

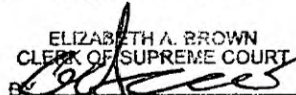
IN THE SUPREME COURT OF THE STATE OF NEVADA

PEYTON HEMINGWAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86259

FILED

OCT 12 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant Peyton Hemingway argues that the district court erred in denying his claim that trial counsel was ineffective during sentencing.

To demonstrate ineffective assistance of 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 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*); see *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (recognizing the right to effective counsel at sentencing). Both components 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 Nev. P.3d 1164, 1166 (2005).

Hemingway argues that counsel should have developed mitigating evidence similar to what was presented at his codefendant Emilio Arenas' penalty hearing. He asserts that due to counsel's deficient performance he received a longer sentence than recommended in the presentence investigation report (PSI).

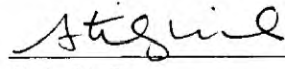
We conclude that this argument lacks merit. The district court found that trial counsel attempted to capitalize on the jury's verdict to differentiate Hemingway from Arenas during sentencing. It further concluded that the strategy was objectively reasonable. Those conclusions are supported by the record. In particular, Arenas was convicted of a more serious offense—first-degree murder—and faced a possible death sentence. Counsel's choice to highlight the fact that the different verdicts suggested that Hemingway was objectively less culpable than Arenas was a logical sentencing strategy. Counsel testified that the PSI mentioned Hemingway's employment history, special education classes, and learning disabilities, and that he did not consider drafting a sentencing memorandum or pursuing testimony from family members at sentencing. Hemingway did not introduce any evidence to show what the family members might have said or what the sentencing memorandum might have contained beyond what was in the PSI. And the fact that Arenas' counsel presented mitigation evidence at his capital penalty hearing does not undermine the sentencing strategy employed by Hemingway's counsel. The two defendants faced vastly different circumstances at sentencing. Thus, Hemingway failed to demonstrate extraordinary circumstances sufficient to challenge counsel's strategy at sentencing. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (“[T]rial counsel’s strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances.”)


(internal quotation marks omitted)); *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (recognizing that decisions regarding what defenses to develop rest with counsel).

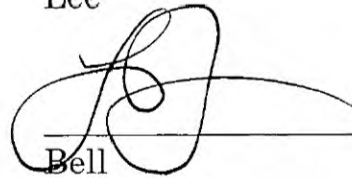
Hemingway further failed to demonstrate prejudice. The record indicates that the evidence that he contended counsel should have explored, such as his work history, lack of criminal history, and enrollment in special education, was described in the PSI. Hemingway included letters from family members pleading for Hemingway's release and assuring the court he had been rehabilitated and would have family support if he was released, but these letters do not illustrate what information about Hemingway was available at the time of sentencing. He pointed to evidence introduced during Arenas' sentencing showing a comprehensive presentation of family and personal history as well as neurological and psychological expert testimony. However, he did not introduce any evidence at the evidentiary hearing to show what a more thorough investigation would have developed. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (requiring a defendant asserting that counsel failed to adequately investigate to show what an adequate investigation would have uncovered). Hemingway's reliance on the evidence introduced during Arenas' penalty hearing is misplaced as he did not demonstrate that he and Arenas shared a similar medical, psychological, or social history. Moreover, the fact that the trial court departed from the PSI's sentencing recommendation does not establish that Hemingway was prejudiced by counsel's performance at sentencing. See *Dunham v. State*, 134 Nev. 563, 569, 426 P.3d 11, 15 (2018) (noting that the trial court is not bound by the PSI recommendation). Therefore, we conclude that the district court's factual findings are

supported by substantial evidence and it did not clearly err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C. J.  
Stiglich

  
\_\_\_\_\_, J.  
Lee

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Michelle Leavitt, District Judge  
Brian Rutledge PC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk