

IN THE SUPREME COURT OF THE STATE OF NEVADA

PASQUAL LOZANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57590

FILED

OCT 01 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Hargrove*
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; Valerie Adair, Judge.

On appeal from the denial of his August 5, 2008, 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 (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) 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. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant argues that counsel was ineffective for failing to ensure that unrecorded bench conferences were put on the record. Appellant fails to demonstrate deficiency or prejudice. Appellant did not specify the subject matter of the listed bench conferences or explain their significance, see Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003), and thus fails to support this claim with specific facts that, if true, would entitle him to relief. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for failing to properly notice the State regarding an expert witness, thereby precluding the witness from testifying as to which hand appellant used while undergoing psychological testing. Appellant fails to demonstrate deficiency or prejudice. Appellant's argument misstates the information counsel was trying to elicit. Appellant was given three psychological tests, the purpose of which was to determine whether he was left- or right-hand dominant. Counsel sought to introduce the results of those tests and not merely the witness's visual observation as to which hand appellant used in taking the tests. Moreover, the jury was presented with evidence that appellant was left-handed through the testimony of his sister, the showing of an older video of appellant in which he was swinging at a piñata using his left hand, and the testimony of a school district nurse that appellant's school records indicate he was left-hand dominant. Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome had counsel been able to call the expert at trial. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for failing to object to the jury instruction on malice because the terms "abandoned or

malignant heart” are meaningless. Appellant fails to demonstrate deficiency or prejudice. Appellant fails to identify what instruction should have been given, and this court considered and rejected a similar argument in Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001). Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected to the malice instruction. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant argues that counsel was ineffective for failing to object to the jury instruction on premeditation and deliberation. Appellant fails to demonstrate deficiency or prejudice. Appellant fails to identify what instruction should have been given, and the instruction that was given was approved by this court in Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000). Further, there was clearly sufficient evidence to establish that appellant acted with deliberation and premeditation. See id. at 233, 994 P.2d at 712. The vehicle stopped near the intended victim, appellant exited the passenger side, walked around the vehicle to the side the intended victim was on, and fired several shots as the intended victim fled. The jury also heard that one of the vehicle’s occupants had previously testified that, after the vehicle stopped, appellant said, “I’m going to get at this dude” and exited the vehicle. Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected to the instruction on premeditation and deliberation. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant argues that counsel was ineffective for opening the door to gang evidence by asking questions that implicated appellant’s lack of motive to shoot the intended victim. Appellant fails to

argue that he was prejudiced pursuant to Strickland. Appellant argues only that, but for counsel's alleged deficiency, the new gang evidence would not have been introduced at trial. Appellant fails to demonstrate that the outcome of trial would have been different but for the admission of the new gang evidence. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant argues that counsel was ineffective for failing to properly investigate the State's witnesses who were to present the new gang evidence or for not requesting a continuance to allow an investigation. Appellant fails to demonstrate deficiency or argue that he was prejudiced. Appellant did notify the court that he may need additional time to investigate, but after speaking with the witnesses, he did not request additional time. Further, appellant fails to state what additional investigation would have revealed. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome. We therefore conclude that 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697. 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).

First, appellant argues that counsel was ineffective for failing to raise the issue of unrecorded bench conferences and challenge the jury instructions on malice, and premeditation and deliberation. For the reasons discussed previously, appellant fails to demonstrate that counsel was deficient or that he was prejudiced. We therefore conclude that the district court did not err in denying these claims.

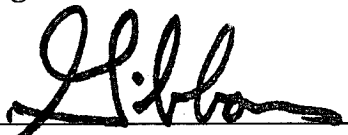
Second, appellant argues that counsel was ineffective for failing to challenge the reasonable-doubt jury instruction. Appellant fails to demonstrate deficiency or prejudice. The instruction given was that required by NRS 175.211, and this court has already approved of the instruction and held it to be constitutional. Elvik v. State, 114 Nev. 883, 897–98, 965 P.2d 281, 290–91 (1998); Lord v. State, 107 Nev. 28, 39-40, 806 P.2d 548, 554-56 (1991). Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome on appeal had counsel raised the claim. We therefore conclude that the district court did not err in denying this claim.

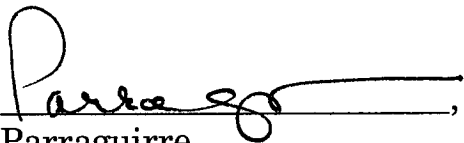
Third, appellant argues that counsel was ineffective for failing to raise jury tampering and/or bias. Appellant fails to demonstrate deficiency or prejudice. Appellant failed to allege any facts that indicated the juror engaged in conduct contrary to her oath or that the person who spoke with the juror attempted to influence the jury process, see Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003), and thus fails to support his claim with specific facts that, if true, would entitle him to relief. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claims that he “received ineffective assistance of counsel based upon cumulative error.” Appellant cited this court’s standard of direct review for cumulative-error analysis, see Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985), but provided no argument or analysis to support his claim, see Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). We therefore conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

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