

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALEX MARQUEZ,
Appellant,
vs.
E.K. MCDANIEL, WARDEN,
Respondent.

No. 64897

FILED

FEB 24 2015

TRACIE K. LINZEMAN
CLERK OF SUPREME COURT
BY *J. Williams*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel raised in his March 11, 2009, petition. To prove ineffective assistance of trial 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 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 that are supported by specific allegations that are not belied by the record, and if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).¹

First, appellant argues that his trial counsel was ineffective for failing to move to suppress his confession due to an inadequate *Miranda* warning, and because appellant lacked the education, background, and experience to intelligently waive his rights. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

At the evidentiary hearing, counsel testified that he did not move to suppress the confession because he concluded such a motion would be meritless. Counsel testified that he reviewed appellant's interview and concluded that the *Miranda* warning was sufficient and that appellant understood the waiver of his rights. Counsel also testified that he wanted to use appellant's statement to the police during the trial and penalty proceedings to show that appellant did not act with an intent to kill the victim. Tactical decisions such as these "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant does not demonstrate. Given the surviving victims' identification of appellant and

¹We note that the district court concluded that appellant had failed to demonstrate that he was entitled to an evidentiary hearing regarding a number of his claims and limited the issues discussed at the evidentiary hearing to those that needed further development outside of the existing record.

the discovery of the deceased victim's blood on appellant's shoe, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel attempted to suppress the confession. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to move to sever his trial from his codefendant's. Appellant asserts that the trials should have been severed because the defenses were antagonistic. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The claim that the defenses were antagonistic was considered on direct appeal under a plain error standard and the Nevada Supreme Court concluded that the defenses were not antagonistic. *See Marquez v. State*, Docket No. 48624 (Order of Affirmance, May 6, 2008). Moreover, appellant fails to demonstrate a reasonable probability of a different outcome had counsel moved to sever the trials as there was substantial evidence of appellant's guilt given his confession, the eyewitness testimony, and physical evidence linking appellant to the crime. Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to move to sever his trial from his codefendant's trial after a codefendant told the other codefendants that they should all decline to testify at trial. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. After the potentially threatening comment was made, the district court admonished each defendant regarding their right to testify and explained that they had to individually decide whether they should testify. Given the circumstances of the comment and the admonishment by the district court, appellant

fails to demonstrate that objectively reasonable counsel would have moved to sever the trials. As there was substantial evidence of appellant's guilt presented at trial, appellant fails to demonstrate that there was a reasonable probability of a different outcome had counsel sought to sever the trials based on the challenged comment. See NRS 174.165(1); *Rodriguez v. State*, 117 Nev. 800, 808-09, 32 P.3d 773, 778-79 (2001). Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Fourth, appellant argues that his trial counsel was ineffective for failing to object to prejudicial victim-impact testimony during the penalty hearing as the deceased victim's parents called the defendants disparaging names and stated a wish that the defendants could be sentenced to death. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Given the nature of the victim-impact testimony and when placed in context, appellant fails to demonstrate that objectively reasonable counsel would have objected during the victim's parents' statements. See NRS 176.015(3)(b) (victims may "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution"); see also *Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) ("A victim can express an opinion regarding the defendant's sentence . . . in non-capital cases."), *overruled on other grounds by Nunnery v. State*, 127 Nev. ___, 263 P.3d 235 (2011). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected during the victim-impact testimony. See *Dieudonne v. State*, 127 Nev. ___, ___ n.3, 245 P.3d 1202, 1207 n.3 (2011) (recognizing that

admission of victim-impact statements is reviewed for harmless error). Therefore, the district court did not err in denying this claim.

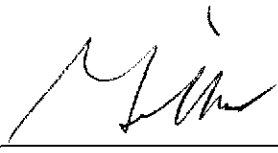
Fifth, appellant argues that his trial counsel was ineffective for failing to request an instruction on mitigation evidence during the penalty hearing. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court instructed the jury to consider the evidence presented at trial and during the penalty hearing. *See Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."). Appellant fails to demonstrate it was objectively unreasonable for counsel to fail to request an additional instruction specifically regarding mitigation evidence. Appellant fails to demonstrate a reasonable probability of a different outcome at the penalty hearing had such an instruction been requested. Therefore, the district court did not err in denying this claim.

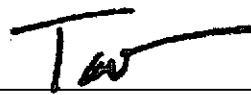
Sixth, appellant argues that his trial counsel was ineffective for failing to request an instruction regarding individualized sentencing for each defendant during the penalty hearing. Appellant fails to demonstrate either deficiency or prejudice for this claim because the district court instructed the jury to consider the sentence for each defendant separately and individually. Therefore, the district court did not err in denying this claim.

Seventh, appellant argues that his trial counsel was ineffective for failing to request that all sentences be imposed concurrently. Appellant cannot demonstrate any deficiency regarding this claim because counsel argued for all sentences to be imposed concurrently. Therefore, the district court did not err in denying this claim.

Eighth, appellant argues that the cumulative effect of ineffective assistance of counsel warrants vacating the judgment of conviction. Appellant fails to demonstrate that any errors, even if considered cumulatively, amount to ineffective assistance of counsel sufficient to warrant vacating the judgment of conviction. Therefore, the district court did not err in denying this claim.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Brent T. Adams, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk