

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAXIMILLIANO CISNEROS,
Appellant,
vs.
HOWARD SKOLNIK, DIRECTOR
NEVADA DEPARTMENT OF
CORRECTIONS; DWIGHT W. NEVEN,
WARDEN, HIGH DESERT STATE
PRISON; AND CATHERINE CORTEZ
MASTO, ATTORNEY GENERAL OF
NEVADA,
Respondents.

No. 58186

FILED

JUL 25 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ First Judicial District Court, Carson City; James E. Wilson, Judge.

In his petition filed on December 2, 2008,² appellant raised several claims of ineffective assistance of counsel.³ To prove ineffective

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Appellant filed his petition with the assistance of retained post-conviction counsel. Appellant is proceeding in proper person on appeal pursuant to the June 24, 2011 order granting post-conviction counsel's motion to withdraw.

³To the extent that appellant raised any claims independently from his claims of ineffective assistance of counsel, those claims were waived as they could have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(2).

assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, 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, 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 regarding ineffective assistance of counsel 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, appellant claimed that trial counsel failed to adequately prepare him for testifying at trial. Appellant failed to provide any specific facts regarding how he was unprepared. Appellant further failed to demonstrate that he was prejudiced as he failed to demonstrate that additional preparation would have had a reasonable probability of altering the outcome at trial.

To the extent that appellant expanded this claim at the evidentiary hearing to include an allegation that trial counsel was ineffective for failing to present evidence of appellant's experience growing up in Southgate, California, in order for the jury to better understand appellant's self-defense argument, this allegation likewise lacks merit. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that he was not

sure if appellant told him about his Southgate experience. Trial counsel further testified that he did not present information about appellant's habit of carrying a loaded gun because he did not want appellant to appear to be a "hoodlum." Appellant failed to demonstrate that there was a reasonable probability of a different outcome had this testimony been presented because even with testimony about appellant's Southgate experience the State would have been able to prove beyond a reasonable doubt that appellant did not act in self-defense when he killed the decedent—the Southgate testimony would not have established that appellant reasonably believed that he was in imminent danger from the decedent and that the use of force was absolutely necessary under the circumstances to avoid death or great bodily injury to himself.⁴ See Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) (acknowledging that the killing of another in self-defense is justified where the person who does the killing "actually and reasonably believes" that he is in imminent danger of death or great bodily injury from the assailant and the use of force that might cause the death of the assailant is "absolutely necessary under the circumstances . . . for the purpose of avoiding death or great bodily injury to himself"). Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel failed to object to several instances of inflammatory and inappropriate comments made by

⁴Appellant further failed to demonstrate that the use of deadly force against the decedent was necessary for the defense of another or habitation. NRS 200.120.

the prosecutor during opening statements.⁵ Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. One of the comments involved a statement about the evidence the prosecutor believed would be presented. While two of the statements may have contained argumentative language, appellant failed to demonstrate that it was unreasonable not to object or that there was a reasonable probability of a different outcome had trial counsel objected. Appellant further failed to demonstrate that he was prejudiced by the failure to object to the State's comment regarding murder and self-defense. Therefore, we conclude that the district court did not err in denying these claims.

Third, appellant claimed that trial counsel failed to object to photographs of the deceased. First, we note that appellant did not specifically identify which photographs should have been objected to or how they were prejudicial or cumulative. Consequently, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced because he did not demonstrate that the photos were inadmissible. See Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000) (recognizing that the district court enjoys broad discretion in matters related to the admission of evidence); Libby v. State, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993) (holding that photographs are admissible as long as their probative value is not substantially outweighed by their prejudicial effect), vacated on other grounds, 516 U.S. 1037

⁵The comments were not identified in the petition but were identified at the evidentiary hearing.

(1996). Therefore, we conclude that the district court did not err in denying this claim.

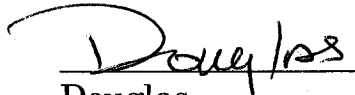
Fourth, appellant claimed that trial counsel failed to object to A. Vega's testimony that the decedent was a nonviolent individual of high character. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel was not deficient for failing to object to the two isolated statements regarding the decedent's character. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel objected. Therefore, we conclude that the district court did not err in denying this claim.


Fifth, appellant claimed that trial counsel was ineffective for failing to object to jury instructions 29, 30, 42, 43, 44, 54, and 55.⁶ Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court rejected appellant's challenge on direct appeal to jury instructions 29, 30, and 54. Cisneros v. State, Docket No. 46840 (Order of Affirmance, October 31, 2007). Appellant failed to provide any specific arguments as to how jury instructions 42, 43, and 44 were confusing and misstatements of the law. Thus, appellant failed to demonstrate that he was prejudiced by the failure to object to the above-identified jury instructions. Therefore, we conclude that the district court did not err in denying this claim.

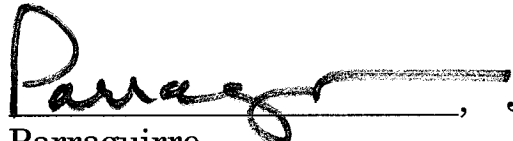
⁶Regarding jury instruction 55, as that instruction related to the charge of attempted murder and he was found not guilty of attempted murder, appellant failed to demonstrate that he was prejudiced by the giving of this instruction.

Finally, in light of our review of the claims as discussed above, we conclude that the district court did not err in denying appellant's claim of cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. James E. Wilson, District Judge
Maximilliano Cisneros
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk