IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENYA SPLOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82989-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Kenya Splond appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 29, 2019, and a supplemental petition filed on October 12, 2020. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Splond claims the district court erred by denying his claims that counsel were ineffective. 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*). 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—deficiency and prejudice—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).

First, Splond claimed trial counsel was ineffective for failing to timely convey a plea offer from the State. "[D]efense counsel has a duty to communicate formal offers from the prosecution." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). To demonstrate prejudice, a petitioner "must demonstrate a reasonable probability [he] would have accepted the earlier plea offer," the State would not have canceled the offer, and the district court would not have refused to accept the plea. *Id.* at 147. Further, a petitioner must demonstrate a "reasonable probability that the end result of the criminal proceedings would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*

After holding an evidentiary hearing, the district court found that Splond failed to demonstrate counsel did not present the offer to him. Counsel testified that while he could not remember specifically conveying the offer, his practice was to relay all offers to his clients and to discuss the offer and whether they should accept the deal or not. Further, at a hearing on April 20, 2015, counsel stated, "I did receive an offer. That offer was not acceptable to my client," which the district court found supported counsel's statement that he would have presented the offer. The district court found counsel to be credible and Splond to be incredible. Substantial evidence in the record supports the decision of the district court. Therefore, we conclude the district court did not err by denying this claim.[1]

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[1]Splond argues on appeal that even if counsel did convey the offer to him, counsel did not effectively explain the offer to him. Splond raised this claim for the first time at the evidentiary hearing, and it was not properly

Second, Splond claimed trial counsel was ineffective for failing to oppose the State's motion to consolidate two cases into one case. NRS 173.115(1)(b) provides that joinder of offenses is proper when the offenses are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." Offenses are considered connected together when "evidence of either crime would be admissible in a separate trial regarding the other crime." *Rimer v. State*, 131 Nev. 307, 321, 351 P.3d 697, 708 (2015) (internal quotation marks omitted). "[T]he district court must still consider whether the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge." *Id.* at 322, 351 P.3d at 708-09. In addition, "the term common plan describes crimes that are related to one another for the purpose of accomplishing a particular goal," and "the term common scheme describes crimes that share features idiosyncratic in character." *Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017) (internal quotation marks omitted).

Here, the district court concluded that the three criminal actions were properly joined together because they were connected together or were parts of a common scheme or plan. The acts were committed all within 13 days of each other, and each of the robberies was committed in a similar manner. In each robbery, Splond entered the store, he waited until he and the clerk were the only people in the store, and he asked the clerk to get him something from behind the counter near the cash register. Splond

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before the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider this argument on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

then pulled out a firearm, pointed it at the clerk, and demanded the money in the cash register. Further, the district court found that the crimes were cross-admissible to prove intent. Thus, the district court concluded that Splond failed to demonstrate counsel was deficient because counsel is not deficient for failing to file a futile motion. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Third, Splond claimed trial counsel was ineffective for failing to present expert testimony. Specifically, Splond claims counsel should have presented an expert on eyewitness identification to challenge the photographic lineups given to two of the victims. The two victims identified Splond in a photographic lineup but were unable to identify him in court. A third victim identified Splond at a show up identification and identified him in court. There was also video surveillance of all three robberies that was presented to the jury. When he was found shortly after the third robbery, Splond had cigarettes and gum that were taken in the third robbery and had clothing that was described by the third victim as being worn by the robber. Given this evidence, Splond failed to demonstrate a reasonable probability of a different outcome had counsel retained an expert regarding eyewitness investigation. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Splond claimed trial counsel was ineffective for failing to request a jury instruction specifically addressing eyewitness identification. The Nevada Supreme Court has held that "specific eyewitness identification instructions need not be given[ ] and are duplicitous of the general instructions on credibility of witnesses and proof

beyond a reasonable doubt." *Nevius v. State*, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985). Here, the district court gave instructions on the credibility of witnesses and proof beyond a reasonable doubt. Therefore, Splond failed to demonstrate such a request would have been granted, and counsel is not deficient for failing to make futile requests. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Accordingly, we conclude the district court did not err by denying this claim.

Finally, Splond raised several claims of ineffective assistance of counsel regarding the charge of possession of stolen property. The property at issue was the firearm used during the robberies.

Splond claimed trial counsel was ineffective for failing to argue there was a lack of evidence to support the charge of possession of stolen property. Splond also claimed trial counsel was ineffective for failing to request an inverse jury instruction regarding the possession of stolen property that would have instructed the jury that, if the State did not prove beyond a reasonable doubt Splond knew or should have known the gun he possessed was stolen, he should be acquitted of that charge. *See Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005) ("[T]his court has consistently recognized that specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request."). Further, he claimed appellate counsel should have argued there was insufficient evidence produced at trial that Splond knew or should have known that the firearm he used was stolen.

Underlying each of Splond's claims in his petition was the contention that the State presented insufficient evidence to prove he knew or should have known the firearm was stolen. *See* NRS 205.275 (requiring

that a defendant knew or should have known the property was stolen). At trial, the State presented evidence that Splond possessed the firearm and that the firearm was stolen. The State argued that Splond knew or should have known the firearm was stolen because he did not register the firearm, he used the firearm in a crime, and he tried to conceal the weapon when stopped by the police.[2] Considering the evidence presented and the State's inferences made in closing argument, we cannot conclude that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Further, that Splond was convicted of a felony for which there was insufficient evidence satisfies the prejudice requirements. *Cf. Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012) (considering whether the conviction, the sentence, or both would have been less severe in determining whether a petitioner had demonstrated prejudice as the result of a rejected guilty plea). For the foregoing reasons, we conclude the district court erred by denying these claims without first conducting an evidentiary hearing to determine whether counsel had a strategic reason for failing to challenge the charge of possession of stolen property at trial and on appeal. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that, 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). Therefore, we reverse the district court's denial of these claims and remand them to the district court to hold

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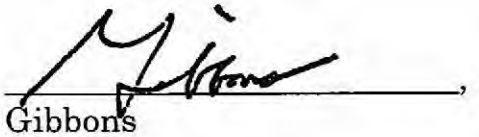
[2]Counsel did not make any argument in closing regarding the possession of a stolen firearm.

an evidentiary hearing to determine whether counsel were ineffective.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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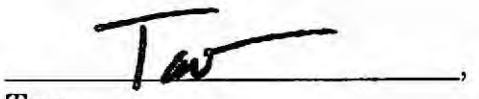
Gibbons



_____, J.
Tao

_____, J.
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cc: Hon. Ronald J. Israel, District Judge
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]In light of our disposition as to these claims, we do not reach Splond's claim that trial counsel was ineffective for failing to elicit testimony negating the elements of possession of stolen property.