

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EARL PARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83045-COA

FILED

FEB 03 2022

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

ORDER OF AFFIRMANCE

James Earl Parker appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 9, 2018, and supplemental pleadings filed on May 15, 2018, and August 22, 2018. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Parker claims the district court erred by denying his claims of ineffective assistance of trial counsel. 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, Parker claimed his trial counsel was ineffective for failing to communicate a plea offer. Parker acknowledged that the plea offer was contingent on his codefendant¹ also accepting it and that Parker's counsel was not made aware of the offer until after Parker's codefendant rejected it and the offer was withdrawn. Because counsel was not aware of the plea offer before it was withdrawn, Parker failed to demonstrate that counsel's failure to communicate it fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Second, Parker claimed his trial counsel was ineffective for failing to investigate his alibi defense. Parker claimed he was in Arizona during the "robbery series." Parker was arrested near the scene of the last robbery in the series and failed to specify the dates he was in Arizona or who counsel should have contacted to corroborate his alibi. Thus, to the extent it was not belied by the record, Parker's claim was bare. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel investigated Parker's alibi. Therefore, we conclude the district court did not err by denying this claim.

Third, Parker claimed his trial counsel was ineffective for failing to cross-examine or otherwise challenge the testimony of K.

¹The superseding indictment lists two codefendants: Ralph Alexander and Tonya Martin. Martin entered into a plea agreement in exchange for her testimony against Parker and Alexander, who were tried together. All references herein to a codefendant refer to Alexander.

Richardson, an employee working during the Family Dollar robbery, about inconsistencies in her description of the perpetrators. At trial, the State presented video surveillance and eyewitness testimony from the robbery. Richardson and another employee identified Parker during a show-up identification as one of the perpetrators. Parker was also identified by a plainclothes officer who observed Parker and his codefendant enter and then later flee the store. The officer gave chase and observed Parker shed clothing while fleeing. Parker was apprehended near the Family Dollar, and police recovered several articles of clothing that were consistent with the eyewitness testimony and surveillance video, including a skull mask that was later determined to contain Parker's DNA. Based on this evidence, Parker failed to demonstrate a reasonable probability of a different outcome but for counsel's failure to challenge Richardson about inconsistencies in her description of the perpetrators. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Parker claimed his trial counsel was ineffective for failing to investigate or otherwise challenge the DNA evidence found inside the skull mask. Parker claimed that other sources of DNA were found inside the mask and that the State failed to test a hair found inside the mask. In cross-examination, counsel elicited testimony from the State's expert that multiple people had contact with the inside of the mask at some point and that she did not test hair found inside the mask. Parker failed to explain how counsel should have further challenged this evidence. And Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel investigated or otherwise challenged the DNA evidence. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004)

(providing that a petitioner claiming counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim.

Fifth, Parker claimed his trial counsel was ineffective for failing to investigate potential witnesses, an alternative suspect, the lack of fingerprints matching Parker's at the crime scenes, and the fact that he was not depicted in the surveillance video because the perpetrators were masked. Parker failed to identify the potential witnesses or specify what they would have said. He also failed to explain what investigation should have been done into the lack of physical evidence at the crime scenes, what it would have uncovered, or how it would have affected the outcome of his trial. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel conducted these investigations. *See id.* Therefore, we conclude the district court did not err by denying this claim.

Sixth, Parker claimed his trial counsel was ineffective for failing to cross-examine or otherwise challenge the testimony of C. Tran, an employee working during the LV Nail Spa robbery, regarding inconsistencies between his trial and grand jury testimonies as to the robbery. Specifically, Parker claimed counsel should have cross-examined Tran about which perpetrators were wearing which masks and the descriptions of the masks used during the robbery. At trial, Martin testified that she drove Parker and his codefendant to the scene of the LV Nail Spa robbery and knew the defendants were going to commit a robbery. Surveillance video from after the robbery depicts the perpetrators getting into a car matching the description of the one owned by Martin, and Martin

identified Parker and his codefendant as the ones entering the car. Parker thus failed to demonstrate a reasonable probability of a different outcome but for counsel's failure to challenge Tran about inconsistencies in his testimony. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Parker claimed his trial counsel was ineffective for failing to effectively cross-examine or otherwise challenge Martin's testimony because her testimony was uncorroborated by other evidence. Facts discussed previously in this order sufficiently corroborated Parker's participation in the Family Dollar robbery. In addition, this court has already determined that the State presented sufficient independent evidence connecting Parker to the other robberies to corroborate Martin's testimony. *See Parker v. State*, No. 70139, 2017 WL 1829968, *2 (Nev. Ct. App. May 1, 2017) (Order of Affirmance). This holding is the law of the case, which prevents further litigation of this issue, *see Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), and Parker did not allege any facts that would amount to an exception to the application of the law of the case to this matter, *see Tien Fu Hsu v. Cty. of Clark*, 123 Nev. 625, 630-32, 173 P.3d 724, 728-29 (2007). Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel engaged in further cross-examination or challenged whether Martin's testimony was sufficiently corroborated by other evidence. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Parker claimed his trial counsel was ineffective for failing to effectively cross-examine or otherwise challenge Martin's testimony as unreliable because she received a plea deal in exchange for it.

Martin testified that she was originally charged with 23 felony counts arising from her participation in the robberies but pleaded guilty to a single count of conspiracy to commit robbery, the offense was probationable, and she was free to argue for an appropriate sentence. She explained that she was testifying in order to fulfill the obligations of her plea agreement, she did not decide to testify until she had been charged and taken into custody, and her priority was to not be taken away from her children again. The jury heard evidence of the circumstances of Martin's plea agreement to examine the reliability of her testimony, and Parker failed to explain what else counsel should have done to challenge the reliability of her testimony. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel engaged in further cross-examination or otherwise challenged the reliability of Martin's testimony. Therefore, we conclude the district court did not err by denying this claim.

Ninth, Parker claimed his trial counsel was ineffective for failing to cross-examine or otherwise challenge the testimony of B. Williams and C. Tunnell regarding their descriptions of a mask worn during the robberies they witnessed. Parker claimed the mask was inconsistently described during the trial. Tunnell, an employee working during the Kwiky Market robbery, described the perpetrator as wearing a white hockey mask. Williams, a customer present during the LV Nail Spa robbery, described the perpetrator as wearing a mask like that from the movie *Scream*. The jury heard evidence of inconsistencies in the description of the mask or masks used during the robberies, and Parker failed to explain what else counsel should have done to challenge these inconsistencies. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard

of reasonableness or a reasonable probability of a different outcome had counsel challenged the testimony. Therefore, we conclude the district court did not err by denying this claim.

Tenth, Parker claimed his trial counsel was ineffective for failing to cross-examine or otherwise challenge the testimony of A. Gutierrez, an employee working during the Rainbow Market robbery, regarding her description of one of the perpetrators as Hispanic. Parker claimed neither he nor his codefendant are Hispanic. Gutierrez testified that she was unable to see the other perpetrator's face. Gutierrez's testimony thus did not exonerate Parker, and Parker failed to explain how counsel should have challenged her testimony. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the testimony. Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Parker claimed his trial counsel was ineffective for failing to cross-examine or otherwise challenge the testimony of A. Miranda, a customer present during the LV Nail Spa robbery, regarding her description of the perpetrator with the skull mask having his hair in "twists." The State argued during closing arguments that Parker was the perpetrator in the skull mask. While Parker claimed that "he was bald," he did not specifically allege that he was bald at the time of the LV Nail Spa robbery, and Martin's testimony evidenced Parker's participation in the robbery. Moreover, counsel cross-examined Miranda about her descriptions of both perpetrators' hair, and Parker failed to specify how counsel should have further challenged this testimony. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of

reasonableness or a reasonable probability of a different outcome had counsel challenged the testimony. Therefore, we conclude the district court did not err by denying this claim.²

Twelfth, Parker claimed his trial counsel was ineffective for failing to file pretrial motions. Parker claimed that, had it been successful, a motion to sever defendants would have allowed him to accept a plea offer that was not conditioned upon his codefendant also accepting it. Parker failed to allege facts that demonstrate a motion to sever would have been successful, *see* NRS 174.165 (providing when a defendant is entitled to a severed trial); *Rowland v. State*, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002) (describing when a court should sever the trial of jointly indicted defendants). To the extent Parker claimed counsel should have filed other pretrial motions, he failed to identify what motions counsel should have filed. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel filed pretrial motions. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Parker claimed his trial counsel was ineffective for conceding that Parker committed the Family Dollar robbery. During closing arguments, counsel stated that the Family Dollar robbery "would probably be the easiest to prove beyond a reasonable doubt" because Parker and his codefendant were "caught relatively near to the scene" and physical

²To the extent Parker also claimed trial counsel failed to cross-examine other witnesses, Parker did not identify who the other witnesses were or how their cross-examination would have affected the outcome of the proceedings. Parker's bare claims failed to demonstrate he was entitled to relief. Therefore, we conclude the district court did not err by denying these claims.

evidence showing they participated in the robbery was “scattered throughout” their flight path. Counsel also described Parker as being “present” and stated that Parker “was there and he got arrested at the scene.” Counsel’s argument was consistent with the evidence presented at trial. Accordingly, Parker failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel’s statements. *See Armenta-Carpio v. State*, 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013) (providing that a concession of guilt is simply a trial strategy that should be reviewed for reasonableness). Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Parker claimed his trial counsel was ineffective for failing to challenge misconduct by the State when it argued during closing arguments that Parker admitted to the Family Dollar robbery even though Parker claimed he never admitted guilt. The State’s comment was made during rebuttal argument and in response to counsel’s closing arguments. It was thus not misconduct. *See Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997) (recognizing the appropriateness of rebuttal arguments that directly respond to issues raised by the defense’s closing), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Accordingly, Parker failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected to the prosecutor’s statements. Therefore, we conclude the district court did not err by denying this claim.

Parker also claims the district court erred by denying his claims of ineffective assistance of appellate counsel. To demonstrate ineffective

assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in 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 687. 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, Parker claimed his appellate counsel was ineffective for not having a pen, paper, or knowledge of the whereabouts of the trial transcripts during their first meeting. Parker failed to explain how counsel's actions during their first meeting affected counsel's ability to effectively represent him on appeal. Accordingly, Parker failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel had a pen, paper, or knowledge of the whereabouts of the trial transcripts during their first meeting. Therefore, we conclude the district court did not err by denying this claim.

Second, Parker claimed his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel on direct appeal. Such claims are generally inappropriate on direct appeal, and Parker did not allege his claim fell into an exception to that general rule. *See Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) ("[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or


where an evidentiary hearing would be unnecessary.”), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Accordingly, Parker failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of success on appeal had counsel raised claims of ineffective assistance of trial counsel. Therefore, we conclude the district court did not err by denying this claim.

Third, Parker claimed appellate counsel was ineffective for conceding Parker’s guilt to the Family Dollar robbery on direct appeal. Parker’s counsel did not concede guilt but rather did “not challenge the convictions arising from the Family Dollar [s]tore [r]obbery” in his opening brief on direct appeal. Accordingly, Parker failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel acted differently. Therefore, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
James Earl Parker
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk