IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL L. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60388

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingram
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.[1] Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In his petition filed on July 20, 2011, appellant claimed that he received ineffective assistance of trial counsel. 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, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505

[1]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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

(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 claimed that trial counsel failed to file a motion to suppress his statements to the police. Appellant claimed that his September statement contained bad acts from other robbery cases. Appellant claimed that the October statement was not recorded and transcribed, there was not a signed Miranda waiver,[2] and appellant made incriminating statements to knowing Ronnie Gibson, using the victim's stolen cell phone and receiving property in the instant case as payment for the vehicle he had stolen. Appellant's trial counsel testified that there was no legal basis to challenge the statements and the credibility of the detective was pursued at trial. Appellant failed to demonstrate that his trial counsel's performances were deficient or that he was prejudiced. Appellant failed to demonstrate that there was a legal basis for suppressing the statements and that such a motion would have been successful. The detective testified that appellant was Mirandized before the interviews in September and October. No testimony was presented at

[2]Miranda v. Arizona, 384 U.S. 436 (1966).

trial that appellant committed other robberies.[3] Nothing requires the statement to the police to be recorded and transcribed in order to be admissible at trial. Finally, the fact that appellant made incriminating statements is not a basis to suppress an otherwise voluntary and knowing statement, for which the defendant waived his rights.

Second, appellant claimed that his trial counsel failed to object to misstatements of facts not in evidence. In particular, appellant claimed that the prosecutor erroneously stated that he gave stolen cars to people for them to commit robberies and received proceeds from the robberies. Appellant claimed that this was a misstatement because it was not in his transcribed statement to the police. Appellant's trial counsel acknowledged that there was an objection during closing arguments, but that there was no legal basis to challenge the statements. Appellant failed to demonstrate that his trial counsel's performances were deficient or that he was prejudiced. On direct examination, the detective testified

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[3]At a pretrial hearing on April 16, 2009, it was discussed that redacted statements would not be presented as such to the juries, but the contents, using neutral pronouns, would be elicited through the detective's testimony. Appellant argued on direct appeal that a motion to sever should have been granted as he was unfairly prejudiced by the prosecutor asking leading questions to avoid problems under Bruton v. United States, 391 U.S. 123 (1968). Smith v. State, Docket No. 54397 (Order of Affirmance, January 31, 2011). This court considered and rejected appellant's claim that his substantial rights were prejudiced. To the extent that appellant attempts to revisit this holding, the doctrine of the law of the case prevents further litigation of this issue. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

that, while denying participation in the robberies in this case, appellant admitted that he had stolen the car used in this case and gave the car, for a fee, to others for a robbery. On cross-examination, appellant's trial counsel attempted to clarify the statement and provided a direct quotation from the statement for the jury's consideration: appellant admitted that he "got cars from people in the alley . . . that need to pay bills, just to run errands, a bunch of little shit, I take a car charge." Appellant denied that he knew what people did with the cars. The detective testified that appellant told him that his fee included being able to select property from the vehicle when it was brought back. Trial counsel objected to the State's characterization of this testimony during closing arguments. Appellant failed to indicate what further actions should have been taken by trial counsel to clarify his statement to the police and how such action by counsel would have had a reasonable probability of altering the outcome at trial.

Third, appellant claimed that trial counsel failed to present the fact that the stolen cell phone not recovered was traced to an apartment occupied by his codefendant Adrian McKnight. Appellant's counsel testified that this fact was strategically irrelevant, it could have opened the door to admitting prior bad acts of a similar nature involving cell phones, and it could have reopened the door regarding the pretrial ruling limiting McKnight's ability to incriminate Smith during trial. Appellant failed to demonstrate that his trial counsels' performances were deficient or that he was prejudiced. Appellant admitted to using one of the victim's cell phones. There was no evidence presented, at trial or at the

evidentiary hearing, regarding the location of the non-recovered cell phone. Because appellant and the codefendant were convicted of conspiracy to commit robbery and robbery, the location of any item taken during the robbery or the identity of the individual who gained possession of items taken during the robbery was irrelevant and would not have had a reasonable probability of altering the outcome at trial.

Next, appellant claimed that he received ineffective assistance of appellate counsel.[4] 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 had 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.

First, appellant claimed that appellate counsel was ineffective for failing to argue that his statements were obtained without a knowing and intelligent waiver of constitutional rights. Appellant failed to set forth any specific facts supporting this claim, and thus, appellant failed to demonstrate that this issue had a reasonable likelihood of success on appeal.

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[4]To the extent that appellant raised any claims independently from his claims of ineffective assistance of counsel, those claims were waived as they could have been raised on direct appeal and appellant failed to demonstrate good cause and actual prejudice for his failure to do so. NRS 34.810(1)(b).

Second, appellant claimed that appellate counsel was ineffective for failing to argue that the denial of a motion to sever prevented him from confronting and cross-examining his codefendant, Adrian McKnight. Appellant also complained that McKnight's redacted confession was presented to the jury. Appellant failed to demonstrate that his appellate counsel's performance was deficient. Appellate counsel did challenge the denial of the motion to sever on appeal, and this court determined that he was not unfairly prejudiced by the denial of the motion, he was the beneficiary of a pretrial ruling made by Judge Mosley, and leading questions about statements made to the police did not affect appellant's substantial rights.[5] Smith v. State, Docket No. 54397 (Order of Affirmance, January 31, 2011). Appellant failed to demonstrate a violation under Bruton v. United States, 391 U.S. 123 (1968) because the testimony about McKnight's statements to the police regarding other participants was not facially incriminating, was couched in neutral terms of "they" or "other people," and only became incriminating to appellant when linked with evidence introduced at trial.[6] See Richardson v. Marsh,

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[5]As discussed earlier, the redacted statements were not presented as such to the jury but through leading questions asked of the detective who interviewed McKnight. The detective mentioned briefly that a statement was redacted. The jury was informed that redaction referred to personal information like birthdates or social security numbers that may be contained in the statement.

[6]Indeed, McKnight's statements were presented after the State presented evidence from the victims describing the offenses, after Ronnie Gibson's testimony inculpating both appellant and McKnight in the

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481 U.S. 200, 208 (1987) (finding no Confrontation Clause violation because the redacted statements did not directly refer to the defendant, but became incriminating only when linked with evidence introduced later at trial); Lisle v. State, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997) (rejecting Bruton claim where "the other guy" was used in a redacted statement because the statement was not incriminating to the defendant on its face, but only when linked with other evidence introduced later at trial). But see Gray v. Maryland, 523 U.S. 185, 192-196 (1998) (determining the right to confrontation was violated where redacted confession of the nontestifying codefendant included blanks, deletions, and symbols because the redactions facially incriminated Gray: obviously referred directly to someone, at times obviously Gray, and involved inferences that the jury could make immediately);[7] Ducksworth v. State, 114 Nev. 951, 953-55, 966 P.2d 165, 166-67 (1998) (recognizing that where

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crimes, after the testimony of K. Lyons who overheard a conversation between appellant, McKnight and Gibson, after the forensic testimony regarding appellant's fingerprints found on the stolen vehicle used during the crimes, and after the detective discussed appellant's statements to the police which linked him to the crime. The references to "they" and "other guys" in the testimony about McKnight's statement were minimal at best and at the conclusion of the State's case-in-chief. The neutral pronouns did not violate appellant's confrontation rights under the facts presented.

[7]Notably, the Gray Court did not overrule Richardson, but distinguished the facts presented in each case and appeared to recognize that a redaction referring to "a few other guys" may pass constitutional muster. 523 U.S. at 196.

the nontestifying codefendant's redacted statement suggested the participation of another person and it was likely that the jury deduced this other person was the defendant, admission of the statement violated Bruton where there was only minimal, circumstantial evidence and the State implicitly conceded that the most damaging evidence against the defendant was the redacted statements). Further, part of appellant's defense hinged on only two persons being specifically observed by the victims as being involved in the crime and appellant used McKnight's statements to the police admitting McKnight's involvement in the Nieva robbery to support this defense.[8] Given the substantial evidence presented against appellant at trial—the testimony of the victims, the evidence linking appellant to the stolen vehicle, the evidence linking appellant to the victim's cell phone, the testimony of Ronnie Gibson (the third defendant who testified against appellant and McKnight and was subject to confrontation and cross-examination by two teams of defense attorneys), and the testimony of K. Lyons who overheard appellant's inculpatory conversation with McKnight and Gibson, appellant failed to demonstrate that further arguments made by appellate counsel would have had a reasonable probability of altering the outcome on appeal.

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[8]Appellant's counsel argued strenuously during trial that only two persons were observed by the victims to have participated in the crimes and the suggestion made by counsel was that it was appellant's co-defendant McKnight and Ronnie Gibson, who admitted to participating in the charged offenses. Appellant's counsel emphasized that appellant never wavered in his denial of participating in the robberies in question in this case.

Third, appellant claimed that his appellate counsel should have argued that there was insufficient evidence presented at trial. Appellant failed to demonstrate that this issue would have had a reasonable likelihood of success on appeal. Appellant offered no specific argument as to how the evidence was insufficient for each of the nine counts for which he was convicted.

Fourth, appellant claimed that his appellate counsel failed to argue that the prosecutor misstated evidence about appellant's procuring stolen vehicles and committed perjury. Appellant failed to demonstrate that his counsel's performance was deficient or that this issue would have had a reasonable likelihood of success on appeal. The prosecutor's statements regarding the stolen vehicles were supported by the testimony of the detective. To the extent that appellant claimed that the prosecutor suborned perjury, appellant failed to demonstrate that the detective or Ronnie committed perjury.

Fifth, appellant claimed that his appellate counsel failed to argue that the district court erred in denying a motion for mistrial based on K. Lyons' testimony that she did not come forward earlier because she was afraid appellant and McKnight would harm Ronnie Gibson's family. Appellant failed to demonstrate that his counsel's performance was deficient or that this issue would have had a reasonable likelihood of success on appeal. Lyons' answer was in response to a question asked by appellant's own counsel; thus, appellant was precluded from raising the issue on appeal. Jones v. State, 95 Nev. 613, 618, 600 P.2d 247, 250 (1979)

(holding that where a defendant participates in an alleged error, he is estopped from raising any objection on appeal).

Sixth, appellant claimed that this appellate counsel failed to supply him with transcripts, communicate with him, and investigate and prepare for the appeal. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellate counsel testified that there was a delay in obtaining the transcripts and she could not share them with appellant as she needed them to complete the briefs. Appellate counsel further testified that there was numerous letters sent between her and appellant about the appeal. Appellant failed to indicate how counsel was unprepared for the appeal or what was required to be investigated.

Finally, appellant failed to demonstrate that cumulative error warranted relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Saitta, J.
Saitta

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court Dept. 14
Michael L. Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk