IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENN DARNELL DEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57000

FILED

JUL 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In his petition, filed on March 19, 2010,[2] appellant first claimed that he received ineffective assistance from trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a)

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]Appellant subsequently filed "First Amendment" petitions on April 6, 2010, April 13, 2010, and May 13, 2010. We note that appellant failed to allege or demonstrate in these petitions any unconstitutional prior restraint of his First Amendment rights. The district court construed these as supplemental petitions to appellant's post-conviction petition for a writ of habeas corpus and considered them on the merits in its decision on the habeas petition.

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 claimed that counsel was ineffective for not impeaching the victim's testimony. Appellant failed to demonstrate deficiency or prejudice. The district court's finding at the evidentiary hearing on the petition that counsel attempted to impeach the victim on cross-examination was supported by substantial evidence. We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for not objecting to D. Vickers-Idrisov as a witness and for not better investigating her story to ensure no surprises at trial. Appellant failed to demonstrate deficiency or prejudice. Because the witness was noticed in accordance with NRS 174.234(1)(a), counsel would have had no basis to object. Further, counsel testified at the evidentiary hearing that the defense had met with the witness prior to trial and her testimony

contained no surprises. Moreover, appellant presented no evidence of what a more thorough investigation would have yielded or how it would have affected the outcome of the trial. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for not objecting to witness D. Vickers-Idrisov's hearsay testimony. Appellant failed to demonstrate prejudice. The witness's testimony repeated the statements of another regarding the victim's bleeding. Even if the statements were hearsay, appellant failed to demonstrate a reasonable probability of a different outcome had counsel objected because the witness, the victim, and Detective Leavitt each testified to their own observations of the victim's injuries. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for not objecting to the victim's hearsay testimony. Appellant failed to demonstrate prejudice. The victim's testimony repeated the statement of a codefendant. Even if the statements were hearsay,[3] appellant failed to

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[3]The statement was not admissible under the coconspirator exclusion from the rule against hearsay. To fall under this exclusion, the statement must have been uttered "during the course and in furtherance of the conspiracy." NRS 51.035(3)(e). The victim testified that the codefendant told him that the codefendant was supposed to be beating him but would instead pretend he had not seen him. Because the statement was made to a non-conspirator (the victim) and without the intent to induce him to join the conspiracy or to act in a way so as to assist the

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demonstrate a reasonable probability of a different outcome had counsel objected because there was substantial independent evidence presented at trial to support each of the charges. The codefendant's actions of leaving the victim, bringing the appellant to the victim's location, and quietly observing the acts constituting robbery and kidnapping supported the conspiracy charge. The victim's testimony of being forced at gunpoint to give his possessions to appellant and get into the vehicle, and then being driven away from the scene while being threatened with death supported the robbery and kidnapping charges. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for not objecting to the hearsay testimony of Officer White and Detective Leavitt. Appellant failed to demonstrate deficiency or prejudice. Appellant claimed that Detective Leavitt's testimony was based on Officer White's report, but appellant failed to present any evidence to support this claim. Appellant also claimed that both policemen's testimony was based on the victim's statements. To the extent this was true, such testimony was not hearsay because the victim testified at trial and was subject to cross-examination. See NRS 51.035(2). We therefore conclude that the district court did not err in denying this claim.

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conspiracy's objectives, the statement was not in furtherance of the conspiracy. Wood v. State, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999) (citing United States v. Shores, 33 F.3d 438, 444 (4th Cir.1994)).

Sixth, appellant claimed that counsel was ineffective for not conducting an adequate investigation because he did not file a motion pursuant to Brady v. Maryland, 373 U.S. 83 (1963), to obtain the victim's jeans and photographs of the victim's injuries. Appellant failed to demonstrate deficiency or prejudice. Appellant did not dispute that this evidence was never collected. Because the evidence was never in the State's possession, Brady would not have applied. Chapman v. State, 117 Nev. 1, 5-6, 16 P.3d 432, 435 (2001). Moreover, appellant failed to demonstrate that the State had a duty to collect the evidence because he failed to show that the items were material and that the police acted in bad faith or were grossly negligent in not gathering the evidence. See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). We therefore conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for not objecting to the prosecutor arguing facts not in evidence, that is, that the victim was dirty and bloody, that the victim was going to get a white tuxedo, that appellant stated he was going to "merk"[4] the victim, and that two others were involved in the conspiracy. Appellant failed to demonstrate deficiency or prejudice because his claims were belied by the record. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). D. Vickers-Idrisov testified that the victim was bleeding, that his shirt was dirty, and that she took him to rent a white tuxedo. The victim

[4]The victim testified that "merk" meant "kill."

testified that appellant stated he was going to "merk" him. The victim further testified that after speaking with one codefendant, that codefendant returned with appellant, and a second codefendant drove the vehicle containing all four individuals during the kidnapping. The challenged arguments were thus based on evidence in the record. We therefore conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that counsel was ineffective for not objecting to the State's failure to give notice that appellant must defend against an additional kidnapping element of "substantially increased risk of harm." Appellant failed to demonstrate deficiency or prejudice. An increased risk of harm is not an element of kidnapping. See NRS 200.310. We therefore conclude that the district court did not err in denying this claim.[5]

Ninth, appellant claimed that counsel was ineffective for not objecting to the State's suppression of a witness's affidavit and the victim's juvenile records. Appellant failed to demonstrate deficiency or prejudice. At trial, appellant possessed and attempted, albeit unsuccessfully, to introduce the affidavit, thereby belying his claim that the State suppressed the evidence. See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

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[5]To the extent that appellant claimed that counsel was ineffective in not objecting to the dual robbery and kidnapping charges as redundant, appellant's claim failed. Appellant acknowledged elsewhere in his petition that the robbery was completed before the acts constituting the charge of kidnapping ensued. Mendoza v. State, 122 Nev. 267, 269-70, 130 P.3d 176, 177 (2006).

Further, appellant failed to demonstrate that the State improperly suppressed the victim's juvenile record. Indeed, counsel specified at trial which information in the victim's juvenile record he intended to use. We therefore conclude that the district court did not err in denying this claim.[6]

Tenth, appellant claimed that counsel was ineffective for not objecting to the perjured or fabricated testimony of the victim and Detective Leavitt. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim that the victim's testimony at trial conflicted with what he gave at the preliminary hearing was belied by the record.[7] The mere fact that the victim omitted details about which he was not asked in one hearing was not evidence that he perjured himself or otherwise fabricated testimony in either hearing. See NRS 199.120 (requiring a false statement to be willfully made). Finally, although there does appear to be a discrepancy surrounding the time at which Detective Leavitt arrived at the scene, the district court found that the detail was of no consequence, and we agree that even had this discrepancy been brought to the attention

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[6]To the extent appellant claimed that the State suppressed the victim's jeans and injury photographs through its failure to collect them, appellant's claim failed for the reasons discussed previously.

[7]Appellant attempted to bolster his claims with statements that the victim made at the preliminary hearing for appellant's codefendants. That hearing took place after appellant was convicted. We note that counsel's performance is evaluated based on what he knew at the time of performance, not on what may later be revealed. Strickland, 466 U.S. at 689.

of the jury, there was no reasonable probability of a different outcome at trial. We therefore conclude that the district court did not err in denying this claim.

Eleventh, appellant claimed that counsel was ineffective for not objecting to the State changing its theory of the case. Appellant failed to demonstrate deficiency or prejudice. The evidence appellant presented demonstrated only that the State focused its case on one of the pleaded alternate theories of intent for the kidnapping charge: for the purpose of committing murder. Further, although appellant claimed there was only sufficient evidence to support robbery and a conspiracy to commit robbery, the law of the case is that there was sufficient evidence to support a charge of kidnapping in the first degree with a deadly weapon.[8] Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). We therefore conclude that the district court did not err in denying this claim.

Twelfth, appellant claimed that counsel was ineffective for not objecting to the 911 recording going in with the jury during deliberations and for not insisting that the chain of custody of the recording be established and the 911 operator testify. Appellant failed to demonstrate deficiency or prejudice. The 911 recording was admitted into evidence, and the jurors were therefore allowed to have access to the recording during deliberations. NRS 175.441(1). Further, any break in the chain of custody would have gone only towards the credibility of the evidence, not

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[8]Dean v. State, Docket No. 52769 (Order of Affirmance, October 21, 2009).

to its admissibility, Sorce v. State, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972), and appellant neither claimed nor demonstrated that the evidence was in any way incredible. Accordingly, he did not demonstrate a reasonable probability of a different outcome had counsel insisted on establishing the chain of custody or calling the operator as a witness. We therefore conclude that the district court did not err in denying this claim.

Thirteenth, appellant claimed that counsel was ineffective for not ensuring that the jury instructions defined the following elements of the various crimes: willfully, feloniously, unlawfully, without authority of law, and for the purpose of committing murder. Appellant failed to demonstrate deficiency or prejudice. "Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions." Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994). Nothing indicated that the above words had any meaning other than their ordinary ones and thus no specific definitions were necessary. Further, although each count in the information included "feloniously" in the description of the mental state, it was not an element of any of the charged crimes. See NRS 199.480; NRS 200.310; NRS 200.380; see also Quiriconi v. State, 95 Nev. 195, 196, 591 P.2d 1133, 1134 (1979) (holding that such surplus language in a charging document does not obligate the State to prove it). We therefore conclude that the district court did not err in denying this claim.

Fourteenth, appellant claimed that counsel was ineffective for not objecting to the verdict form because it did not require the jury to specify whether he was a principal in the crimes or whether he aided and abetted in their commission. Appellant failed to demonstrate deficiency or

prejudice. Jury unanimity on the theory of criminality is not required so long as the mental states could reasonably be found to be of a moral equivalence. Evans v. State, 113 Nev. 885, 894-895, 944 P.2d 253, 259 (1997). Here, the two theories are of a moral equivalence. See NRS 195.020; Evans, 113 Nev. at 896; 944 P.2d at 260. Accordingly, the general verdict form was appropriate. We therefore conclude that the district court did not err in denying this claim.[9]

Fifteenth, appellant claimed that counsel was ineffective because he did not argue for 20 additional days' credit that appellant felt he earned between the oral pronouncement of sentence and the filing of the judgment of conviction and neither counsel nor appellant was present when the judgment of conviction was actually filed. Appellant failed to demonstrate deficiency or prejudice. Appellant did not claim that he and counsel were not present at the sentencing hearing, nor did he claim that the written judgment of conviction varied from the oral pronouncement of sentence. There is no requirement that counsel or appellant be present when a judgment of conviction is filed by the clerk of the court. Further, appellant did not demonstrate that he was denied credit from the date of

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[9]To the extent that appellant claimed that the "ambiguous" jury verdict led the district court to enter a directed verdict for the State and thereby violate the Double Jeopardy Clause, we conclude that the verdict was not ambiguous, the record belied appellant's claim of a directed verdict, and the Double Jeopardy Clause was not violated by entry of the verdict.

oral pronouncement. We therefore conclude that the district court did not err in denying this claim.

Appellant next claimed that he received ineffective assistance from 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). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that counsel was ineffective for not arguing the ineffective assistance of trial counsel. Such claims are generally not appropriate for direct appeal, and appellant did not demonstrate a reasonable probability of success had counsel raised the claim. See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001). We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective because he did not raise the following claims: appellant was entitled to an additional 20 days' credit; appellant was denied the right to be present when the judgment was filed; the victim gave impermissible hearsay testimony; all elements of the crimes were not defined for the jury; and the prosecutor argued facts not in evidence, elicited false testimony from the

victim, and failed to give notice of an additional kidnapping element. For the reasons discussed previously, appellant failed to demonstrate that counsel was deficient or that appellant was prejudiced. We therefore conclude that the district court did not err in denying these claims.

Appellant next raised several claims that could have been raised on direct appeal,[10] NRS 34.810(1)(b)(2), and were therefore procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.810(1)(b). First, appellant claimed that the State argued facts not in evidence, elicited false testimony from the victim, failed to give notice of an additional kidnapping element, filed a perjured information because there was insufficient evidence that appellant committed the crimes, and changed its theory of the case during trial; that the district court abused its discretion in not holding a hearing to determine whether a juror was biased[11]; and that insufficient evidence supported his convictions. To the extent that appellant's blanket reference to having received ineffective assistance of appellate counsel could be

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[10]Dean v. State, Docket No. 52769 (Order of Affirmance, October 21, 2009).

[11]Appellant attempted to expand this claim at the evidentiary hearing by claiming that counsel was ineffective for failing to remind the district court to hold the hearing. However, the 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).

construed as an argument for good cause, he did not demonstrate prejudice because he failed to state any facts that would have demonstrated a reasonable probability of success on appeal. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims are insufficient to grant relief). We therefore conclude that the district court did not err in denying these claims.

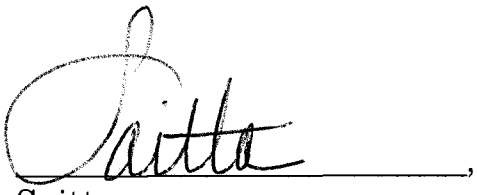
Second, appellant claimed that the prosecutor engaged in misconduct when he presented false witness testimony. Appellant argued that he had good cause to excuse the procedural bar because new evidence arose in the form of the victim's testimony at the preliminary hearing of appellant's codefendants, held two months after appellant was sentenced. Appellant failed to demonstrate prejudice. The crux of appellant's argument was that the victim's testimony at the codefendants' preliminary hearing differed from that at trial. However, appellant identified no materially inconsistent testimony and thus did not demonstrate "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Riley v. State, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977). To the extent that appellant claimed that the ineffective assistance of appellate counsel was good cause, we conclude that for the reasons just discussed, he failed to demonstrate a reasonable probability of success on appeal. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claimed that cumulative errors—the wrong presentence credits; the failure of counsel to ensure that the jury instructions defined all elements; and the failure of counsel to object to the hearsay testimony of D. Vickers-Idrisov, Detective Leavitt and Officer

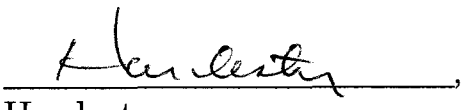
White—entitled him to relief. Because this court has determined that only one of these complaints may have constituted error, appellant failed to demonstrate cumulative error. We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we

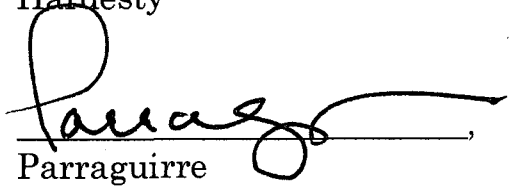
ORDER the judgment of the district court AFFIRMED.[12]



_____, J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

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[12]Appellant explicitly abandoned at the evidentiary hearing his final claims that he received ineffective assistance of trial and appellate counsel for failing to argue that his arrest and restraint were illegal and unconstitutional.

We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Donald M. Mosley, District Judge
Glenn Darnell Dean
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk