

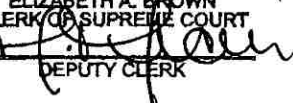
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH ANTONETTI A/K/A JOSEPH
ANTOINETTI A/K/A JOSEPH
GOZDZIEWICZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84752-COA

FILED

MAY 08 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joseph Antonetti appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 23, 2008, and a supplement filed on November 2, 2014. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Antonetti filed his petition more than two years after issuance of the remittitur on direct appeal on January 17, 2006. Thus, Antonetti's petition was untimely filed. *See* NRS 34.726(1). Antonetti's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* Antonetti argued that he had cause for the delay because, as of the submission of his petition, he had never been informed that his direct appeal was final. The district court accepted Antonetti's argument as to cause for the delay, and the State does not challenge this conclusion on appeal.

However, Antonetti was also required to demonstrate undue prejudice in order to overcome the procedural time bar. "A showing of undue

prejudice necessarily implicates the merits of the [petition]” See *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018). The district court concluded Antonetti’s claims lacked merit.¹

Antonetti argues the district court erred by concluding without first conducting an evidentiary hearing that his claims of ineffective assistance of trial counsel lacked merit. 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. 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. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). 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).

¹The district court erred by reaching the merits of the claims outside the context of determining whether Antonetti demonstrated undue prejudice sufficient to overcome the procedural time bar. We nevertheless affirm because the district court reached the correct result. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

First, Antonetti claimed that counsel was ineffective for failing to investigate or call three witnesses at trial who would have undermined the testimony of the victim and bolstered Antonetti's claim that he was not the person who shot the victim. Antonetti claimed the victim's landlord would have testified that contrary to the victim's claim, Antonetti paid the rent on the home. Antonetti claimed his new roommate would have testified that Antonetti moved out of the victim's home three days prior to the shooting, contradicting the victim's testimony that they fought about Antonetti continuing to live in the home. Finally, Antonetti claimed J. Heller would have testified that Antonetti was with her at the time of the shooting and that she had never seen Antonetti with the type of gun described by the victim.

At trial, the victim testified that she was in her room with a friend when they began to speak about Antonetti and how she no longer wanted him living in the home. She testified Antonetti had been staying with her for about two months and had not been paying rent. Antonetti was outside the room listening, and the victim called him in to talk about the issues. They fought. Antonetti left the room, returned with a gun, shot the victim nine times, and then left the premises. The victim attempted to call for help but was unable to get the phone to work. The victim's friend went outside to find help, and the victim followed him. The victim collapsed in the neighbor's driveway. While believing she was dying, the victim named Antonetti as the shooter.

Also introduced at trial were details regarding a shooting that occurred almost a month after the instant shooting and that further implicated Antonetti as the shooter in the instant case. In that case,

Antonetti was convicted of shooting and killing one person and shooting and injuring another. The striations on the bullet cartridges expelled in the later case matched the striations on the bullet cartridges expelled in the instant case, indicating the bullets were shot from the same gun. Antonetti was identified by the surviving victim in that case as the shooter. Further, when Antonetti was arrested, ammunition was found in the vehicle that he was driving that matched the ammunition used in both cases.

Given the evidence presented at trial, Antonetti failed to demonstrate a reasonable probability of a different outcome had counsel investigated and presented these three witnesses at trial. Therefore, Antonetti did not allege specific facts that, if true, demonstrated undue prejudice sufficient to overcome the procedural time bar to this claim.

Second, Antonetti claimed that counsel was ineffective for failing to investigate or call the friend that the victim testified was present in the room when the victim was shot. The victim testified at trial that the friend was in the room; however, on the night of the shooting, the friend told the police he had only recently arrived at the home and found the victim outside. Antonetti argued that had this witness testified at trial, his testimony would have undermined the victim's account of what happened that night.

The victim's friend had already refused to testify at Antonetti's trial for the later shooting referenced above, and Antonetti does not explain why the friend would have changed his mind in the four months since the previous trial and testified at the instant trial. Further, counsel introduced into evidence the friend's statement that he found the victim outside, counsel impeached the victim with this information on cross-examination,

and counsel argued this evidence in closing. Therefore, Antonetti failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel investigated or called the witness at trial. Accordingly, Antonetti did not allege specific facts that, if true, demonstrated undue prejudice sufficient to overcome the procedural time bar.

Third, Antonetti claimed that counsel was ineffective for failing to call an expert witness to testify concerning the long-term effects of methamphetamine use. Antonetti argued that the victim was a long-term user of methamphetamine and an expert could have testified how that long-term use could have affected her ability to remember and understand what happened the night of the shooting. Given the substantial amount of evidence of guilt presented at trial, Antonetti failed to demonstrate a reasonable probability of a different outcome at trial had counsel called an expert on methamphetamine use. Therefore, Antonetti did not allege specific facts that, if true, demonstrated undue prejudice sufficient to overcome the procedural time bar.

Fourth, Antonetti claimed that counsel was ineffective for failing to object to a portion of the State's closing argument. In closing argument, the State argued:

Let me start out by saying ladies and gentlemen, the State doesn't pick the victims in this case. The State doesn't pick who's gonna be shot, the State doesn't pick who's gonna be killed, the State doesn't pick who's gonna have to run out of their house and try looking for emergency help.

You know who picks who's gonna be shot and who's gonna be killed? The shooter.

And in this case that shooter is Joseph Antonetti. Antonetti argued the State's reference to more than one victim in the first sentence and "who's gonna be killed" were improper and inflammatory because there was only one victim in the instant case and she was not killed.

The State should have limited its statement to the singular "victim" rather than "victims," but the misstatement was fleeting and not repeated. Further, because this was an attempted murder case, and the State was required to prove Antonetti attempted to kill the victim, *see* NRS 200.030, the State's references to "who's gonna be shot" and "who's gonna be killed" were not improper. *See Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013) (holding that during closing arguments, the State may "assert inferences from the evidence and argue conclusions on disputed issues"). Finally, the State's overall argument was not improper as it was made in rebuttal to Antonetti's argument that the victim was a drug user, a prostitute, and possibly involved in credit-card fraud. *See Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000). Therefore, counsel was not deficient for failing to object to this argument by the State. And given the substantial evidence of guilt presented at trial, Antonetti failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, Antonetti did not allege specific facts that, if true, demonstrated undue prejudice sufficient to overcome the procedural time bar.

Finally, Antonetti argued that the district court erred by denying his claim that the cumulative errors of counsel entitled him to relief. 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, given the facts of the case, that the alleged cumulative deficiencies in counsel's performance prejudiced Antonetti. Therefore, Antonetti did not demonstrate undue prejudice sufficient to overcome the procedural time bar.

Based on the foregoing, Antonetti failed to overcome the procedural time bar, and we conclude the district court did not err by denying relief without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Tierra Danielle Jones, District Judge
The Law Office of Kristina Wildeveld & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk