IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHANE MICHAEL WOZNIAK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67290

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Appellant Shane Wozniak claims the district court erred by dismissing his May 7, 2014, petition without appointing counsel or holding an evidentiary hearing. Wozniak fails to demonstrate the district court abused its discretion by not appointing counsel or holding an evidentiary hearing.

NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The determination of whether counsel should be

appointed is not necessarily dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief.

In this case, the district court concluded that Wozniak was not indigent because he earns $2,200 a month and the issues presented in his petition were not difficult, there was no indication that he was unable to comprehend the proceedings, and discovery was not necessary. Substantial evidence supports the decision of the district court. Further, we note, while Wozniak was not officially represented by counsel, his petition was "ghost" written by counsel, so the normal concerns of NRS 34.750 regarding understanding the proceedings and the difficulty of the issues were not present. Therefore, the district court did not err in denying Wozniak's motion to appoint counsel.

In order to receive an evidentiary hearing, a petitioner must raise claims that are supported by specific factual findings that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). In his petition, Wozniak raised three claims of ineffective assistance of trial and appellate 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, 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*). To demonstrate prejudice for an ineffective assistance of appellate counsel claim, a petitioner must show 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, 1114 (1996). 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, Wozniak claims that trial counsel was ineffective for failing to adequately investigate and prepare for trial. Wozniak was convicted of two counts of luring a child. Wozniak claims that counsel should have presented evidence that Hug High School was a similar distance from the 7-11 as the elementary school and Wozniak had difficulty seeing the girls because the vehicle he drove was short and low to the ground. He claims this would have shown that he reasonably believed he was talking to high school girls and not elementary-aged girls.

Wozniak fails to demonstrate counsel was deficient or resulting prejudice. There was some evidence, including distances, presented to the jury of where Hug High School was in relation to where the incident took place. During trial, counsel attempted to get the district court to allow a viewing of the vehicle, including allowing the jurors to sit in the vehicle. The district court denied counsel's request to allow the jurors to sit in the vehicle and counsel withdrew his request to have the jury view the outside of the vehicle. Further, there was testimony presented throughout trial that the vehicle was low to the ground, at times

Wozniak's face was obscured from the girls and Wozniak had to somewhat bend over to look out the window to see the girls. Therefore, Wozniak fails to demonstrate a reasonable probability of a different outcome at trial had counsel presented further evidence.[1] Accordingly, the district court did not err in dismissing this claim without an evidentiary hearing.

Second, Wozniak claims that trial counsel was ineffective for failing to have the jury properly instructed. Wozniak's argument is somewhat confusing, but he seems argue one of two things: (1) counsel should have requested lesser-related jury instructions regarding loitering near a school and disturbing the peace, or (2) counsel should have requested a jury instruction informing the jury that Wozniak was only on trial for luring a child and no other offenses.[2]

We conclude that Wozniak fails to demonstrate counsel was deficient. Wozniak was not entitled to jury instructions on lesser-related

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[1]We note that closing arguments were not provided to this court; therefore, it is impossible to tell whether counsel argued these facts and this defense theory to the jury. The burden is on Wozniak to provide an adequate record enabling this court to review assignments of error. *Thomas v. State*, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); *see also Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

[2]To the extent Wozniak claimed that counsel was ineffective for failing to offer certain verdict forms at his first trial, Wozniak did not raise this claim below and we decline to consider it for the first time on appeal. *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.

offenses.[3] *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Further, Wozniak fails to demonstrate a jury instruction informing the jury that he was only on trial for luring a child was necessary or that it would have been given if requested. The jury was properly informed that Wozniak was on trial for luring a child and the State was required to prove every element beyond a reasonable doubt. Therefore, the district court did not err in dismissing this claim without holding an evidentiary hearing.

Third, Wozniak claims that trial and appellate counsel were ineffective for failing to argue that under the "completeness doctrine," NRS 47.120, he should have been able to introduce his entire statement made to the police after the State asked a police officer about portions of his statement. This is a different theory than Wozniak raised below. In his petition below, Wozniak conceded the completeness doctrine did not apply to his case because his statement was neither written nor recorded. Instead, he argued, based on *Crawford v. Washington*, his statement should be admissible because he should be able to confront himself without actually testifying at trial. 541 U.S. 36 (2004). An appellant is not allowed to change his theory underlying an assignment of error on

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[3]Contrary to Wozniak's claim, disturbing the peace and loitering near a school are not lesser-included offenses of luring a child as they have different elements than the offense of luring a child. *See* NRS 201.560; NRS 203.010; NRS 207.270; *Smith v. State*, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (defining lesser-included offense).

appeal. *Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Therefore, we decline to consider this claim.

Finally, Wozniak argues that the errors of trial and appellate counsel cumulatively amount to ineffective assistance of counsel. As Wozniak fails to demonstrate deficiency or prejudice for any of his claims, he fails to demonstrate cumulative errors sufficient to amount to ineffective assistance of counsel.

Having concluded that Wozniak is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[4]To the extent Wozniak claims that he was not served with the motion to dismiss or the order dismissing the petition, the certificates of service included with the motion and the notice of entry of order show that Wozniak was served by mail at his last known address. Further, the State was not required the serve the motion to dismiss on Wozniak's "ghost" counsel, because "ghost" counsel did not represent Wozniak in the district court proceedings.

cc: Hon. David A. Hardy, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk