

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK ROBERT WALKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68564

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Frank Robert Walklin claimed the district court erred in denying his claims of ineffective assistance of trial counsel raised in his May 19, 2015, postconviction petition for a writ of habeas corpus. To prove ineffective 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

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. See NRAP 34(f)(3), (g).

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).

First, Walklin claimed his trial counsel was ineffective for failing to inform him of the State's notice of its intent to seek an indictment. Walklin failed to demonstrate either deficiency or prejudice for this claim because the record indicates the notice was served upon him in open court on May 28, 2013. See *Sheriff, Humboldt Cnty. v. Marcum*, 105 Nev. 824, 826, 783 P.2d 1389, 1390 (1989). In addition, Walklin was ultimately convicted by a jury, and thus, could not demonstrate prejudice regarding the grand jury proceedings. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986) (holding that any error in grand jury proceedings was harmless where defendants were found guilty beyond a reasonable doubt at trial); *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998). Therefore, the district court did not err in denying this claim.²

Second, Walklin claimed his trial counsel was ineffective for failing to file a motion to suppress the photo line-up identification or otherwise argue the photo line-up was performed in a suggestive manner. Walklin failed to demonstrate his counsel's performance was deficient or

²Walklin also claimed the State improperly failed to give him notice of its intent to seek an indictment. This claim could have been raised on direct appeal and Walklin did not demonstrate cause for the failure to do so and actual prejudice. See NRS 34.810(1)(b). Therefore, the district court did not err in denying relief for this claim.

resulting prejudice. This court considers the totality of the circumstances to determine whether the photo line-up procedure was “so unduly prejudicial as to fatally taint [the defendant’s] conviction.” *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (alteration in original) (quoting *Simmons v. United States*, 390 U.S. 377, 383 (1968)).

The testimony at trial revealed the FBI agent used a computer program to compile the photo line-up. The program selected five photographs of persons with characteristics similar to Walklin, Walklin’s photograph was then placed into an array with the other five photographs, and the agent arranged to show them to the bank teller that was robbed in this matter. The agent testified he told the teller the authorities received new information regarding this case, wished to verify if they were proceeding appropriately, but that the photo line-up may not contain a photograph of the person who committed the crimes. The agent then showed the teller the photo line-up and she picked Walklin as the one who committed the crimes. Under these circumstances, Walklin failed to demonstrate objectively reasonable counsel would have argued the line-up procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *See id.* (quoting *Simmons*, 390 U.S. at 384). Therefore, the district court did not err in denying this claim.

Third, Walklin claimed his trial counsel was ineffective for failing to object to the use of still photographs from the surveillance cameras in the bank. Walklin claimed counsel should have asserted the photographs were not appropriate to use without surveillance video. Walklin failed to demonstrate his trial counsel’s performance was deficient

or resulting prejudice. The State's witnesses testified the still photographs were true and accurate depictions of the actions that occurred during the robbery of the bank. *See* NRS 52.015; NRS 52.025. Given this testimony, Walklin failed to demonstrate objectively reasonable counsel would have objected to the admission of the photographs. Trial counsel questioned witnesses regarding their failure to collect the surveillance video depicting the robbery and Walklin did not demonstrate a reasonable probability of a different outcome had counsel raised objections or further arguments regarding the admission of the photographs. Therefore, the district court did not err in denying this claim.

Fourth, Walklin claimed his trial counsel was ineffective for failing to pose questions to the State's witnesses regarding a reward as the motivation for reporting Walklin to authorities. Walklin cannot demonstrate deficiency for this claim because counsel cross-examined a State's witness regarding his acceptance of that reward. Walklin failed to demonstrate a reasonable probability of a different outcome had counsel posed further questions regarding the reward. Therefore, the district court did not err in denying this claim.

Fifth, Walklin claimed his trial counsel was ineffective for failing to move for a mistrial when a State's witness talked to two jurors prior to testifying at trial. Walklin failed to demonstrate trial counsel's performance was deficient or resulting prejudice. Casual conversation between a juror and a witness is not appropriate, but when the conversation pertains to matters not related to the issue before the jury, "a court does not abuse its discretion by refusing to declare a mistrial." *Reese v. State*, 95 Nev. 419, 424, 596 P.2d 212, 216 (1979). The district court

may remove a juror for a "violation of the court's admonishment rather than declaring a mistrial." *Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1028 (2005).

Here, a State's witness talked with two jurors prior to testifying, but the district court was informed of the contacts at the beginning of that witness' testimony and conducted a hearing regarding the nature of those contacts. The district court questioned the first juror regarding her conversation with the witness, and the juror revealed the conversation was unrelated to this matter. The district court then dismissed the juror from service and an alternate juror served for the remainder of the trial. The second juror informed the district court that the witness had made a brief statement regarding coffee and assured the court the witness' statement had no bearing upon his partiality.

Given the nature of the contacts and the first juror's removal from service, Walklin failed to demonstrate objectively reasonable counsel would have moved for a mistrial. Walklin also failed to demonstrate a reasonable probability of a different outcome had trial counsel moved for a mistrial based on these contacts. *See Roever v. State*, 111 Nev. 1052, 1055, 901 P.2d 145, 147 (1995) (stating a mistrial will only be granted if the defendant was prejudiced as a result of the contact between the juror and the witness). Therefore, the district court did not err in denying this claim.

Sixth, Walklin claimed his trial counsel was ineffective for failing to properly introduce a document into evidence which showed Walklin received a payment from a medical research company. Walklin asserted this document would have undermined a witness' assertion that


Walklin stated he used money he obtained from the bank robbery to purchase gifts. Walklin failed to demonstrate he was prejudiced. The document stated Walklin received a payment in December 2010, approximately one year before the bank robbery in December 2011. Moreover, the bank teller positively identified Walklin as the robber and two witnesses testified Walklin admitted to committing the bank robbery. Under these circumstances, Walklin failed to demonstrate a reasonable probability of a different outcome had the payment document been properly introduced into evidence. Therefore, the district court did not err in denying this claim.

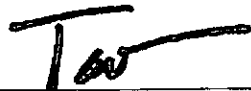
Seventh, Walklin claimed his trial counsel was ineffective for failing to object when the State argued the victim's testimony, if believed beyond a reasonable doubt, is sufficient to sustain a guilty verdict. Walklin failed to demonstrate either deficiency or prejudice for this claim because the State's argument accurately reflected Nevada law. See *Zgombic v. State*, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990) (the uncorroborated testimony of a victim can support a conviction), *superseded by statute on other grounds as stated in Steese v. State*, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). Therefore, the district court did not err in denying this claim.

Eighth, Walklin claimed his trial counsel was ineffective for failing to permit him to examine the State's evidence against him. Walklin failed to demonstrate deficiency or prejudice for this claim. Walklin stated counsel did not send him pieces of evidence due to counsel's concern that unwanted persons would get access to that information. Walklin failed to demonstrate this was the action of an objectively

unreasonable trial counsel. In addition, Walklin failed to demonstrate a reasonable probability of a different outcome had counsel permitted Walklin to personally examine the State's evidence. Therefore, the district court did not err in denying this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Frank Robert Walklin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk