IN THE SUPREME COURT OF THE STATE OF NEVADA

MILO WILLIAM HICKS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54904

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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 that was filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Appellant Milo William Hicks, Jr., was convicted, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, three counts of robbery with the use of a deadly weapon, and two counts of battery with the use of a deadly weapon.

Hicks first claims that his two battery convictions are redundant and should be reversed, arguing that battery is a lesser-included offense of robbery and that the battery convictions and two of the robbery convictions were based on the same criminal conduct. We conclude that this claim lacks merit. First, battery is not a lesser-included offense of robbery because each offense "requires proof of a fact that the other does not." Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) (discussing the test established in Blockburger v. United States, 284 U.S. 299, 304 (1932), for determining the existence of a lesser-included

offense). Second, the battery convictions were not based on "the exact same illegal act" on which the two robbery convictions were based. See Salazar v. State 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003) (redundant convictions may warrant reversal, even if they comport with Blockburger, if the gravamen of both offenses are the same) (quotation marks omitted).

Hicks next claims that he was improperly precluded from eliciting testimony at trial about a victim's profile on a dating website that Hicks alleges supported his theory of defense that he was mistakenly identified as the perpetrator and that an unknown third party committed the crimes. Although Hicks is entitled to introduce evidence which would tend to prove his theory of defense, "that right is subject to the rules of evidence." Rose v. State, 123 Nev. 194, 205 n.18, 163 P.3d 408, 416 n.18 (2007). The district court precluded Hicks from eliciting this testimony on the grounds that it was not relevant to the matters in issue and was prejudicial, see NRS 48.025(2); NRS 48.035(1), (2); NRS 48.045, and the district court's decision was not manifestly wrong. Therefore, we conclude Hicks has failed to demonstrate that the district court abused its discretion. See Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006).

Finally, Hicks claims that the two battery victims' in-court identifications were tainted and unreliable and should have been suppressed because one victim was unable to positively identify him on prior occasions and the other victim's prior identification was "tentative" and not based on recognition of distinctive tattoos on Hicks' face. The victims' tentative identification or inability to identify Hicks on prior occasions are "factor[s] to be weighed by the trier of fact," and do "not render the in-court identification[s] inadmissible." Browning v. State, 104

Nev. 269, 274, 757 P.2d 351, 354 (1988). To the extent that Hicks argues that the in-court identifications were inadmissible because the pretrial photographic lineup procedures were unnecessarily suggestive, we are unable to meaningfully review this claim because Hicks failed to include the pretrial photographic lineups in the record on appeal. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))). Therefore, we conclude that Hicks has failed to demonstrate that the district court erred by admitting the in-court identification testimony.

Having considered Hicks' contentions and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Cannon & Tannery
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk