

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KODY PATRICK CLOUTIER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83434-COA

FILED

MAY 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kody Patrick Cloutier appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Cloutier argues the district court erred by denying his August 3, 2020, petition and later-filed supplement without first conducting an evidentiary hearing. In his petition, Cloutier claimed his trial counsel was 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*). 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). 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).

First, Cloutier argued that his trial counsel was ineffective for failing to adequately conduct pretrial preparation and investigation. Cloutier asserted that his counsel should have retained experts concerning ballistics, crime scene reconstruction, and DNA. A petitioner claiming that counsel should have conducted an investigation must identify what the investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Cloutier failed to identify what an investigation into the facts of his case would have revealed or explain what favorable information could have been obtained from expert witnesses. Cloutier also failed to identify possible or potential experts or the potential testimony these experts would have offered. Because Cloutier did not support his claim with specific factual allegations, his claim is not sufficient to demonstrate that his counsel's performance fell below an objective standard of reasonableness. In addition, Cloutier did not demonstrate a reasonable probability of a different outcome at trial had counsel further investigated this matter or presented expert witnesses. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Cloutier argued that his trial counsel was ineffective for failing to retain an expert on eyewitness identification. Cloutier claimed

counsel should have presented expert testimony concerning eyewitness identification so that the jury could understand the complexities and inherent weaknesses of that type of evidence.

The victim in this matter did not merely view Cloutier during the commission of the crime but rather knew Cloutier prior to the incident. And Cloutier's defense at trial was not that the victim mistakenly identified him but that the victim was not a credible and reliable source of information. In light of the circumstances of this case, Cloutier did not show that counsel's performance fell below an objective standard of reasonableness by any failure to retain an expert on eyewitness identification. And Cloutier failed to demonstrate a reasonable probability of a different outcome had counsel retained an expert on eyewitness identification. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Cloutier argued that his trial counsel was ineffective for failing to consult with him concerning the facts of the case in order to develop exculpatory evidence and discover witnesses. Cloutier failed to identify or explain the benefit of any information that counsel could have obtained from consulting with him. *See id.* Moreover, this court has already concluded that substantial evidence of Cloutier's guilt was presented at trial, including "eyewitness testimony and DNA evidence, as well as additional physical evidence that corroborated the State's theory of the case, including the bat and two metal pipes that were used [to] beat [the victim]." *Cloutier v. State*, No. 76310-COA, 2019 WL 3379131, *2 (Nev. Ct. App. July 25, 2019) (Order of Affirmance). Accordingly, Cloutier did not demonstrate

a reasonable probability of a different outcome at trial had counsel consulted with him concerning the facts of the case. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Cloutier argued that his trial counsel was ineffective for failing to file a motion requesting a physical lineup. Cloutier's identity as one of the participants in the relevant incident was not at issue in this matter, and therefore, he failed to demonstrate it was unreasonable for counsel to not pursue a physical lineup. Cloutier also failed to demonstrate a reasonable probability of a different outcome had counsel requested a physical lineup. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Cloutier argued that his trial counsel was ineffective for failing to file a motion to sever his case from his codefendant's case. Cloutier asserted he was prejudiced because the State introduced a large amount of evidence at trial of his codefendant's guilt and Cloutier's defense was antagonistic to his codefendant. "[A] defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party." *Lisle v. State*, 113 Nev. 679, 690, 941 P.2d 459, 466 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Therefore, Cloutier would not have been entitled to severance on the basis that there was more evidence implicating his codefendant in the commission of the crimes.

In addition, the defenses were not antagonistic. A review of the record reveals both defendants argued that the victim was not believable and the State failed to meet its burden to prove their guilt beyond a reasonable doubt. Therefore, counsel's failure to move for severance of the cases on these bases did not demonstrate counsel's performance fell below an objective standard of reasonableness. Cloutier also failed to demonstrate a reasonable probability of a different outcome had counsel moved to sever the cases in light of the substantial amount of evidence of his guilt produced at trial. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Cloutier argued that his trial counsel was ineffective for failing to file a written motion to continue the trial. The trial court initially denied counsel's oral request to continue trial but eventually granted a continuance. Thus, Cloutier did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to file a written motion to continue or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Cloutier argued that his trial counsel was ineffective for failing to object to prosecutorial misconduct. Cloutier claimed that the State committed misconduct by alluding to facts not in evidence, misrepresenting the evidence, vouching, implying the jury had a duty to convict, and injecting personal opinion. Cloutier contended that the failure to object precluded review of these issues on direct appeal. However,

Cloutier raised the underlying misconduct claim on direct appeal. This court reviewed Cloutier's claim of prosecutorial misconduct under a plain-error standard and concluded that he was not entitled to relief because he did not demonstrate error affecting his substantial rights. *Cloutier*, No. 76310-COA, 2019 WL 3379131, at *1-2. In light of this court's conclusion on direct appeal and the substantial evidence of Cloutier's guilt produced at trial, Cloutier failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State's comments. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Cloutier argued that his trial counsel was ineffective for failing to request a cautionary instruction on eyewitness identification. The Nevada Supreme Court has already concluded "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).¹ Because the jury in this matter was instructed on the credibility of witnesses and the reasonable-doubt standard, Cloutier did not

¹Cloutier urges that *Nevius* be overruled. However, this court cannot overrule Nevada Supreme Court precedent. See *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007), *as modified* (Aug. 15, 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court." (quotation marks and internal punctuation omitted)); see also *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (observing *stare decisis* "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court").

demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to request a cautionary instruction regarding eyewitness identification. Cloutier also failed to demonstrate a reasonable probability of a different outcome had counsel requested such an instruction. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Ninth, Cloutier argued that his trial counsel was ineffective for failing to request an alternate flight instruction. Counsel objected to the flight instruction that was ultimately given and argued that the evidence did not establish that the instruction was warranted. In light of counsel's objection, Cloutier did not demonstrate his counsel's performance fell below an objective standard of reasonableness by any failure to also propose an alternate flight instruction. Moreover, the flight instruction utilized in this matter was a proper statement of the law concerning flight, *see Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005); *Walker v. State*, 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997), and, as there was substantial evidence of Cloutier's guilt presented at trial, Cloutier failed to demonstrate a reasonable probability of a different outcome had counsel requested an alternate flight instruction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Tenth, Cloutier argued that his trial counsel was ineffective during closing arguments because counsel argued that both codefendants were not guilty and did not anticipate the State's arguments during rebuttal. During closing argument, counsel argued at length that the victim's testimony was not credible and the forensic evidence collected by

the State did not support the victim's version of events. That Cloutier now believes counsel could have argued the case differently did not demonstrate that his counsel's performance during closing arguments fell below an objective standard of reasonableness. In addition, as there was substantial evidence of Cloutier's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome had counsel presented a different closing argument. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

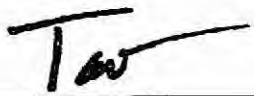
Eleventh, Cloutier argued that his trial counsel was ineffective during the sentencing hearing. Cloutier contended that his counsel did not properly prepare for sentencing and did not properly explain to the sentencing court that Cloutier's mental health issues made him susceptible to manipulation or domination by his codefendant. During the sentencing hearing, counsel noted that Cloutier accepted responsibility for his actions, he did not have a lengthy criminal record, and he did not use a firearm during the incident. Counsel also noted that Cloutier submitted letters to the sentencing court that provided insight into who he is as a person and his learning disability. Counsel urged the sentencing court to consider those issues when it imposed sentence, and counsel requested a lenient sentence. Because the sentencing court was informed of Cloutier's learning disability, counsel urged the sentencing court to review information to understand Cloutier as a person, and counsel made a lengthy argument at the sentencing hearing in support of a lenient sentence, Cloutier did not demonstrate that counsel's performance fell below an objective standard of


reasonableness by any failure to make additional arguments or statements during the sentencing hearing. Cloutier also failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions during the sentencing hearing. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Cloutier claimed the cumulative errors of trial counsel warrant relief. Even assuming any such errors could be cumulated, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), Cloutier failed to demonstrate he was prejudiced in light of the substantial evidence of his guilt presented at trial. We therefore conclude the district court did not err by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk