

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENTON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87664-COA

FILED

FEB 25 2025

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

ORDER OF AFFIRMANCE

Brenton Smith appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on March 30, 2021, and supplement. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Smith argues the district court erred by denying his claims of ineffective assistance of counsel without 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Smith contended trial counsel was ineffective for failing to file a timely pretrial motion to admit gang-affiliation evidence regarding the victim and his associates. Smith contended that this evidence was relevant to show his fear and that his testimony “would have been much more impactful had the jury been aware that [the victim] and others surrounding [the victim] were” gang members.

On the first day of trial, the district court held a hearing on the State’s motion in limine,¹ during which Smith’s counsel argued that he should be allowed to introduce gang-affiliation evidence because such evidence was relevant to Smith’s state of mind at the time of the crime. The district court deferred its decision on the issue and subsequently stated it wanted to hold a hearing on the matter “to be fair to both sides” because counsel did not raise the issue in a prior motion in limine. The district court ultimately denied counsel’s request on the merits.

Even assuming counsel was deficient for failing to raise this issue in a timely pretrial motion, Smith failed to demonstrate prejudice. The district court did not prohibit Smith from introducing gang-affiliation evidence due to counsel’s failure to file such a motion. Moreover, the State presented evidence that Smith chased the victim for approximately 225 to 235 feet and fired 12 shots at the fleeing victim. Smith also testified he had time to leave the scene or to call for help after the victim started to run

¹The State’s motion in limine sought to preclude or limit the introduction of evidence regarding the victim’s bad character and did not specifically reference or discuss gang-affiliation evidence.

away. Indeed, on direct appeal, the supreme court concluded “the excluded gang evidence would not have affected the verdict given the overwhelming evidence that [Smith] did not act in self-defense.” *See Smith v. State*, No. 79600, 2021 WL 857242, at *2 (Nev. Mar. 5, 2021) (Order of Affirmance). Therefore, Smith failed to allege specific facts indicating a reasonable probability of a different outcome but for counsel’s alleged error. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Smith contended trial counsel was ineffective for failing to present an expert witness: James Borden. Smith contended that (1) Borden was a retired sergeant who “trained individuals in critical and confrontational incidents and weapons use”; and (2) after his investigation and analysis of the facts, Borden opined that Smith fired his weapon to chase the victim away in order to help effectuate his own escape and acted “in a manner consistent with fear rather than aggression and revenge.”

Even assuming counsel was deficient in failing to present this witness, Smith failed to demonstrate prejudice. As previously discussed, the State presented overwhelming evidence that Smith did not shoot the victim in self-defense. Moreover, the jury heard evidence that Smith acted in fear. In particular, Smith testified that he believed the victim was violent, that he was scared, that he thought he was going to die, and that he ran toward the victim and fired his weapon to scare the victim away. Another witness also testified that Smith appeared to be scared after the victim punched him or knocked him down. Smith also testified that he was aware of the victim’s violent history, which included throwing a Molotov cocktail at his mother’s house, shooting his brother’s car, and assaulting his sister and his niece.

In light of the foregoing, Smith failed to allege specific facts indicating a reasonable probability of a different outcome but for counsel's alleged error. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Smith contended trial counsel was ineffective for failing to obtain a psychological analysis of him or present his cognitive deficiencies at the time of trial. Specifically, Smith claimed a doctor had previously diagnosed him with "mild neurocognitive impairment, secondary to a history of traumatic brain injury." Smith claimed the doctor stated in a report that Smith tended to minimize his cognitive issues but had "discussed missing exits, needing GPS, forgetting appointments, forgetting his cell phone at home, and making multiple trips back home to pick up things he has forgotten."

Smith alleged his cognitive deficiency caused him to be forgetful, not fearful. Although Smith contended this evidence would have allowed the jury to "ascertain and fully comprehend [his] trial testimony," Smith did not explain why this evidence would have been relevant to his theory of defense that he shot the victim in self-defense.² Thus, Smith failed to allege facts indicating objectively reasonable counsel would have presented evidence of his mild neurocognitive impairment at trial. He also did not allege what a psychological analysis would have revealed. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a

²To the extent Smith contended this evidence would have allowed the parties and/or the jury to "properly explore[]" his "explanation of his fear and his actions on the night in question," Smith did not allege how his alleged forgetfulness would have provided insight into his fearful state at the time of the shooting.


petitioner alleging counsel should have conducted a better investigation must specify what the results of a better investigation would have been).


Moreover, evidence of Smith's mild neurocognitive impairment would not have affected the jury's verdict in light of the overwhelming evidence of Smith's guilt. Therefore, Smith failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Smith contended the cumulative effect of counsel's errors requires reversal in this matter. 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), Smith failed to demonstrate that counsel's alleged errors, considered cumulatively, would have entitled him to relief. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating the relevant factors to consider in evaluating a claim of cumulative error). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Jacqueline M. Bluth, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk