

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,

vs.

THE STATE OF NEVADA; E.K.
MCDANIEL, IN HIS OFFICIAL
CAPACITY AS WARDEN OF ELY
STATE PRISON; AND GLEN
WHORTON, IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF THE
NEVADA DEPARTMENT OF
CORRECTIONS,
Respondents.

No. 52903

FILED

MAY 10 2010

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 a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of 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 there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective

assistance of counsel, but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel was ineffective for failing to question juror venire members in private and individually, seek a cautionary instruction, or move for a mistrial after the venire members gave their opinion on appellant's theory of defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that, while questioning the venire members in private crossed his mind, he did not feel it was appropriate in this case and felt that he needed to begin to explain an accidental discharge of the rifle during voir dire, so the jurors would not be surprised by the topic during trial. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and appellant fails to demonstrate any such circumstances here. Further, appellant fails to demonstrate that the venire members' opinions and statements about experience with firearms amounted to expert opinion testimony or unduly biased the venire members. Mach v. Stewart, 129 F.3d 495, 497-98 (9th Cir. 1997), superseded on other grounds, 137 F.3d 630 (9th Cir. 1998). Considering appellant's insistence that the shooting was accidental, appellant fails to demonstrate he was prejudiced by his counsel's decision to question the venire members together on their willingness to consider an accidental shooting defense rather than in private and individually. Therefore, the district court did not err in rejecting these claims.

Second, appellant argues that his trial counsel was ineffective for failing to investigate and present during the trial and penalty hearing psychological and psychiatric evidence regarding use of Paxil and

withdrawal from Paxil to show that appellant's thought processes were altered by Paxil. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, trial counsel testified that appellant was insistent that the shooting was accidental and appellant rejected the idea that he acted under emotional distress. Trial counsel testified that using a defense of emotional distress caused by Paxil would have been inconsistent with appellant's testimony during trial. Counsel also testified that he made a tactical decision not to present any psychological evidence during the penalty hearing because he did not want to contradict appellant's testimony during trial. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," Ford, 105 Nev. at 853, 784 P.2d at 953, and appellant fails to demonstrate any such circumstances here. Further, considering that appellant informed multiple people that the shooting was accidental, testified that it was accidental at trial, and testified it was accidental at the post-conviction evidentiary hearing, appellant failed to demonstrate a reasonable probability that a defense based on Paxil withdrawal or mitigation evidence concerning Paxil withdrawal would have a reasonable probability of altering the outcome of the trial or penalty hearing. Therefore, the district court did not err in concluding that trial counsel was not ineffective for failing to investigate and present evidence regarding Paxil use and withdrawal.

Third, appellant argues that his trial counsel was ineffective for failing to object to prosecutorial misconduct when the State made allegations it could not prove and made statements in closing arguments that were not supported by the evidence. The district court concluded that appellant failed to demonstrate prejudice from the alleged instances of misconduct. Appellant's appendix before this court includes only portions

of the trial transcripts and appellant did not call witnesses at the evidentiary hearing that could have supported these allegations. The documents before this court are insufficient to demonstrate that the district court erred in concluding that appellant was not prejudiced due to counsel's failure to object to prosecutorial misconduct. It is appellant's burden to provide this court with an adequate record for review. McConnell v. State, 125 Nev. ___, ___ n.13, 212 P.3d 307, 316 n.13 (2009). Therefore, appellant fails to demonstrate that the district court erred in denying this claim.

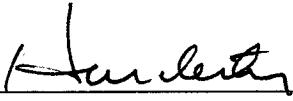
Fourth, appellant argues that his trial counsel was ineffective for failing to object when K. Kade, appellant's ex-wife, testified concerning incidents where appellant became angry and violent. Appellant cannot demonstrate his trial counsel's performance was deficient because the district court admitted this testimony over the objection of trial counsel. In addition, appellant cannot demonstrate prejudice because this evidence was properly admitted to show appellant's motive for the crime. NRS 48.045(2); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987). Therefore, the district court did not err in denying this claim.

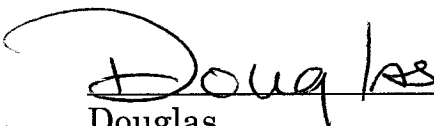
Next, appellant argues that the district court erred by not granting expenses for expert witness testimony on the use of Paxil and withdrawal from Paxil. The district court concluded that, even assuming the evidence appellant presented at the evidentiary hearing on Paxil and possible complications stemming from Paxil withdrawal were true, appellant had failed to demonstrate that there was a reasonable probability of a different outcome at trial or sentencing. As such, the district court concluded that expert testimony on Paxil was not reasonably necessary as the expert would not have assisted the district court in determining a fact at issue. See NRS 50.275. Appellant fails to demonstrate the district court abused its discretion in refusing to grant


expenses for expert testimony on Paxil. NRS 34.750(2); Widdis v. Dist. Ct., 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998).

Having considered appellant's contentions and concluding they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: First Judicial District Court Dept. 2, District Judge
Richard F. Cornell
Attorney General/Carson City
Carson City District Attorney
Karla K. Butko
Carson City Clerk