

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SIMON CORDOVA RIOS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80872-COA

FILED

MAR 05 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Simon Cordova Rios, Jr., appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Rios argues the district court erred by dismissing claims of ineffective assistance of appellate counsel raised in his December 9, 2016, postconviction petition for a writ of habeas corpus and later-filed supplement without conducting an evidentiary hearing. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). To

warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual 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).

First, Rios argued his appellate counsel should have asserted that the trial court erred by declining his request to instruct the jury that testimony from law enforcement officials should be evaluated for credibility in the same manner as any other witness. “It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury.” *Rose v. State*, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007). The trial court rejected Rios’s proposed instruction because the information contained within his proposed instruction was adequately covered by a different credibility instruction. Because “a defendant is not entitled to . . . duplicative jury instructions,” *Sanchez-Dominguez v. State*, 130 Nev. 85, 89-90, 318 P.3d 1068, 1072 (2014), Rios did not demonstrate his counsel’s failure to raise the underlying claim on direct appeal fell below an objective standard of reasonableness. Rios also did not demonstrate a reasonable likelihood of success on appeal had counsel raised the underlying claim, in particular because the victim testified that Rios was the person who stabbed him and the victim was not a member of law enforcement. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Second, Rios argued his appellate counsel should have asserted that the trial court erred by denying his pretrial motion to exclude the victim’s identification testimony. Rios contended the victim’s in-court identification of him as the perpetrator was tainted when the police improperly conducted a photographic line-up after the victim had viewed

his mugshot. Rios also argued that the photographic line-up itself was flawed because the officer did not follow proper procedures when preparing it and the persons depicted in the additional photographs did not look like him.

The Due Process Clauses of the United States and Nevada Constitutions prohibit the use of a pretrial identification if, based on the totality of the circumstances, the identification was unnecessarily suggestive and conducive to irreparable mistaken identification. *Johnson v. State*, 131 Nev. 567, 575, 354 P.3d 667, 673 (Ct. App. 2015). “First, the procedure must be shown to be suggestive, and unnecessary because of lack of emergency or exigent circumstances. Then, if so, the second inquiry is whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.” *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978). “The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct.” *Perry v. New Hampshire*, 565 U.S. 228, 241 (2012).


The trial court conducted a pretrial evidentiary hearing concerning this issue. At the evidentiary hearing, the victim testified he noticed he had a missed phone call from a police officer. The victim stated that after he noticed the call, he looked up mugshots on the internet and discovered one depicting Rios. The victim discovered that Rios was in custody for charges unrelated to this matter, but the victim recognized Rios as the person that stabbed him. The victim testified he subsequently called the police officer, the officer asked him to participate in a photographic line-up, and he identified Rios as the perpetrator in the photographic line-up. The trial court concluded that the victim’s testimony demonstrated that he discovered Rios’s mugshot on his own and did not do so at the behest of the

police officer. Moreover, the trial court concluded the police officer did not utilize an unnecessarily suggestive identification procedure. The trial court also reviewed the photographs contained within the photographic line-up and concluded they depicted individuals that matched Rios's general description. The trial court therefore concluded the photographic line-up did not contain improper photographs. For those reasons, the trial court declined to exclude the victim's identification testimony and denied Rios's motion.

In light of the circumstances in this matter, Rios did not demonstrate the identification process was unnecessarily suggestive or conducive to irreparable mistaken identification. *See Thompson v. State*, 125 Nev. 807, 814, 221 P.3d 708, 713 (2009) (holding photographic lineup consisting of people who matched the victim's general description of the assailant was not impermissibly suggestive). Accordingly, Rios did not demonstrate counsel's failure to raise the underlying claim on direct appeal fell below an objective standard of reasonableness or a reasonable likelihood of success on appeal had counsel raised that issue. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Connie J. Steinheimer, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk