

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY ANTHONY MORROW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69979

FILED

DEC 14 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Troy Anthony Morrow appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on March 12, 2014. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Morrow 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 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, Morrow argues the district court erred by denying his claim appellate counsel was ineffective for failing to challenge statements made by the prosecutor during voir dire. The district court found any attempt made by counsel to allege Morrow was deprived of his right to a fair trial based on the prosecutor's comments would have been futile because it gave a curative instruction advising the potential jurors the comments and questions by counsel were not evidence and could not be considered by the jurors. Because the record supports the district court's finding and further reveals trial counsel acknowledged the matter was cured during voir dire, we conclude the district court did not err in rejecting this claim. See *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.").

Second, Morrow argues the district court erred by denying his claim trial counsel was ineffective for failing to object when the district court failed to conduct an arraignment as required by NRS 174.015. Although Morrow was not formally arraigned, the record reveals he was fully aware of the criminal charges and the possibility of a habitual criminal adjudication if he proceeded to trial and lost. It further reveals his arraignment was continued several times so he could pursue plea negotiations. Because the record does not demonstrate Morrow was prejudiced by counsel's failure to object to the absence of a formal arraignment, we conclude the district court did not err in rejecting this claim. See *Snyder v. State*, 103 Nev. 275, 280, 738 P.2d 1303, 1306 (1987)

(observing defendant's failure to plead at a formal arraignment "did not deprive him of any substantial right, nor did it change the course of his trial").

Third, Morrow argues the district court erred by denying his claim appellate counsel was ineffective for failing to challenge the fact he was not arraigned in the district court as required by NRS 174.015. The district court found any attempt made by counsel to raise this issue on appeal would have been futile because a defendant waives his right to formal arraignment by proceeding to trial without objecting to the absence of a plea. The record supports the district court's finding and we conclude the district court did not err in rejecting this claim. *See Kirksey*, 112 Nev. at 998, 923 P.2d at 1114; *Snyder*, 103 Nev. at 279-80, 738 P.2d at 1306.

Fourth, Morrow argues the district court erred by denying his claim trial counsel was ineffective for failing to offer a jury instruction on the burden of proof for the public authority defense modeled after the burden of proof for the procuring agent defense described in *Love v. State*. *See Love v. State*, 111 Nev. 545, 551, 893 P.2d 376, 379 (1995) (holding the defendant does not have the burden to prove the procuring agent defense), *overruled on other grounds by Adam v. State*, 127 Nev. 601, 261 P.3d 1063 (2011). The district court found such an offer would have been futile.


On direct appeal, Morrow alleged the district court erred by failing to instruct the jury on the necessary burden of proof for the public authority defense. The Nevada Supreme Court rejected the claim, concluding "[e]ven assuming that Nevada recognizes the public authority defense . . . no prejudice resulted from the deficiencies in the instruction appellant identifies considering the substantial evidence supporting appellant's convictions." *Morrow v. State*, Docket No. 63552 (Order of


Affirmance, February 13, 2014). In light of the Nevada Supreme Court's conclusion, Morrow cannot demonstrate he was prejudiced by counsel's failure to offer a burden-of-proof instruction and, therefore, the district court did not err in rejecting this claim.

Fifth, Morrow argues the district court erred by denying his claim appellate counsel was ineffective for failing to incorporate *Love* into the burden-of-proof issue he presented on appeal. The district court found the jury was properly instructed on the State's burden of proof. Because the record supports this finding and the Nevada Supreme Court concluded Morrow was not prejudiced by any possible deficiencies in the instruction given, Morrow cannot demonstrate that incorporating *Love* into the burden-of-proof issue would have improved the issue's probability of success on appeal. Therefore, we conclude the district court did not err in rejecting this claim.

Sixth, Morrow argues the district court erred by denying his claim trial counsel was ineffective for failing to advise him that sentencing under the large habitual criminal statute was a possible consequence of proceeding to trial and losing. Morrow further asserts the district court erred by not conducting an evidentiary hearing on this claim. However, the district court found Morrow's claim was belied by the record, the record supports the district court's finding, and the record reveals Morrow was fully informed of the consequences he would face by going to trial. Therefore, we conclude the district court did not err in rejecting this claim without conducting an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding a petitioner is not entitled to an evidentiary hearing or relief where his claims are belied by the record).

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Rob Bare, District Judge
Tanasi Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk