IN THE SUPREME COURT OF THE STATE OF NEVADA

KAREN BODDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62491

FILED

OCT 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
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. Ninth Judicial District Court, Douglas County; David R. Gamble, Senior Judge.

On appeal from the denial of her February 28, 2011, petition,[1] appellant argues that the district court erred in denying some of her claims of ineffective assistance of trial counsel.[2] To prove ineffective

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[1]The petition was filed more than one year from the issuance of remittitur on direct appeal on February 26, 2010. *See Bodden v. State*, Docket No. 51537 (Order of Affirmance, February 1, 2010). The district court allowed three days for mailing pursuant to NRCP 6(e) and concluded that the petition was therefore timely filed. The district court was in error because NRCP 6(e) does not apply to post-conviction habeas petitions. *See generally Gonzales v. State*, 118 Nev. 590, 53 P.3d 901 (2002) (holding that a petition filed two days late was untimely). We nevertheless affirm the district court's conclusion that the petition was timely because the one-year deadline fell on a Saturday such that a petition filed on Monday, February 28, 2011, as was appellant's, was timely. NRCP 6(a); *see Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

[2]Although appellant was represented by two attorneys at trial, attorney Erik Johnson was appointed co-counsel in an order signed only 20 days before the start of trial, was not an active participant at trial, and
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14-34377

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 (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 if supported by substantial evidence and not clearly erroneous 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 investigate and present to the jury alibi testimony from appellant's children. Appellant has failed to demonstrate deficiency or prejudice. The victim was last in contact with or seen by any disinterested witnesses in the afternoon of August 15, 2006, and appellant told law enforcement officers that she last saw the victim flying off in an airplane with "Ramos" around 8:30 a.m. on August 16, 2006. The State argues that the Ramos story was a ruse appellant created to conceal that she had murdered the victim and disposed of his body on August 15 and/or 16. Specifically, appellant argues that counsel should have called on B. Allen and C. Allen to testify that they worked and ate dinner with appellant until late on

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testified at the evidentiary hearing that his limited role was to "basically do what I'm told in terms of assisting" lead counsel James Wilson.

August 15.[3] B. Allen admitted at the evidentiary hearing that when he spoke with counsel before the trial, he was unsure about what he had been doing on the dates in question. Further, C. Allen did not testify at the evidentiary hearing, and appellant presented no other evidence to support an alibi. Accordingly, appellant failed to demonstrate the facts underlying her claim by a preponderance of the evidence. Moreover, even if she could have established the alleged alibi, she alleged no alibi for the hours between the end of dinner on August 15 and an early-afternoon lunch on August 16. Accordingly, appellant fails to demonstrate a reasonable probability of a different outcome had the alibi evidence been presented. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for failing to investigate and present to the jury alibi testimony from appellant's former clients. Appellant has failed to demonstrate deficiency or prejudice. The former clients testified at the evidentiary hearing, but none could say with certainty whether or when appellant was with them on August 15 or 16.[4] Counsel testified that because the witnesses could

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[3]Petitioner also argues that counsel should have called K. Rasor to testify that she lunched with appellant on August 16. This is new argument not raised below, and we decline to consider it on appeal in the first instance. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33. Below, appellant argued that counsel should have called the witness to confirm that B. Allen and C. Allen worked late with appellant the evening of August 15.

[4]To the extent that appellant is arguing that counsel was ineffective for failing to introduce these witnesses' statements that, in the days following the victim's disappearance appellant did not act like someone who had just murdered her husband, we conclude that appellant has failed to demonstrate deficiency or prejudice. Such testimony is not "alibi"

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have provided only a weak alibi at best, he did not call them at trial because any benefit would have been outweighed by the negative impact of wasting the jury's time. Appellant fails to demonstrate that counsel's strategy was objectively unreasonable or that there was a reasonable probability of a different outcome had counsel called these witnesses. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for failing to investigate and present to the jury R. Brown's statement that he may have seen the victim on August 19. This argument was not raised below, and we decline to consider it on appeal in the first instance. *Davis*, 107 Nev. at 606, 817 P.2d at 1173. Below, appellant acknowledged that the witness disavowed the statement and argued that counsel was ineffective in not using that disavowal to discredit the police report.

Fourth, appellant argues that counsel was ineffective for failing to introduce at trial C. Dickerson's statement to investigators that he heard a gunshot around sunset on August 15 in the direction of the victim's hangar, where the victim was likely killed. Appellant has failed to demonstrate deficiency or prejudice. Appellant acknowledges that the witness died prior to trial, and appellant does not allege that this statement falls under any exceptions to the prohibition against hearsay. *See* NRS 51.035 (defining hearsay); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that it is appellant's responsibility to provide

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evidence, *Black's Law Dictionary* 79 (8th ed. 2004) (defining alibi as "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time"), and was not necessarily exculpatory. Accordingly, counsel was not objectively unreasonable in not eliciting it, and appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel done so.

cogent argument). Moreover, counsel testified that he did not introduce the statement because it implicitly contradicted appellant's statements to law enforcement that she saw the victim the following day. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant appears to argue that counsel was ineffective for failing to elicit testimony from various witnesses that appellant had told them prior to and around the time of the victim's disappearance that the victim was considering working on an airplane for an illegal drug runner named "Ramos." Appellant has failed to demonstrate deficiency or prejudice. Counsel testified that he could find no evidence to corroborate appellant's "Ramos" story, and we conclude that it was not objectively unreasonable for counsel not to emphasize the self-serving story. Moreover, appellant does not allege that the victim's statements fall under any exceptions to the prohibition against hearsay. *See* NRS 51.035; *Maresca*, 103 Nev. at 673, 748 P.2d at 6. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant appears to argue that counsel was ineffective for failing to have appellant undergo a more thorough psychological evaluation earlier in the case and present that evidence to demonstrate why appellant gave conflicting statements. Appellant has failed to demonstrate deficiency or prejudice. Counsel testified that none of his interactions with appellant nor conversations with her friends and family gave him reason to doubt her mental health. Counsel further testified that, because of appellant's "bizarre" conduct more than 10 years prior to the instant crime, he did obtain a psychiatric evaluation just to cover all bases and that the doctor who performed it confirmed that the results were not helpful to the defense. Finally, counsel testified that based on the information in the report he received, even had he obtained it several months earlier, he still would not have sought additional testing, and the district court found this to be objectively reasonable. Appellant failed to demonstrate that, given the information counsel had at the time, his decision not to pursue additional testing was objectively unreasonable. Moreover, appellant makes only bare claims that had the jury been presented with the results of the psychiatric evaluation performed for post-conviction proceedings, jurors would have had a different view of appellant's reactions and allegedly puzzling responses. Appellant fails to identify what those reactions and responses were or how they affected the outcome of trial. *Maresca*, 103 Nev. at 673, 748 P.2d at 6. We therefore conclude that the district court did not err in denying this claim.

Seventh, appellant makes references to several other claims of ineffective assistance of trial counsel, including that counsel should not have relied solely on a defense of insufficient evidence or allowed appellant to waive giving a jury instruction on certain lesser-included offenses, and that counsel should have bolstered appellant's defense with expert witnesses, presented the testimony of the forensic entomologist, presented testimony regarding appellant's character, and presented a witness to mitigate evidence that appellant had been previously convicted for embezzlement. Not all of these claims were raised below, *Davis*, 107 Nev. at 606, 817 P.2d at 1173, and appellant has failed to provide cogent argument for any of them, *see Maresca*, 103 Nev. at 673, 748 P.2d at 6; *see also* NRAP 28(e)(2) (prohibiting incorporation by reference).

Appellant next argues that she is entitled to post-conviction relief due to the cumulative errors of counsel. Where, as here, appellant fails to demonstrate any error of counsel, there can be no error to cumulate. We therefore conclude that the district court did not err in denying this claim.

Finally appellant argues for the first time in her reply brief that the district court required the wrong burden of proof. Argument may not be raised for the first time in a reply brief, NRAP 28(c), and we therefore need not consider this argument, NRAP 28(j). Moreover, as a separate and independent ground to deny relief, appellant's claim is without merit. The district court properly considered whether appellant demonstrated the facts underlying her claims by a preponderance of the evidence, *Means*, 120 Nev. at 1012, 103 P.3d at 33, then considered whether she had demonstrated a reasonable probability of a different outcome, *Strickland*, 466 U.S. at 687-88.

For the foregoing reasons, we conclude that appellant's claims lack merit, and we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. David R. Gamble, Senior Judge
Ninth Judicial District Court Dept. 1
Matthew D. Ence, Attorney & Counselor at Law
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk