

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51847

FILED

AUG 10 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

On March 18, 2005, the district court convicted Brown, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Brown to serve two consecutive prison terms of 20 to 50 years. We affirmed the judgment of conviction on direct appeal. Brown v. State, Docket No. 45026 (Order of Affirmance, January 11, 2006).

On June 27, 2006, Brown filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Brown, counsel filed a supplemental petition, and the State moved to dismiss both the petition and supplemental petition. Thereafter, the district court conducted an evidentiary hearing and entered findings of fact, conclusions of law, and an order denying the petition. This appeal followed.

Brown contends that the district court erred by denying his claims of ineffective assistance of 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 was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)). To demonstrate prejudice arising from deficient performance of trial counsel, the petitioner "must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694). To demonstrate prejudice arising from deficient performance of appellate counsel, the petitioner "must show that the omitted issue would have a reasonable probability of success on appeal." Id. at 998, 923 P.2d at 1114. A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First-Degree Murder Instruction

Brown claims that trial counsel was ineffective for failing to ensure that the jury was properly instructed on the crime of first-degree murder. Brown asserts that the jury was not instructed in accordance with Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), Instruction No. 18 was inadequate as a matter of law, and neither "premeditation" nor "deliberation" were defined for the jury. Brown argues that the district court should have found "that trial counsel was ineffective for failing to seek [an] instruction in accordance with a five-year standing case and [found] that appellate counsel was ineffective for failing to read and apply the law."

Brown raises this ineffective assistance of counsel claim for the first time on appeal.¹ We decline to address this claim because it was not raised in the habeas petition or supplemental petition Brown filed below and, therefore, it was not considered by the district court in the first instance. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); see also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (explaining that this court has consistently held that an appellant “cannot change [his] theory underlying an assignment of error on appeal”).

Manslaughter Instruction

Brown claims that trial counsel was ineffective for failing to ensure that the jury was instructed on the definition of manslaughter, the difference between voluntary and involuntary manslaughter, and “the State’s burden to prove beyond a reasonable doubt that [he] did not act in the heat of passion with the requisite legal provocation.” Brown argues that trial counsel was ineffective because he was unaware of standing law and did not attempt to have the jury properly instructed and that appellate counsel was ineffective because he failed to raise this issue on direct appeal. In support of his claim, Brown cites to Mullaney v. Wilbur, 421 U.S. 684, 704 (1975), in which the Supreme Court held “that the Due

¹In his habeas petition, Brown claimed that “[Instruction No.] 18 was confusing to the jury because they sent the judge a note saying that they need a better explanation for premeditation. Timeframe.” However, this claim was not raised in the context of ineffective assistance of counsel and the district court found that it was barred because it could have been raised on direct appeal. See NRS 34.810(1)(b)(2).

Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case,” and Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005), in which we held “that where a defense theory of voluntary manslaughter is properly at issue in a homicide case, a district court should provide upon request accurate and complete instructions setting forth the State’s burden to prove the absence of heat of passion upon sufficient provocation unless that principle of law is fully, accurately, and expressly stated in the other instructions.”

The record on appeal reveals that the jury was instructed on voluntary manslaughter and the provocation necessary to reduce murder to voluntary manslaughter, but it was not instructed on involuntary manslaughter. The district court found that there was “virtually no chance that a jury could have found manslaughter based on the evidence adduced at trial.” Citing to Doyle v. State, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000), the district court further found that trial counsel was not ineffective for failing to anticipate our holding in Crawford. Brown has not demonstrated that the district court’s findings are not supported by substantial evidence or is clearly wrong. Therefore, we conclude that Brown has not established that he was prejudiced by trial and appellate counsels’ performance and the district court did not err by denying this claim.

Transition Instruction

Brown claims that trial counsel was ineffective for failing to request a transition instruction that informed the jury on how it should proceed from the consideration of first-degree murder to second-degree murder to voluntary manslaughter to involuntary manslaughter during its deliberations. Brown further asserts that appellate counsel was ineffective for failing to raise this issue on direct appeal. In support of his

claim, *Brown* cites to *Green v. State*, 119 Nev. 542, 548, 80 P.3d 93, 97 (2003), in which we held that “when a transition instruction is warranted, the district court must instruct the jury that it may consider a lesser-included offense if, after first fully and carefully considering the primary or charged offense, it either (1) finds the defendant not guilty, or (2) is unable to agree whether to acquit or convict on that charge.”

The district court found that this case was different than *Green* because no transition instruction was given at all and the jury was free to consider the various offenses in any order without any restrictions. The district court was not persuaded by the evidence that trial counsel was required to request a transition instruction. And the district court found that “any claim of prejudice from the lack of an explicit instruction is far too speculative to warrant relief in this collateral attack.”

Brown has not demonstrated that the district court’s findings are not supported by substantial evidence or are clearly wrong, nor has he shown that this issue would have had a reasonable probability of success on appeal. Therefore, we conclude that *Brown* has not established that trial and appellate counsels’ performance were deficient and the district court did not err by denying this claim.

Careful Instruction

Brown claims that trial counsel was ineffective for failing to request an instruction on the care that the jury should take when weighing the testimony of drug addict witnesses. In support of his claim, *Brown* cites to *Champion v. State*, where we held that “[w]hen the State adduces testimony by an addict-informer, the defendant is entitled to careful instructions cautioning the jury of the care which must be taken in weighing such testimony.” 87 Nev. 542, 543, 490 P.2d 1056, 1057 (1971) (internal quotation marks and citation omitted), distinguished by *King v. State*, 116 Nev. 349, 998 P.2d 1172 (2000). *Brown* further asserts that

appellate counsel was ineffective for failing to raise this issue on direct appeal.

The district court found that “[w]hile there was evidence that various witnesses had used drugs, there was no evidence that any witness was an addict or an informant. The various witnesses were percipient witnesses who were not acting as police agents when they made their observations.” Citing to Browning v. State, the district court further determined that under these circumstances, “a general instruction concerning the weight and credibility of witnesses, coupled with the opportunity to cross-examine and to argue, [was] enough.” 120 Nev. 347, 367, 91 P.3d 39, 53 (2004).

Brown has not demonstrated that the district court’s finding is not supported by substantial evidence or is clearly wrong. Therefore, we conclude that Brown has not shown that trial and appellate counsels’ performance were deficient and the district court did not err by denying this claim.

Prosecutorial Misconduct

Brown claims that trial counsel was ineffective for failing to object to the prosecutor’s questions regarding his invocation of his constitutional right to remain silent. Brown asserts that the prosecutor deprived him of a fair trial by eliciting testimony that he exercised his right to remain silent when Reno Police Department detectives attempted to interview him in California. Brown cites to McGee v. State for the proposition that “[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused’s election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966).” 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986).

During the trial, while the prosecutor questioned Detective Jim Duncan about his first meeting with Brown in California, the following colloquy occurred:

Q All right. Did he agree to talk with you?

A No.

Q What did he tell you?

A He said he would rather speak with an attorney before he talked to us.

Q Okay. So you terminated the interview at that point?

A Yes, sir.

During the evidentiary hearing, trial counsel testified that he anticipated that the prosecutor would ask Detective Duncan about whether Brown had invoked his Fifth Amendment right to remain silent. When asked why he did not object to this question, trial counsel stated: "I don't know why I didn't object, I do think it was a passing reference, and ultimately, Mr. Brown did speak to the police." Thereafter, the district court found that there was no further mention of Brown's invocation of his right to remain silent, no argument suggesting that the jury should draw any inference from that comment, and no relief was warranted because any claim of prejudice was too speculative.

Although the comment was improper, under these circumstances the error was harmless. See Sampson v. State, 121 Nev. 820, 831-32, 122 P.3d 1255, 1262 (2005). Brown has not demonstrated that the district court's finding is not supported by substantial evidence or is clearly wrong. Therefore, we conclude that Brown has not established that he was prejudiced by trial and appellate counsels' performance and the district court did not err by denying this claim.

Demonstrative Evidence

Brown claims that trial counsel was ineffective for failing to object to the inappropriate amount of time that the prosecutor's autopsy photographs were displayed before the jury and to the prosecutor's use of a mannequin as demonstrative evidence. Brown asserts that "use of a mannequin which was displayed to the jury with objects that looked like pencils sticking out of the mannequin was cumulative evidence and intended to provoke the jury and inflame the passions of the jury rendering its decision." Brown argues that trial counsel should have objected to the use of this type of evidence and appellate counsel should have raised this issue on direct appeal.

The district court found that the claim regarding the autopsy photographs was speculative and insufficient to warrant relief and that any objection to the use of the mannequin would have been futile because it was used to show the angle that the bullets entered the victim's body so as to demonstrate the sequence of events. The district court specifically found that this evidence "had great probative force." Brown has not demonstrated that the district court's findings are not supported by substantial evidence or are clearly wrong. Therefore, we conclude that Brown has not established that trial and appellate counsels' performance were deficient and the district court did not err by denying this claim.

Cumulative Error

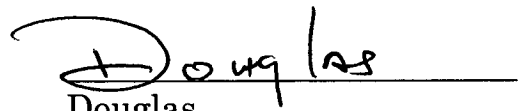
Brown claims that there was cumulative error warranting the reversal of his conviction. Brown asserts that he "proved by a preponderance of the evidence that the jury was not properly instructed, prejudicial evidence was improperly admitted, the passions of the jury were inflamed, the State improperly commented upon [his] invocation of constitutional rights, and that his trial was reduced to a sham." Brown cites to Homick v. State for the proposition that "[i]f the cumulative effect

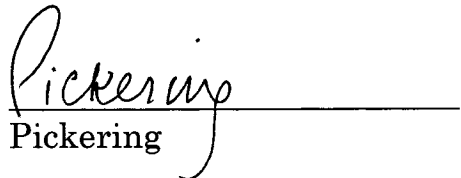
of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction.” 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996). However, Brown has failed to show that trial and appellate counsel were ineffective and therefore he has failed to demonstrate cumulative error warranting a reversal of his conviction.

Having considered Brown’s claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

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