

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON CHRISTOPHER RAGLAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66646

FILED

FEB 04 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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.¹ Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his May 12, 2014, post-conviction petition for a writ of habeas corpus, 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 *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

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).

First, appellant claimed that his trial counsel was ineffective for failing to conduct pretrial investigation. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant did not demonstrate that his counsel could have uncovered favorable evidence through reasonably diligent investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In addition, the evidence demonstrating appellant's guilt was overwhelming, as appellant's fingerprint and DNA were discovered on the firearm and the firearm was found in appellant's vehicle. Given the strong evidence of appellant's guilt, he failed to demonstrate that any evidence appellant's counsel could have uncovered would have had a reasonable probability of producing a different outcome at trial. Therefore, the district court did not err in denying this claim

Second, appellant claimed that his trial counsel was ineffective for failing to attend the grand jury proceedings, inform appellant of his right to attend the grand jury proceedings, or argue there was insufficient evidence presented to the grand jury. Appellant failed to demonstrate that he was prejudiced. Appellant was ultimately convicted of the charged offense beyond a reasonable doubt, and thus, could not demonstrate a reasonable probability of a different outcome had he or counsel attended the grand jury proceedings. *See United States v. Mechanik*, 475 U.S. 66, 70, (1986) (holding that any error in the grand jury proceedings was harmless where the 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).

Appellant also failed to demonstrate a reasonable probability of a different outcome had counsel argued that there was insufficient

evidence presented to the grand jury. A review of the record reveals that the State presented sufficient evidence to the grand jury to support a probable cause finding for the charge against appellant. *See Sheriff, Washoe Cnty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object during opening statements when the State referenced a confrontation appellant had with his girlfriend. Appellant asserted that this was improper because the girlfriend did not testify at trial, he was not charged with a crime related to that confrontation, and it was unduly prejudicial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. If uncharged acts are necessary to complete the story of a crime, the evidence of uncharged acts is admissible under the *res gestae* rule. *See NRS 48.035(3); State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995). The State in opening statements and police officers during their testimony briefly mentioned that the police had received a call regarding a confrontation between appellant and his girlfriend. The brief mention of the confrontation occurred to explain the search for appellant that led to the discovery of the firearm. Under these circumstances, appellant failed to demonstrate that objectively reasonable counsel would have objected to discussion of this information during opening statements or during presentation of the State's evidence. *See id.*; *see also Watters v. State*, 129 Nev. ___, ___, 313 P.3d 243, 247 (2013) (explaining the scope of opening statements). As there was overwhelming evidence of appellant's guilt produced a trial, appellant failed to demonstrate that there was a reasonable probability of

a different outcome had counsel objected to introduction of this information. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to object to testimony regarding touch DNA, as appellant asserts it was unreliable. Appellant failed to demonstrate either deficiency or prejudice for this claim. The district court properly admitted expert testimony regarding appellant's DNA discovered on the firearm. *See NRS 50.275; Higgs v. State*, 126 Nev. ___, 222 P.3d 648, 658-59 (2010). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to hire an independent DNA expert to test the DNA sample. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that there were any experts who would have testified differently than the expert witnesses who testified on behalf of the State at trial. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Given the overwhelming evidence of appellant's guilt presented at trial, appellant failed to demonstrate there was a reasonable probability of a different outcome had counsel hired an independent DNA expert. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to cross-examine the police officers over conflicting statements regarding discovery of the firearm in the vehicle. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel cross-examined the officers regarding the discovery of the firearm in the vehicle and challenged their version of events. Appellant failed to demonstrate that there was a reasonable

probability of a different outcome at trial had counsel posed further questions to the officers regarding the discovery of the firearm. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to seek instructions regarding a lesser-included-offense of attempted felon in possession of a firearm. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. "In Nevada, the statutory definition of an attempt crime is '[a]n act done with intent to commit a crime, and tending but failing to accomplish it.'" *Crawford v. State*, 107 Nev. 345, 351, 811 P.2d 67, 71 (1991) (quoting NRS 193.330). "Because an element of the crime of attempt is the failure to accomplish it, an attempt crime may not be a [lesser] included offense of the completed crime." *Id.* Therefore, appellant was not entitled to a lesser-included-offense instruction for attempted felon in possession of a firearm. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had counsel sought an attempt instruction. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to an improper instruction defining the crime of felon in possession of a firearm. Appellant failed to demonstrate either deficiency or prejudice for this claim because the instruction properly instructed the jury pursuant to NRS 202.360(1)(a). Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to argue that the jury was not properly instructed on constructive possession. Appellant failed to demonstrate either deficiency

or prejudice for this claim because the instruction properly instructed the jury regarding constructive possession. *See Palmer v. State*, 112 Nev. 763, 768-69, 920 P.2d 112, 115 (1996) (discussing constructive possession). Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to argue that appellant only possessed the firearm's magazine and not the entire firearm. Appellant failed to demonstrate either deficiency or prejudice for this claim because the firearm contained appellant's DNA and the entire firearm was discovered in appellant's vehicle. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to object when the State expressed its opinion during closing arguments. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not identify any specific improper statements. Bare claims, such as this one, are insufficient to demonstrate that a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had counsel objected during closing arguments, as there was overwhelming evidence of appellant's guilt. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective for only raising one claim on direct appeal. 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, 1113-14 (1996). 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).

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant did not identify any claims that objectively reasonable counsel would have raised. He also did not demonstrate that there were any claims that would have had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.


Next, appellant argues that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Appellant failed to demonstrate that any errors of counsel, even if considered cumulatively, amount to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

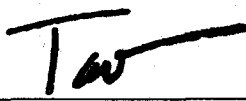
Next, appellant claimed that his motion to suppress the firearm evidence should have been granted. Appellant raised this argument on direct appeal and the Nevada Supreme Court concluded that the district court properly denied his motion to suppress. *Ragland v. State*, Docket No. 64340 (Order of Affirmance, April 10, 2014). Reconsideration of this claim is barred by the doctrine of law of the case, which "cannot be avoided by a more detailed and precisely focused argument." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). While appellant claimed that the Nevada Supreme Court erred in its disposition of this issue, appellant failed to demonstrate that the law of

the case should not be applied. See *Tien Fu Hsu v. Cnty. of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007) (discussing when the doctrine of the law of the case should not be applied).

Finally, appellant claimed that the State improperly influenced the grand jury, the corpus delicti of the crime was not established, the State committed malicious prosecution, the warrant permitting the State to collect his DNA was improper, and the district court should have ordered changes to the presentence investigation report. These claims could have been raised on direct appeal and appellant did not demonstrate cause for the failure to do so and actual prejudice. See NRS 34.810(1)(b). Therefore, the district court did not err in denying relief for these claims.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²We have reviewed all documents that appellant has submitted to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. David B. Barker, District Judge
Brandon Christopher Ragland
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk