

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE RAYMOND VOSS,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
GREGORY SMITH,
Respondent.

No. 56981

FILED

NOV 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Jesse Voss argues that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. Voss has the burden of proving by a preponderance of the evidence that counsel's performance was deficient and resulted in prejudice. See Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 31-33 (2004) (explaining the Strickland test for ineffective assistance of counsel). Voss raises six errors on appeal.

First, Voss argues that trial counsel was ineffective for failing to object to several comments made by the State during closing arguments. These comments were supported by testimony at trial and therefore trial counsel's decision not to object did not fall below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (explaining the standard for deficient performance); see also Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims.").



Second, Voss argues that the district court erred when it denied him an evidentiary hearing on counsel's failure to object to testimony from a State witness about the possible uses for various items discovered in his motel room. Because Voss did not allege any factual allegations that, if true, would entitle him to relief, an evidentiary hearing was not required. See Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983). The detective's testimony was clearly relevant to show how Voss could have used the items found in his motel room to alter checks. Therefore, trial counsel was not deficient for failing to object to this testimony.

Third, Voss argues that trial and appellate counsel were ineffective for failing to raise the issue of vindictive prosecution and that the district court erred in denying him an evidentiary hearing. Voss was not entitled to an evidentiary hearing because his petition did not contain specific factual allegations that would have entitled him to relief. See Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) (explaining the requirements for obtaining an evidentiary hearing); see also U.S. v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995) ("To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." (internal quotation marks omitted)). Voss argues that he was vindictively charged as a habitual criminal after the jury's verdict because he exercised his constitutional right to trial. However, the State is permitted by statute to file a habitual criminal count after the defendant is convicted for the primary offense. See NRS 207.016(2); see also NRS 173.095(2) (granting the prosecuting attorney discretion to decide whether to file a notice of habitual criminality under NRS 207.010). Therefore,

trial and appellate counsel's performance was not deficient because there was no appearance of vindictiveness.


Fourth, Voss argues that trial counsel was ineffective because he waived Voss' right to attend the grand jury proceedings without his knowledge despite his desire to testify before the grand jury. If true, counsel's performance likely fell below an objective standard of reasonableness. See Sheriff v. Marcum, 105 Nev. 824, 826, 783 P.2d 1389, 1390 (1989) (explaining defendant's right to be notified and testify in grand jury proceedings). However, Voss failed to demonstrate that there was a reasonable probability that but for counsel's waiver, the outcome of the proceedings would have been different. See Strickland, 466 U.S. at 687-88 (explaining that petitioner must show both deficient performance and resulting prejudice in order to be entitled to relief). Voss' claims of resulting prejudice consisted primarily of "naked" claims, unsupported by any factual allegations, and therefore did not entitle him to an evidentiary hearing or show that any deficient performance resulted in prejudice. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

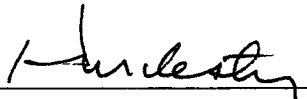
Fifth, Voss argues that trial and appellate counsel were ineffective for failing to challenge the admission of uncertified documents supporting his sentencing enhancement as a habitual criminal. However, the defendant admitted during direct examination that he had six felony convictions stemming from three separate judgments of conviction. The district court denied Voss an evidentiary hearing on this issue by finding that it had taken judicial notice of the records. While not certified, a review of the admitted documents reveals that Voss was represented by counsel when he entered his prior guilty pleas and that he was sentenced before the Second Judicial District Court in each case. We conclude that Voss' admission alone was sufficient for the State to prove the prior

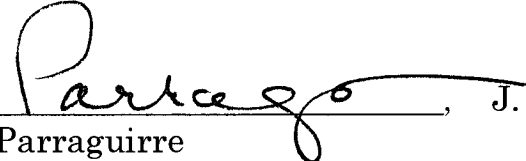
convictions beyond a reasonable doubt. See Hollander v. State, 82 Nev. 345, 350, 418 P.2d 802, 804 (1966) (requiring State to prove prior felony convictions beyond a reasonable doubt). Accordingly, we do not conclude that trial counsel's performance was deficient.

Sixth, Voss argues that cumulative error warrants reversal of the district court's denial of his petition. Because we have rejected Voss' assignment of error, we conclude that his allegation of cumulative error lacks merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk