

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ADAM CHAVEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50516

**FILED**

MAY 04 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On March 10, 2005, the district court convicted Chavez, pursuant to a jury verdict, of one count each of assault with a deadly weapon, driving under the influence, and destruction or injury to property. The district court sentenced Chavez to serve a prison term of 16 to 72 months for assault with a deadly weapon, a consecutive term of 16 to 72 months for driving under the influence, and a concurrent term of 12 months for destruction or injury to property. On appeal, this court affirmed the judgment of conviction. See Chavez v. State, Docket No. 45057 (Order of Affirmance, January 10, 2006).

On September 13, 2006, Chavez filed a proper person petition for a writ of habeas corpus in the district court. The district court appointed counsel and counsel filed a supplement to the petition. The district court denied Chavez's petition after conducting an evidentiary hearing. This appeal followed.

Chavez contends that the district court abused its discretion in finding that that he did not receive 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 fell below an objective standard of reasonableness, and counsel's errors were so severe they rendered the jury's verdict unreliable. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Chavez argues that the district court abused its discretion in denying his claim that his counsel was ineffective for failing to call his neighbor, Martin Ocegueda, to testify at trial. He asserts that Ocegueda would have testified that he heard glass break and Chavez repeatedly plead with someone to leave his condo on the morning of the incident. Ocegueda would have also testified that, forty-five minutes later, he saw Chavez drive away as the police were arriving. Chavez contends that Ocegueda's testimony would have supported his claim that the victim was not assaulted as she was not put in fear of her life. In support of his claim, he submitted a letter, purportedly from Ocegueda to the district court in which Ocegueda described the events of that morning.

We conclude that Chavez failed to meet his burden of demonstrating that he was prejudiced. At the evidentiary hearing, Chavez's trial counsel testified that Chavez stated that Ocegueda would testify that he heard the victim threaten Chavez which indicated that she was not afraid. However, an investigator interviewed Ocegueda prior to trial and Ocegueda stated that he only heard yelling and could not identify any independent threats. Thus, counsel did not feel it necessary to introduce Ocegueda's testimony in court because he could not provide the testimony needed to bolster the defense. Ocegueda also testified at the evidentiary hearing. He testified that he heard yelling and a commotion but, while he could identify Chavez saying "[h]ow could you do this to me," several times, he could not identify what anyone else said. Further, he did not actually see what happened inside the condo. While Chavez submitted a letter purportedly from Ocegueda claiming that he could hear what was said that morning, he failed to authenticate the letter at the evidentiary hearing. The district court found that Chavez suffered no prejudice from the failure to call Ocegueda to testify at his trial because he did not demonstrate that Ocegueda saw or heard the victim do anything, and the finding is supported by substantial evidence. See State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (citing State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658-59 (2002)). Therefore, the district court did not abuse its discretion in denying this claim.

Second, Chavez argues that the district court abused its discretion in denying his claim that his counsel was ineffective for failing to subpoena phone records that would have indicated there was an available telephone line in the home from which the victim could have called the police. He asserts that evidence that there was a phone in the

upstairs bedroom would have impeached the victim's testimony that she could have only called from her cell phone.

We conclude that Chavez failed to meet his burden of demonstrating that his counsel was deficient or that he was prejudiced. Chavez did not introduce the purported phone records at the evidentiary hearing despite the opportunity to do so. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, given the consistent testimony provided by the victim and another witness, John Ravo, about the incident, Chavez failed to demonstrate a reasonable probability of a different result at trial had his counsel attempted to impeach the victim on this collateral matter. Therefore, the district court did not abuse its discretion in denying this claim.

Third, Chavez argues that the district court abused its discretion in denying his claim that his counsel was ineffective for failing to subpoena the victim's medical records. He asserts that the records would have demonstrated that the victim had a preexisting injury to her fingers and that they were not in fact injured by being struck with an ax handle.


We conclude that Chavez failed to demonstrate that he was prejudiced. In convicting Chavez of assault with a deadly weapon, the jury did not have to find that Chavez actually struck the victim during the incident. Rather, the jury had to find that Chavez "intentionally [placed] another person in reasonable apprehension of immediate bodily harm." See 2001 Nev. Stat., ch. 216, § 1, at 986-87 (NRS 200.471(1)(a)). Thus, Chavez failed to demonstrate that there was a reasonable likelihood of a different outcome at trial had his trial counsel introduced the victim's


medical records. Therefore, the district court did not abuse its discretion in denying this claim.


Lastly, Chavez concedes that the district court did not abuse its discretion in denying his claims that his trial counsel was ineffective for failing to object to the introduction of photographs at trial and the district court's consideration of Chavez's prior 1986 DUI conviction at sentencing. He further concedes that the district court did not abuse its discretion in denying his claim that his trial and appellate counsel were ineffective for failing to object or argue on appeal that the district court erred in permitting the police to arrest and place Chavez in restraints in view of some jurors. Accordingly, we affirm the district court's denial of these claims.

Having considered Chavez's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

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

cc: Hon. Jerome Polaha, District Judge  
John Adam Chavez  
Mary Lou Anne Wilson  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk