IN THE SUPREME COURT OF THE STATE OF NEVADA

BEAU E.Z. BROWN,
Appellant,
vs.
E.K. MCDANIEL, IN HIS OFFICIAL CAPACITY AS WARDEN OF ELY STATE PRISON AND HOWARD SKOLNIK, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,
Respondents.

No. 56057



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. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On appeal from the denial of his January 26, 2005, petition, appellant claims that the district court erred in denying his claims of ineffective assistance of trial counsel during the guilt and penalty phases of his jury trial. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in 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 counsel was ineffective for failing to provide appellant's expert with the original surveillance videotape. Appellant fails to demonstrate deficiency or prejudice. He fails to demonstrate that counsel should have known her copy of the video was not a true, accurate copy, and no evidence was presented that the videographer had requested the original videotape. Moreover, at the evidentiary hearing on the petition, appellant's new expert testified that, based on the original video, he could not exclude appellant as being the perpetrator such that there was no reasonable probability of a different outcome at trial had the original video been provided. Therefore, the district court did not err in denying this claim.[1]

Second, appellant argues that counsel was ineffective for failing to adequately investigate an alleged conspiracy between the State's witness M.B. and the victim's son and then failing to use that information to impeach M.B.'s testimony. Appellant fails to demonstrate deficiency or prejudice. Counsel, upon being advised of a potentially inappropriate conversation between M.B. and the victim's son, questioned both in a hearing outside the presence of the jury and concluded that she could not establish any misconduct. In addition, counsel testified that she felt that

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[1]Appellant also argues that trial counsel used the wrong expert to analyze the video. This claim was not properly before the district court below, see Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006), and we decline to consider it on appeal. 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).

the informant, appellant's mother, would not have been a credible witness on the issue and that counsel had not been made aware that another person had overheard another similarly inappropriate conversation between M.B. and the victim's son. Moreover, appellant fails to demonstrate a reasonable probability of a different outcome at trial because not only did counsel cross-examine M.B. as to contact with the victim's son and argue the potential taint to the jury in closing, but there was substantial, unrelated circumstantial evidence pointing to appellant as the perpetrator. Therefore, the district court did not err in denying this claim.[2]

Third, appellant argues that counsel was ineffective for failing to request a "motive" jury instruction as that was the theory of defense. Appellant fails to demonstrate deficiency or prejudice. Appellant's theory of defense was that the State failed to prove each and every element beyond a reasonable doubt. Further, appellant cites no controlling authority that such a jury instruction is required or that it is otherwise deficient not to request it. See Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1997). Moreover, appellant fails to demonstrate a reasonable probability of a different outcome at trial had the jury received the requested instruction. Nothing prevented the jury from considering counsel's closing argument that appellant lacked a motive, yet the jury still found him guilty beyond a reasonable doubt. Therefore, the district court did not err in denying this claim.

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[2]Appellant also argues that counsel was ineffective for eliciting testimony from M.B. that undermined the theory of defense. This claim was not properly before the district court below, see Barnhart, 122 Nev. at 303-04, 130 P.3d at 651-52, and we decline to consider it on appeal. Davis, 107 Nev. at 606, 817 P.2d at 1173.

Fourth, appellant argues that counsel was ineffective for failing to oppose the attempted-robbery jury instruction on the grounds that it lowered the State's burden of proof and that it misstated Nevada law on renunciation. Appellant fails to demonstrate deficiency or prejudice. The challenged jury instruction is an accurate statement of Nevada law, see, e.g., Mathis v. State, 82 Nev. 402, 405-06, 419 P.2d 775, 777 (1966), and did not alter the State's burden to prove appellant guilty beyond a reasonable doubt. Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that counsel was ineffective for failing to object to the verdict form on the grounds that it did not allow the jury to find appellant guilty of second-degree murder, in violation of NRS 200.030(3). Appellant fails to demonstrate deficiency or prejudice. NRS 200.030(3) requires only that the verdict form itself designate the degree of murder. The verdict form returned by appellant's jury specified that he was guilty of first-degree murder and thus satisfied the requirements of the statute. Further, appellant points to no evidence that would support a second-degree murder conviction, cf. Rosas v. State, 122 Nev. 1258, 1267-68, 147 P.3d 1101, 1108 (2006), and he cites no authority that supports his contention that a jury must be given the opportunity to find a defendant guilty of a lesser-included offense where, as here, the evidence points only to the greater offense, see Maresca, 103 Nev. at 672-73, 748 P.2d at 6. Therefore, the district court did not err in denying this claim.

Sixth, appellant argues that counsel was ineffective for antagonizing the jury during the penalty hearing's closing arguments. Appellant fails to demonstrate prejudice. While ten of twelve jurors signed a note expressing their displeasure with counsel, the jury had been instructed that their decision was not to "be influenced by sympathy, passion, [or] prejudice," and we must presume that a jury follows their

instructions. Hymon v. State, 121 Nev. 200, 211, 111 P.3d 1092, 1100 (2005). The note did not indicate that the jury considered any improper information, and appellant has presented no evidence to counter the presumption that they followed instructions. Further, the jury found beyond a reasonable doubt that appellant had committed a senseless, violent crime, and this court held on direct appeal that the sentence was not disproportionate to the crime. Brown v. State, Docket No. 40062 (Order of Affirmance, January 8, 2004). Appellant has thus not demonstrated a reasonable probability of a different outcome absent counsel's statements. Therefore, the district court did not err in denying this claim.

Seventh, appellant argues that counsel was ineffective for failing to present to the jury during the penalty phase evidence from a forensic psychologist that appellant would not present a future danger to society. Appellant fails to demonstrate deficiency or prejudice. Counsel's testimony that the evidence presented by the forensic psychologist would have been consistent with her theory of the case at sentencing does not demonstrate that it was objectively unreasonable for her to not have retained such an expert. Further, appellant cites to no authority that requires counsel to seek such evidence where, as here, there is no reason to suspect a client suffers from any mental illness. See Maresca, 103 Nev. at 672-73, 748 P.2d at 6. Moreover, we conclude that there is no reasonable probability of a different sentence had counsel presented to the jury evidence from the forensic psychologist. Therefore, the district court did not err in denying this claim.

Eighth, appellant argues that counsel was ineffective for failing to object at the penalty hearing when the victim's father and son each requested that the jury give appellant the maximum sentence of life without the possibility of parole. Appellant failed to demonstrate

deficiency or prejudice. This court has held that "[a] victim may express an opinion regarding the defendant's sentence in a noncapital case." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Thus counsel's lack of objection was not objectively unreasonable. Further, because NRS 176.015(3)(b), which provides for victim impact statements, does not differentiate between sentencing bodies, appellant's attempt to distinguish Randell and the instant case fails. Moreover, in light of the above, the nature of the crime, and the remainder of the victims' impact statements for which appellant raises no concerns, appellant has not demonstrated a reasonable probability of a different sentencing outcome had counsel objected. Therefore, the district court did not err in denying this claim.

Appellant also argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) 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—and will be most effective when he does not—raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Again, both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

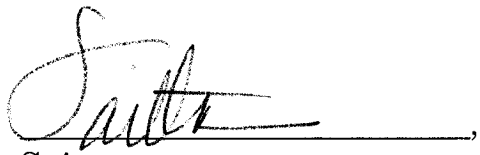
Appellant argues that appellate counsel were ineffective because they did not argue that the district court should have sua sponte instructed the jury on motive, the attempted-robbery jury instruction improperly lowered the State's burden of proof, the verdict forms should have included an option for second-degree murder, and the victim's family should not have been allowed to opine as to what sentence appellant

should receive. For the reasons discussed previously, appellant failed to demonstrate that appellate counsel were deficient or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that the above claims cumulatively amount to ineffective assistance of trial counsel. Because this court has determined that appellant failed to demonstrate deficiency on all claims except one and that he failed to demonstrate prejudice for that one claim, appellant cannot demonstrate cumulative error. We therefore conclude that the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



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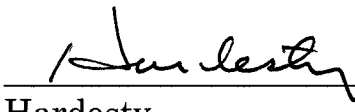

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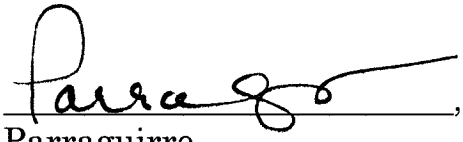

_____, J.
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk