

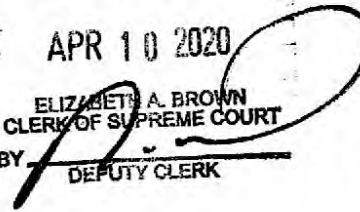
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUANE DAVID GRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78151-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Duane David Gray appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 6, 2015, and a supplemental petition filed on October 30, 2017. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

First, Gray argues the district court erred by denying his claims that he received ineffective assistance of counsel at trial. 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).

Gray claimed counsel were ineffective for failing to request a limiting instruction after the district court ruled the State's questioning of his witness regarding his prior criminal history and the testimony elicited by both trial counsel and the State regarding his marijuana use was improper. The underlying claim was raised on direct appeal and the majority of the Nevada Supreme Court panel found that it was error for the district court not to give a limiting instruction but the error was harmless. Therefore, Gray argued that, because there was error, counsel should be found deficient for not requesting the limiting instruction and prejudice should be presumed because one justice found the error was not harmless.

The district court found that the majority of the Nevada Supreme Court panel concluded that Gray's use of marijuana and his criminal history were "tangential to the charged crime" and, therefore, the testimony regarding petitioner's marijuana use and criminal history was harmless. Therefore, the district court concluded Gray failed to demonstrate a reasonable probability of a different outcome at trial had counsel requested a limiting instruction. The record supports the decision of the district court. Further, Gray failed to demonstrate prejudice could be presumed where one justice dissents from the majority. Accordingly, we conclude the district court did not err by denying this claim.

Gray also claimed counsel were ineffective for choosing to present a post-traumatic stress disorder (PTSD) defense. Specifically, Gray

claimed he told counsel not to use this defense and instead to argue that it was just an accident. The district court held an evidentiary hearing and found that by Gray's own testimony, he did not object to using this defense. Specifically, Gray testified he did not want a "mental health" defense but did want counsel to present evidence of his PTSD as "mitigation" at trial. In addition to Gray's testimony, two of Gray's trial counsel also testified Gray did not object to the use of the PTSD. The district court concluded this claim lacked merit, and denied it. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Gray further claimed counsel were ineffective for failing to object to jury instruction 14, the deadly weapon instruction. Specifically, Gray claimed this jury instruction lowered the State's burden because it allowed him to be convicted under an assault theory instead of a battery theory. The district court found that the jury was properly instructed on what constitutes a deadly weapon pursuant to NRS 193.165(6)(b). Further, the district court found the jury was properly instructed on battery and instructed they had to find all of the elements of the crime charged in order to convict. Therefore, the district court concluded the jury was properly instructed and this claim lacked merit. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Gray next claimed counsel were ineffective for failing to propose a lesser-included jury instruction of assault on an officer. The district court found that counsel considered a lesser-included offense instruction but

chose not to request it. Specifically, one of Gray's attorneys testified he believed Gray was innocent and he made a strategic decision not to include it in order to pursue an acquittal. Further, this same attorney testified he knew Gray was facing a potential habitual criminal sentence whether Gray was convicted of assault or battery and he wanted to put as few felonies in front of the jury as possible. The district court concluded counsel's decision was strategic and Gray failed to demonstrate otherwise. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (observing strategic decisions by counsel are "virtually unchallengeable absent extraordinary circumstances"). The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Gray also claimed counsel were ineffective for failing to present any witnesses in mitigation at sentencing. Gray claimed several of his family members would have testified. The district court found that Gray failed to inform counsel there were any witnesses who would be willing to testify on his behalf. Further, the only witness who testified at the evidentiary hearing lived in Montana at the time and stated she did not think she would have made it to the sentencing hearing to testify. Therefore, the district court concluded Gray failed to demonstrate counsel were deficient or resulting prejudice. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Second, Gray claimed appellate counsel were ineffective for failing to argue the district court erred by failing to give supplemental instructions to the jury in response to two jury questions. 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, 988, 923 P.2d 1102, 1114 (1996). 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). 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*, 121 Nev. at 686, 120 P.3d at 1166.

The district court concluded that appellate counsel were not deficient because counsel does not have to raise every non-frivolous issue on appeal. Further, the district court concluded that Gray failed to demonstrate prejudice because he failed to show this claim would have had a reasonable probability of success on appeal. Specifically, the district court found that the jury questions were concerned with how the facts related to the charges and did not demonstrate confusion regarding the elements of any of the charged crimes. And the trial court's response to the questions referred the jury back to the instructions so that the trial court would not improperly interfere with the deliberations. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim. See *Gonzalez v. State*, 131 Nev. 991, 996, 366 P.3d

680, 683-84 (2015) (holding that where a jury question does not suggest confusion or lack of understanding of a significant element of law, the district court has wide discretion in answering a jury question and may refer them back to the instructions already given).

Having concluded Gray is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Montero, District Judge
Karla K. Butko
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk