

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANNY REYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73765

FILED

JUN 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Danny Reyes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Reyes argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his December 28, 2016, petition. 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).

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

First, Reyes argued his trial counsel was ineffective for failing to ensure that bench conferences were transcribed. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. Bench conferences should be memorialized, "either contemporaneously or by allowing the attorneys to make a record afterward," but the appellant must demonstrate meaningful appellate review of any alleged error was precluded by the failure to memorialize the bench conference. *Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014). Here, the parties made a record regarding a number of issues that were discussed at bench conferences, and Reyes failed to demonstrate his counsel's actions in this regard were objectively unreasonable.

Further, assuming there were issues that were discussed at a bench conference that were not later memorialized, Reyes did not demonstrate any unrecorded bench conference had significance or meaningful appellate review was precluded by any failure to later make a record regarding the conference. Accordingly, Reyes failed to demonstrate a reasonable probability of a different outcome had counsel objected when a bench conference was not transcribed or made a later record regarding the bench conference. Therefore, we conclude the district court did not err by denying this claim.

Second, Reyes argued his trial counsel was ineffective for failing to seek an instruction regarding larceny as a lesser-included offense of robbery. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. Counsel requested the district court to instruct the jury regarding larceny as a lesser-included offense, but the district court denied that request. In addition, Reyes cannot demonstrate prejudice related to this issue because robbery is a general intent crime that

requires an element of force or intimidation in taking property from a person or taking property in the presence of a person, whereas larceny is a specific intent crime that does not require force or the presence of the person. *Compare* NRS 200.380(1) *with* NRS 205.220. Thus, larceny is not a lesser included offense of robbery. *See Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (“an offense is not a lesser included offense unless the elements of the lesser offense are an entirely included subset of the elements of the charged offense”), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). Additionally, a defendant is not entitled to an instruction for a lesser-related offense. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas*, 122 Nev. 1258, 147 P.3d 1101. Therefore, we conclude the district court did not err by denying this claim.

Third, Reyes argued his trial counsel was ineffective for failing to object when the State vouched for the credibility of witnesses during its closing arguments. Reyes failed to demonstrate his counsel’s performance was deficient or resulting prejudice. “The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness’s veracity.” *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted). However, “when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness.” *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

The record demonstrates that Reyes’ counsel argued the victims in this matter had not testified truthfully. During its rebuttal, the State

argued the victims were credible because they would not have approached law enforcement or testified regarding their involvement with drugs and a drug deal had they not actually been the victims of a robbery. The record reveals the State simply argued the circumstances in this matter indicated the victims' testimony was credible. Arguments such as this do not amount to improper vouching because the State did not offer personal assurances of a witness' veracity. Accordingly, Reyes did not demonstrate counsel's failure to object was objectively unreasonable. Reyes also failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the State's arguments. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Reyes argued his trial counsel was ineffective for failing to object during jury selection. Reyes speculates that, during an unrecorded bench conference, the trial court limited his ability to exercise peremptory challenges. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. This claim was belied by the record, and therefore, Reyes was not entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). The record demonstrates Reyes' counsel exercised peremptory challenges during jury selection and the trial court did not limit counsel's ability to do so. Therefore, the district court did not err by denying this claim.

Next, Reyes argued 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, 1113-14 (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 v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Reyes argued his appellate counsel should have asserted the district court erred by failing to record bench conferences. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. As explained previously, a number of the bench conferences were later memorialized and, assuming there were issues that were discussed at a bench conference that were not later memorialized, Reyes did not demonstrate any unrecorded bench conference had significance or meaningful appellate review was precluded by any failure to later memorialize the conference. *See Preciado*, 130 Nev. at 43, 318 P.3d at 178. Accordingly, Reyes did not demonstrate counsel acted objectively unreasonable regarding this issue or a reasonable likelihood of success had counsel raised the underlying claim on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Second, Reyes argued his appellate counsel was ineffective for failing to assert the district court erred by declining to instruct the jury regarding larceny as a lesser-included offense of robbery. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. As explained previously, larceny is not a lesser-included offense of robbery. Accordingly, Reyes did not demonstrate counsel acted objectively unreasonable regarding this issue or a reasonable likelihood of success had counsel raised the underlying claim on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Third, Reyes argued his appellate counsel was ineffective for failing to argue on appeal that the State improperly vouched for witnesses during its closing arguments. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. As we previously explained, the record demonstrates the State did not improperly vouch for the credibility of its witnesses, but rather reasonably argued the circumstances indicated the victims' testimony was credible. Accordingly, Reyes did not demonstrate counsel acted objectively unreasonable regarding this issue or a reasonable likelihood of success had counsel raised the underlying claim on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Reyes argued his appellate counsel was ineffective for failing to argue on appeal that the district court limited his ability to exercise peremptory challenges. Reyes failed to demonstrate his counsel's performance was deficient or resulting prejudice. As explained previously, the record demonstrates Reyes' trial counsel exercised peremptory challenges during jury selection and the trial court did not limit counsel's ability to do so. Accordingly, Reyes did not demonstrate counsel acted objectively unreasonable regarding this issue or a reasonable likelihood of success had counsel raised the underlying claim on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Next, Reyes argued the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Reyes 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, Reyes argued the trial court erred by declining to permit cross-examination regarding a witness' potential bias. Reyes asserted this violated his right to confront adverse witnesses. This claim could have been raised on direct appeal and Reyes does not demonstrate cause for the failure to do so and actual prejudice. *See* NRS 34.810(1)(b)(2). Therefore, the district court did not err by denying this claim as procedurally barred.

Next, Reyes argues the district court erred by denying the petition before Reyes was able to review his trial counsel's case file. An inability to review the case file did not prevent Reyes from pursuing postconviction relief. *Cf. Hood v. State*, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995) (explaining a counsel's failure to send a petitioner the case file did not prevent the petitioner from filing a timely petition). The issues Reyes raised in his petition lacked merit and Reyes did not demonstrate that review of the case file would have altered the outcome of the proceedings. Therefore, Reyes fails to demonstrate he is entitled to relief.²


Next, Reyes argues the district court erred in denying the petition without conducting an evidentiary hearing and permitting discovery. 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*, 100 Nev. at 502-03, 686 P.2d at 225. The district court concluded Reyes' claims did not meet that


²Reyes also appears to assert the district court improperly did not permit him to file a reply after the State filed its opposition to his petition. Reyes did not have a right to file a supplemental pleading, *see* NRS 34.750(5), and he does not demonstrate the district court erred in denying the petition without permitting him to file any additional documents. *See State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 457-58 (2006) (explaining NRS 34.750(5) grants the district court broad authority regarding allowing supplemental pleadings in postconviction proceedings).

standard and the record before this court reveals the district court's conclusions in this regard were proper. In addition, because the district court did not set an evidentiary hearing, Reyes was not entitled to conduct discovery. *See* NRS 34.780(2). Therefore, the district court properly denied the petition without conducting an evidentiary hearing and permitting discovery.

Finally, Reyes argues the district court erred by denying the petition without appointing postconviction counsel. 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. *See Renteria-Novoa v. State*, 133 Nev. ___, ___ 391 P.3d 760, 760-61 (2017).

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Danny Reyes
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk