IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD BRIAN ACKERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52966

FILED

MAY 06 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 appellant's post-conviction petition for writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant first claims that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) prejudice in that counsel's errors were so severe that they rendered the jury's verdict unreliable. 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. The petitioner bears the burden of establishing the facts underlying his claims by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). When reviewing the district court's resolution of an ineffective-assistance claim, this court will defer to the court's factual findings if supported by substantial evidence and not clearly erroneous, but we

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 trial counsel was ineffective in failing to move to dismiss a count as multiplicitous. Appellant fails to demonstrate prejudice. As the danger posed by multiplicity is of multiple sentences for the same offense, the remedy is not necessarily dismissal but rather ensuring that only one sentence is imposed for each offense. See Gordon v. Dist. Court, 112 Nev. 216, 230, 913 P.2d 240, 249 (1996); 1A Charles A. Wright & Andrew D. Leipold, Federal Practice and Procedure § 145 (4th ed. 2008). Here, appellant received only one sentence and therefore fails to demonstrate a reasonable probability of a different outcome had trial counsel moved to dismiss a count. Accordingly, we conclude the district court did not err in denying this claim.[1]

Second, appellant argues that trial counsel was ineffective for failing to investigate the victim's alleged involvement in an armed robbery of appellant prior to the kidnapping and the victim's alleged theft of appellant's personalty while he was incarcerated thereafter. Appellant fails to demonstrate deficiency or prejudice. Trial counsel testified that he

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[1]Appellant argues alternatively that the information is duplicitous. However, appellant's argument is that a single alleged offense has been pleaded in multiple counts, while duplicity is "joining in a single count two or more distinct and separate offenses," Gordon, 112 Nev. at 228, 913 P.2d at 247-48. Accordingly, appellant's claim of duplicity fails on its face. To the extent appellant is arguing that the multiple counts in the information violated the Double Jeopardy Clauses of the Nevada and United States Constitutions, we note that he was only convicted of one count and, to date, the district attorney has not re-filed charges for the two counts on which the jury failed to reach a verdict. The Double Jeopardy Clauses are therefore not implicated at this time.

investigated the alleged armed robbery and concluded that the claim was uncorroborated. Moreover, appellant has not demonstrated what additional evidence further investigation could have revealed or how it would have given rise to a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err in denying these claims.

Third, appellant argues that trial counsel was ineffective for not filing a motion for discovery to learn of the victim's severe chemical addiction. Appellant fails to demonstrate deficiency or prejudice. Trial counsel testified that he knew of the victim's chemical addiction. Moreover, as the victim testified to her addiction at trial, including that appellant provided her with drugs, appellant has failed to demonstrate a reasonable probability of a different outcome at trial had counsel delved more deeply into it. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant argues that trial counsel was ineffective for failing to interview and procure witness L.A. for trial. Appellant fails to demonstrate deficiency or prejudice. Trial counsel testified that the contact information appellant provided for the witness was invalid. Moreover, appellant has failed to establish by a preponderance of the evidence to what the witness would have testified and therefore fails to demonstrate a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant argues that trial counsel was ineffective in not producing L.L. and D.L. as witnesses for trial. Appellant fails to demonstrate deficiency or prejudice. Trial counsel testified that he

wanted to preserve these witnesses for a companion case with which appellant had been charged. Which witnesses to call is a strategic decision that is "virtually unchallengeable absent extraordinary circumstances," Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000)), circumstances which appellant has neither alleged nor demonstrated. Moreover, not only were these witnesses' written statements admitted at trial, but appellant was acquitted of the count to which these witnesses could have testified. He therefore fails to demonstrate a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant argues that trial counsel was ineffective in not thoroughly cross-examining the victim regarding her prior convictions, alleged favorable treatment she received in exchange for testifying, and the ease with which the handcuffs could be removed. Appellant fails to demonstrate deficiency or prejudice. Appellant has presented no admissible evidence of the victim's criminal background, and trial counsel did question the victim briefly about it at trial. Further, the prosecutor testified that he was unaware of any favorable treatment that the victim may have received in exchange for testifying in this case, nor has appellant presented any evidence in support of his claim. Moreover, appellant admitted that he testified at trial to the quick-release latch on the handcuffs, and the handcuffs were admitted into evidence so that the jurors had an opportunity to examine their release mechanism. Appellant therefore has failed to demonstrate a reasonable probability of a different

outcome at trial. Accordingly, we conclude the district court did not err in denying these claims.

Seventh, appellant argues that trial counsel was ineffective in failing to raise the issue of prosecutorial misconduct. Appellant fails to demonstrate deficiency or prejudice. Trial counsel testified only to having a general impression that the prosecutor "had it in" for appellant. Appellant's claim that the prosecutor's "unpleasant" conversation with D.L. to dissuade her from testifying was belied by the uncontroverted evidence adduced at the prosecutor's deposition that he was attempting to procure the witnesses' attendance at trial. Moreover, as appellant was acquitted of the count to which they would have testified, appellant fails to demonstrate a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err in denying this claim.

Finally, appellant argues that trial counsel was ineffective in failing to object to a hearsay statement that Cox Cable did not provide internet service to his apartment, testimony that was introduced solely to impeach appellant. Appellant fails to demonstrate prejudice. The victim had testified that the apartment had internet service, and trial counsel's cross-examination revealed that the investigator determined only that Cox Cable did not serve appellant's apartment, not that appellant's apartment had no internet service.[2] Appellant therefore failed to demonstrate a

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[2]Appellant opens his brief with a bare argument that the district court abdicated its role as an impartial and fair decision-maker by adopting verbatim the State's proposed order. Appellant has made no showing of error in the district court's order. See State v. District Court, 100 Nev. 90, 102, 677 P.2d 1044, 1052 (1984) ("On appeal, every

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reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claims that the district court erred in denying his claim of ineffective assistance of appellate counsel. To prove a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) resulting prejudice in that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal, Jones v. Barnes, 463 U.S. 745, 751 (1983), as he will be most effective when every conceivable issue is not raised, Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Appellant argues that appellate counsel was ineffective for failing to challenge his conviction on the grounds of insufficient evidence.[3]

. . . continued

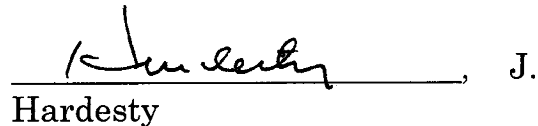
presumption is in favor of the propriety of the trial court's action in the absence of a showing of error."). However, one sentence in the district court's order is belied by the record, and we take this opportunity to note the correction. Paragraph 26 states, "The Investigator determined that no such internet access existed and testified in rebuttal to this fact." As discussed above, the record demonstrates only that the investigator determined that Cox Cable did not provide internet service to the building.

[3]Appellant raises several other claims of ineffective assistance of appellate counsel. However, as these claims were not raised below, we decline to address them here in the first instance. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

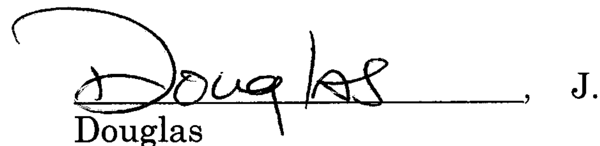
Appellant fails to demonstrate deficiency or prejudice. The evidence adduced at trial—including testimony by the victim that appellant took her to California against her will for the purpose of committing sexual assault and/or murder, as well as corroborating physical evidence and eyewitness accounts—was such that any rational trier of fact could have found the elements of first-degree kidnapping beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. See Mitchell v. State, 124 Nev. ___, 192 P.3d 721, 727 (2008). Appellant therefore fails to demonstrate a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_________________________, J.
Hardesty



_________________________, J.
Douglas

_________________________, J.
Pickering

cc: Hon. Michael Villani, District Judge
Potter Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk