

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BENARD WADSWORTH,
Appellant,
vs.
WARDEN, SOUTHERN DESERT
CORRECTIONAL CENTER, BRIAN
WILLIAMS, SR.; AND THE STATE OF
NEVADA,
Respondents.

No. 58811

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
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. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On appeal from the denial of his petition filed on January 21, 2009, and his supplemental petition filed on December 3, 2009, appellant first argues that the district court erred in denying his claim that trial counsel provided ineffective assistance by pursuing a "second shooter" theory of defense. To prove ineffective assistance of counsel, a petitioner must demonstrate that (1) 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). 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). “In order to avoid the distorting effects of hindsight, the evaluation begins with the strong presumption that ‘counsel’s conduct falls within the wide range of reasonable professional assistance.’” Ennis v. State, 122 Nev. 694, 704-05, 137 P.3d 1095, 1102 (2006) (quoting Strickland, 466 U.S. at 689). 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).

Appellant specifically argues that trial counsel was ineffective for pursuing a defense theory that someone else shot the victim, rather than a theory that appellant shot the victim in self-defense. The district court found that appellant failed to demonstrate that counsel’s theory of defense was unreasonable or that a different theory of defense had a reasonable probability of altering the outcome of the trial. We conclude that the district court’s findings are supported by substantial evidence and are not clearly wrong. Appellant’s own testimony at trial supported this “second shooter” theory of defense. He testified that during the altercation between his friends and the victim and others, he heard several gun shots, so he fired several shots at the ground near the victim. When he later learned that the bullet that hit the victim was not a ricochet, he “felt relieved, because I know that I didn’t point the gun at anyone, and I know that I was shooting at the ground So I know that I did not commit the crime.” He also testified that, following his arrest, he told his grandmother and aunt that a second shooter had killed the victim. Furthermore, other evidence at trial supported his defense of a second

shooter. His friend, who was one of the men involved in the altercation, told the police that another man with a gun was present at the time of the shooting. There was also differing testimony from witnesses as to the number of shots fired and the number of men involved in the altercation. Thus, in light of appellant's own statements and other witnesses' testimony, the "second shooter" theory was not unreasonable. Moreover, appellant failed to demonstrate a reasonable probability that a self-defense theory would have altered the outcome of the trial. The evidence at trial showed that his friends had initiated the altercation, and there was little, if any, testimony, other than from appellant, indicating that he shot the victim in self-defense. Because appellant failed to demonstrate deficiency or prejudice, we conclude that the district court did not err in denying this claim.

Next, appellant argues that the district court erred by summarily dismissing his other claims without holding an evidentiary hearing or making specific findings of fact or conclusions of law as to those claims. Specifically, appellant contends that the district court's order should be reversed because the district court stated that the claims raised in appellant's proper person petition were dismissed "on motion of the State, for the reasons stated in the motion to dismiss." We conclude that, to the extent that the district court erred by failing to set forth specific findings of fact and conclusions of law pursuant to NRS 34.830(1) and NRAP 4(b)(5)(B), appellant has failed to demonstrate that he was harmed by such error. Our review of the record reveals that the claims raised by appellant in his proper person petition were belied by the record, were rejected by this court on direct appeal and thus were barred by the

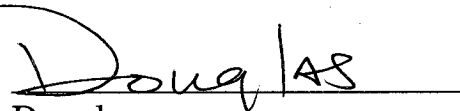
doctrine of the law of the case, or failed to demonstrate actual prejudice. Furthermore, other than asserting that the district court failed to hold an evidentiary hearing or make factual findings or conclusions of law in denying these claims, appellant does not present any argument on appeal to demonstrate that the district court erred in declining to hold an evidentiary hearing on these claims. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument.”). Thus, we conclude that the district court did not err by denying the claims.


Finally, appellant argues that there was insufficient evidence to convict him of first-degree murder with the use of a deadly weapon because there was no evidence of premeditation and deliberation. This claim was not raised in appellant’s supplemental petition and was raised in appellant’s proper person petition only in the context of ineffective assistance of counsel. Thus, we need not address the insufficient-evidence claim in the first instance. See generally Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (observing that arguments not presented in district court in first instance need not be considered on appeal), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). To the extent that appellant’s claim in his proper person petition could be construed as a separate claim of insufficient evidence, such a

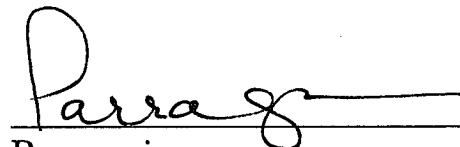
claim would be procedurally barred because it could have been raised on direct appeal.¹ See NRS 34.810(1)(b)(2).

For the foregoing reasons, we conclude that the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹We note that a claim of insufficient evidence was in fact raised and rejected on direct appeal, and to the extent that he is trying to provide further argument on this issue, his claim is barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).