

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTOINE D. PHILLIPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75472-COA

FILED

APR 16 2019

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

ORDER OF AFFIRMANCE

Antoine D. Phillips appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 27, 2017. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Phillips argues the district court erred by denying his claims of ineffective assistance of counsel. 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 trial 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*). Similarly, to demonstrate prejudice for an ineffective assistance of appellate counsel claim, a petitioner must demonstrate 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. We give deference to the 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, Phillips claimed trial counsel was ineffective for incorrectly advising Phillips regarding the consequences of the plea deal offered by the State. Specifically, he claims counsel incorrectly told him if he took the plea deal he would not be able to see his son because he would now be a registered sex offender. At the evidentiary hearing, counsel testified he and Phillips did not discuss his son or the sex offender registry. Counsel testified Phillips was concerned about the prison term and rejected the offer based on that. The district court found counsel to be credible and that counsel was not deficient because Phillips failed to demonstrate counsel gave him incorrect advice regarding the plea. Further, the district court found Phillips informed the district court on the first day of trial he understood the plea offer and was rejecting it. Substantial evidence supports the findings of the district court, and we conclude the district court did not err by denying this claim.

Second, Phillips claimed trial counsel was ineffective for failing to file a *Brady*¹ or *Giglio*² motion, and counsel did not adequately cross-examine the victim as to the benefits she received by testifying. The district court concluded Phillips failed to demonstrate counsel was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he discussed *Brady/Giglio* information with the prosecutor and was informed there was no information that the victim received any deal in exchange for

¹*Brady v. Maryland*, 373 U.S. 83 (1963).

²*Giglio v. United States*, 405 U.S. 150 (1972).

her testimony. Further, the district court found Phillips failed to demonstrate the victim actually received a deal for her testimony, and therefore, Phillips failed to demonstrate a reasonable probability of a different outcome at trial had counsel filed a *Brady* or *Giglio* motion. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Third, Phillips claimed trial counsel was ineffective for failing to call a witness at trial. Specifically, Phillips claimed counsel should have called Darryl Scendrick to testify at trial because Scendrick knew the victim prior to her meeting Phillips.³ The district court concluded Phillips failed to demonstrate counsel was deficient and that Phillips failed to allege he was prejudiced by this failure. At the evidentiary hearing, counsel testified he did not call Scendrick to testify because his investigator found Scendrick had several felony convictions, current warrants for his arrests, and would not make a good witness. The district court found counsel's decision not to call Scendrick was a tactical decision. Further, the district court found Phillips failed to allege there was a reasonable probability of a different outcome at trial had counsel called Scendrick to testify at trial. Substantial evidence supports the decision of the district court, *see Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), and we conclude the district court did not err by denying this claim.

³To the extent Phillips claimed counsel was ineffective for failing to call a different witness at trial, he failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Fourth, Phillips claimed appellate counsel was ineffective for failing to raise a *Batson*⁴ issue on appeal. The district court concluded Phillips failed to demonstrate counsel was deficient or resulting prejudice. The district court found the *Batson* issue would not have been successful on appeal because the State demonstrated race-neutral reasons for using two of its peremptory challenges on African Americans, and Phillips failed to demonstrate these race neutral reasons were merely a pretext for engaging in purposeful discrimination. Substantial evidence supports the decision of the district court, *see McCarty v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016), and we conclude the district court did not err by denying this claim.

Fifth, Phillips claimed appellate counsel was ineffective for failing to argue the kidnapping statute was unconstitutional. Specifically, he claims the Nevada Supreme Court determined the “intent to keep” language in NRS 200.310(1) was unconstitutional, *see Schofield v. State*, 132 Nev. 303, 308-309, 372 P.3d 488, 491 (2016), and because Phillips was charged under the “intent to keep” portion of the statute, counsel should have challenged his conviction on this ground.

The district court found Phillips failed to demonstrate the issue would have had a reasonable probability of success on appeal and counsel was not deficient for failing to raise every possible issue on appeal. Specifically, the district court found that while the Nevada Supreme Court found the “intent to keep” language was ambiguous, it was not constitutionally fatal as long as the State could show a defendant intended to keep the minor permanently or for a protracted period of time. *See id.*

⁴*Batson v. Kentucky*, 476 U.S. 79 (1986).

Here, Phillips took the victim from California to Las Vegas for eight days without the permission of her guardian. The district court found this was a protracted period of time. Further, the district court found Phillips was also charged under the “intent to hold the minor to unlawful service” portion of the statute, and based on the facts of this case, Phillips was guilty of intending to hold the victim for prostitution. Therefore, Phillips failed to demonstrate this claim would have had a reasonable probability of success on appeal.

Substantial evidence supports the decision of the district court, *see id.*; *Ford*, 105 Nev. at 853, 784 P.2d at 953 (appellate counsel will be most effective when every conceivable issue is not raised on appeal), and we conclude the district court did not err by denying this claim.

Sixth, Phillips claimed the cumulative errors of counsel entitled him to relief. Phillips did not raise this claim in his petition filed below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Finally, Phillips claimed the district court erred by denying the remaining claims raised in his petition without first holding an evidentiary hearing on them. Specifically, he claims the district court erred by denying the following claims without first holding an evidentiary hearing: counsel was ineffective for (1) failing to file a response to the State’s opposition to the pretrial petition for a writ of habeas corpus; (2) failing to file a request for a limiting instruction regarding the use of Phillips’ nickname “Outlaw;” (3) failing to challenge the constitutionality of the kidnapping statute;⁵ (4) failing to move to sever the robbery counts; (5) failing to include any lesser

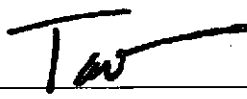
⁵We note this claim was raised at the evidentiary hearing.


offense jury instructions; (6) failing to challenge the sufficiency of the language of the charging document; and (7) failing to argue that living from the earnings of a prostitute was a lesser included offense of sex trafficking and violated double jeopardy.

The district court denied these claims because they were belied by the record, failed to allege prejudice, or were bare and naked claims. Phillips fails to make any specific arguments challenging these findings by the district court, and therefore, fails to demonstrate the district court erred by denying these claims without first holding an evidentiary hearing. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225 (to warrant an evidentiary hearing a petitioner must support his claims with specific facts not belied by the record that, if true, would entitle him to relief).

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
William B. Terry, Chartered
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk