IN THE SUPREME COURT OF THE STATE OF NEVADA

JIM BASS HOLDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58143

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order by the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

On appeal from the denial of his petition filed on April 17, 2009, and his supplemental petition filed on September 20, 2010, appellant argues that the district court erred in denying his claims that his counsel provided ineffective assistance at trial and on direct appeal. To prove ineffective assistance of counsel, a petitioner must demonstrate (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) 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). To demonstrate prejudice from trial counsel's errors, the petitioner must show that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland, 466 U.S. at 687-88; Lyons, 100 Nev. at 432-33, 683

P.2d at 505. To demonstrate prejudice for appellate counsel's failure to raise an issue on appeal, the petitioner must show 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—deficiency and prejudice—must be shown. Strickland, 466 U.S. at 697.

First, appellant argues that counsel was ineffective for failing to argue at trial and on direct appeal that there was insufficient evidence to support his conviction for first-degree kidnapping with the use of a deadly weapon. Specifically, appellant contends that dual convictions for kidnapping and murder are improper because any movement or restraint of the victims was incidental to the murder. We conclude that the district court did not err in denying this claim. Dual convictions for kidnapping and murder are proper "'where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged.'" Pascua v. State, 122 Nev. 1001, 1006, 145 P.3d 1031, 1034 (2006) (quoting Mendoza v. State, 122 Nev. 267, 274, 130 P.3d 176, 180 (2006)). Here, the jury heard testimony that appellant restrained the victims for up to 10 minutes, during which time appellant's co-conspirator blocked the exit and appellant pointed a gun at the victims and threatened to kill them. The jury was adequately instructed on the requirements for a dual conviction of kidnapping and murder, and could have found from this evidence that the restraint substantially exceeded that required to complete the murder. Thus, appellant failed to demonstrate that a challenge to the dual convictions would have a reasonable probability of success on appeal. Accordingly, the district court did not err in denying this claim.

Second, appellant argues that appellate counsel was ineffective for failing to argue on direct appeal that his conviction for first-degree murder is invalid under a felony-murder theory because there was no evidence to support the kidnapping charges. However, as discussed above, there was sufficient evidence to support the kidnapping conviction. Thus, this claim fails and the district court did not err in denying it.

Third, appellant argues that appellate counsel was ineffective for failing to argue on direct appeal that there was insufficient evidence of attempted murder, as there was no evidence that he had the necessary intent to commit murder. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The jury heard testimony that appellant pointed a gun at the victims and threatened to kill them. When one of the victims lunged at him, appellant shot and killed him and then pointed the gun at the other victim and shot at him as he attempted to flee, hitting him in the arm. Thus, we conclude that sufficient evidence supported the jury's verdict that appellant intended to kill the victim. See NRS 193.200 (intent); Valdez v. State, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) (stating that the jury may infer intent to kill from "the individualized, external circumstances of the crime" and "the manner of the defendant's use of a deadly weapon" (internal quotations omitted)). As such, any challenge to the sufficiency of the evidence for the attempted murder conviction would not have had a reasonable probability of success on appeal, and appellate counsel was not ineffective for failing to raise it. Accordingly, we conclude that the district court did not err by denying this claim.

Fourth, appellant argues that counsel was ineffective at trial and on direct appeal for failing to challenge the jury instruction defining

first-degree murder because it did not include a definition for "lying in wait." Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Trial counsel specifically requested that the jury not be instructed on the definition of "lying in wait." Appellant failed to demonstrate that counsel's decision was deficient and that a definition was needed for "lying in wait." See Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Further, appellant failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had the jury been instructed on a definition of "lying in wait." Trial counsel argued extensively during closing argument that appellant did not lie in wait for the victims. Moreover, there was sufficient evidence for the jury to conclude that appellant was concealed in the house waiting for the victims, and evidence supports the State's theory that he wanted to kill them. See Collman v. State, 116 Nev. 687, 717, 7 P.3d 426, 445 (2000) (defining "lying in wait" as "watching, waiting, and concealment from the person killed with the intention of killing or inflicting bodily injury upon that person" (emphasis omitted)). Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that trial counsel was ineffective for failing to conduct an adequate investigation into the gang affiliation and violent history of victim Michael Panek. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The record shows that trial counsel was aware of Panek's gang affiliation, as counsel cross-examined several witnesses about the fact that Panek had been a member of the 21st Street gang and carried guns. Appellant has

failed to identify with specificity what other evidence could have been discovered through further investigation, and his own investigator was unable to uncover other evidence of Panek's alleged violent history. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Thus, the district court did not err in denying this claim.

Sixth, appellant argues that appellate counsel was ineffective for failing to argue on appeal that the district court improperly precluded testimony from Josh Heatwole about his fear that Panek would injure or kill him. Appellant failed to show that he was prejudiced. Substantial evidence was presented that Panek had assaulted Heatwole several days prior to the shooting. In particular, Heatwole testified that he was scared when Panek got on top of him and attempted to strangle him, and another witness testified that Heatwole was "screaming for his life" at the time. Thus, because extensive evidence was admitted about Panek's violent behavior and Heatwole's fear of him, appellant could not show that this issue had a reasonable probability of success on appeal. Appellant also claims that appellate counsel was ineffective for failing to argue that the district court improperly precluded him from introducing specific instances of violent conduct by Panek. However, other than the attack on Heatwole, which was presented to the jury, appellant fails to identify any specific instances of violence that were precluded at trial. See id. Thus, the district court did not err in denying this claim.

Seventh, appellant argues that trial counsel was ineffective for failing to advise him of plea negotiations, and the district court erred by failing to hold an evidentiary hearing on this claim. The Supreme Court has recognized that defense counsel has a duty to communicate formal plea offers and that to demonstrate prejudice a petitioner must show a

reasonable probability that he would have accepted the more favorable plea offer but for counsel's deficient performance and that the plea would have been entered without the State's canceling it or the district court's refusing to accept it. Missouri v. Frye, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012). During trial, there was a discussion about plea negotiations, and the record reflects some confusion about the nature of the plea offer and whether there was more than one offer made to appellant. Thus, because the record does not belie appellant's claim, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing.

Eighth, appellant argues that appellate counsel was ineffective for failing to challenge the Tavares[1] jury instruction because it stated that evidence of uncharged bad acts could be used to "disprove a claim of self-defense." We conclude that appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Evidence of prior bad acts may be admissible under NRS 48.045(2) "to show motive and rebut the assertion of self-defense." Ochoa v. State, 115 Nev. 194, 200-01, 981 P.2d 1201, 1205-06 (1999). Because the jury instruction was a correct statement of the law, appellant could not demonstrate that this issue would have had a reasonable probability of success on direct appeal. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant contends that appellate counsel was ineffective for failing to argue on direct appeal that the district court improperly admitted his voluntary statement to the police admitting to

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[1]Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001), modified by Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008).

ingesting methamphetamine less than five hours prior to the crimes. Appellant failed to demonstrate prejudice. There was overwhelming evidence presented at trial that appellant committed the offenses and did not act in self-defense. Thus, appellant did not demonstrate that there was a reasonable probability of success on appeal had appellate counsel raised this claim. Accordingly, we conclude that the district court did not err in denying this claim.

Tenth, appellant argues that trial counsel was ineffective for failing to ensure that unrecorded bench conferences were put on the record. Other than asserting in a conclusory fashion that he was denied meaningful review, appellant failed to explain how he was prejudiced. He 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). Thus, he failed to support this claim with specific facts that, if true, would entitle him to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, the district court did not err in denying this claim.

Eleventh, appellant argues that trial counsel was ineffective for failing to object to several jury instructions. Appellant first asserts that counsel should have objected to the words "abandoned and malignant heart" in the jury instruction on implied malice,[2] as well as the words

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[2]This instruction, which tracks the language of NRS 200.020, stated: "Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

"heart fatally bent on mischief" in the definition of malice aforethought,[3] because they are vague and meaningless. This court has previously considered and rejected these exact arguments. Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001). Thus, appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced by counsel's failure to object to these instructions.

Next, appellant asserts that counsel was ineffective for failing to object to the jury instruction on premeditation and deliberation because it relieved the State of its burden of proof as to essential elements of first-degree murder. Appellant failed to demonstrate deficiency or prejudice, as the instruction that was given was identical to the instruction approved by this court in Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000). Therefore, the district court did not err in denying this claim.

Next, appellant asserts that counsel was ineffective for failing to object to the jury instruction on reasonable doubt because it minimized the State's burden of proof. We disagree. The district court gave the reasonable doubt instruction mandated by NRS 175.211, and we have repeatedly upheld the constitutionality of that instruction. See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Evans v. State, 112 Nev. 1172, 1191, 926 P.2d 265, 277 (1996). Thus, appellant failed to demonstrate that trial counsel was deficient in failing to challenge this instruction or that he was prejudiced.

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[3]This instruction stated: "[The condition of mind described as malice aforethought] may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty."

Appellant also argues that counsel should have objected to the instruction on "equal and exact justice" because it improperly minimized the State's burden of proof and created a reasonable likelihood that the jury would not apply the presumption of innocence. This court has rejected this claim where, as here, the jury was also properly instructed on the presumption of innocence and the State's burden of proof. See Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Thus, appellant failed to show deficient performance or prejudice, and the district court did not err by denying this claim.

Twelfth, appellant argues that trial counsel was ineffective for telling the jury during opening statement that appellant only wrote a journal because he was forced to do so by another inmate, which then opened the door to the admission of the journal entries. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Prior to opening statement, the district court had granted the State permission to introduce relevant portions of appellant's journal, including statements about appellant's being a paid "enforcer" in both this incident and another fatal shooting and appellant's fooling the police into thinking that he had acted in self-defense. Appellant has not pointed to any other journal entries that were admitted based on counsel's opening statement, and thus has failed to show that counsel's statements opened the door to prejudicial evidence. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, we conclude that the district court did not err in denying this claim.

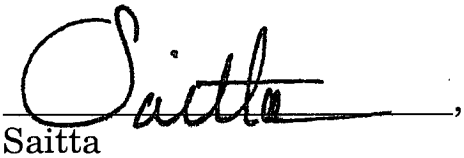
Thirteenth, appellant asserts that he "adopts" all of the claims that were raised in his proper person habeas petition. This is improper, as an appellant may not incorporate by reference documents filed in the

district court. NRAP 28(e)(2). Appellant offers no cogent argument in regard to these claims. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, we decline to address them.

Finally, appellant argues that he was entitled to an evidentiary hearing on his claims. However, because appellant failed to provide specific factual allegations that, if true and not repelled by the record, would entitle him to relief, no evidentiary hearing was required other than on his claim related to plea negotiations. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Saitta

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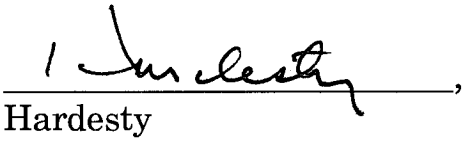

_____, J.
Hardesty

cc: Hon. Elissa F. Cadish, District Judge
Christopher R. Oram
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Clark County District Attorney
Eighth District Court Clerk