

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAY PINEDA,
Appellant,
vs.
E.K. MCDANIEL, WARDEN, ELY
STATE PRISON,
Respondent.

No. 66281

FILED

APR 15 2015

TRAVIS K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Ray Pineda challenges the district court's denial of his February 5, 2009, habeas petition. Pineda argues that defense counsel were ineffective because they failed to prepare for trial, meet with the defense expert witness before trial, effectively cross-examine Alfredo Mena regarding the dangerousness of George Chacon and the victim, object to the admission and demonstrative use of a knife that was not the murder weapon, and preserve various trial errors for appeal. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Here, the district court conducted an evidentiary hearing on the claims raised in Pineda's habeas petition and made the following factual findings: Counsel prepared for trial by reading the transcript of Pineda's previous trial, retaining an expert on gang culture and behavior,

15-900444

and discussing the case with Pineda.¹ Pineda failed to show how a more thorough preparation of the expert witness would have resulted in a different jury verdict. Counsel tried to elicit testimony from Mena regarding the potential for trouble between Pineda, Chacon, and the victim, but they were unsuccessful because the court sustained the State's objections on hearsay and speculation grounds. The district court further found that Pineda could not show that he was prejudiced by the State's use of the knife because on direct appeal the Nevada Supreme Court determined that "the testimony clearly stated that the knife displayed was not the knife used in the killing" and ruled that the knife "was relevant to demonstrate the manner in which the victim died."

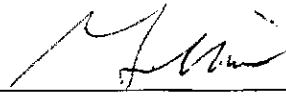
Our review of the record reveals that the district court's factual findings are supported by substantial evidence and are not clearly wrong. To the extent that Pineda claims that counsel were ineffective for failing to properly preserve trial issues for appeal, he has not shown that these issues had a reasonable probability of success on appeal. We conclude that Pineda has failed to demonstrate that the district court erred by denying his ineffective-assistance-of-counsel claims.² See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); see also *Means v. State*, 120

¹Pineda was previously tried for this offense and his judgment of conviction was reversed on appeal. See *Pineda v. State*, 120 Nev. 204, 88 P.3d 827 (2004).

²Pineda also claims that the cumulative errors of counsel warrant relief. However, this claim was not raised in the court below and we decline to consider it here. 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.

Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner must prove the facts underlying his claims of ineffective-assistance by a preponderance of the evidence). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk