IN THE SUPREME COURT OF THE STATE OF NEVADA

OTIS CHARLES BROWN,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 40051

FILED

JAN 0 7 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Otis Brown's post-conviction petition for a writ of habeas corpus.

The district court convicted appellant, pursuant to a jury verdict, of one count each of attempted murder with the use of a deadly weapon, burglary, and robbery with the use of a deadly weapon. Having adjudicated appellant a habitual criminal, the district court sentenced him to numerous consecutive and concurrent terms of imprisonment with a minimum parole eligibility of 36 years. This court dismissed appellant's appeal from his judgment of conviction.[1]

Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus in the district court. Counsel was appointed and filed a supplement. Following an evidentiary hearing, the district court denied the petition. This appeal followed.

Appellant first raises the following four claims: (1) during its closing argument, the State engaged in improper burden-shifting; (2) the

[1]Brown v. State, Docket No. 32724 (Order Dismissing Appeal, September 16, 1999).

district court improperly rejected appellant's proffered jury instructions; (3) the convictions used in the habitual criminal adjudication were constitutionally infirm; and (4) the district court failed to conduct a sufficient canvass to determine whether appellant knowingly and intelligently waived his right to testify. Appellant waived these claims by failing to raise them in his direct appeal and by failing to plead specific facts that demonstrate good cause for failing to raise them in the earlier proceeding.[2]

Appellant next argues that the district court abused its discretion in adjudicating him a habitual criminal and in admitting "nurse testimony" that the victim's wounds were life-threatening and that "trial counsel committed error by failing to employ an expert to rebut the nurse's testimony or to move for a continuance." This court previously considered and rejected these claims in appellant's direct appeal. Specifically, this court determined that the district court did not abuse its discretion in adjudicating appellant a habitual criminal or in allowing the nurse's testimony because appellant "conceded that he would not have been able to find an expert to rebut [her] testimony" and therefore suffered no prejudice.[3] The law of a first appeal is the law of the case in all later

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[2]See NRS 34.810(1)(b)(2), (3) (providing that the district court shall dismiss a petition, absent a demonstration of good cause and prejudice, if the claims raised in the petition could have been raised on direct appeal); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[3]Brown, Docket No. 32724 at 3-4.

appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument.[4]

Appellant next alleges numerous instances of ineffective assistance of trial and appellate counsel. Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.[5] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[6] "Petitioners for post-conviction relief have the burden of establishing factual allegations in support of their petitions."[7] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[8] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceedings would have been different.[9] Further, the tactical

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[4]Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). To the extent appellant argues that this court has held that the appointment of counsel insulates an appellant from the application of any and all procedural default rules, we reject the contention. The cases cited by appellant do not stand for so broad a proposition and cannot be relied upon severed from their underlying facts.

[5]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[6]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[7]Lozada v. State, 110 Nev. 349, 353 n.3, 871 P.2d 944, 947 n.3 (1994).

[8]Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[9]Id. at 988, 923 P.2d at 1107.

decisions of counsel are "virtually unchallengeable absent extraordinary circumstances."[10]

First, appellant contends that his trial counsel failed to move for a mistrial or to remove a juror when she allegedly "mocked [appellant] by making a slashing gesture" across her neck. Appellant further complains that "trial counsel, a white man, the judge, a white man, and the juror, a white women [sic], all mustered in the judge's office" without appellant, who is black. This claim is meritless. First, it is clear from the record that appellant authorized his trial attorney to appear in chambers without him regarding the alleged juror misconduct. Second, during the in camera interview, the juror denied having made the gesture or having any bias against appellant. At the evidentiary hearing, trial counsel testified that given the juror's representations, he perceived no basis for a motion for mistrial. We conclude that appellant has failed to demonstrate that his counsel's decision with regard to the juror was objectively unreasonable or that he was prejudiced.

Second, appellant claims that his trial counsel failed to adequately advise him concerning his right to testify. However, at the evidentiary hearing, trial counsel testified that he recalled having "more than one conversation" with appellant regarding his right to testify. He further asserted that he informed appellant that he had the absolute right to make that decision. Trial counsel also testified that in light of appellant's prior felony convictions and because incriminating statements had been suppressed, he believed appellant had nothing to gain from

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[10]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), overruled on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

taking the stand. Finally, when the district court canvassed appellant regarding his right to testify, he indicated that he understood his right to remain silent as well as his right to testify, that he had discussed these rights with his attorney, and that he did not wish to testify. We therefore conclude that appellant has failed to establish that his trial counsel's performance was deficient or that he was prejudiced.

Third, appellant argues that his trial counsel failed to cross-examine the State's detective regarding her "successful attempt to plant evidence," a wallet containing appellant's identification card and his driver's license, in the victim's apartment. The record belies this claim. The record, including an affidavit by trial counsel, shows that trial counsel investigated whether the wallet could have been removed from appellant's apartment and concluded that such a contention was not colorable. Appellant's trial counsel further asserted in his affidavit that "as to the general issue of switching the wallet," he attempted to develop evidence through defense witness testimony, his cross-examination of the State's detective, and in his closing argument.[11]

Next, appellant contends that his trial counsel failed to cross-examine the State's detective regarding her alleged "attempts to frame [appellant] for a prior sex crime that turned out to be fabricated," call alibi witnesses, and present DNA evidence. Appellant is not entitled to relief on these claims. First, in his affidavit, appellant's trial attorney explained

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[11]We note that appellant failed to provide this court with relevant portions of the trial transcript. See NRAP 30(b)(3) (providing that it is appellant's responsibility to provide this court with "the record essential to determination of issues raised in appellant's appeal"); see also Lozada, 110 Nev. at 353 n.3, 871 P.2d at 947 n.3.

that because the instant offenses included sexual assault, he believed examining the witness regarding "another instance wherein [appellant] had been accused of the same offense" was not in appellant's best interest. Second, in his affidavit and at the evidentiary hearing, trial counsel stated that he investigated potential alibi witnesses and determined that they could not provide appellant with a credible alibi. Trial counsel further explained that one of the potential alibi witnesses admitted to having ingested methamphetamine with appellant the day of the crimes. This witness also indicated that she "did not want to be alone" with appellant and had told him that she was sick to encourage him to leave. Third, trial counsel stated that the DNA evidence recovered in the case indicated that appellant was the perpetrator: appellant was the donor of the semen recovered from the victim's vagina, and the victim was the source of a blood stain identified on appellant's pants. While an expert consulted by the defense opined that the crime lab's handling of the DNA evidence was flawed, he also told trial counsel that he nevertheless agreed with the lab's ultimate result. We therefore conclude that trial counsel made reasoned tactical decisions with respect to these issues.

Next, appellant raises the following two claims: (1) trial counsel removed the only minority juror and "acquiesced" to the district court's removal of another juror without consulting appellant, and (2) "considering the size of the community and the notoriety of the offense," trial counsel's failure to move for a change of venue constituted ineffective assistance. These claims do not warrant relief. Appellant has failed to

provide the appropriate record, specific argument, or relevant authority necessary to support his claims.[12]

Next, appellant claims that his trial and appellate counsel were ineffective in failing to move for a mistrial "or otherwise preserve the mistrial issue for appeal" based upon the prosecutor's reference to the "O. J. Simpson case" in his closing argument. Appellant's claim of ineffective assistance of trial counsel is, in part, belied by the record. Trial counsel did object to the prosecutor's statement. We further conclude that appellant's claim that his counsel were ineffective in failing to move for a mistrial otherwise lacks merit. First, at the evidentiary hearing on the instant petition, appellant's trial counsel explained that because certain inculpatory statements had been suppressed and because the State did not seek admission of incriminating DNA evidence, he did not believe that a motion for mistrial was in appellant's best interest. We conclude that appellant has not shown that his trial counsel's determination was objectively unreasonable. Second, it appears that the district court sustained trial counsel's objection and admonished the State to avoid references to other proceedings, thus eliminating the danger of prejudice. Finally, appellate counsel was not ineffective in failing to raise this claim on direct appeal because it lacks merit.[13]

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[12]See NRAP 30(b)(3); see also Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating that this court need not consider arguments that are not supported by relevant legal authority or cogent argument).

[13]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.").

Finally, appellant argues that "given the severity of the penalty, appellate counsel's decision to limit appeal to four issues was per se ineffective." We disagree. Effective counsel need not raise every non-frivolous issue on appeal.[14] Rather, counsel will often be most effective when every conceivable issue is not raised.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Andrew J. Puccinelli, District Judge
Attorney General/Carson City
Elko County District Attorney
Matthew J. Stermitz
Elko County Clerk

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[14]Id. at 998, 923 P.2d at 1113.

[15]See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989); see also Smith v. Robbins, 528 U.S. 259, 288 (2000) (holding that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal") (emphasis added) (citing Jones v. Barnes, 463 U.S. 475 (1983)).