

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT FOULTON MORRIS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72843

FILED

FEB 13 2018

ELIZABETH A. BROVIN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Foulton Morris, Jr. appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Morris argues the district court erred in denying the claims of ineffective assistance of trial counsel raised in his April 13, 2015, petition and supplements. To prove ineffective assistance of 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, 687-88 (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, 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, Morris argued his trial counsel was ineffective for failing to object to an instruction directing the jury to find the use of a deadly weapon either true or not true on the verdict form. Morris asserted this direction lowered the burden to prove that allegation beyond a reasonable doubt. Morris failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he did not object to this instruction because it also informed the jury the State had the burden of proving the allegation beyond a reasonable doubt. Tactical decisions such as this "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Morris did not demonstrate. As the jury was required to find the use of a deadly weapon was proven beyond a reasonable doubt before marking it was true on the verdict form, Morris failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the instruction. Therefore, we conclude the district court did not err in denying this claim.

Second, Morris argued his trial counsel was ineffective for failing to argue instruction no. 18 improperly stated Morris had to reasonably believe it was absolutely necessary under the "present circumstances" to use force that might cause death or great bodily harm in order to act in self-defense. Morris asserted the "present circumstances" language improperly increased the burden to show he acted in self-defense. Morris failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he did not object to use of this instruction because he believed it was appropriate

in this case given Morris' trial testimony. Tactical decisions such as this "are virtually unchallengeable absent extraordinary circumstances," *id.*, which Morris did not demonstrate. In addition, the Nevada Supreme Court has already concluded the jury was properly instructed regarding self-defense, *Morris, Jr. v. State*, Docket No. 65349 (Order of Affirmance, October 15, 2014), and accordingly, Morris failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to this instruction. Therefore, we conclude the district court did not err in denying this claim.

Third, Morris argued counsel was ineffective for failing to assert the self-defense instructions used confusing terms regarding the victim's character, improperly directed the jury to consider the victim's non-aggression, improperly stated words alone are insufficient to justify a battery, and improperly instructed the jury the defendant's retaliation must be proportionate to the degree of provocation. Morris failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he proposed an alternative self-defense instruction rather than raising objections and believed that was appropriate in this matter. Tactical decisions such as this "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which Morris did not demonstrate. Moreover, as stated previously, the Nevada Supreme Court has already concluded the jury was properly instructed regarding self-defense, *Morris, Jr. v. State*, Docket No. 65349 (Order of Affirmance, October 15, 2014), and accordingly, Morris failed to demonstrate a reasonable probability of a different outcome at trial had counsel raised multiple objections to the self-defense

instructions. Therefore, we conclude the district court did not err in denying this claim.

Next, Morris argues his appellate counsel was ineffective. 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, 1114 (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*, 105 Nev. at 853, 784 P.2d at 953.


Morris argued appellate counsel was ineffective for failing to raise multiple claims regarding the self-defense instructions. Morris failed to demonstrate his appellate counsel's performance was deficient or resulting prejudice. On direct appeal, appellate counsel argued the district court erred by declining to give Morris' proposed jury instruction on self-defense. The Nevada Supreme Court concluded the district court erred, but the error was harmless because the jury was fully and accurately instructed on self-defense. *Morris, Jr. v. State*, Docket No. 65349 (Order of Affirmance, October 15, 2014). As the Nevada Supreme Court has already concluded the jury was appropriately instructed regarding self-defense, Morris cannot demonstrate a reasonable likelihood of success on direct appeal had counsel

raised additional challenges to the self-defense instructions. Therefore, we conclude the district court did not err in denying this claim.¹

Finally, Morris appeared to argue the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Morris failed to demonstrate any errors were committed by his counsel, and accordingly, there were no errors to cumulate. Therefore, we conclude the district court did not err in denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

¹Morris also asserted the trial court committed reversible error when it declined to give his defense self-defense instruction. The Nevada Supreme Court has already considered this claim and concluded Morris was not entitled to relief, and accordingly, the doctrine of the law of the case prevents further litigation of this issue and “cannot be avoided by a more detailed and precisely focused argument.” *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). To the extent Morris argues this court should reconsider this claim, Morris failed to demonstrate the law of the case doctrine should not be applied. *See Tien Fu Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729-30 (2007) (discussing exceptions to the law of the case doctrine).

cc: Chief Judge, Second Judicial District Court
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk