

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK MICHAEL FORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59148

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malore
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; Doug Smith, Judge.

On appeal from the denial of his October 18, 2007, 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 in 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). 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, appellant argues that counsel was ineffective for failing to object to a voluntary-manslaughter jury instruction that used an adult standard because it resulted in this court reviewing the claim for plain rather than harmless error on direct appeal. Appellant fails to demonstrate prejudice or deficiency. Appellant offers no cogent argument as to how a different standard of review on appeal would have affected the outcome of either trial or the appeal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). To the extent appellant argues that the failure to offer a jury instruction affected the outcome at trial, appellant failed to provide this court with the trial transcripts or jury instructions, thereby precluding review of the district court's disposition of the claim. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for not arguing to the jury that appellant committed only voluntary manslaughter. Appellant fails to demonstrate prejudice or deficiency. The district court's finding that counsel made a reasonable, strategic decision to argue that appellant committed second-degree murder is supported by substantial evidence in the record. See Hernandez v. State, 124 Nev. 978, 990-91, 194 P.3d 1235, 1243 (2008) (acknowledging that effective counsel may concede guilt). To the extent appellant argues that counsel was

ineffective for failing to request that the jury be instructed that the State bears the burden of disproving the sudden passion necessary for voluntary manslaughter, we again note that appellant has failed to provide this court with an adequate record on appeal. 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 claim 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.

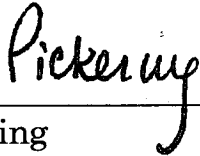
Appellant argues that counsel was ineffective for failing to claim that insufficient evidence supported his conviction for burglary while in possession of a deadly weapon. Appellant reasons that the only way the jury's apparently inconsistent verdicts can be reconciled is to conclude that there must have been insufficient evidence to support one of the counts of which he was convicted. Appellant fails to demonstrate prejudice or deficiency. Appellant's reasoning is fatally flawed because whether a jury's verdicts are consistent is irrelevant to a review of a claim of insufficient evidence. United States v. Powell, 469 U.S. 57, 67 (1984); see also Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675

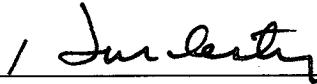
(1995). We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Doug Smith, District Judge
Oronoz & Ericsson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹To the extent appellant argued that trial counsel was ineffective for failing to adequately present exculpatory evidence to the jury, this claim was not raised below and we therefore decline to consider it on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).