IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD LOVERREN VAN HORN, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69948

ORDER OF AFFIRMANCE

Appellant Richard Loverren Van Horn, III, appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on September 17, 2015.[1] Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Van Horn claims the district court erred by denying his petition because he received ineffective assistance of trial and appellate counsel. To establish ineffective assistance of trial counsel, a petitioner must demonstrate 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 (1984). Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate 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 had a

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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, Van Horn argues the district court erred by denying his claims that trial and appellate counsel were ineffective for failing to challenge the prosecutor's use of a PowerPoint slide during closing argument. The slide depicted Van Horn's booking photo with the word "GUILTY" superimposed across it. Van Horn cites to the Nevada Supreme Court's decision in *Watters v. State*, 129 Nev. ___, 313 P.3d 243 (2013) (holding a computerized slideshow presentation used by the prosecutor during opening statement, which included a slide showing the defendant's booking photo with the word "GUILTY" superimposed across his face, was an impermissible declaration of guilt that undermined the presumption of innocence).

The district court found the use of the booking photo slide was permissible because it was presented during closing argument, Van Horn failed to demonstrate the outcome of the trial would have been different if the slide had not been used, and trial counsel may have chosen not to object for tactical and strategic reasons. The district court further found this issue did not have a reasonable probability of success on appeal because *Watters* applies to opening statements and not to closing arguments, a prosecutor is permitted to argue the presumption of innocence has been overcome during closing argument, and the use of demonstrative exhibits is permissible during closing argument.

The record supports the district court's findings and we conclude the district court did not err by rejecting Van Horn's claims that trial and appellate counsel were ineffective for failing to challenge the prosecutor's PowerPoint slide. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006); *Allred v. State*, 120 Nev. 410, 419, 92 P.3d 1246, 1252 (2004); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Second, Van Horn argues the district court erred by denying his claim that appellate counsel was ineffective for failing to challenge the limitations the district court placed on his use of consent as a defense.

The district court found trial counsel made a tactical decision to argue the one irrefutable sexual assault count was a consensual sex act and the remaining sexual assault and lewdness counts never occurred. Trial counsel presented the consent defense to the jury during opening argument, elicited testimony in support of this defense during cross-examination of the State's witnesses, and argued the victim consented to the lone sex act during closing argument. Given trial counsel's strategy, appellate counsel could not have logically claimed Van Horn was deprived of the ability to present consent as a complete defense to all of the counts. Moreover, to the extent Van Horn argued appellate counsel was ineffective for failing to challenge the district court's restriction on the use of consent as a defense to the alternative lewdness count, such a challenge would not have a reasonable probability of success because consent is not a defense to lewdness.

The record supports the district court's findings and we conclude the district court did not err by rejecting Van Horn's claim that appellate counsel was ineffective for failing to challenge limitations placed

on the use of consent as a defense. *See State v. Koseck*, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997); *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114 ("An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel.").

Van Horn also claims the district court abused its discretion by denying his request for appointment of postconviction counsel because he has a limited education, his ability to communicate effectively is questionable, he uses psychiatric medications, and his case is complex. Van Horn does not have a constitutional or statutory right to postconviction counsel, and the district court's decision to appoint such counsel is discretionary. *See* NRS 34.750(1); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). We conclude the district court did not abuse its discretion in this regard.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Richard Loverren Van Horn, III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk