial would have been different had the evidence been available to the defense. Id. Given the substantial evidence of his guilt due to the strong identifications of the victims, appellant failed to demonstrate that conducting a paraffin test had a reasonable probability of altering the outcome of the trial due. Further, appellant’s trial counsel attempted to question the State’s witnesses concerning the lack of a paraffin test, but was precluded from detailed questioning by the district court. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to request that a paraffin test be conducted. Appellant failed to demonstrate that his trial counsel’s performance was deficient. At the evidentiary hearing, appellant’s trial counsel testified that he did not request a paraffin test because there was a long time period between appellant’s arrest and his appointment as counsel; thus, he felt that a test would not have revealed anything of value. “Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances” and appellant failed to demonstrate any such circumstances here. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to use a peremptory challenge on a juror who stated that she had been mugged by a black male. Appellant failed to demonstrate that his trial counsel’s performance was deficient. At the evidentiary hearing, appellant’s trial counsel testified that he felt that other potential jurors

may have been a greater threat to appellant's case. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances. Id. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for reserving the opening statement until the close of the State's evidence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel made a tactical decision to reserve the opening statement until the close of the State's evidence. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances. Id. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had his trial counsel given an opening statement at the beginning of the trial. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct. Appellant claimed that the State elicited perjured testimony from Officer Susiak and Officer Hinote. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that any of the testimony the State elicited was perjured as he did not support his claim beyond simply making the allegation. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to question the crime scene analyst concerning the lack of a

paraffin test for gunpowder residue on appellant's hands. Appellant failed to demonstrate that his trial counsel was deficient. Appellant's trial counsel attempted to question the crime scene analyst concerning the lack of a paraffin test, but was precluded from doing so by the district court. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to adequately question the defense's expert on eyewitness identification. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A review of the record reveals that a thorough questioning of the defense's expert was conducted by appellant's trial counsel. Appellant failed to identify what additional questions that counsel should have asked that would have had a reasonable probability of altering the outcome of the trial. Id. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to call additional witnesses to testify in his defense. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any additional witnesses that should have been called or what any potential witnesses would have testified to that would have had a reasonable probability of altering the outcome of the trial. Id. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to investigate whether or not appellant should have testified in his own defense. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, appellant was thoroughly canvassed by the district court concerning his right to testify and appellant stated that he did not want to testify. In

addition, appellant failed to demonstrate that there was a reasonable probability that further investigation in this area would have altered the outcome of the trial. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to object to the use of a jury instruction requiring a unanimous verdict.<sup>2</sup> Appellant claimed that this was an improper Allen charge. See Allen v. United States, 164 U.S. 492 (1896). Appellant failed to demonstrate that his trial counsel's performance was deficient. NRS 175.481 provides that a jury verdict shall be unanimous. Thus, a proper jury instruction on a unanimous verdict was given. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel was ineffective for failing to object to the use of a jury instruction stating that the jury may presume a firearm is a deadly weapon.<sup>3</sup> Appellant failed to demonstrate that his trial counsel's performance was deficient. Pursuant to NRS 193.165(6)(c), NRS 202.290 describes one meaning of a deadly weapon. NRS 202.290 discusses aiming or discharging a firearm at another person.<sup>4</sup> Thus, the jury instruction correctly stated Nevada law

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<sup>2</sup>The pertinent part of instruction no. 26 read: "Your verdict must be unanimous."

<sup>3</sup>The pertinent part of instruction no. 4 read: "You are instructed that a firearm is a deadly weapon and proof of its deadly capabilities is not required."

<sup>4</sup>NRS 202.253(2) defines a firearm, as it is used in NRS 202.253 to 202.369, to be "any device designed to be used as a weapon from which a  
*continued on next page . . .*

regarding the finding that a firearm may be presumed to be a deadly weapon. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his trial counsel was ineffective for failing to object to the use of jury instructions nos. 3 and 6. Instruction no. 3 listed the charges against appellant. Instruction no. 6 discussed the elements of robbery. Appellant claimed that these instructions improperly minimized the State's burden of proof. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate how the list of the charges in instruction no. 3 lessened the State's burden of proof. NRS 200.380 states the elements of the crime of robbery and instruction no. 6 comports with that statute. In addition, the jury was properly instructed on the reasonable doubt standard as required by NRS 175.191.

To the extent that appellant claimed that his trial counsel should have objected when the jury was improperly instructed on conspiracy and that the improper instruction lessened the State's burden of proof, we conclude that appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. NRS 199.480 states that a conspiracy occurs when two or more persons conspire to commit a crime. Further, each conspirator must possess the requisite intent to commit the crimes performed in furtherance of the conspiracy. Bolden v. State, 121 Nev. 908, 922, 124 P.3d 191, 200-01 (2005); see also Sharma v. State, 118

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*... continued*

projectile may be expelled through the barrel by force of any explosion or other form of combustion.”



Nev. 648, 56 P.3d 868 (2002). Jury instruction no. 5 properly discusses criminal conspiracy and that a defendant must intend to perform the crime the conspirators agreed to commit. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his trial counsel was ineffective for allowing a hearing to be conducted outside of his presence. A brief hearing concerning the inclusion of a jury instruction regarding a lesser included offense to the attempted murder charge was held without appellant's presence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that he did not believe that appellant needed to be there to discuss the lesser included offense instruction because he had already discussed the issue with appellant and appellant had decided not to request an instruction on a lesser included offense to attempted murder. Further, appellant was acquitted of the charge of attempted murder. Thus, appellant failed to demonstrate that his presence at the hearing would have had a reasonable probability of altering the outcome at trial. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. Appellant claimed that the State improperly told the jurors to "justify" any lack of belief in the State's evidence to the other members of the jury. Appellant failed to demonstrate that he was prejudiced. During closing arguments, the State asked that the jurors, if they did not believe the three victims' testimony, to "justify it to your fellow jurors" why the three victims were not truthful. Appellant failed to demonstrate that

there was a reasonable probability of a different outcome given the substantial evidence of his guilt given the strong identifications of the three victims. We further note that the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence and that the jury was properly instructed on the reasonable doubt standard. Therefore, the district court did not err in denying this claim.

Seventeenth, appellant claimed that his trial counsel was ineffective for failing to object when the State made improper comments that lessened the reasonable doubt standard. Appellant failed to demonstrate that he was prejudiced. The State did not argue for a lessened reasonable doubt standard. During closing arguments, the State asked the jury to think of the Mona Lisa and if they could remember every detail of the painting. It was an attempt to argue that, although the jurors may not be able to remember every detail of the Mona Lisa, they would be able to recognize the painting if they saw it again. Thus, the implication was that even if the victims could not remember every detail of the robber, their identifications of appellant were still believable. Again, we note that the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence and that the jury was properly instructed on the reasonable doubt standard. Therefore, the district court did not err in denying this claim.

Eighteenth, appellant claimed that his trial counsel was ineffective for failing to object when the State suggested that appellant was the gunman during the robbery. At trial, the evidence concerning the gunman was inconclusive; however during closing arguments the State made statements that appeared to suggest that appellant was the

gunman.<sup>5</sup> Appellant failed to demonstrate that he was prejudiced. Appellant was charged as a coconspirator in the robbery, the evidence did not exclude him as the gunman, and the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Further, considering the substantial evidence of appellant's guilt, we conclude that the statements in closing arguments did not prejudice appellant. Therefore, the district court did not err in denying this claim.

Nineteenth, appellant claimed that his trial counsel was ineffective for failing to object when the district court abused its discretion by sentencing him as a habitual criminal. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any reasons why the district court abused its discretion when it adjudicated him as a habitual criminal. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Twentieth, appellant claimed that his trial counsel was ineffective for failing to object when he was sentenced to pay restitution to Jesus Lera. Appellant claimed that the sentence for restitution amounted to double jeopardy because he was acquitted of the attempted murder Jesus Lera. Appellant failed to demonstrate that his trial counsel's

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<sup>5</sup>During closing arguments, the State made the following statement: "We know the Defendant was the one on that side of the car. Chances are it had to have been the Defendant who fired that shot."

If you're unsure as to whether it was the Defendant who fired the shot, it doesn't matter. You have got different theories of criminal liability."

performance was deficient or that he was prejudiced. When medical expenses are a direct result of a crime committed, restitution may be appropriate. NRS 176.033(1)(c); see also Norwood v. State, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996); Martinez v. State, 115 Nev. 9, 11, 974 P.2d 133, 134 (1999). The judgment of conviction did not specify that the restitution was for the attempted murder charge, and the conspiracy to commit robbery charge and one count of attempted robbery with the use of a deadly weapon involved Jesus Lera. Further, the medical expenses incurred by Jesus Lera were a direct result of the robbery. Therefore, the district court did not err in denying this claim.

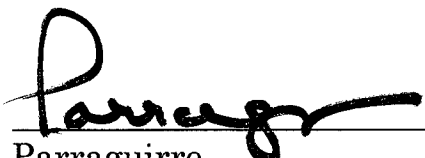
Next, appellant argues that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

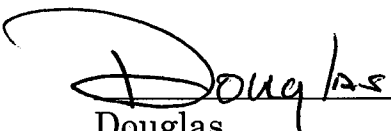
Appellant claimed that his appellate counsel was ineffective for failing to raise all of the underlying claims discussed above on direct appeal. As appellant failed to demonstrate that his trial counsel was deficient and/or that he was prejudiced in any of the above claims, we conclude that appellant could not demonstrate that he was prejudiced for his appellate counsel's failure to raise them on direct appeal. Therefore, we conclude that the district court did not err in denying these claims.

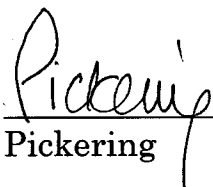
In addition, appellant claimed that his appellate counsel was ineffective because he had a conflicting interest which did not allow him to effectively represent appellant on appeal. Appellant claimed that as the same counsel who represented him during the trial, his counsel should have withdrawn because an effective direct appeal would have shown all of the errors that trial counsel made during the trial. Appellant failed to demonstrate that he was prejudiced. Notably, claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Appellant failed to articulate an issue that would have had a reasonable probability of success on appeal. Therefore, 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. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Donald M. Mosley, District Judge  
Alvin Rankin, Jr.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk