

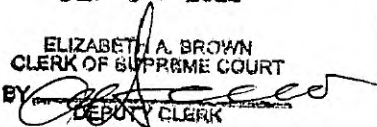
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERMAINE HAMPTON, A/K/A
JERMAINE HAMPTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84360-COA

FILED

SEP 09 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Germaine Hampton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 22, 2021. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Ineffective assistance of trial counsel

Hampton claims the district court erred by denying his claims that trial counsel were ineffective without first conducting an evidentiary hearing. 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, Hampton claimed that counsel were ineffective for failing to object when the State referred to Hampton's codefendant as his coconspirator while questioning witnesses. The State referred to the codefendant as a coconspirator during its examination of a witness and Hampton. Counsel were late to objecting to the State's use of coconspirator during its examination of the witness, and the objection was sustained when counsel ultimately objected. Given that the victim testified that the defendants acted in concert during the robbery and Hampton participated in the robbery, Hampton failed to demonstrate a reasonable probability of a different outcome had counsel objected earlier. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Hampton claimed that counsel were ineffective for failing to object when the State referred to Hampton's codefendant as his coconspirator during closing arguments. This court has already decided it was not improper for the State to refer to Hampton's codefendant as such. *See Hampton v. State*, No. 79683-COA, 2020 WL 6955398, at *3 (Nev. Ct. App. Nov. 25, 2020) (Order of Affirmance). Therefore, Hampton failed to demonstrate counsel were deficient for failing to object, *see Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same."), or a reasonable probability of a different outcome had counsel objected. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Hampton claimed counsel were ineffective for failing to object to the State's and the district court's references at sentencing to Hampton having used a gun during the robbery. Hampton claimed this was improper because he was found not guilty of using a deadly weapon during the robbery. A sentencing court may consider a defendant's past criminal history, including charges of which the defendant has been acquitted so long as that conduct has been proven by a preponderance of the evidence. See *United States v. Watts*, 519 U.S. 148, 152, 157 (1997). While Hampton was acquitted of using a firearm during the trial, the use of a firearm by Hampton was proven by a preponderance of the evidence because the victim testified Hampton used a firearm. Therefore, counsel was not deficient for failing to object. Further, the district court stated it understood Hampton had been acquitted of the charges; therefore, Hampton failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Hampton claimed counsel were ineffective for failing to investigate and prepare a defense. Specifically, he claimed counsel should have investigated his alibi defense that he had a job installing cameras, had access to the job site office and money, and therefore did not have a motive to commit the robbery.¹ The alleged evidence would not constitute alibi evidence. That Hampton had the opportunity to commit a different crime

¹Hampton attempts to add facts to this claim in his reply brief that were not presented below. Further, Hampton claims in his opening brief that counsel were ineffective for failing to interview and call his codefendant at trial. Hampton did not present these facts and claim below; therefore, 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).

did not negate his intention, motive, or ability to commit these crimes. Further, Hampton admitted to being present during the robbery. Therefore, Hampton failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had this evidence been presented. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Hampton claimed counsel were ineffective for failing to communicate with him prior to trial. Specifically, he claimed counsel failed to respond to letters, did not answer phone calls, and failed to meet with him. He claimed that counsel's failure to communicate caused counsel not to interview alibi, character, and exculpatory witnesses. For the reasons stated above, Hampton failed to demonstrate a reasonable probability of a different outcome at trial had counsel communicated more with him and investigated his alibi. As to the character and exculpatory witnesses, Hampton failed to allege who these witnesses were or what they would have said, and he therefore failed to support this portion of the claim with specific facts that, if true, would entitle him to relief. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixth, Hampton claimed counsel were ineffective for advising him to lie under oath at trial. Even assuming this is true, Hampton failed to demonstrate he was prejudiced by this advice because Hampton stated he refused the advice and told the truth at trial. Accordingly, we conclude

the district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventh, Hampton claimed counsel was ineffective because she introduced herself and co-counsel to the jury by stating that Hampton “has pled not guilty at this point and is claiming to be innocent of all of the charges.” Hampton argued this statement signaled to the jury that counsel did not believe he was innocent. The statement was a short introduction made to the jury pool at the beginning of jury selection as to where the case was at that point. Hampton pointed to nothing that indicates it was meant as anything other than an explanation that Hampton had pleaded not guilty and maintained his innocence. Thus, Hampton failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel not made this statement. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eighth, Hampton claimed counsel were ineffective for failing to object to inadmissible evidence. In his petition, he alleged counsel should have objected to photographs shown during the trial because they did not accurately depict where things were located in his vehicle. Even if the pictures were inaccurate and could have been objected to, given the other evidence presented at trial, Hampton failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Ninth, Hampton claimed counsel were ineffective for failing to object to the State’s closing arguments. Specifically, he claimed counsel should have objected to the State’s argument that he had a gun during the

commission of the offense when the jury ultimately found that he did not possess a gun and there was no physical evidence that he possessed a gun. The victim testified that Hampton had a gun during the robbery. The State's argument was therefore based on evidence presented at trial, and counsel was not deficient for failing to object. See *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (holding that a "prosecutor may argue inferences from the evidence" (internal quotation marks omitted)). Further, because the jury acquitted Hampton of the weapon enhancement, he cannot demonstrate prejudice. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Tenth, Hampton claimed counsel were ineffective for failing to object to the State's and district court's misapprehension of his criminal record. Hampton failed to state what misapprehension the State and the district court had about his criminal record. Therefore, Hampton did not demonstrate counsel were deficient or resulting prejudice. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eleventh, Hampton claimed that counsel were ineffective because of a conflict of interest. Specifically, he claimed there was a conflict because counsel failed to communicate with him, did not investigate, and told him to lie on the stand. "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if "counsel 'actively represented conflicting interests'" and the "conflict of

interest adversely affected [the defendant's] lawyer's performance." *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)).

Hampton did not demonstrate counsel were placed in a situation that was conducive to divided loyalties. Hampton also did not demonstrate that his counsel actively represented conflicting interests. Hampton's claims were thus insufficient to show that his counsel had an actual conflict of interest. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Twelfth, Hampton claimed that counsel were ineffective for failing to object to the judge's and other court actors' behavior while he was testifying. Hampton claimed the judge and other people in the courtroom would make faces and gestures to the jury while he was testifying, indicating that Hampton should not be believed. This claim is not belied by the record before this court and, if true, would entitle Hampton relief because his defense of the crime relied on his credibility in front of the jury. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, Hampton claimed he was entitled to relief based on the cumulative errors of counsel. Even assuming that multiple deficiencies in counsel's performance may be considered cumulatively to establish prejudice, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), we are not convinced that the cumulative deficiencies in counsel's performance prejudiced Hampton. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Next, Hampton argues the district court erred by denying his claims that appellate counsel was ineffective without first conducting an evidentiary hearing. 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). We give deference to the 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*, 121 Nev. at 686, 120 P.3d at 1166.

First, Hampton claimed appellate counsel was ineffective for failing to argue that the sentence imposed was based on impalpable evidence that he used a gun during the robbery. As stated above, it was not error for the district court to consider that Hampton used a firearm during the robbery because the State proved by a preponderance of the evidence that he did so. Further, the district court acknowledged that the jury did not find that fact. Therefore, Hampton failed to demonstrate this claim had a reasonable probability of success on appeal. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Hampton claimed appellate counsel was ineffective for failing to argue prosecutorial and judicial misconduct on appeal. Hampton

did not raise this claim below, and we decline to address it for the first time on appeal. *See McNelton*, 115 Nev. at 416, 990 P.2d at 1276.

Third, Hampton claimed appellate counsel was ineffective for failing to provide this court with a copy of a transcript that would have supported his claim that the trial court erred by denying his request to represent himself. The district court found that this court denied relief on that claim on the ground that Hampton failed to satisfy the first prong of *Lyons v. State*, 106 Nev. 438, 445-446, 796 P.2d 210, 214 (1990), *abrogated on other grounds by Vanisi v. State*, 117 Nev. 330, 341-42, 22 P.3d 1164, 1172 (2001), which is that the request was untimely. The district court misunderstood this court's ruling on appeal.

On appeal, this court first cited to *Lyons* for the proposition that “if granting the request [for self-representation] would require a continuance, the district court may deny the request as untimely *if there is no reasonable cause to justify the late request.*” *Hampton*, No. 79683-COA, 2020 WL 6955398, at *2 (emphasis added) (internal punctuation and quotation marks omitted). This court then concluded Hampton was not entitled to relief not merely because the request was untimely but also because the record provided to the court did not demonstrate reasonable cause for the lateness of the request. *Id.* In determining that Hampton had failed to demonstrate reasonable cause, this court noted that this was due to appellate counsel's failure to provide this court with a copy of the transcript of the sealed hearing where Hampton's request to represent himself was discussed. *Id.*

Hampton's claim in his petition was that if this transcript had been provided, counsel could have demonstrated reasonable cause for the lateness of his request, and accordingly, relief would have been granted on

appeal. The transcript of the sealed hearing is not in the record on appeal, and nothing in the record indicates that the district court reviewed a transcript of the hearing before denying Hampton's claim. Therefore, we conclude this claim is not belied by the record, and if the transcript demonstrates reasonable cause to excuse the lateness of Hampton's request to represent himself, then Hampton would be entitled to relief. Accordingly, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Remaining claims raised on appeal

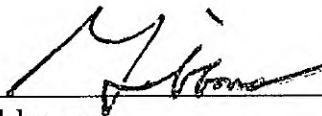
Hampton claims the district court erred by denying his petition without allowing him to respond to the State's reply to his petition. Because the State did not move to dismiss his petition, Hampton was not allowed to file any additional pleadings without further order from the district court. *See* NRS 34.750(5). The district court did not order that he could file additional pleadings. Therefore, we conclude Hampton failed to demonstrate the district court erred.

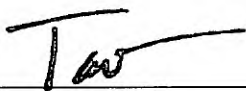
Hampton also argues the district court erred by failing to file his pro se motions and instead forwarding them to an attorney representing Hampton in a different matter. To the extent this was error, Hampton failed to demonstrate his substantial rights were violated, *see* NRS 178.598 ("Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded."), and therefore, we conclude he is not entitled to relief.

Finally, Hampton claims the district court judge should have recused herself from his case because of bias. Hampton claims the district court judge was biased because she stated that the sentence was appropriate in this case and that she would have imposed an even more severe sentence if possible. "[R]emarks of a judge made in the context of a

court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all of the evidence.” *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). This statement was made in explanation of the district court’s conclusion that Hampton failed to demonstrate prejudice from the sentencing court’s consideration of his use of a deadly weapon during the robbery. Further, Hampton failed to demonstrate this remark showed the district court judge had closed her mind to all of the evidence. Therefore, we conclude Hampton failed to demonstrate that the district court was biased and that he is entitled to relief on this claim. 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.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²The State has filed a motion to transmit the presentence investigation report (PSI). Because the PSI is not necessary for the resolution of this appeal, we deny that motion. We also deny Hampton’s “motion to subpoena attorney Gregory and Waldo’s computer tower for the month of June 2019” and motion requesting transcripts, both filed on August 22, 2022.

cc: Hon. Tara D. Clark Newberry, District Judge
Germaine Hampton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk