

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH PATTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59682

FILED

OCT 08 2012

TACOE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

In his petition filed on April 11, 2011, appellant claimed that he received ineffective assistance of trial counsel.<sup>2</sup> To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and 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-

<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>To the extent that appellant raised any claims independently from his claims of ineffective assistance of trial counsel, those claims were waived as they could have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b), (3).

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.

First, appellant claimed that trial counsel failed to challenge the constitutionality of the kidnapping statute and whether he received proper notice of the State's theory that the kidnapping count was not incidental to the battery and robbery counts. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel filed a pretrial petition for a writ of habeas corpus, arguing that the kidnapping count was incidental to the battery count. Trial counsel further sought a motion to dismiss and motion for advisory verdict. This court considered and rejected appellant's challenge to the kidnapping count on direct appeal. Patton v. State, Docket No. 54364 (Order of Affirmance, July 15, 2010). Appellant's argument relating to whether kidnapping is incidental to battery and robbery does not implicate the constitutionality of NRS 200.310, and appellant failed to otherwise demonstrate that NRS 200.310 was unconstitutional. Nothing requires the State to set forth its theory regarding whether a kidnapping charge is incidental to another charged offense in the criminal information. NRS 173.075. Appellant failed to demonstrate that any further arguments regarding the kidnapping count would have had a reasonable probability of altering the outcome at trial.

Second, appellant claimed that trial counsel failed to conduct a more thorough investigation. Appellant claimed that trial counsel failed to visit him before trial to talk about the case. Appellant specifically identified the following points that were not adequately pursued: the victim's testimony about the chronology of the incident, the medical

reports, and the neighbor's statements to the police. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate how further investigation regarding any of these points would have had a reasonable probability of altering the outcome at trial.<sup>3</sup>

Third, appellant claimed that trial counsel failed to prepare a defense for trial. Appellant claimed that trial counsel failed to hire an expert witness to testify about the length of time it would take for swelling to occur and failed to investigate and/or present appellant's self-defense argument and argument that the victim waited 24 hours to report the crime. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any testimony regarding swelling-times would have had a reasonable probability of altering the outcome at trial. Trial counsel did present a self-defense argument and argued that the battery occurred 24 hours prior to the victim's reporting of the crime. It was for the jury to determine the weight and credibility of the evidence and testimony presented at trial. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel failed to question the doctors and the police about whether the victim inflicted her own injuries, the victim's statement that she returned to her upstairs residence, and whether an ambulance took the victim to the hospital when

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<sup>3</sup>To the extent that appellant claimed that trial counsel failed to adequately cross-examine the victim about these points, appellant failed to demonstrate that raising these points on cross-examination would have had a reasonable probability of altering the outcome at trial.

appellant believed that a private vehicle was used. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, the police officers who first responded to the report of domestic violence testified that they found the victim on the couch in her upstairs unit, battered and bloody.<sup>4</sup> The medical testimony, including the stipulation, was that the victim suffered a nasal fracture, facial fractures, a bilateral brain bleed, which was testified to be life-threatening, and vision loss, and that the victim reported abdominal pain. While the testimony was slightly ambiguous about her mode of transport to the hospital, any testimony on this point would not have related to any material fact at issue. Appellant failed to demonstrate that questions regarding any of these points would have had a reasonable probability of altering the outcome of trial.

Fifth, appellant claimed that trial counsel failed to interview witnesses in order to prepare a series of questions for use at trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the witnesses or the questions to be asked. Thus, he necessarily failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel taken further action.

Sixth, appellant claimed that trial counsel failed to object to inadmissible testimony about the knives. Appellant claimed that the victim lied about appellant brandishing knives and that it was the victim who brandished a knife. Appellant failed to demonstrate that trial

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<sup>4</sup>One of the officers testified that it was the worst presentation of any battery injuries that he had ever seen on a victim who was alive.

counsel's performance was deficient or that he was prejudiced. The fact that the victim's story differed from appellant's story did not render testimony about the knives inadmissible. The jury was presented with appellant's story that the victim attacked him with a knife and with the fact that a knife was found in the victim's purse in the hospital. It was for the jury to determine the weight and credibility of the evidence and testimony presented. See Bolden, 97 Nev. at 73, 624 P.2d at 20.<sup>5</sup>

Seventh, appellant claimed that trial counsel failed to challenge the Dr. Schwartz stipulation as the jury was not provided a definition for a bilateral brain bleed. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A stipulation necessarily indicates mutual agreement between the opposing parties, and thus, trial counsel would have had no reason to challenge the stipulation. The emergency room doctor testified that a bilateral brain bleed was a life-threatening injury. Appellant failed to demonstrate that further testimony defining a bilateral brain bleed would have had a reasonable probability of altering the outcome at trial.<sup>6</sup>

Eighth, appellant claimed that trial counsel failed to challenge the reasonable doubt jury instruction. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced as he received the instruction required by NRS 175.211.

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<sup>5</sup>To the extent that appellant claimed that trial counsel failed to cross-examine the victim about the knives, the record belies appellant's claim.

<sup>6</sup>Contrary to appellant's assertion, nothing in the record would support his attempt to equate a bilateral brain bleed with a broken nose.

Ninth, appellant claimed that trial counsel failed to challenge jury instructions 11-18. Appellant provided no arguments that should have been made regarding these instructions. Thus, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

Tenth, appellant claimed that trial counsel failed to object to prosecutorial misconduct during closing arguments. Appellant failed to identify which statements should have been objected to. Thus, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

Eleventh, appellant claimed that trial counsel failed to investigate or request lost police notes or reports. Appellant failed to identify the lost police notes or provide an explanation for how counsel could have viewed notes or reports that had been lost. Thus, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

Twelfth, appellant claimed that trial counsel failed to present lesser-included offenses of false imprisonment and coercion. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. First, appellant was originally charged in the justice court with coercion, but trial counsel successfully argued a motion to dismiss this count. Trial counsel presented a self-defense theory, which included a denial of any type of restraint of the victim. Appellant failed to

demonstrate that there is a reasonable probability of a different outcome had trial counsel presented a theory inconsistent with self-defense.<sup>7</sup>

Thirteenth, appellant claimed that trial counsel failed to object to the procedures used for the jury's questions. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. This court considered and rejected appellant's argument on direct appeal that the procedures were insufficient, determining that appellant failed to demonstrate that his substantial rights had been affected by the failure to correctly follow the procedures. Patton v. State, Docket No. 54364 (Order of Affirmance, July 15, 2010).

Fourteenth, appellant claimed that trial counsel failed to object to the premeditation and deliberation jury instruction, failed to object to the implied malice jury instruction, failed to object to autopsy photographs, failed to object to trace metal evidence and present expert testimony regarding such, and failed to interview and call an alibi witness. Appellant failed to demonstrate that his counsel was ineffective. It appears that these claims may have been borrowed from another inmate's petition and were inadvertently included in the instant case as none of these claims relate to appellant's case. This was not a murder case, none of the challenged instructions were given, no evidence regarding trace metal was presented, an alibi was not pursued in this case,<sup>8</sup> and no autopsy photographs were presented.

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<sup>7</sup>The jury was instructed on the lesser offense of second-degree kidnapping.

<sup>8</sup>Notably, appellant does not identify the purported alibi witness.

Fifteenth, appellant claimed that trial counsel failed to object to the district court's giving of an incomprehensible jury instruction on proximate cause and an erroneous instruction on contributory negligence. No such instructions were given, and thus, appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced.

Sixteenth, appellant claimed that trial counsel should have objected to the district court's failure to provide an instruction on the State's loss of critical evidence collected at the hospital. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Notably, appellant failed to identify the critical evidence lost at the hospital.

Seventeenth, appellant claimed that trial counsel showed no concern for him because appellant is African-American. Appellant offered no facts in support of this claim, and the record provides no support. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel.<sup>9</sup> To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102,

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<sup>9</sup>To the extent that appellant raised any claims independently from his claims of ineffective assistance of appellate counsel, those claims were waived as they could have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b), (3).



1114 (1996). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

First, appellant claimed that appellate counsel should have challenged the doctor's testimony regarding a bilateral brain bleed. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant failed to identify what manner of argument could have been raised to challenge the doctor's testimony and failed to demonstrate that this issue would have had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel should have argued that the court erred in admitting highly prejudicial photographs of the victim and allowing the State to leave them on zoom for a long period of time. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. First, appellant did not identify the specific photographs. Second, photographs of the victim's injuries were probative and relevant to the charges. Appellant failed to demonstrate that this issue would have had a reasonable likelihood of success on appeal.

Third, appellant claimed that appellate counsel should have argued that the court improperly admitted the victim's testimony about the ATM card because it differed from her earlier statements to the police. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Even assuming that the victim made inconsistent statements, any inconsistencies would not make the testimony inadmissible.

Fourth, appellant claimed that appellate counsel should have argued that Detective Schmidt's testimony was improperly admitted because he testified as an expert. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Detective Schmidt did not testify as an expert on blood spatter. Rather, Detective Schmidt testified as a percipient witness about the state of the victim's residence.

Fifth, appellant claimed that appellate counsel should have argued that Officer Salgado was not qualified to testify as an expert witness in accident reconstruction. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Officer Salgado did not testify as an expert in accident reconstruction. Rather, Officer Salgado testified as a percipient witness about the state of the victim's residence.

Sixth, appellant claimed that appellate counsel should have argued that he was not provided adequate notice of the grand jury proceedings and was denied the right to testify before the grand jury. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced as the State never pursued an indictment but filed a criminal complaint in the justice court. Appellant was present for the preliminary hearing and canvassed about his right to testify.

Seventh, appellant claimed that appellate counsel should have presented an argument of judicial coercion. Appellant provided no facts or cogent argument relating to this claim. Therefore, we conclude that the district court did not err in denying this claim as he failed to demonstrate that he received ineffective assistance of appellate counsel.

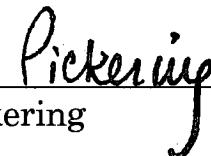
Eighth, appellant claimed that appellate counsel should have argued that the implied malice jury instruction was in error. The jury was not given an implied malice instruction. Thus, appellant failed to demonstrate that his counsel was ineffective.

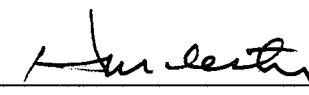
Ninth, appellant claimed that appellate counsel should have filed a timely petition for rehearing. Appellant failed to set forth any arguments that should have been made in a petition for rehearing, and thus, he failed to demonstrate that his counsel was ineffective.

Finally, appellant claimed that appellate counsel should have argued that the district court made a public display of sympathy for the victim when he offered the victim a tissue. Appellant failed to demonstrate that this issue would have had a reasonable probability of success on appeal. While the record indicates that the district court expressed concern at times, none of the expressions violated the duty of impartiality.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Carolyn Ellsworth, District Judge  
Kenneth Patton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk