

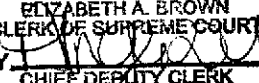
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RODNEY LAVELLE-TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70022

FILED

MAR 22 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Rodney Lavelle-Taylor appeals from an order of the district court denying his January 9, 2015, postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Lavelle-Taylor argues the district court erred in denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. 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*,

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

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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations 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).

First, Lavelle-Taylor argued his trial counsel was ineffective for failing to file a motion to sever his case from his codefendant's case. Lavelle-Taylor asserted counsel should have sought severance of the cases because the evidence was overwhelmingly directed at Lavelle-Taylor's codefendant and their defenses were antagonistic. Lavelle-Taylor failed to demonstrate his counsel's performance was deficient or resulting prejudice. "[A] defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party," *Lisle v. State*, 113 Nev. 679, 690, 941 P.2d 459, 466 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998), and therefore, Lavelle-Taylor would not have been entitled to severance on the basis that there was more evidence implicating his codefendant in the kidnapping. Further, the defenses were not antagonistic; a review of the record reveals both defendants argued the victim was not believable given her methamphetamine use and both asserted the kidnapping did not occur. Therefore, counsel's failure to move for severance of the cases on these bases did not demonstrate counsel acted in an objectively unreasonable manner.

Moreover, the evidence produced at trial established Lavelle-Taylor was an active participant in the kidnapping, as he told the victim

she could not leave until she earned money by committing acts of prostitution, used his physical presence to intimidate the victim and block her exits, and took the victim to a bus station and hotels against her will. In addition, after the victim escaped into a hotel office to request help and the hotel employee called emergency services, Lavelle-Taylor and his codefendant fled the scene together. Under these circumstances, Lavelle-Taylor failed to demonstrate a reasonable probability of a different outcome had counsel sought to sever the codefendants' cases. See *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) ("To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict."). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Lavelle-Taylor argued his trial counsel was ineffective for failing to investigate and prepare for trial. Lavelle-Taylor asserted counsel should have attempted to obtain surveillance video recordings from the bus station and the Ponderosa Hotel, as well as obtain the victim's mental health records. Lavelle-Taylor failed to demonstrate his counsel's performance was deficient or resulting prejudice. Lavelle-Taylor did not demonstrate any of this evidence was actually available and could have been obtained by counsel through reasonably diligent investigation. Further, the record reveals multiple witnesses, including employees of the Ponderosa Hotel, testified regarding the codefendants' actions with respect to kidnapping the victim and Lavelle-Taylor failed to demonstrate a reasonable probability of a different outcome at trial had counsel attempted to obtain the sought after evidence. Therefore, the district

court did not err in denying this claim without conducting an evidentiary hearing.

Third, Lavelle-Taylor argued his trial counsel was ineffective for failing to object when a police officer testified regarding street culture. At the trial, a police officer testified regarding his interactions with the victim following the kidnapping. During his testimony, the officer briefly stated that he believed the victim's actions could be explained by her understanding of "street culture" and persons involved with such a culture have a different way of doing things than most people. The officer then testified the victim's involvement with street culture caused her to fear retaliation from the codefendants if she had attempted to flee. The officer did not testify regarding his training or experience with street culture. Lavelle-Taylor asserted the officer's testimony regarding street culture amounted to improper expert opinion. Lavelle-Taylor failed to demonstrate prejudice resulting from admission of this testimony.

The record reveals the challenged testimony was duplicative of the victim's testimony as she testified regarding her experience of living as a homeless methamphetamine addict and the way she had to live in order to protect her reputation with others involved in that way of life. She further testified to her fear the codefendants would find her and harm her if she had attempted to escape at the wrong time. Given the victim's testimony, the additional evidence produced at trial, and the brief nature of the challenged testimony, Lavelle-Taylor failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected when the officer testified regarding street culture. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Lavelle-Taylor argued his counsel was ineffective for failing to request a mere presence instruction. Lavelle-Taylor failed to demonstrate his counsel's performance was deficient or resulting prejudice. As previously stated, Lavelle-Taylor's defense at trial was that the victim was not believable due to her issues stemming from use of methamphetamine. Given that defense, Lavelle-Taylor did not demonstrate objectively reasonable counsel would have sought a mere presence instruction. Further, the evidence produced at trial demonstrated Lavelle-Taylor was an active participant in the kidnapping, and therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel sought a mere presence instruction. *See Walker v. State*, 113 Nev. 853, 869, 944 P.2d 762, 773 (1997) (stating "although mere presence cannot support an inference that one is a party to an offense, presence together with other circumstances may do so." (internal quotation marks omitted)). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

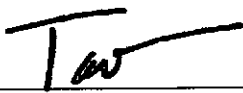
Fifth, Lavelle-Taylor argued his counsel was ineffective for failing to request an instruction regarding the unreliability of the victim's testimony given her status as a drug addict. Lavelle-Taylor failed to demonstrate his counsel's performance was deficient or resulting prejudice. The trial court instructed the jury regarding the determination of the credibility of witnesses and Lavelle-Taylor failed to demonstrate objectively reasonable counsel would have sought an additional instruction regarding a similar issue. Given the evidence produced at trial and the circumstances of this case, Lavelle-Taylor failed to demonstrate a reasonable probability of a different outcome at trial had counsel sought


this type of instruction. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Finally, Lavelle-Taylor argues the district court erred in declining to appoint postconviction counsel to represent him. The appointment of postconviction counsel was discretionary in this matter. See NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. David A. Hardy, District Judge
Rodney Lavelle-Taylor
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk