

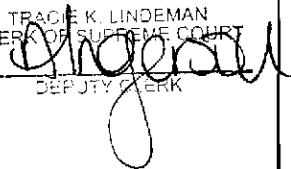
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICK SHAWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63001

FILED

DEC 12 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his January 22, 2013, petition, appellant claimed that his trial counsel was ineffective. 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 (1984) (adopting the test in

¹This 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).

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).

First, appellant claimed that his trial counsel was ineffective for failing to argue that he was not properly notified of the grand jury proceedings. Appellant failed to demonstrate prejudice, as he was ultimately convicted by a jury and thus could not demonstrate a reasonable probability of a different outcome had counsel raised arguments regarding notice of the grand jury proceedings. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986) (holding that any error in grand jury proceedings was harmless where defendants were found guilty beyond a reasonable doubt at trial); *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel improperly agreed to the use of videotaped testimony from prior court proceedings in order to save time. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to demonstrate that use of videotaped testimony of unavailable witnesses from one of his prior criminal proceedings was improper. See *Funches v. State*, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997); *Drummond v. State*, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970). Given the substantial evidence of appellant's guilt presented at trial, appellant failed to demonstrate a reasonable probability of a different outcome had counsel not stipulated to use of the videotaped testimony. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to suppress appellant's statements to the police because he was not read warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant had not been placed under arrest and was still in his home when he made the challenged statements, and the statements were unprompted by the police. In considering the circumstances in which appellant made the challenged statements, appellant failed to demonstrate he was subjected to a custodial interrogation, and therefore, his statements were properly admitted at trial. See *Casteel v. State*, 122 Nev. 356, 362, 131 P.3d 1, 4 (2006); *Rosky v. State*, 121 Nev. 184, 191-92, 111 P.3d 690 695-96, (2005). Therefore, the district court did not err in denying this claim.²

Fourth, appellant claimed that his counsel was ineffective for failing to object to the State's use of leading questions. Appellant failed to demonstrate that he was prejudiced. The district court allowed the State to pose leading questions to one of the elderly witnesses who could not remember the details he had included in his statement to police. Under

²Appellant also claimed that his appellate counsel was ineffective for failing to argue that his statements should have been suppressed. As appellant's statements were properly admitted at trial, appellant failed to demonstrate his appellate counsel was deficient for failing to raise the underlying claim or a reasonable likelihood of success had counsel raised the underlying claim on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

these circumstances and given the significant evidence of appellant's guilt presented at trial, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for advising appellant not to testify. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The trial court informed appellant that he had the right to testify and that the decision whether to testify was his alone. Appellant acknowledged that he had discussed testifying with counsel and that he understood that he had to decide whether to testify. In addition, appellant had an extensive and lengthy criminal history, with the majority of his previous convictions involving similar fraudulent activities to those he was charged with in this matter, and he would have been subject to questioning regarding those convictions. *See* NRS 50.095. Given appellant's statements to the district court and his criminal history, he failed to demonstrate that counsel's advice was objectively unreasonable or that there was a reasonable probability of a different outcome had counsel advised appellant to testify. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to object when the State referred to a prior bad act during closing arguments. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel opposed admission of appellant's prior bad acts pretrial, but the district court concluded they were admissible. Based on that ruling, the prosecutor's closing argument was proper. Appellant also failed to demonstrate it was

objectively unreasonable for counsel to not renew the objection during trial. *See Epps v. State*, 901 F.2d 1481, 1483 (8th Cir. 1990) (explaining that prosecutor's comments that were not objectionable could not be a basis for an ineffective-assistance claim based on counsel's failure to object). Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel raised an additional objection to the prosecutor's comment. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to request to have appellant evaluated for competency. Appellant failed to demonstrate deficiency or prejudice because he did not demonstrate that he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to seek an expert to examine the elderly witnesses' ability to recall events. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel challenged the elderly witnesses' recollection of events during cross-examination and appellant failed to demonstrate that objectively reasonable counsel would have sought an expert witness on the same subject. And because there were witnesses who were not elderly and appellant was recorded committing a number of the illegal activities on surveillance videos,

appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel sought an expert regarding the elderly witnesses' memories of the events. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel was ineffective because he was unprepared for jury selection, did not investigate or review the case, did not interview witnesses, rested without presenting witnesses or evidence, failed to object to prosecutorial misconduct, failed to object to infirm jury instructions, failed to adequately cross-examine witnesses, and did not move for a change of venue. Appellant failed to demonstrate either deficiency or prejudice. Appellant presented these claims in a list and did not elaborate or explain these claims with any additional detail or facts. Bare claims, such as these, are insufficient to demonstrate that appellant was entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying these claims.

Tenth, appellant claimed that his trial counsel was ineffective at the sentencing hearing. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel filed a sentencing memorandum that sought a favorable sentence. At the hearing, counsel informed the court of multiple reasons why appellant should receive a favorable sentence. Appellant did not provide any information that counsel failed to present to the district court which would have had a reasonable probability of leading to a different outcome at the sentencing hearing. Such a bare claim is insufficient to demonstrate that

he was entitled to relief. *See id.* Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. 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*, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel failed to argue that he was not notified of the grand jury proceedings. Appellant failed to demonstrate prejudice. As discussed previously, appellant was convicted by a jury and therefore failed to demonstrate a reasonable probability that an issue regarding notice of the grand jury proceedings would have been successful on appeal. *See Mechanik*, 475 U.S. at 70; *Lisle*, 114 Nev. at 224-25, 954 P.2d at 746-47. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel failed to argue that the court improperly declared a mistrial during his first trial. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. After a mistrial, the retrial will not be barred by double jeopardy if the "mistrial was dictated by manifest

necessity or the ends of justice.” *Beck v. Seventh Judicial Dist. Court*, 113 Nev. 624, 627, 939 P.2d 1059, 1060 (1997) (internal quotation marks omitted). Here, the district court declared a mistrial shortly after jury selection because all parties made mistakes regarding the charges, the possible sentences appellant faced, and the number of permissible peremptory challenges, and because two jurors had already had to be excused from serving due to personal emergencies. Under these circumstances, appellant was properly retried after his first trial was declared to be a mistrial. *See* NRS 174.085(4). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel failed to argue that the district court erred in allowing one witness’ statement to the police to be read to the jury. Appellant failed to demonstrate deficiency or prejudice because the statement was properly admitted by the district court as a recorded recollection pursuant to NRS 51.125. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel failed to argue that the jury improperly viewed him wearing handcuffs and shackles. Appellant failed to demonstrate deficiency or prejudice for this claim. During trial, the district court conducted a hearing outside the presence of the jury and concluded that the jury had not viewed appellant in restraints. Appellant failed to demonstrate a reasonable likelihood of success on appeal had counsel raised the underlying claim. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel failed to argue that the State withheld exculpatory evidence. Appellant failed to

demonstrate deficiency or prejudice for this claim because he did not identify any exculpatory evidence that the State withheld. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his appellate counsel failed to argue that the district court erred by admitting prior bad act evidence. Appellant cannot demonstrate deficiency or prejudice for this claim because counsel raised the underlying claim on direct appeal and it was rejected by this court. *Shawn v. State*, Docket No. 58903 (Order of Affirmance, September 12, 2012). Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his appellate counsel had a conflict of interest because counsel worked for the public defender's office. Appellant failed to demonstrate that employment by the public defender's office caused an actual conflict of interest or that his counsel had divided loyalties. *See Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his appellate counsel was ineffective for only raising two issues on appeal. As appellant failed to demonstrate either deficiency or prejudice for any of his claims of ineffective assistance of appellate counsel, he failed to demonstrate that his appellate counsel was ineffective for failing to raise additional issues on appeal. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to send appellant all of the documents related to this case. Appellant failed to demonstrate prejudice as he failed to

demonstrate a reasonable likelihood of success on appeal had counsel sent him additional documents. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. As appellant did not demonstrate that any of his claims of ineffective assistance of counsel had merit, he failed to demonstrate they cumulatively amount to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Valerie Adair, District Judge
Rick Shawn
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk