

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRANCE OLYSUSISS STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78059-COA

FILED

MAY 11 2020

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

ORDER OF AFFIRMANCE

Terrance Olysusiss Stewart appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Stewart argues the district court erred by denying the claims of ineffective assistance of appellate counsel raised in his August 15, 2018, petition and later-filed supplements. 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, 1114 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). 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, Stewart claimed his appellate counsel was ineffective for failing to argue on appeal that witnesses improperly identified him in court as the perpetrator when they had previously told police officers they were unsure who committed the offense. Stewart did not allege the witnesses' testimonies were tainted by an improper pre-trial identification procedure, but rather contended their testimonies conflicted with prior statements they made concerning their ability to identify the perpetrator.

Absent an allegation that an in-court identification was tainted by an improper pretrial identification process, an in-court identification is not subject to suppression but rather must be evaluated for credibility by the jury. *Steese v. State*, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998). Stewart cross-examined the challenged witnesses concerning their in-court identifications and any inconsistencies in those witnesses' identifications "was appropriately resolved by the jury's evaluation of [the witnesses'] credibility." *Id.* Stewart failed to demonstrate his counsel's performance fell below an objective standard of reasonableness regarding this issue. Moreover, because overwhelming evidence of Stewart's guilt was presented at trial, which included the victim's identification of Stewart as the perpetrator, the physical evidence concerning the firearm and bullets, and Stewart's messages to the victim and the victim's girlfriend in which he admitted he shot the victim, Stewart failed to demonstrate a reasonable likelihood of success on appeal had counsel challenged the witnesses' in-court identifications. Therefore, we conclude the district court did not err by denying this claim.

Second, Stewart claimed his appellate counsel was ineffective for failing to argue that the State did not establish a proper chain of custody for the firearm. A witness testified she was on the street and heard a noise as a car drove by. She subsequently discovered a firearm on the ground near her and reported it to the police. The police secured the firearm and collected it into evidence. Analysts also testified concerning tests conducted on the firearm and the evidence storage protocols undertaken regarding the firearm. Under these circumstances, Stewart failed to demonstrate that objectively reasonable counsel would have asserted there was an improper break in the chain of custody. *See Burns v. Sheriff Clark Cty.*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976). Stewart also failed to demonstrate a reasonable likelihood of success on appeal had counsel raised this issue. *See Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972) (discussing that doubt arising from evidence of tampering resulting from a break in the chain of custody “goes to the weight of the evidence” and not to its admissibility). Therefore, we conclude the district court did not err by denying this claim.

Third, Stewart claimed his appellate counsel was ineffective for failing to assert on appeal that there was insufficient evidence presented at trial to support his conviction of ownership or possession of a firearm by a prohibited person. Stewart contended the State failed to prove he actually possessed the firearm. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido v. State*, 114 Nev.

378, 381, 956 P.2d 1378, 1380 (1998); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The victim testified he was acquainted with Stewart and saw Stewart's face when Stewart shot him with the firearm. The authorities later discovered a .25 caliber pistol near the crime scene and the bullet recovered from the victim matched that firearm. A search of Stewart's vehicle revealed .25 caliber cartridges. Stewart also wrote multiple messages to the victim following the incident and admitted shooting the victim in some of the messages. Given the evidence and testimony, the jury could reasonably find Stewart possessed a firearm. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Accordingly, Stewart failed to demonstrate his counsel's performance fell below an objectively reasonable standard by failing to raise this claim or a reasonable likelihood of success had counsel raised this issue on appeal. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Stewart claimed his appellate counsel was ineffective for failing to argue there was insufficient evidence presented to support his conviction for preventing or dissuading a witness from testifying or producing evidence. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido*, 114 Nev. at 381, 956 P.2d at 1380; *see also Jackson*, 443 U.S. at 319.

Evidence and testimony was presented concerning multiple Facebook and text messages Stewart sent to the victim and his girlfriend containing threats of harm should they attend court proceedings. The victim testified he knew the Facebook messages originated from Stewart because the account contained Stewart's photograph. The victim's girlfriend testified Stewart identified himself by name when he texted her the threatening messages. Given the evidence and testimony, the jury could reasonably find Stewart committed preventing or dissuading a witness from testifying or producing evidence. *See* NRS 199.230. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden*, 97 Nev. at 73, 624 P.2d at 20. Accordingly, Stewart failed to demonstrate his counsel's performance fell below an objectively reasonable standard by failing to raise this claim or a reasonable likelihood of success had counsel raised this issue on appeal. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Stewart claimed his appellate counsel was ineffective for failing to argue the trial court improperly included evidence in the jury instructions. Stewart contended an instruction improperly contained statements from Facebook messages. The jury instruction at issue was a copy of the amended information that was read to the jury as an instruction. It included a statement that Stewart was charged with preventing or dissuading a witness from testifying or providing evidence for allegedly sending the victim threatening messages via text and/or Facebook and it specifically identified the messages Stewart allegedly sent. The challenged

instruction informed the jury that the “Amended Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.”

Jurors are presumed to follow the district court’s instructions. *See Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997). Given the presumption that the jurors followed the district court’s instruction that the amended information was not evidence of guilt, Stewart failed to demonstrate it was objectively unreasonable for appellate counsel to fail to raise a claim concerning this instruction on direct appeal. Stewart also failed to demonstrate a reasonable likelihood of success on appeal had counsel raised a claim concerning this instruction. Therefore, we conclude the district court did not err by denying this claim.


Sixth, Stewart claimed his appellate counsel was ineffective for failing to argue on appeal that Stewart had an alibi. During trial, Stewart argued that he had already been detained by the police by the time the shooting took place. Stewart urged the jury to find he had an alibi because the call alerting the authorities of the shooting occurred after he had been detained. However, the jury necessarily rejected Stewart’s argument in light of its verdict. Stewart did not explain how reasonably diligent appellate counsel would have raised an alibi claim on direct appeal and thus, Stewart failed to demonstrate his counsel was objectively unreasonable. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Stewart also failed to demonstrate a reasonable likelihood of success on appeal had counsel asserted Stewart had an alibi. Therefore, we conclude the district court did not err by denying this claim.

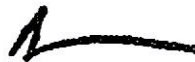
Next, Stewart claims the district court abused its discretion by initially denying his requests for transcripts and only granting his request and providing him transcripts after the district court had already denied his petition. Stewart has failed to demonstrate that the denial of his request for transcripts prevented him from adequately raising his claims of ineffective assistance of appellate counsel. Accordingly, we conclude no relief is warranted for this claim.

Finally, Stewart argues his appellate counsel was ineffective for failing to argue the trial court permitted multiple biased jurors to serve on the jury and he is entitled to relief due to cumulative error. However, Stewart did not raise these claims in his petition and we decline to consider them in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Terrance Olysusiss Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk