


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY RICHARD WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82798-COA

FILED

FEB 03 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Troy Richard White appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 24, 2018, and a supplement filed on December 20, 2018. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

White 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, 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).

22-03756

First, White claimed his trial counsel was ineffective for failing to investigate, because counsel did not have White's cell phone forensically analyzed. White claimed a forensic analysis of his cell phone was necessary so counsel could "properly determine" the accuracy of the State's witnesses' testimony that White sent threatening voice and text messages to a victim. White failed to demonstrate what forensic analysis of his cell phone would have revealed. Accordingly, White failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel had a forensic analysis done on White's cell phone. *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 demonstrate 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.

Second, White claimed his trial counsel was ineffective for failing to object to questions posed to a witness by the State insinuating White had engaged in prior acts of domestic violence. The district court found that the State's questions did not reference prior acts of domestic violence and were instead elicited to show that the witness lacked intimate knowledge of the deceased victim and White's relationship. These findings are supported by substantial evidence in the record and are not clearly erroneous. Accordingly, White 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 State's questions. Therefore, we conclude the district court did not err by denying this claim.

Third, White claimed his trial counsel was ineffective for failing to challenge a warrantless forensic analysis of a cell phone attributed to the deceased victim. White claimed the text messages obtained from the cell phone were used to establish the State's theory of the case. White failed to identify facts that would have led objectively reasonable counsel to believe White had standing to challenge the search of the cell phone. The cell phone was found near the victim's body, White was not present when the phone was found, and White did not allege he told trial counsel the phone was his. Accordingly, White failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim. *See United States v. Pulliam*, 405 F.3d 782, 786 (9th Cir. 2005) (“[A] person seeking to exclude evidence allegedly obtained in violation of the fourth amendment must have standing to challenge the illegal conduct that led to the discovery of the evidence.”); *State v. Taylor*, 114 Nev. 1071, 1077-78, 968 P.2d 315, 320 (1998) (“A person who voluntarily abandons his property has no standing to object to its search or seizure . . .”).

Fourth, White claimed his trial counsel was ineffective for failing to object to an improper argument made by the State during closing arguments. Specifically, White claimed the prosecutor mischaracterized the standard of proof necessary to find a defendant guilty of manslaughter by improperly informing the jury it must find the provocation that is necessary to reduce a crime from murder to manslaughter resulted in an irresistible desire to kill. Jurors are presumed to follow the trial court's instructions. *McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004). White conceded the jury was properly instructed. Moreover, the

district court found that the State did not instruct the jury to disregard the instructions, and this finding is supported by substantial evidence in the record and is not clearly erroneous. Because the jury was properly instructed, White failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State's argument. Therefore, we conclude the district court did not err by denying this claim.

Fifth, White claimed his trial counsel was ineffective for failing to object to the reasonable-doubt jury instruction because it improperly minimized the State's burden of proof. The district court gave the reasonable doubt instruction mandated by NRS 175.211, and the Nevada Supreme Court has long held this instruction does "not dilute the state's burden to establish guilt beyond reasonable doubt and does not shift the burden of proof." *Cutler v. State*, 93 Nev. 329, 337, 566 P.2d 809, 814 (1977). Accordingly, White 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 reasonable doubt instruction. Therefore, we conclude the district court did not err by denying this claim.

Sixth, White claimed his trial counsel was ineffective for failing to object to the equal-and-exact-justice jury instruction because it improperly minimized the State's burden of proof. Because the jury was instructed that White was presumed innocent and that the State bore the burden of proving guilt beyond a reasonable doubt, this instruction is consistent with controlling case law. *See Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (providing that, in such circumstances, the equal-and-exact-justice instruction does not undermine the presumption of innocence or lessen the burden of proof). Accordingly, White 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 equal and exact justice instruction. Therefore, we conclude the district court did not err by denying this claim.

White 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).

White claimed his appellate counsel was ineffective for failing on appeal to challenge (1) the impropriety of the questions posed to a witness by the State insinuating prior acts of domestic violence, (2) the improper argument made by the State during closing arguments concerning manslaughter, (3) the reasonable-doubt jury instruction, and (4) the equal-and-exact-justice jury instruction. For the reasons discussed in the related claims above, White did not demonstrate counsel's performance fell below an objective standard of reasonableness and a reasonable likelihood of success had counsel raised the challenges on appeal. Therefore, we conclude the district court did not err by denying these claims.

White next claims the district court erred by denying his claim that cumulative errors committed by counsel warrant relief. However, even


assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), White did not demonstrate multiple deficiencies. Therefore, we conclude the district court did not err by denying this claim. See *Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018).

Finally, White claims the district court erred by denying his petition without first conducting an evidentiary hearing on each issue.¹ To warrant an evidentiary hearing, 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. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Because we have concluded White was not entitled to relief on any of his claims, we conclude the district court did not err by denying his petition without allowing an evidentiary hearing on every issue raised.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹The district court conducted an evidentiary hearing on only some of the issues.

cc: Hon. Ronald J. Israel, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk