IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRELLIS ANDRE QUINN,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 87232-COA

ORDER OF AFFIRMANCE

Trellis Andre Quinn appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 4, 2018, and several supplemental petitions. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Quinn argues the district court erred by denying his claims that 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). 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, Quinn claimed that counsel was ineffective for failing to object to the third amended information, which added new theories of liability for the crimes. "The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." NRS 173.095(1). Appellate counsel raised this issue on direct appeal, and this court concluded that "[a]s Quinn had sufficient notice of the theory of prosecution, he does not demonstrate the amendment prejudiced his substantial rights." *Quinn v. State*, No. 70779-COA, 2018 WL 1442759 (Nev. Ct. App. Mar. 14, 2018) (Order of Affirmance). This finding, that the amendment did not prejudice Quinn's substantial rights, is the law of the case which "cannot be avoided by a more detailed and precisely focused argument." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Because the amendment did not prejudice Quinn's substantial rights and because Quinn has not alleged that the amendment changed or added charges, Quinn has not demonstrated trial counsel's performance was deficient or a reasonable probability of a different outcome had trial counsel objected to the third amended information. *See* NRS 173.095(1); *see also Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (concluding "[t]rial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims"). Therefore, we conclude that the district court did not err by denying this claim.[1]

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[1]On appeal, Quinn argues that his substantial rights were violated because, had he been given more notice of the amended information, he would not have called a witness, Marcus Kearney, at trial. It is not clear that this argument was raised below, *see State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issued raised for the first time on appeal.), and Quinn's argument that his rights were violated is subject to the law of the case doctrine which, as stated above, cannot be avoided by a more detailed and precisely focused

Second, Quinn claimed that counsel was ineffective for allowing, eliciting, and making references to Quinn's custody status when questioning a witness, which he argued opened the door to questions regarding his custody status. Initially, the witness at issue, Tamerinka Crockett, stated that Quinn was not involved. Later, after Quinn was arrested, Crockett changed her statement and said that Quinn was involved. She also identified him in a photo lineup. At trial, counsel cross-examined Crockett about her history of lying to authority figures and asked why she changed her story and whether it was because Quinn had been arrested. Counsel implied and later argued that Crockett accused Quinn only after he had been arrested so she could place the blame on him rather than someone else close to her. On redirect examination, the State asked Crockett questions that implied she was telling the truth about Quinn's involvement because Quinn was in custody and she felt safe. Counsel objected to the questioning by the State, and the district court sustained the objection.

The district court found that counsel made a strategic decision to impeach Crockett by showing she gave two different statements—one before Quinn was arrested and the second after his arrest—and suggesting she felt safe lying to protect another person because Quinn was in custody. The record supports the decision of the district court, and Quinn failed to demonstrate counsel's performance was deficient. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("[C]ounsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances." (internal quotation marks omitted)). Further, he failed to

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argument, *see Hall*, 91 Nev. at 316, 535 P.2d at 799. Further, even were we to consider this claim, it is belied by the record as the State called Kearney as a witness at trial.

demonstrate deficiency where counsel objected to the State's follow-up questions implicating Quinn's custody status. Quinn also failed to demonstrate a reasonable probability of a different outcome had counsel not asked Crockett these questions or had counsel further objected. Therefore, we conclude that the district court did not err by denying this claim.[2]

Third, Quinn claimed that counsel was ineffective for failing to file a motion to suppress the pretrial identifications of Quinn by two witnesses because the identification procedure was suggestive. The Due Process Clauses of the United States and Nevada Constitutions prohibit the use of a pretrial identification if, based on the totality of the circumstances, the identification procedure was unnecessarily suggestive and conducive to irreparable mistaken identification. *Johnson v. State*, 131 Nev. 567, 574-75, 354 P.3d 667, 672-73 (Ct. App. 2015). "First, the [identification] procedure must be shown to be suggestive, and unnecessary because of lack of emergency or exigent circumstances. Then, if so, the second inquiry is whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978). Although "[r]eliability is the linchpin," *id.*, "[t]he due process check for reliability . . . comes into play only after the defendant establishes improper police conduct," *Perry v. New Hampshire*, 565 U.S. 228, 241 (2012). If a pretrial identification is alleged to have been suggestive based on conduct other than that of the police or the State, the identification will not be suppressed but rather will be subject to trial safeguards such as cross-examination and effective assistance of counsel. *Id.* at 241-48.

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[2]On appeal, Quinn argues about several more instances where his custody status was presented to the jury. These instances were not presented below, and we decline to consider them in the first instance on appeal. *See Wade*, 105 Nev. at 209 n.3, 772 P.2d at 1293 n.3.

Quinn challenged the identification made by Eddie Atkinson and Crystal Myles. Atkinson was the victim in this case, and Myles was present when Atkinson was shot. Atkinson and Myles were at the hospital shortly after the shooting when Atkinson's cousin visited. Atkinson told his cousin that "Fase" shot him. His cousin did a search on Facebook and found Quinn. The cousin showed Quinn's picture to Atkinson, and Atkinson confirmed that the photo showed the person who shot him. After Atkinson identified Quinn from the Facebook picture, the police came to the hospital and separated Myles and Atkinson. The police showed Myles and Atkinson a six-picture array, and both identified Quinn as the shooter. In his petition, Quinn argued the procedure of showing the photo arrays was suggestive and tainted because Atkinson had seen the Facebook picture of Quinn before seeing the photo arrays. Quinn also claimed that Myles was not truthful at trial when she testified she did not see the Facebook photo and that her identification was tainted by the discussion between Atkinson and his cousin.

Here, the purportedly suggestive portion of the identification procedure came not from the police or the State, but rather from Atkinson's cousin and the Facebook search. Because the suggestiveness was based on conduct by someone other than the police or the State, a motion to suppress these identifications would have been futile, and counsel is not deficient for failing to file futile motions.[3] *See Perry*, 565 U.S. at 241; *see also Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Moreover, because a motion to suppress would have been futile, Quinn failed to demonstrate a reasonable probability of a different outcome at trial had counsel filed the motion.

[3]We note counsel extensively cross-examined these witnesses regarding their identifications.

Therefore, we conclude that the district court did not err by denying this claim.

Fourth, Quinn claimed that counsel was ineffective for failing to file a motion to suppress the photo lineup identification of Quinn by Crockett. Quinn claimed that the identification should have been suppressed because counsel was not present during the photo lineup with Crockett despite the fact that Quinn had been arrested at the time the lineup was done. Relying on *Thompson v. State*, Quinn argued that "[t]he right to counsel attaches when the prosecutorial process shifts from the investigatory to the accusatory stage and focuses on the accused." 85 Nev. 134, 138, 451 P.2d 704, 706 (1969). Because he had been arrested, Quinn contended he was at the accusatory stage and was entitled to counsel at the photo lineup. As counsel concedes in his reply brief, the Nevada Supreme Court disavowed the *Thompson* standard in *Barone v. State*, finding "there is no right to counsel at a photographic identification because unlike a lineup there is no 'trial-like confrontation' involving the presence of the accused. 109 Nev. 1168, 1171, 866 P.2d 291, 292 (1993) (quoting *United States v. Ash*, 413 U.S. 300, 317 (1973)). Therefore, Quinn failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had counsel filed a motion to suppress this identification. Accordingly, we conclude that the district court did not err by denying this claim.

Fifth, Quinn claimed that counsel was ineffective for failing to call an expert on eyewitness identifications. At the evidentiary hearing on Quinn's petition, counsel testified that he made a strategic decision not to call an expert witness because he believed they "mudd[ied]" the waters and he could get the same information by heavily cross-examining the witnesses regarding their identifications. Because the decision to not call an expert witness on eyewitness identification was a strategic one, it is virtually

unchallengeable absent extraordinary circumstances, *see Lara*, 120 Nev. at 180, 87 P.3d at 530, and Quinn failed to demonstrate extraordinary circumstances. Therefore, Quinn failed to demonstrate counsel's performance was deficient. Accordingly, we conclude that the district court did not err by denying this claim.

Sixth, Quinn claimed that the cumulative errors of counsel entitled him to relief. Even if multiple instances of deficient performance could be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Quinn failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we conclude that the district court did not err by denying this claim.

Next, Quinn argues the district court erred by denying his claim that there was insufficient evidence presented at trial. The district court found that this claim was procedurally barred because the claim could have been raised on direct appeal, and Quinn failed to demonstrate good cause and prejudice to overcome the procedural bar.[4] *See* NRS 34.810(b)(2). The record supports the finding of the district court. Therefore, we conclude that the district court did not err by denying this claim.

Finally, on appeal Quinn claims counsel was ineffective for allowing Kearney to testify at trial while under the influence of marijuana. This claim was not raised in his petition or his supplements. Rather, it appears Quinn attempted to raise this claim for the first time after the evidentiary hearing. It is within the discretion of the district court to allow

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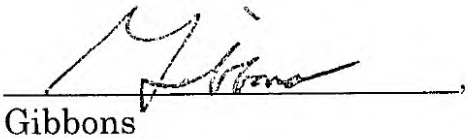
[4]In his reply brief, Quinn argues he has good cause to raise this claim based on ineffective assistance of appellate counsel. This good cause claim was not raised below, and we decline to consider it for the first time on appeal. *Wade*, 105 Nev. at 209 n.3, 772 P.2d at 1293 n.3.

claims to be added at or after an evidentiary hearing. *Cf. Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). Here, the district court did not exercise that discretion and allow this claim to be added after the evidentiary hearing, and we decline to consider this claim for the first time on appeal. *State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

For the forgoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge
Nevada State Public Defender's Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk