

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARELL KEITH DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75558-COA

FILED

APR 16 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Darell Keith Davis appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 11, 2016, and supplemental petition filed on July 26, 2017. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Davis was convicted, pursuant to a jury verdict, of crimes surrounding two beatings of his ex-girlfriend. He was convicted of domestic battery, false imprisonment with the use of a deadly weapon, and assault with the use of a deadly weapon for events that started at a motel. He was also convicted of two counts of domestic battery for events occurring at a casino three days later. Finally, based on a couple of recorded jailhouse calls he made two weeks later, he was convicted of preventing or dissuading a witness from assisting in a prosecution and preventing or dissuading a witness from testifying.

The district court granted Davis an evidentiary hearing on two of his claims of ineffective assistance of trial counsel and denied the remaining claims outright. On appeal, Davis contends the district court erred by denying one of the claims that was the subject of the evidentiary



hearing and by denying two others without the benefit of an evidentiary hearing.

To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 that are supported by substantial evidence and not clearly wrong 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Davis claimed counsel was ineffective for failing to properly advise him during the plea negotiation process, causing him to reject a more favorable plea offer. Specifically, Davis claimed counsel did not inform him that his jailhouse calls could be redacted and admitted against him at trial. Davis failed to demonstrate deficiency or prejudice. The district court conducted an evidentiary hearing on this claim and found counsel had discussed the jailhouse calls with Davis prior to his waiving the preliminary hearing. The district court further found Davis wanted to take

his chances that the victim loved him and would not appear to testify against him at trial. The district court concluded the above evidence demonstrated that, despite Davis' evidentiary hearing testimony suggesting otherwise, Davis knowingly rejected a more favorable plea offer. It is up to the district court to weigh witness credibility, *see Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001), and the district court's factual findings are supported by substantial evidence in the record. We therefore conclude the district court did not err by denying this claim.


Second, Davis claimed counsel was ineffective for failing to move to sever the motel, casino, and jailhouse call counts from each other, and he contends he was entitled to an evidentiary hearing on this claim. The record supports the district court's conclusion that any such motion would have been unsuccessful. The motel and casino counts were properly joined as a common scheme because they involved domestic violence against Davis' ex-girlfriend and occurred three days apart in the same part of town. *See Farmer v. State*, 133 Nev. ___, ___, 405 P.3d 114, 120-21 (2017) (discussing factors relevant to a common scheme). And because the jailhouse calls would have been admissible as evidence of consciousness of guilt, *see Abrams v. State*, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979), the counts arising out of those calls were properly joined as "connected together" with the motel and casino counts. *See* NRS 173.115(2) (1967) (providing that two or more acts may be joined when they are "connected together"); *Weber v. State*, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005) (defining "connected together" as when "evidence of either crime would be admissible in a separate trial regarding the other crime), *rejected on other grounds by Farmer*, 133 Nev. at ___, 405 P.3d at 119-20.


Further, Davis did not demonstrate that “joinder [was] so manifestly prejudicial that it outweigh[ed] the dominant concern of judicial economy and compel[led] the exercise of the court’s discretion to sever.” *Rimer v. State*, 131 Nev. 307, 324, 351 P.3d 697, 710 (2015) (quotation marks omitted) (internal punctuation omitted). Accordingly, any motion to sever would have been futile, and counsel was not ineffective for failing to make a futile motion. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). And because Davis did not raise a claim that would entitle him to relief, the district court did not err by denying this claim without first conducting an evidentiary hearing on it.

Finally, Davis claimed counsel was ineffective for failing to litigate the issue of whether the knife used in the motel crimes was a deadly weapon pursuant to NRS 202.350, and he contends he was entitled to an evidentiary hearing on this claim. Davis did not explain the relevance of NRS 202.350 to his convictions for false imprisonment with the use of a deadly weapon or assault with the use of a deadly weapon. Accordingly, Davis did not raise a claim that would entitle him to relief, and we therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk