IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE TORRES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58477

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; Janet J. Berry, Judge.

Appellant Jorge Torres, Jr., argues that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. Torres 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). 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, Torres argues that appellate counsel failed to argue that there was insufficient evidence to support his conviction on two counts of robbery. In order to show prejudice, Torres must demonstrate that this

issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

At trial the first victim testified that Torres prevented her from closing her car door, took her phone, berated her for being a bad mother and struck her on the forehead. A second victim testified that when she attempted to call 911, Torres' brother took her phone and pushed her to the ground. The second victim testified that Torres did not do anything to her and she did not remember telling officers that Torres moved to cut off her escape route. An officer testified that the second victim told him that Torres was the one who knocked her to the ground and took her purse and phone. When confronted with his sentencing transcript, Torres' brother testified that he told the sentencing judge that he grabbed the second victim's phone and threw it. Torres denied the victims' allegations and testified that he and his brother were breaking up a fight between his sister and sister-in-law and the victims.

The district court concluded that Torres' insufficiency argument was not likely to succeed on appeal because a rational juror could have found that Torres personally acted to rob victim one and aided and abetted his brother in robbing victim two by preventing the victims from coming to the aid of each other. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). We agree. See NRS 200.380(1); Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction). To the extent that Torres' argument incorporates a challenge to the sufficiency of the information because it does not include a theory of aiding and abetting, as discussed below, Torres has not shown prejudice. See Ex Parte Boley, 76 Nev. 138, 140,

350 P.2d 638, 639 (1960) (explaining that post-conviction petitioner must show prejudice when attacking the sufficiency of an information). Therefore, we affirm the denial of this claim.

Second, Torres argues that counsel was ineffective for failing to request a jury instruction on battery as a lesser-included offense of robbery. We conclude that counsel was not deficient because he abided by Torres' wish to pursue a complete innocence defense.[1] We give deference to the district court's factual determination that counsel made a strategic decision not to request a lesser-included offense instruction in order to focus the attention of the jury on Torres' theory of defense and conclude that the district court not err in denying this claim. See Lader, 121 Nev. at 686, 120 P.3d at 1166.

Third, Torres argues that trial counsel was ineffective for failing to object to the State's aiding and abetting instruction and appellate counsel was ineffective for failing to raise the error on direct appeal. The district court concluded that the language "in joint participation" in the information was sufficient to put Torres on notice that the State was pursuing an aiding and abetting theory and that Torres was not prejudiced because trial counsel testified at the evidentiary hearing that he was not surprised and was fully prepared to defend the claim of aiding and abetting. A theory of joint participation is fundamentally different from a charge of aiding and abetting. Batt v. State, 111 Nev. 1127, 1130-31, n.2, n.3, 901 P.2d 664, 666, n.2, n.3 (1995).

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[1]We also note that battery is not a lesser-included offense under this court's elements test. See Barton v. State, 117 Nev. 686, 694-95, 30 P.3d 1103, 1108-09 (2001).

However, despite the State's error in failing to amend the information, see Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983), we give deference to the district court's factual determination that trial counsel had actual knowledge of the State's intent to proceed on an aiding and abetting theory and therefore conclude that Torres was not denied due process. See Koza v. State, 104 Nev. 262, 264, 756 P.2d 1184, 1185-86 (1988). Accordingly, we conclude that the district court did not err by concluding that Torres' trial and appellate counsel were not ineffective. See Means, 120 Nev. at 1011-12, 103 P.3d at 31-33.

Fourth, Torres argues that trial counsel was ineffective for stipulating to the admission of his brother's unredacted sentencing transcript, which contained accusations against Torres by both his brother's attorney, who shifts all of the blame to Torres, and the State, who implicates both men in the brother's crime, and that appellate counsel was ineffective for failing to raise this error on direct appeal. The district court's factual determination that Torres abandoned his pleaded claim during the evidentiary hearing and did not identify the offending evidence with specificity is unsupported by the record and we review Torres' fourth claim de novo. The sentencing transcript was inadmissible under NRS 50.095 because Torres' brother did not deny his conviction. See Tomarchio v. State, 99 Nev. 572, 578, 665 P.2d 804, 808 (1983). Furthermore, only one statement by Torres' brother in the eight-page transcript was admissible under NRS 50.135 as a prior inconsistent statement. The prejudicial statements made by trial counsel, the State, and parole and probation were all inadmissible hearsay. See NRS 51.035.

According to Torres' trial counsel, he made a strategic decision to stipulate to the entire transcript in order to show Torres' brother's involvement in the crime and that the transcript would tell the jury more about his brother's actions than just a judgment of conviction. We conclude that even if Torres' trial counsel was acting based on the State's "joint participation" theory, the decision to stipulate to the inadmissible hearsay accusations against his client was at the very least imprudent. Further, we cannot discern a strategy for stipulating to the entire transcript when trial counsel claims he was aware that the State was also pursuing an aiding and abetting theory of liability. Therefore, we conclude that trial counsel's performance was deficient, falling below an objective standard of reasonableness. Means, 120 Nev. at 1011, 103 P.3d at 32. Because the district court dismissed Torres' claim without addressing whether the admission of the entire sentencing transcript to the jury resulted in prejudice, we remand this claim to the district court to determine whether trial counsel's deficient performance resulted in prejudice.

Fifth, Torres argues that trial counsel was ineffective for failing to object to the State's comments on Torres' post-arrest silence and appellate counsel was ineffective for failing to raise the error on direct appeal. During trial, after asking Torres why he did not stick around and talk to the police if he was innocent, the State asked Torres: "Did you talk to the cops any time after that up until let's say yesterday about what happened in this case?" The district court concluded that Torres' Fifth Amendment claim was unlikely to succeed on appeal because the State's comments and trial counsel's failure to object would not amount to plain

error. However, the district court failed to address whether trial counsel's failure to object to the State's comment on Torres' post-arrest silence resulted in prejudice. See Washington v. State, 112 Nev. 1054, 1059-60, 921 P.2d 1253, 1257 (1996) (concluding that trial counsel was ineffective for failing to object to prosecutor's comments on defendant's post-arrest silence in a case which rested "solely on defendant's word versus the victim's word" (internal quotations omitted)). Therefore, we remand Torres' claim to the district court to determine whether trial counsel's failure to object to the State's comments and request a limiting instruction resulted in prejudice.

Finally, Torres argues that NRAP 3C is unconstitutional because appointed trial counsel is "expected to work [for] free in Nevada" and may not have the skills necessary to file an appeal on behalf of their clients. We direct Torres to NRAP 3C(b)(2) which explains that trial counsel is responsible for "adjust[ing] their public or private contracts for compensation to accommodate the additional duties imposed by this rule." Furthermore, lawyers in Nevada are required to have the legal knowledge and skill necessary for the representation of clients. See RPC 1.1 (competence); see also SCR 73. Accordingly, we conclude that this claim lacks merit.

Although we remand two of Torres' claims to the district court to determine whether counsel's deficient performance resulted in prejudice, we express no opinion as to whether Torres' can satisfy the prejudice prong for his claims either individually or cumulatively, see McConnell v. State, 125 Nev. 243, 259, n. 17, 212 P.3d 307, 318, n. 17 (2009).

We conclude that Torres is only entitled to the relief described herein, and we[2, 3]

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.[4]

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

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[2]Torres also raises several ineffective assistance claims concerning the admission of a prison phone call between Torres' brother and his wife which was used to impeach his brother's testimony. We decline to address these claims because Torres has not established good cause for his failure to raise them in his post-conviction petition filed in the district court. See McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

[3]To the extent that Torres argues that counsel was ineffective for failing to request a jury instruction on how to evaluate impeachment evidence, we decline to consider this claim because he offers no cogent argument or relevant authority. Maresca v. State, 103 Nev. 669, 673, 748 P.3d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[4]This order constitutes our final resolution of this appeal; any appeal from the district court's decision on remand shall be docketed as a new a separate matter

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk