

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON OMAR GRIFFITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 84060-COA

**FILED**

APR 06 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
B. [Signature]  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jason Omar Griffith appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

*Ineffective assistance of trial counsel*

Griffith argues that the district court erred by denying his January 16, 2018, petition and later-filed supplements. In his petition, Griffith first claimed that 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, 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).

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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, Griffith claimed that his counsel was ineffective for failing to conduct an investigation into a self-defense expert who could have offered testimony to strengthen Griffith's trial defense. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

At the evidentiary hearing, counsel testified that he considered utilizing an expert in self-defense but ultimately decided not to pursue such an expert. Counsel stated that he was not concerned with the type of force used but was instead concerned about the amount of time and pressure that it would have taken to cause someone to pass out or die from the chokehold Griffith used on the victim. Counsel also stated his concern that additional testimony regarding the time and pressure from the chokehold Griffith used on the victim could have made it more likely that he would be found guilty of first-degree murder. And for those reasons, counsel decided not to pursue an expert witness in self-defense.

In light of counsel's testimony at the evidentiary hearing, Griffith failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating "trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)). Griffith also failed to

demonstrate a reasonable probability of a different outcome had counsel sought a self-defense expert. Therefore, we conclude that the district court did not err by denying this claim.

Second, Griffith claimed that his counsel was ineffective for failing to conduct investigation into an expert witness in an effort to present testimony concerning Griffith's mental health. A petitioner alleging that an attorney should have conducted an investigation must demonstrate what the results of an investigation would have been and how it would have affected the outcome of the proceedings. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). The district court found that Griffith did not produce evidence to show that he actually suffered from mental health issues. The district court therefore found that Griffith failed to meet his burden to demonstrate his factual assertions by a preponderance of the evidence. The record supports the district court's decisions. Griffith therefore failed to demonstrate his counsel's performance fell below an objective standard of reasonableness due to a failure to investigate Griffith's mental health issues 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.

Third, Griffith claimed that his counsel was ineffective for failing to object to the trial court's response to jury questions and the trial court's failure to provide supplemental instructions. During its deliberations, the jury inquired into whether a verbal threat can constitute an attempt and whether a serious and a highly provoking injury can occur without direct physical contact. At the evidentiary hearing, counsel stated he discussed that matter with the trial court and the State off the record.

After a discussion with the parties, the trial court decided to inform the jury that it was not at liberty to supplement the already-given instructions.

Griffith did not allege that the instructions provided to the jury were erroneous. Griffith also did not offer an instruction that counsel should have requested. Thus, Griffith failed to demonstrate that the trial court abused its discretion by refusing to provide a supplemental instruction. *See Jeffries v. State*, 133 Nev. 331, 338, 397 P.3d 21, 28 (2017) (“[A] district court does not abuse its discretion when it refuses to answer a jury question after giving correct instructions if neither party provides the court with a proffered instruction that would clarify the jury’s doubt or confusion.”). Because Griffith did not demonstrate that the trial court’s decision to decline to supplement the already-given instructions in response to the jury’s question was erroneous, Griffith failed to demonstrate that his trial counsel’s performance fell below an objective standard of reasonableness due to any failure to object to the trial court’s response or any failure to provide supplemental instructions. Griffith also failed to demonstrate 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.

Fourth, Griffith claimed that his counsel was ineffective for failing to object when questions from the jury were discussed off the record and outside of Griffith’s presence. Griffith argued on direct appeal that the trial court improperly held an off-the-record discussion regarding the jury’s questions, and the Nevada Supreme Court concluded “that there was no error.” *Griffith v. State*, Docket No. 66312, 2016 WL 4546998 (Nev. Aug. 11, 2016) (Order of Affirmance). As discussed previously, counsel testified

at the evidentiary hearing that he discussed the jury's questions off the record with the trial court and the State. Counsel also testified that he later informed Griffith of the discussion.

Griffith failed to demonstrate under the circumstances in this matter that he was prejudiced by any failure of counsel to seek to have the discussion concerning the jury's questions transcribed or to seek to have Griffith present for the discussion regarding those questions. Therefore, we conclude that the district court did not err by denying this claim.

Fifth, Griffith claimed that his counsel was ineffective for failing to object when the district court held unrecorded bench conferences. Here, the parties made a record regarding issues that were discussed at bench conferences, and Griffith failed to demonstrate his counsel's actions in this regard were objectively unreasonable.

Further, even assuming there were issues that were discussed at a bench conference and that were not later memorialized, Griffith did not demonstrate any unrecorded bench conference had significance. *Cf. Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014) (stating that there must be a demonstration that meaningful appellate review of any alleged error was precluded by the failure to memorialize a bench conference). Accordingly, Griffith failed to demonstrate a reasonable probability of a different outcome had counsel objected when a bench conference was not transcribed. Therefore, we conclude that the district court did not err by denying this claim.

Sixth, Griffith claimed trial counsel was ineffective for failing to object to the admission of a detective's "exciting" summary of the course

of the investigation. The authority Griffith relied on did not demonstrate that the detective's testimony was inappropriately "exciting."

Griffith's reliance on *Abram v. State* is misplaced because that case involved an officer's "highly prejudicial" testimony regarding inadmissible character evidence that was not relevant to the State's theory of the case, 95 Nev. 352, 355, 594 P.2d 1143, 1144-45 (1979), while here, the testimony concerning Griffith's interviews with the detective was relevant to the State's development of Griffith as a suspect and the offer of immunity to the State's witness. *Sandersfield v. Oklahoma* is distinguishable, as that case involved an officer's improperly prejudicial testimony that the defendant had been arrested for murder where the charge before the jury was misdemeanor assault. 461 P.2d 1019, 1019-20 (Okla. Crim. App. 1969). No similar testimony or impropriety was present here. Nor does *United States v. Reyes* show that counsel was deficient, because *Reyes* focused on whether a jury could consider non-hearsay testimony for the truth of the matter asserted, 18 F.3d 65, 70 (2d Cir. 1994), and no similar testimony was presented here.

Griffith thus did not demonstrate that counsel's performance fell below an objective standard of reasonableness for any failure to argue that the detective's testimony was inappropriate based on application of these opinions. Griffith also failed to demonstrate a reasonable probability of a different outcome had counsel contended that the detective's testimony constituted an exciting summary of the course of his investigation. Therefore, we conclude that the district court did not err by denying this claim.

Seventh, Griffith claimed trial counsel was ineffective for failing to object when the recording of the interrogation was not properly redacted because it included his statement declining to answer a portion of the detective's questions. The district court found that the statement at issue was innocuous. The district court also concluded that Griffith did not attempt to demonstrate prejudice stemming from any failure to redact the relevant statement from the recording. The record supports the district court's decision. Griffith thus did not demonstrate a reasonable probability of a different outcome had counsel sought to redact the challenged statement from the recording. *See Johnson v. State*, 133 Nev. 571, 577, 402 P.3d 1266, 1274 (2017) (stating a petitioner "must specifically explain how his attorney's performance was objectively unreasonable and how that deficient performance undermines confidence in the outcome of the proceeding sufficient to establish prejudice"). Therefore, we conclude that the district court did not err by denying this claim.

Eighth, Griffith claimed trial counsel was ineffective for failing to assert that he invoked his right to counsel for all of the police questioning and all of his statements should have therefore been suppressed. Griffith's underlying claim was raised on direct appeal, and the Nevada Supreme Court concluded that Griffith did not invoke his right to counsel for all of the questions posed by the police, he only invoked his right to counsel regarding individual questions, and the trial court properly suppressed the questions for which he invoked his right to counsel. *Griffith*, Docket No. 66312, 2016 WL 4546998. Because Griffith did not invoke his right to counsel for all of the questions posed to him by the police, Griffith failed to demonstrate that his counsel's performance fell below an objective standard

of reasonableness due to any failure to assert before the trial court that Griffith had done so. Griffith also failed to demonstrate a reasonable probability of a different outcome had counsel asserted that he invoked his right to counsel for all of the questions posed to him by the police. Therefore, we conclude that the district court did not err by denying this claim.

Ninth, Griffith claimed trial counsel was ineffective for failing to object when the prosecutor committed misconduct by referring to him as a liar. Griffith raised the underlying claim on direct appeal. The Nevada Supreme Court concluded on direct appeal that the prosecutor did not commit misconduct because he was permitted to question Griffith concerning his admissions that he had lied and to subsequently summarize his testimony during closing arguments. *Griffith*, Docket No. 66312, 2016 WL 4546998. Because the State did not commit misconduct concerning this issue, Griffith failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to object to the challenged comments. Griffith also failed to demonstrate 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.

Tenth, Griffith claimed trial counsel was ineffective for failing to object when the prosecutor vouched for the credibility of a witness by stating that the witness was more credible than Griffith. Griffith raised the underlying claim on direct appeal, and the Nevada Supreme Court concluded "that any error does not warrant reversal" because the challenged "statement was only a small portion of the prosecution's closing argument." *Griffith*, Docket No. 66312, 2016 WL 4546998. Moreover, Griffith did not



explain how any failure to object undermined the confidence in the outcome of the trial. *See Johnson*, 133 Nev. at 577, 402 P.3d at 1274. Because the challenged comment was only a small portion of the prosecution's closing argument, and due to Griffith's failure to explain how counsel's failure to object to the challenged comment undermined the confidence in the trial outcome, Griffith did not demonstrate a reasonable probability of a different outcome at trial had counsel asserted that the State vouched for the credibility of a witness. Therefore, we conclude that the district court did not err by denying this claim.

Eleventh, Griffith claimed trial counsel was ineffective for failing to object when the prosecutor and a witness commented on his invocation of his right to silence and his right to an attorney. The right to remain silent and the right to an attorney "protect the privilege against compulsory self-incrimination . . . by requiring an interrogation to cease when either right is invoked." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (internal citation omitted). Moreover, "the prosecution is forbidden at trial to comment upon an accused's election to remain silent." *Gaxiola v. State*, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). A criminal defendant's self-incriminating statements are admissible at trial if the defendant made only an ambiguous or equivocal invocation of those rights or if the defendant subsequently waived those rights and initiated discussions with the police. *See Berghuis*, 560 U.S. at 381-82; *Carter v. State*, 129 Nev. 244, 248, 299 P.3d 367, 370 (2013).

During his opening statement, the prosecutor stated that the evidence produced at trial would show that Griffith was willing to speak to the police in the presence of an attorney. A detective later testified that

Griffith was initially reluctant to discuss this matter with him without an attorney but that Griffith later initiated a conversation. A person who wants to invoke his right to remain silent must do so unambiguously. *See Berghuis*, 560 U.S. at 381. Griffith did not unambiguously invoke his right to remain silent, and therefore, he did not demonstrate that the challenged comments regarding his willingness to speak with the police were improper. Accordingly, Griffith did not demonstrate that it was objectively unreasonable for counsel to refrain from raising an objection based upon his right to remain silent.

Moreover, the Nevada Supreme Court concluded that Griffith did not invoke his right to counsel for the entire investigation and that he voluntarily engaged in a conversation with the detective without counsel. *Griffith*, Docket No. 66312, 2016 WL 4546998. And when viewed in context, the challenged comments provided an explanation as to the circumstances surrounding Griffith's discussions with the police. In light of the circumstances concerning the challenged comments, Griffith did not demonstrate that it was objectively unreasonable for counsel to refrain from raising an objection based upon his right to counsel. In addition, Griffith did not specifically explain why any failure to object to the challenge comments undermined confidence in the outcome of the trial, and accordingly, Griffith did not demonstrate a reasonable probability of a different outcome had counsel done so. *See Johnson*, 133 Nev. at 577, 402 P.3d at 1274. Therefore, we conclude that the district court did not err by denying this claim.

*Ineffective assistance of appellate counsel*

Griffith next argues that 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means*, 120 Nev. at 1012, 103 P.3d at 33. 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 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*, 121 Nev. at, 686, 120 P.3d at 1166.

First, Griffith claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by admitting a detective's "exciting" summary of the course of the investigation. As explained previously, Griffith did not identify inappropriately "exciting" testimony, and the authority he proffered is distinguishable from the situation in this matter. Griffith thus failed to show that any failure by appellate counsel to raise the underlying claim on direct appeal fell below an objective standard of reasonableness. Griffith also failed to demonstrate a reasonable

probability of a different outcome had counsel contended that the detective's testimony constituted an exciting summary of the course of his investigation and the trial court thus erred by admitting it. Therefore, we conclude that the district court did not err by denying this claim.

Second, Griffith claimed appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct by commenting on his invocation of his right to silence and his right to an attorney. As explained previously, the prosecutor stated that the evidence produced at trial would show that Griffith was willing to speak to the police in the presence of an attorney, and a detective later testified that Griffith was initially reluctant to discuss this matter with him without an attorney but that Griffith later initiated a conversation.

Griffith did not unambiguously invoke his right to remain silent, and therefore, he did not demonstrate that the challenged comments concerning his willingness to speak with the police were improper. In addition, when viewed in context, the challenged comments provided an explanation as to the circumstances surrounding Griffith's discussions with the police. In light of the circumstances concerning the challenged comments, Griffin did not demonstrate that it was objectively unreasonable for counsel to refrain from arguing that the prosecutor or the detective improperly commented upon his right to remain silent or upon his right to counsel. In addition, Griffith did not specifically explain why any failure to raise an argument on appeal regarding the challenged comments undermined confidence in the outcome of the appellate proceedings. *See Johnson*, 133 Nev. at 577, 402 P.3d at 1274. Accordingly, Griffith did not demonstrate a reasonable probability of a different outcome had counsel

raised the underlying claim on direct appeal. Therefore, we conclude that the district court did not err by denying this claim.

Third, Griffith claimed appellate counsel was ineffective for failing to argue that the trial court erred by holding unrecorded bench conferences. As explained previously, the parties made a record regarding issues that were discussed at bench conferences, and Griffith thus failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to raise the underlying claim on appeal.

Further, even assuming there were issues that were discussed at a bench conference and that were not later memorialized, Griffith did not demonstrate any unrecorded bench conference had significance or that meaningful appellate review was precluded by any failure to later make a record regarding the conference. *See Preciado*, 130 Nev. at 43, 318 P.3d at 178. Accordingly, Griffith failed to demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim on direct appeal. Therefore, we conclude that the district court did not err by denying this claim.

*Cumulative errors of counsel*

Griffith contends the district court erred by denying his claim that he is entitled to relief due to the cumulative effect of trial and appellate counsel's errors. 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), Griffith failed to specifically explain how his counsel's deficient performances undermined confidence in the outcome of the respective proceedings sufficient to establish prejudice, *see*

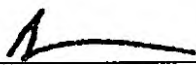
*Johnson*, 133 Nev. at 577, 402 P.3d at 1274. Griffith therefore failed to demonstrate a reasonable probability of a different outcome even if counsel's errors were considered for their cumulative effect. We therefore conclude that the district court did not err by denying this claim.

*Trial court error*

Griffith contends the district court erred by denying his claim that the trial court erred by holding unrecorded bench conferences. This claim could have been raised on direct appeal, and Griffith did not demonstrate good cause for the failure to do so and actual prejudice. Therefore, he is not entitled to relief. *See* NRS 34.810(1)(b). Accordingly, we conclude that the district court did not err by denying Griffith's petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Kathleen E. Delaney, District Judge  
Law Office of Christopher R. Oram  
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Eighth District Court Clerk