

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT JOSEPH SCHNUERINGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76071-COA

FILED

MAY 15 2019

ELIZABETH A. BROVAT
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Joseph Schnueringer appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Schnueringer argues the district court erred by denying the claims of ineffective assistance of trial counsel he raised in his February 10, 2015, petition and later-filed supplement. 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, Schnueringer argued his trial counsel was ineffective for failing to move to sever his case from his codefendants'. Schnueringer failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified that he did not move to sever Schnueringer's case from his codefendants' cases because he believed such a motion would have been denied as the defenses were not irreconcilable with each other. The district court found Schnueringer failed to demonstrate his counsel's decision to not move for severance of the cases fell below an objective standard of reasonableness. Substantial evidence supports the district court's decision. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances"); *see also Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (recognizing that counsel is not ineffective for omitting a futile objection). Further, Schnueringer failed to demonstrate a reasonable probability of a different outcome had counsel filed a motion to sever because he did not demonstrate such a motion had a reasonable likelihood of success. *See Rowland v. State*, 118 Nev. 31, 44-45, 39 P.3d 114, 122-23 (2002) (explaining standard for when codefendants' cases should be severed). Therefore, we conclude the district court did not err by denying this claim.

Second, Schnueringer argued his trial counsel was ineffective for failing to call Nathaniel Smith to testify at trial. Schnueringer failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. The district court heard Smith's testimony at the evidentiary hearing and noted Smith admitted he had lied to the police and was

intoxicated on the night of the incident. The district court found Smith's testimony would have been impeached at trial and counsel properly did not present Smith's testimony at trial. Substantial evidence supports the district court's findings. Given the record in this matter, Schnueringer failed to demonstrate a reasonable probability of a different outcome had counsel called Smith to testify at trial. Therefore, we conclude the district court did not err by denying this claim.

Third, Schnueringer argued his trial counsel was ineffective for failing to call a pathologist to testify on behalf of the defense at trial. Schnueringer failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he had consulted with a potential expert witness concerning the victim's cause of death, but the expert's conclusions were not favorable for the defense. For that reason, counsel did not call that expert to testify during trial. The district court found counsel's decision was reasonable given the circumstances in this matter. Substantial evidence supports the district court's decision. *See Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call"). Given the record in this case, Schnueringer failed to demonstrate a reasonable probability of a different outcome had counsel presented expert testimony concerning the victim's cause of death. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Schnueringer argued his trial counsel was ineffective for waiving the opportunity to present a closing argument. Schnueringer failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he had prepared to

present a closing argument and believed the State's closing argument was light, but based on his experience he believed the prosecutor had prepared a significant rebuttal argument. Counsel testified that for those reasons, he made the tactical decision to waive the defense closing argument in order to avoid a rebuttal argument from the State. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, and the district court found Schnueringer did not demonstrate his counsel's decision to waive closing argument amounted to an extraordinary circumstance. Substantial evidence supports the district court's decision. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002) (explaining that it was not objectively unreasonable for defense counsel to make a tactical decision to waive closing argument out of concern that the prosecutor would make a persuasive rebuttal argument).


The district court also found Schnueringer did not demonstrate a reasonable probability of a different outcome had counsel presented a closing argument. The district court found compelling evidence of Schnueringer's guilt had been presented at trial, including multiple witnesses that identified him as one of the persons who struck the victim and medical evidence demonstrating the victim's death had been caused by the cumulative nature of the blows. The record supports the district court's findings in this regard. Therefore, we conclude the district court did not err by denying this claim.


Fifth, Schnueringer argued his counsel was ineffective during the sentencing hearing for failing to call witnesses to testify in mitigation concerning his difficult childhood and state he was a good person in bad circumstances. Schnueringer failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary

hearing, counsel testified he had communicated with these potential witnesses but chose not to present their testimony at the sentencing hearing. Counsel testified that he believed their testimony may not have been helpful and could have included harmful information concerning Schnueringer's school disciplinary problems. The district court found counsel's decisions concerning these potential mitigation witnesses were reasonable given the circumstances in this matter. Substantial evidence supports the district court's findings. See *Rhyne*, 118 Nev. at 8, 38 P.3d at 167. Given the record in this case, Schnueringer failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel presented additional mitigation evidence. Therefore, we conclude the district court did not err by denying this claim.

Having concluded Schnueringer is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹We grant counsel's motion to withdraw as counsel in this appeal.

cc: Hon. Elliott A. Sattler, District Judge
Troy Curtis Jordan
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk
Robert Joseph Schnueringer