

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57473

FILED

JAN 16 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angelisa*  
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. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On appeal from the denial of his September 9, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such 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). To warrant an evidentiary hearing, a petitioner

must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant argues that trial counsel was ineffective for conceding his guilt. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel conceded that the facts of the crime occurred, but argued appellant was not criminally liable because he acted under duress based upon perceived threats from his codefendant. See Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 49 (2004) (stating "[u]nder NRS 194.010(7), duress requires a reasonable belief that one's life would be endangered or that one would suffer great bodily harm"). As trial counsel argued appellant was not criminally liable for the charged offenses as appellant acted under duress, counsel's admission that the facts surrounding the crime were true did not amount to a concession of guilt. Appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued the facts surrounding the crime had not occurred as there was overwhelming evidence of appellant's guilt given appellant's confession. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that trial counsel was ineffective for improperly introducing statements made by the codefendant. Appellant fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's counsel introduced statements made by appellant's codefendant, which included statements incriminating appellant. During a lengthy discussion, in appellant's presence but not

before the jury, counsel informed the district court that he believed the codefendant's statements would show that the codefendant was the leader during the incident and that the codefendant changed his story so often that the jury would not believe the codefendant's version of events. This was a tactical decision related to appellant's duress defense and, as such, is "virtually unchallengeable absent extraordinary circumstances," Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant did not demonstrate. Given the substantial evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel not introduced these statements. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that trial counsel was ineffective because of a conflict of interest as the public defender's office represented appellant's father. To show that an actual conflict of interest existed, appellant must demonstrate that his counsel was placed in "a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." Id. (quoting Smith, 923 F.2d at 1320). Appellant does not demonstrate that his counsel was placed in a situation that divided his loyalties. The public defender's office represented appellant's father regarding a charge of felon in possession of a firearm based on a firearm that was recovered during a search of the father's residence during the investigation of this case. All parties agreed that the

firearm belonged to the father,<sup>1</sup> but counsel stated he felt he could not state to the jury in appellant's case that the father owned the firearm, as that was effectively accusing a client represented by his office of a crime. The district court instructed the jury that the firearm belonged to the father, not appellant, thereby relieving counsel of the burden of posing questions regarding the father's gun ownership. Accordingly, appellant fails to demonstrate that an actual conflict of interest existed. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.<sup>2</sup>

Fourth, appellant argues that trial counsel was ineffective for failing to investigate character witnesses. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant fails to discuss any witnesses who could have provided testimony of appellant's good character or state what further investigation counsel should have performed regarding those potential witnesses. Appellant fails to demonstrate a reasonable probability of a different

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<sup>1</sup>The firearm recovered from the residence was a rifle, not the handguns that were used by the assailants during the commission of this crime.

<sup>2</sup>Appellant also argues that appellate counsel was ineffective for failing to argue that trial counsel had a conflict of interest. As appellant fails to demonstrate that trial counsel had an actual conflict of interest, he therefore fails to demonstrate his appellate counsel was ineffective for failing to assert the underlying claim on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Strickland, 466 U.S. at 697.

outcome had counsel conducted further investigation into character witnesses. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, appellant fails to demonstrate that the district court erred in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that trial counsel was ineffective for failing to impeach a victim with contradictions between her statement to police and her trial testimony. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant does not identify what portion of the victim's testimony conflicted with her statements to police and therefore, makes only unsupported claims. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Trial counsel questioned the victim regarding differences between her preliminary hearing testimony and her trial testimony and appellant fails to demonstrate a reasonable probability of a different outcome had counsel pursued further similar questioning. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, appellant argues that trial counsel was ineffective for failing to investigate the motives of the victims to make false allegations. Appellant makes only a bare claim that the victims fabricated their allegations, and therefore fails to demonstrate deficiency or prejudice for this claim. See id. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Seventh, appellant argues that trial counsel was ineffective for failing to preclude suggestive pretrial identification of appellant by his codefendant. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The codefendant

knew appellant and told the police appellant's first name and that appellant attended UNLV before the police showed a photograph of appellant to the codefendant for identification purposes. Thus, the identification of appellant was not "unnecessarily suggestive and conducive to irreparable mistaken identification." Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967), abrogated on other grounds by Griffith v. Kentucky, 479 U.S. 314 (1987)). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued that the pretrial identification by the codefendant was suggestive as appellant admitted to police that he participated in the incident and appellant's defense was that appellant participated under duress, rendering identification of the participants a nonissue at trial. See Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001) (stating that the defendant's own statements may be considered in assessing whether improper admission of a codefendant's statements was harmless error). Therefore, the district court did not err in denying this claim.

Eighth, appellant argues that trial counsel was ineffective for failing to seek a psychological evaluation of the female victim. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Here, multiple victims testified about the crimes, and their stories, including the female victim's, were substantially similar. Appellant fails to demonstrate that a psychological evaluation of the victim would have been appropriate as he fails to demonstrate there was little or no corroboration evidence or a reasonable basis for believing the female victim's mental or emotional state may have affected her veracity.

See Abbott v. Nevada, 122 Nev. 715, 724, 138 P.3d 462, 468 (2006). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought a psychological evaluation of the female victim. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant argues that the jury did not represent a fair cross-section of the public and that his convictions should be reversed due to cumulative error. These claims could have been raised in appellant's direct appeal, and appellant fails to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b)(2). Therefore, the district court did not err in denying these claims.<sup>3</sup>

Finally, appellant argues that the district court erred in denying additional claims from the proper person petition. Appellant fails to provide any cogent argument as to how or why the district court erred in denying these claims and merely refers to the proper person petition without discussing any of the claims contained therein. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, appellant may not incorporate by reference arguments contained in documents filed before

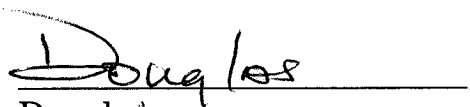
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<sup>3</sup>To the extent appellant asserts that cumulative errors of counsel amounted to ineffective assistance of counsel, appellant fails to demonstrate deficiency or prejudice for any of his claims, and therefore, fails to demonstrate cumulative error amounted to ineffective assistance of counsel.

the district court. See NRAP 28(e)(2). Thus, we need not address these claims.

Having concluded that appellant is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. James M. Bixler, District Judge  
Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk