

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN EDMISTEN, A/K/A JUSTIN
JAMES EDMINSTON, A/K/A JUSTIN J.
EDMISTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83145-COA

FILED

DEC 09 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Justin Edmisten appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Edmisten argues that the district court erred by denying his claims of ineffective assistance of trial counsel raised in his January 12, 2021, petition. 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 687. 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). A petitioner must raise claims supported by specific factual allegations that are not belied by

the record and, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Edmisten claimed his trial counsel was ineffective for failing to retain a handwriting expert to examine a handwritten note given to a convenience store clerk during a robbery. Edmisten did not allege that a handwriting expert would have provided favorable testimony had counsel retained such an expert. Moreover, there was strong evidence of Edmisten's guilt presented at trial as three victims identified him as the perpetrator of the offenses and surveillance recordings depicted him committing the crimes. Accordingly, Edmisten failed to allege specific facts that demonstrated his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel retained a handwriting expert. Therefore, we conclude the district court did not err by denying this claim.

Second, Edmisten claimed his trial counsel was ineffective for failing to "resolve" jury instruction no. 30 as it related to the State's closing argument concerning charges stemming from crimes committed at a Circle K convenience store. Edmisten appeared to assert the State improperly urged the jury to find he was guilty of both burglary and burglary while in possession of a deadly weapon for the same incident, that argument violated a jury instruction, and his counsel should have objected when the State made the improper argument.

Jury instruction no. 30 informed the jury that Edmisten was charged with burglary while in possession of a deadly weapon due to an incident at the Circle K. The instruction informed the jury that, in order to find Edmisten was guilty of burglary while in possession of a deadly weapon, it had to find beyond a reasonable doubt that he used a deadly

weapon during the commission of the offense. The instruction also stated that if the jury found beyond a reasonable doubt that Edmisten committed burglary but that he did not use a deadly weapon in the commission of that offense, it could properly find Edmisten guilty of simple burglary. The instruction further informed the jury that it could not find that Edmisten committed both burglary and burglary while in possession of a deadly weapon for his actions at the Circle K, but rather it could only find guilt for one of those charges.

During its closing argument, the State did not urge the jury to find Edmisten guilty of both burglary and burglary while in possession of a deadly weapon for the Circle K incident. Rather, the State urged the jury to find Edmisten guilty of burglary while in possession of a deadly weapon for the Circle K incident. Because the State did not urge the jury to convict Edmisten of both burglary and burglary while in possession of a deadly weapon for the incident at the Circle K, Edmisten's claim was belied by the record. Moreover, the jury was instructed that it could only find Edmisten guilty of either burglary or burglary while possession of a deadly weapon, but not both charges, for his actions at the Circle K, and jurors are presumed to follow the trial court's instructions. See *McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004). And the jury ultimately convicted Edmisten of burglary while in possession of a deadly weapon, and not burglary, for the Circle K incident. Accordingly, Edmisten failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected to the State's closing arguments concerning the underlying issues. Therefore, we conclude the district court did not err by denying this claim.


Third, Edmisten claimed that his trial counsel was ineffective for failing to file motions to preserve materials for independent testing or requesting an acquittal. Edmisten appeared to assert that the State improperly failed to preserve a handwritten note and his counsel should have moved to dismiss the case based upon the failure to preserve the note. Edmisten argued on direct appeal that the State improperly damaged the note during testing for fingerprints, and the Nevada Supreme Court concluded that Edmisten was not prejudiced by any failure by the State to preserve the note as there was strong evidence of his guilt presented at trial. *Edmiston v. State*, No. 76814, 2020 WL 5633674 (Nev. Sept. 18, 2020) (Order of Affirmance). In light of the strong evidence of Edmisten's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome had counsel filed motions to preserve the note or request dismissal of the case based upon any failure by the State to preserve the note. Therefore, we conclude the district court did not err by denying this claim.

Finally, Edmisten argues on appeal that his trial counsel was ineffective for failing to contend that the State did not prove he took money or property, failing to investigate an alibi defense, and failing to request an adverse-inference instruction. Edmisten did not raise these claims in his petition, he did not seek permission to raise new claims in any additional documents he filed in the district court, and the State was not given an opportunity to respond to these claims before the district court. The district court has discretion as to whether to consider later-raised claims. *See* NRS 34.750(5); *Barnhart v. State*, 122 Nev. 301, 303, 130 P.3d 650, 651 (2006) ("Generally, the only issues that should be considered by the district court [] on a post-conviction habeas petition are those which have been

pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond.”). Because these claims were not properly raised below, we decline to consider them for the first time on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Justin Edmisten
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk