

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN GILLEN,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 90192

FILED

FEB 17 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
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; Monica Trujillo, Judge.

A jury convicted appellant Martin Gillen of lewdness with a child under the age of 14, use of a minor in producing pornography, possession of a visual presentation depicting sexual conduct of a child, burglary, and kidnapping. We affirmed the judgment of conviction and sentence on direct appeal. *Gillen v. State*, No. 80171, 2021 WL 1964228 (Nev. May 14, 2021) (Order of Affirmance). Gillen filed a timely petition for postconviction habeas relief alleging ineffective assistance of trial and appellate counsel. The district court held an evidentiary hearing on one claim before denying the petition. Gillen argues that the district court should have held an evidentiary hearing on the other ineffective-assistance claims and erred in denying all claims.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice from counsel's errors such that there is a reasonable probability that the outcome of the proceedings would

have been different. *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 697. An evidentiary hearing is required when the petitioner raises claims supported by specific factual allegations that are not belied by the record and that, if true, would entitle the petitioner to relief. *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).

First, Gillen asserts his counsel failed to investigate potential alibi witnesses, the GPS information on his vehicle, and other evidence that would have shown he was not with the victim at the time of the alleged contact. The district court conducted an evidentiary hearing on this claim. Gillen declined to present any evidence in support of this claim at the hearing. Instead, Gillen stipulated to the State's proffer that Gillen's trial counsel and investigator would testify Gillen never informed them of any potential alibi evidence, and in fact told them he was at the victim's home on the night in question. Gillen had the burden at the evidentiary hearing of establishing the facts underlying his claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). By presenting no evidence and stipulating to testimony contradicting his factual allegations, Gillen failed to demonstrate either deficient performance or prejudice. Accordingly, the district court did not err by denying this claim.

Gillen next argues trial counsel failed to sufficiently communicate with him. Gillen's argument that this amounted to ineffective assistance primarily relies on his claim that counsel failed to investigate alibi evidence, which lacks merit as explained above. Gillen therefore failed to allege specific facts indicating counsel's communication with him was deficient or prejudicial. Accordingly, the district court did not err by denying this claim without conducting an evidentiary hearing.

Gillen next contends counsel failed to argue for exclusion of the prior sexual offense based on this court's decision in *Franks v. State*, 135 Nev. 1, 432 P.3d 752 (2019), which outlined factors the district court must consider before admitting evidence of a prior sexual offense under NRS 48.045(3). Gillen argues that the district court erred by denying this ineffective-assistance claim based on the law of the case. On direct appeal, this court considered the *Franks* factors and concluded that the prior sexual offense was properly admitted under NRS 48.045(3). See *Gillen*, No. 80171, 2021 WL 1964228, at *3-4 (affirming the district court's decision to admit evidence of Gillen's prior sexual offense). While Gillen is correct that this ineffective-assistance claim is not barred by the law of the case, he failed to allege specific facts as to what counsel should have argued or how any objection by counsel would have been successful in light of this court's determination on direct appeal. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding counsel is not ineffective for failing to make futile objections). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Gillen contends counsel failed to call any witnesses at trial. Gillen did not specify what testimony any additional witnesses would have provided and thus failed to allege specific facts demonstrating deficient

performance or prejudice. Accordingly, the district court properly denied this claim without conducting an evidentiary hearing.

Gillen argues that trial counsel threatened Gillen during trial to dissuade him from testifying. Gillen asserted the threat was audible to others in the court room, but the threat does not appear in the record and Gillen did not raise the issue during the trial court's thorough canvass on whether Gillen understood his right to testify. Further, Gillen did not state what his testimony would have been, nor how it would have affected the outcome of the trial. Thus, he failed to allege specific facts to demonstrate deficient performance or prejudice, and the district court did not err in denying this claim without conducting an evidentiary hearing.

Gillen argues his counsel should have notified him of the grand jury proceedings against him and challenged the makeup of the grand jury. Gillen has not demonstrated either deficient performance or prejudice. As to notice of the grand jury, Gillen did not explain how notifying him of the grand jury proceedings would have changed the result. As to the composition of the grand jury, Gillen asserted that because only 15 members were present, the indictment was invalid. Only 12 grand jurors must concur in an indictment. NRS 172.255(1). Thus, any challenge to the composition of the grand jury would have been futile. *Ennis*, 122 Nev. at 706, 137 P.3d at 1103 (holding that counsel need not make futile arguments). Accordingly, the district court properly denied these claims without conducting an evidentiary hearing.

Gillen contends counsel failed to object to improper questions by the State during voir dire, specifically questions about how prospective jurors would react to a lack of forensic evidence. Parties are free to ask hypothetical questions on case-specific issues to ensure prospective jurors

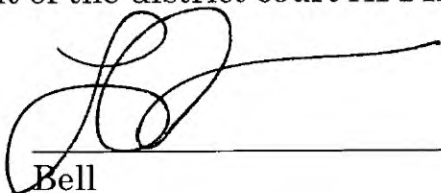
can view the evidence fairly. *See Chaparro v. State*, 137 Nev. 665, 671, 497 P.3d 1187, 1194 (2021) (allowing parties to ask hypothetical questions about how prospective jurors may react to certain evidence). Because the questions were not improper, any objection would have been futile. *Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Therefore, the district court properly denied this claim without conducting an evidentiary hearing.

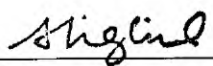
Gillen next argues appellate counsel should have challenged Gillen's sentence as cruel or unusual punishment because the sentence shocks the conscience. Gillen was sentenced to life without the possibility of parole for lewdness with a child under 16, which is the mandatory sentence because Gillen had a previous conviction in another jurisdiction that would constitute a sex offense against a child in Nevada. NRS 201.230(4). It is not deficient performance for appellate counsel to focus on the claims most likely to be successful. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) ("Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue."). Instead, Gillen "must show that the omitted issue would have a reasonable probability of success on appeal." *Id.* at 998, 923 P.2d at 1114. This court will not disturb a sentence within the statutory limits "unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). While Gillen cites to other cases where courts have determined a sentence shocks the conscience, those cases involve minor property crimes, not a sexual offense against a child. Thus, Gillen did not demonstrate that a cruel-and-unusual-punishment claim would have had a reasonable probability of success on direct appeal, and as such


he failed to show deficient performance or prejudice based on appellate counsel's omission of this argument. Accordingly, the district court properly denied this claim without conducting an evidentiary hearing.

Lastly, Gillen argues that the cumulative prejudice of counsel's various alleged deficiencies warrants reversal. Even were claims of cumulative error available in postconviction proceedings, we conclude the district court did not err by denying this claim where Gillen did not demonstrate deficient performance. *See McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (recognizing but not adopting the principle that prejudice may be cumulated). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Bell


_____, J.
Stiglich


_____, J.
Cadish

cc: Hon. Monica Trujillo, District Judge
Waldo Law, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk