

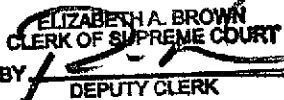
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK ANTHONY MACIAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71475

FILED

FEB 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Frank Anthony Macias appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Macias argues the district court erred in denying claims of ineffective assistance of counsel raised in his January 19, 2010, 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).

First, Macias argued trial counsel was ineffective for failing to file a pretrial motion requesting the victim's toxicology report. Macias failed to demonstrate his trial counsel's performance was deficient or resulting

18-900237

prejudice. During the trial, counsel questioned a doctor regarding a possible toxicology report for the victim and the doctor responded such a report would be contained in the victim's medical records if such a report existed. Counsel later asserted the medical records did not contain a toxicology report. Macias did not provide a toxicology report during the postconviction proceedings, and therefore, he failed to demonstrate counsel could have obtained such a report through reasonably diligent efforts. Macias also failed to demonstrate a reasonable probability of a different outcome had counsel sought a toxicology report because he did not demonstrate such efforts would have produced favorable evidence. Therefore, we conclude the district court did not err in denying this claim.

Second, Macias argued trial counsel was ineffective for failing to seek to exclude the photo line-up identification. Macias asserted the photo line-up was unreliable because the victim was hospitalized, had recently undergone surgery, and was likely affected by medication when the line-up took place. Macias failed to demonstrate trial counsel's performance was deficient or resulting prejudice. The victim testified he reviewed the photo line-up at the hospital and was under the influence of post-surgery medication, but that it was not difficult for him to identify Macias' photo as the perpetrator because he had interacted with Macias prior to the incident. Given the circumstances in this case, Macias failed to demonstrate the photo line-up procedure was so prejudicial as to taint his conviction. See *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997). Accordingly, Macias failed to demonstrate objectively reasonable counsel would have sought to exclude this identification or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err in denying this claim.

Third, Macias argued trial counsel was ineffective for failing to object when witnesses and the State used Macias' "Demon" moniker during the trial. Macias failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. The victim and another witness testified that they and others referred to Macias as Demon and the State posed follow-up questions regarding their relationship with Macias. The victim later testified he recognized Macias as the person who robbed and shot him because of his prior dealings with Macias. Under the circumstances in this matter, Macias' "Demon" moniker was relevant to demonstrate how the victim identified Macias and the probative value of this evidence did not substantially outweigh its prejudicial nature. See NRS 48.015; NRS 48.035(1). Accordingly, Macias failed to demonstrate his counsel acted in an unreasonable manner by failing to object to introduction of this information or a reasonable probability of a different outcome had counsel raised objections. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Macias argued trial counsel was ineffective for failing to object to descriptions of the victim's injuries and surgery. Macias asserted this information was irrelevant because the State did not need to establish the level of harm caused to the victim. Macias failed to demonstrate trial counsel's performance was deficient or resulting prejudice. The record demonstrates the evidence and testimony regarding the victim's shooting injuries and the resulting surgery to correct the injuries were relevant to establish Macias' intent to kill the victim. See NRS 193.330(1); NRS 200.010; see also *Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (stating intent "can be inferred from conduct and circumstantial evidence."). Given the nature of the evidence and testimony,

Macias failed to demonstrate reasonably diligent counsel would have objected to admission of this information or a reasonable probability of a different result had counsel objected because it was relevant and not unfairly prejudicial. *See Byford v. State*, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000); *see also Robins v. State*, 106 Nev. 611, 623, 798 P.2d 558, 566 (1990) (approving admission of gruesome photographs because they were “helpful in assisting the jury to understand the nature and gravity of the wounds inflicted” on the victim by the defendant). Therefore, we conclude the district court did not err in denying this claim.

Fifth, Macias argued trial counsel was ineffective for failing to object or move for a mistrial when a police officer testified he discovered Macias had felony warrants. Macias failed to demonstrate his counsel’s performance was deficient or resulting prejudice. Macias’ counsel objected to this testimony and the trial court overruled the objection. In light of the trial court’s ruling, Macias failed to demonstrate objectively reasonable trial counsel would have raised further arguments regarding this testimony. In addition, on direct appeal the Nevada Supreme Court concluded admission of testimony regarding Macias’ felony warrants was error, but the error was harmless. *Macias v. State*, Docket No. 52332 (Order of Affirmance, November 4, 2009), and accordingly, Macias failed to demonstrate a reasonable probability of a different outcome had counsel raised further arguments regarding this issue. Therefore, we conclude the district court did not err in denying this claim.

Sixth, Macias argued the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Macias failed to demonstrate any errors were committed by his counsel, and accordingly, there were no errors to

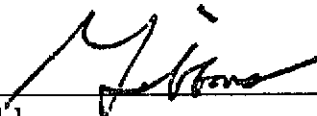
cumulate. Therefore, we conclude the district court did not err in denying this claim.

Next, Macias argues the district court erred in denying the petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations 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). The district court concluded Macias' claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper.¹

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

¹Macias lists additional claims he raised below and appears to assert those claims demonstrate the district court should have conducted an evidentiary hearing. To the extent Macias intended to raise these issues separately and independently from his evidentiary hearing claim, Macias did not provide cogent argument regarding any errors he believes the district court made in its conclusions regarding these claims, and therefore, we decline to consider these claims. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining it is the appellant's responsibility to present relevant authority and cogent argument).

cc: Hon. Douglas Smith, District Judge
Justice Law Center
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk