IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC KEVIN BERRY,

Appellant,

vs.

WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, DAVID MILLIGAN,

Respondent.

No. 34645

FILED

OCT 28 1999

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

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On March 25, 1997, appellant was convicted, pursuant to a jury verdict, of one count each of burglary, attempted kidnapping in the first degree with the use of a deadly weapon, discharging a firearm out of a motor vehicle, and attempted armed robbery. Appellant pursued a direct appeal, which this court dismissed. See Berry v. State, Docket No. 30333 (Order Dismissing Appeal, October 27, 1997). On November 2, 1998, appellant filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel and conducted an evidentiary hearing. On July 1, 1999, the district court denied the petition. This timely appeal followed.

Appellant contends that the district court erred by rejecting various of his claims of ineffective assistance of

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trial counsel. The question of whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review; however, the district court's factual findings on such a claim are entitled to deference on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

First, appellant argues that trial counsel was ineffective for failing to request an instruction on false imprisonment as a lesser included offense of attempted kidnapping. After reviewing the documents submitted with this appeal, we conclude that the district court correctly determined that trial counsel made a reasonable tactical decision, after consultation with appellant, not to request such an instruction and that, even if counsel had requested such an instruction, there is not a reasonable probability that the outcome of the trial would have been different.

Appellant next contends that trial counsel was ineffective for failing to put appellant on the stand to testify that he did not intend to kidnap the victim. The district court found that appellant was fully advised regarding his right to testify and that it was his right to decide whether to do so.

This finding is supported by substantial evidence. Moreover, we agree with the district court's conclusion that counsel's advice that appellant not testify did not fall below an objective standard of reasonableness.

Appellant also contends that trial counsel was ineffective for failing to request that the jury be instructed on the specific intent required for attempted kidnapping. The record demonstrates that jury was adequately instructed on the elements of attempted kidnapping. Accordingly, trial counsel was not deficient for failing to request additional instructions.

Appellant further contends that trial counsel was ineffective for failing to present evidence demonstrating that appellant was mentally incapable of forming the specific intent needed to commit an attempt offense. It does not appear that this particular argument was presented to the district court; appellant may not change theories on appeal. See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Moreover, other than vague testimony that appellant had suffered hallucinations at various times due to methamphetamine use, appellant presented no evidence that he was incapable of forming the specific intent to commit the attempt offenses. We therefore conclude that this argument lacks merit.

Appellant additionally claims that trial counsel was ineffective for failing to place appellant in the most favorable light possible at sentencing. Appellant's argument on this claim below focused on counsel's alleged failure to present mitigating evidence demonstrating that appellant was amenable to

treatment for his drug addiction. The district court found that appellant failed to present any credible evidence that he was amenable to treatment. We conclude that the district court's finding in this respect is entitled to deference. See Riley, 110 Nev. at 647, 878 P.2d at 278.

Finally, appellant argues that the information was defective as to the attempted kidnapping and attempted armed robbery charges because he was never put on notice that he was facing prosecution under NRS 193.330 and because the information read to the jury did not allege any overt acts in the attempt charges. We disagree with both contentions. The charging document clearly states that appellant was charged with attempted kidnapping and attempted armed robbery. The attempted kidnapping count specifically refers to NRS 193.330. Although the attempted armed robbery count does not include a citation to NRS 193.330, this omission is not a ground for dismissal of the information or for reversal of appellant's conviction as the record clearly demonstrates that the omission did not mislead appellant to his prejudice. See NRS 173.075. Additionally, the information, prior to the interlineation requested by appellant's trial counsel at the beginning of trial, contained sufficient allegations of overt acts for each of the attempt charges to put appellant on notice as to the alleged overt acts. Moreover, the interlineation did not prevent the jury from having to find that appellant performed an overt act toward the commission of first degree kidnapping and robbery; the jury was specifically instructed on this element of an attempt offense.

We therefore conclude that appellant's challenges to the sufficiency of the information lack merit.[1]

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

Maupin, J.

Shearing, J.

Becker, J.

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

[1]We note that below appellant raised these same arguments in the context of an ineffective assistance claim. To the extent that appellant intended to make the same argument on appeal, we conclude that it lacks merit.