

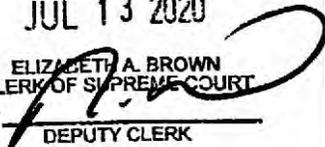
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO ALVAREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78956-COA

FILED

JUL 13 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Francisco Alvarez appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on April 10, 2017, and a supplemental petition for a writ of habeas corpus filed on March 20, 2018. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Ineffective assistance of trial counsel

Alvarez claims the district court erred by denying his petition because trial counsel was ineffective. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The petitioner must show both components of the ineffective-assistance inquiry—deficiency and prejudice, *id.* at 697, and the petitioner must demonstrate the underlying facts of his claim 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 if they are supported by substantial evidence and not clearly wrong but review the district 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, Alvarez claimed trial counsel was ineffective for failing to rebut a witness's in-court identification with available evidence. Alvarez argued that counsel should have challenged victim James Bayot's identification in two ways. "First, defense counsel should have established that during law enforcement's investigation of the case that all of the victims except Bayot stated that the assailant had a mustache. Second, defense counsel should have consulted with and presented an expert witness regarding the frailties of an in-court identification." The district court conducted an evidentiary hearing and made the following findings. Bayot observed Alvarez at the time of the crime, viewed the surveillance video, and identified him in court. An argument that Bayot's identification was invalid because Bayot did not describe the assailant as having a mustache would have been pointless. Alvarez did not identify an expert witness that would have been willing to testify in his case. And Alvarez did not show how the expert witness could have undermined the reliability of the witnesses who had identified him in court. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to meet his burden to demonstrate that trial counsel was ineffective, and the district court did not err by rejecting this claim.

Second, Alvarez claimed trial counsel was ineffective for failing to challenge the fingerprint evidence. Alvarez argued that competent counsel would have moved to exclude the fingerprint testimony because it lacked scientific validity and would have challenged the procedures

Forensic Scientist Heather Gouldthorpe used to determine that his fingerprint was on a bottle. The district court made the following findings. The State established the trustworthiness and reliability of fingerprint evidence through the foundational evidence provided by FS Gouldthorpe. Codefendant's trial counsel cross-examined FS Gouldthorpe regarding the fallibility of fingerprint analysis. The jury asked a question regarding how many points of similarity are required to make a match and found Alvarez guilty after hearing evidence on this issue. And there was no probability that the outcome would have been different if Alvarez's trial counsel had cross-examined FS Gouldthorpe regarding the reliability of her fingerprint identification. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to meet his burden to demonstrate that trial counsel was ineffective, and the district court did not err by rejecting this claim.

Third, Alvarez claimed trial counsel was ineffective for failing to describe the evidence against him and thereby rendered his rejection of the State's plea offer unknowing, involuntary, and unintelligent. The district court made the following findings. Alvarez's claim that trial counsel failed to inform him of the nature and extent of the evidence against him and failed to explain the likely outcome of going to trial was a bare and naked allegation. Alvarez's claim that he would have taken the plea offer if he had seen the evidence is belied by the record. And Alvarez could not have taken the plea offer because the offer was contingent on acceptance by all of the defendants and one of Alvarez's codefendants had rejected the offer. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to meet his burden to demonstrate that trial counsel was ineffective, and the district court did not err by rejecting this

claim. See *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); cf. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims are bare and lack specific factual allegations).

Ineffective assistance of appellate counsel

Alvarez claims the district court erred by denying his petition because appellate counsel was ineffective. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient and resulted in prejudice. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Appellate counsel's performance is prejudicial if an "omitted issue would have a reasonable probability of success on appeal." *Id.* at 998, 923 P.2d at 1114. The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697.

First, Alvarez claimed appellate counsel was ineffective for failing to raise a claim that there was insufficient evidence to support the finding that a firearm was used during the commission of counts 1, 3, 4, 6, 7, 9, 10, 12, 16, and 18. The district court made the following findings. Alvarez only discussed counts 1, 3, 10, and 12 in his petition. He failed to demonstrate there was insufficient evidence to show that a firearm was used during the commission of counts 1, 3, 10, and 12. And his assertion that the deadly weapon enhancements to counts 4, 6, 7, 9, 16, and 18 would have been reversed on appeal was a bare and naked allegation. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to demonstrate that appellate counsel was ineffective, and the district court did not err by rejecting this claim. Cf. *Hargrove*, 100 Nev.

at 502-03, 686 P.2d at 225; see generally *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining the test for reviewing the sufficiency of the evidence).

Second, Alvarez claimed appellate counsel was ineffective for failing to raise a claim that the surveillance video relevant to counts 7, 8, and 9 was not properly admitted into evidence. Alvarez argued the video was not properly authenticated because the custodian of records was unable to identify a victim depicted in the video and Crime Scene Analyst Jennifer Reiner's identification of the victim was based on hearsay. The district court made the following findings. The State made a sufficient showing that the video depicted the events that unfolded on the day in question. CSA Reiner, who interacted with the victim shortly after the crime occurred, testified the victim was the individual who appeared in the video. The jury was free to make reasonable inferences from the video. And it would have been futile for appellate counsel to argue there was insufficient evidence to authenticate the video and that CSA Reiner's identification of the victim was based on hearsay. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to demonstrate that appellate counsel was ineffective, and the district court did not err by rejecting this claim. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel cannot be deemed ineffective for failing to raise futile claims).

Third, Alvarez claimed appellate counsel was ineffective for failing to raise a claim that Alvarez's confrontation rights were violated by the State's failure to have a named victim testify against him. The district court made the following findings. Although the victim testified before the grand jury, she did not testify at trial and her grand jury testimony was not presented during the trial. Consequently, it would have been futile for

appellate counsel to argue that Alvarez's confrontation rights were violated. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to demonstrate that appellate counsel was ineffective, and the district court did not err by rejecting this claim. *See id.*

Fourth, Alvarez claimed appellate counsel was ineffective for failing to raise a claim that there was insufficient evidence to support one of his robbery convictions. Alvarez argued that the State failed to prove the element of fear in count 9 because the victim did not testify that she felt fear. The district court made the following findings. The State presented a surveillance video that depicted the crime. "In the video, the victim was approached by three individuals in the store and she then backed away and put her hands up after being shown what appeared to be a gun." A rational juror could easily have inferred from the victim's actions that she was fearful of injury. And, consequently, any claim to the contrary would have been futile. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to demonstrate that appellate counsel was ineffective, and the district court did not err by rejecting this claim. *See id.*; *Jackson*, 443 U.S. at 319.

Fifth, Alvarez claimed appellate counsel was ineffective for failing to raise a claim that the district court abused its discretion by denying his motions to dismiss and for a directed verdict as to counts 7, 8, and 9. Alvarez argued the State did not present sufficient evidence of "force of fear," the victim did not testify at trial, and Alvarez was not identified in the surveillance video that was played for the jury. The district court made the following findings. The State presented prima facie cases of the elements for counts 7, 8, and 9. The trial court was free to draw reasonable inferences from the State's evidence when it denied Alvarez's motions to

dismiss and for a directed verdict. And a challenge to the district court's denial of these motions on appeal would have been futile. We conclude these findings are supported by the record and are not clearly wrong, Alvarez failed to demonstrate that appellate counsel was ineffective, and the district court did not err by rejecting this claim. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103; *see generally* NRS 175.381(1); *Middleton v. State*, 114 Nev. 1089, 1105, 968 P.2d 296, 307 (1998) ("The granting of an advisory instruction to acquit rests within the sound discretion of the district court.").

Cumulative error

Alvarez claimed the cumulative effect of counsel's errors deprived him of a fair trial. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there was nothing to cumulate because Alvarez failed to demonstrate any such deficiencies. Therefore, we conclude the district court did not err by rejecting this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge
Ornoz & Ericsson, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk