IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMMY JOHN WEBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50613

FILED

JUL 20 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Timmy John Weber killed his girlfriend, Kim Gautier, and her 15-year-old son, A.G. Weber had also subjected Gautier's 14-year-old daughter, M.G., to ongoing sexual abuse. Ten days after the murders, Weber attempted to kill Gautier's 17-year-old son, C.G., and William Froman, M.G. and C.G.'s temporary guardian. Weber was convicted of 17 felony counts, including two counts of murder with the use of a deadly weapon. He was sentenced to death for A.G.'s murder and life in prison without the possibility of parole for Gautier's murder. On appeal, this court affirmed the judgment of conviction. Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005).

In this appeal from a district court order denying a post-conviction petition for a writ of habeas corpus, Weber argues that the district court erred by denying without an evidentiary hearing three ineffective-assistance-of-counsel claims, as well as the claims he had raised on direct appeal and a claim challenging the torture aggravator pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). We conclude that the district court did not err by denying any of Weber's claims and affirm the district court's judgment.

Weber also raises for the first time on appeal several claims of trial error. We decline to address those claims in the first instance.[1] See McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Ineffective-assistance-of-counsel-claims

Weber argues that the district court erred by denying three claims of ineffective assistance of counsel. Under the two-part test established by the United States Supreme Court in Strickland v. Washington, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) prejudice in that

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[1]Weber also challenges the effective assistance of post-conviction counsel. However, his claims are premature as the instant matter concerns his first post-conviction petition. Weber may challenge post-conviction counsel's performance in a second timely post-conviction petition. See Crump v. Warden, 113 Nev. 293, 302-05, 934 P.2d 247, 252-54 (1997).

there is a reasonable probability of a different outcome. 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). Weber was entitled to an evidentiary hearing on his claims only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1301, 198 P.3d 839, 858 (2008), cert. denied, ___ U.S. ___, 130 S. Ct. 414 (2009).

Prosecutor's opening statement

Weber contends that trial counsel were ineffective for not objecting to five comments the prosecutor made during opening statements that were designed to inflame the jury, specifically: (1) "what [Weber] did to [A.G.] can only be described as sadistic and torturous;" (2) "the tormenting of [A.G.] didn't end there;" (3) "Our character is what we do when we think no one is looking. [M.G.] is going to tell you what the defendant did to her when no one was looking"; (4) "Perhaps the defendant had returned to Las Vegas for someone else"; and (5) "It appeared once again, the defendant had come back to Las Vegas for someone."

Considering the challenged comments in context, see Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), we conclude that the comments were not inflammatory but were made in the context of describing the evidence the prosecutor contended would prove all of the offenses beyond a reasonable doubt. The first two comments, relating to the torturous acts inflicted upon A.G. were proper because Weber was charged with torture murder. The third comment was made in

the context of explaining to the jury that Weber's motive for the crimes went beyond a fight that he and M.G. had the night before the sexual assault and murders, that is, his five-year sexual abuse of M.G., which she kept secret. Considering that the prosecution proved Weber's clandestine on-going sexual abuse of M.G., this comment was not improper. Comments four and five stemmed from the prosecutor's explanation that Weber fled Nevada after the crimes but returned sometime before April 14, when he attacked C.G. and Froman. On that day, the police discovered Weber's clothing, binoculars, and numerous strips of cloth in M.G.'s bedroom. Two weeks later, when police officers apprehended Weber in a trailer, they discovered bungee cords and rope. Considering the evidence the prosecution produced proving that Weber bound his victims and attempted to kill C.G. upon returning to Las Vegas, we conclude that the challenged comments were not improper.

Because these comments were not improper, Weber cannot demonstrate ineffective assistance based on counsel's failure to object to the challenged comments. The district court therefore did not err by summarily denying these claims.[2]

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[2]Weber argues that appellate counsel was ineffective for not challenging the prosecutor's opening statement. Because he did not show deficient performance or prejudice, see Kirksey v. State, 112 Nev. at 998, 923 P.2d at 1114, the district court did not err by summarily denying this claim.

Anti-sympathy instruction

Weber argues that counsel were ineffective for not objecting to an anti-sympathy instruction. This court has repeatedly approved this instruction where, as here, the jury has also been instructed to consider mitigating evidence. See, e.g., Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 825 (2004); Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413-14 (2001); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 803-04 (1996). Accordingly, Weber cannot demonstrate ineffective assistance based on counsel's failure to object to the anti-sympathy instruction. The district court therefore did not err by summarily denying this claim.[3]

Investigation

Weber argues that trial counsel were ineffective for not adequately investigating and presenting mitigating evidence that he suffered from brain damage. In particular, he chides counsel's reliance on Dr. Louis Etcoff, who, according to Weber's post-conviction psychologist, Dr. Barry Crown, failed to perform a proper evaluation and was unable to offer a psychological opinion as to why Weber committed the offenses. After his evaluation, Dr. Crown concluded that there was "a high

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[3]To the extent Weber contends that the district court erred by giving the anti-sympathy instruction, this claim is procedurally barred absent good cause and prejudice because it was appropriate for direct appeal. See NRS 34.810(1)(b)(2). Because Weber failed to overcome the procedural bar, the district court did not err by summarily denying this claim.

probability that Mr. Weber may have a neuropsychological impairment." Weber contends that the absence of this evidence left the jury with no explanation of why he exacted such violence on the Gautier family, particularly when he had no history of violence. There are two components to Weber's argument on appeal—(1) the district court erroneously concluded that he did not cooperate with Dr. Etcoff and (2) Dr. Etcoff's mental health evaluation was deficient.

In denying Weber's claim, the district court concluded that counsel's reliance on Dr. Etcoff did not fall below an objective standard of reasonableness in light of Weber's "lack of cooperation and preference for the death penalty instead of life in prison" and that the failure to discover possible brain damage was not attributable to counsel. In his evaluation and testimony at trial, Dr. Etcoff explained that Weber declined to discuss the offenses with him, other than his sexual relationship with M.G., was unwilling to divulge information about himself, and did not help Dr. Etcoff understand him.

We conclude that the record supports the district court's finding that Weber was uncooperative with Dr. Etcoff. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (stating that this court will give deference to district court's factual findings that are supported by substantial evidence and not clearly wrong). Although Weber cooperated in the evaluation to some degree, Dr. Etcoff's report and testimony illustrate that his evaluation was inhibited by Weber's reluctance to provide helpful information about himself.

Turning to Weber's allegation that Dr. Etcoff's evaluation was deficient, Dr. Etcoff was engaged by the defense to "determine whether [Weber] would cooperate in preparing his defense" and if Dr. Etcoff "considered him rational enough to consider resolution of his case." However, Dr. Etcoff's evaluation and testimony actually focused on Weber's background and personality, noting that (1) both of Weber's parents had been incarcerated when he was a child but he was apparently close to his mother; (2) Weber was a good and obedient student in school, that he had no history of physical or sexual abuse or aggressive or violent behavior prior to the instant crimes; (3) Weber described having suffered a mild head injury from a fall when he was 10 or 11 years old, which left him momentarily unconscious and required hospitalization; (4) he was in a car accident when he was 10 or 11 years old, and (5) Weber described having a tic disorder and a history of fainting spells. Dr. Etcoff's testimony and evaluation also indicated that Weber would function well in a structured environment but would "possibly be taken advantage of by other prisoners" and that Weber had "quite an unremarkable childhood," which was "very unusual in cases like this." Although Dr. Etcoff did not perform tests that Weber now suggests were necessary to explain his crimes, he enlightened the jury, in addition to other mitigation witnesses, about Weber's background and character, ultimately concluding that Weber's crimes were inexplicable considering his personality and upbringing.

On the other hand, Dr. Crown's diagnosis of brain damage was vague and not particularly illuminating because he did not elucidate how that condition mitigated Weber's crimes or explained his actions, information which Weber now stresses was crucial to the jury's sentencing decision. Rather, Dr. Crown proffers a cursory conclusion that Weber "has longstanding neuropsychological and mental health problems which have impaired his functioning and are mitigating circumstances."

Considering Dr. Etcoff's evaluation and testimony, along with the vague and perfunctory nature of Dr. Crown's reports, we conclude that Weber did not show that Dr. Etcoff's evaluation was deficient on the ground that it failed to explain Weber's violence against the Gautier family.

Because Weber cannot demonstrate that counsel was deficient for not investigating or presenting evidence concerning his alleged brain damage or prejudice resulting from the omission of this evidence, the district court did not err by summarily denying this claim.

Torture aggravator

Weber contends that the district court erroneously concluded that the dual use of torture as a murder theory and an aggravator did not violate McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). Because this claim was appropriate for direct appeal, it was procedurally barred

absent good cause and prejudice.[4] See NRS 34.810(1)(b)(2). Weber failed to satisfy either prong.

In Hernandez v. State, 124 Nev. 978, 984, 194 P.3d 1235, 1239 (2008), this court rejected the argument Weber raises here, concluding that "torture murder identifies a constitutionally narrow class of murders" such that no further narrowing was required. Accordingly, the district court did not err by summarily denying this claim.[5]

Claims raised on direct appeal

Weber raises again all matters considered on direct appeal, but the doctrine of the law of the case prevents further review of those claims. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Nevertheless, this court has discretionary authority "to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted." Pellegrini v. State, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001). Other than to identify matters raised on direct appeal and fault appellate and post-conviction counsel for failing to raise those claims in

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[4]During our direct appeal mandatory review of Weber's death sentence pursuant to NRS 177.055(2), we observed that McConnell was not implicated because "Weber was convicted of deliberate, premeditated murder and/or murder by torture, not felony murder." Weber v. State, 121 Nev. 554, 587, 119 P.3d 107, 129 (2005).

[5]Because the torture aggravator is valid, we decline to address Weber's challenge to our reweighing analysis under Apprendi v. New Jersey, 530 U.S. 466 (2000).

the context of federal constitutional violations, Weber does not explain why this court should abandon the law-of-the-case doctrine and revisit his direct appeal claims. Nor does he explain how citation to federal constitutional principles would have garnered relief on appeal or in post-conviction proceedings. Therefore, we conclude that the district court did not err by denying those claims or his claim that appellate counsel was ineffective for failing to raise his direct appeal claims in the context of federal constitutional violations.[6]

Claims not raised in the district court

Weber presents a number of claims that were not raised below, including: (1) challenges to the torture murder, torture aggravator, implied malice, and reasonable doubt instructions; (2) a claim that the use of juvenile convictions in aggravation was improper; (3) a contention that the deadly weapon enhancement was improper; and (4) a claim that cumulative trial errors and counsel deficiencies rendered his trial unfair. Generally, this court declines to consider matters not raised below in the first instance absent a demonstration of good cause and prejudice. McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998). Because Weber

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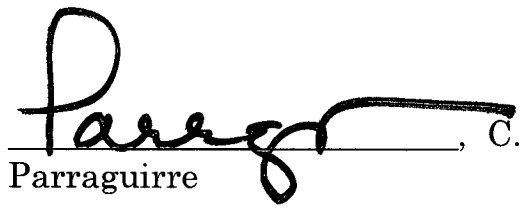
[6]To the extent Weber argues that an evidentiary hearing was warranted on his direct appeal claims, a hearing was unnecessary to develop a factual record to resolve those issues.

wholly fails to explain good cause and prejudice, we decline to consider these claims in the first instance.[7]

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

ORDER the judgment of the district court AFFIRMED.



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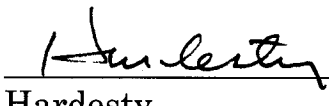

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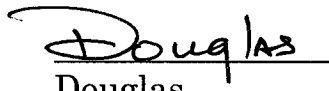

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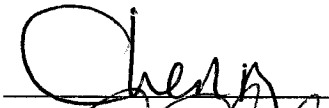

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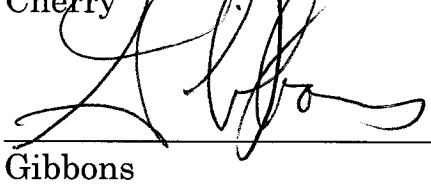

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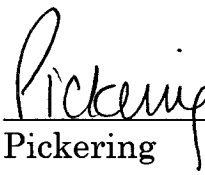

_____, J.
Pickering

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[7]Weber also raises these claims in the context of ineffective assistance of trial, appellate, and post-conviction counsel. As with his substantive claims, he must raise ineffective-assistance-of-counsel claims in the district court in the first instance.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk