

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASA JAVON BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81288-COA

FILED

APR 12 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Asa Javon Brown appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Brown argues the district court erred by denying the claims of ineffective assistance of trial counsel raised in his December 19, 2019, postconviction petition for a writ of habeas corpus.¹ To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v.*

¹Brown filed his petition more than one year after issuance of the remittitur on direct appeal on December 3, 2018. *See Brown v. State*, Docket No. 74440-COA (Order of Affirmance, November 8, 2018). The district court concluded Brown demonstrated cause for his delay due to interference by prison officials because he was prohibited from using the prison law library during a lockdown. The record supports the district court's decision in this regard. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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 687. 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).

First, Brown argued his trial counsel was ineffective for failing "to request a mandatory jury instruction on 'rebuttable presumption' and heat of passion." The trial court instructed the jury regarding voluntary manslaughter and heat of passion. Therefore, Brown did not demonstrate his counsel's performance regarding the voluntary manslaughter instructions fell below an objective standard of reasonableness. As the jury was instructed regarding voluntary manslaughter and heat of passion, Brown failed to demonstrate a reasonable probability of a different outcome had counsel requested additional instructions concerning those issues. In addition, Brown did not identify any issue where a rebuttable presumption instruction would have been appropriate and, therefore, he did not demonstrate he was entitled to relief regarding that issue. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err by denying this claim.

Second, Brown argued his trial counsel was ineffective for failing to request a proximate cause jury instruction. The Nevada Supreme Court has explained that "a criminal defendant can only be exculpated where, due to a superseding cause, he was in no way the proximate cause of

the result.” *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (internal quotation marks omitted). The evidence produced at trial demonstrated that Brown shot and killed the victim during a dispute over five dollars. Brown did not allege there was a superseding event that caused the victim’s death that rendered him in no way the proximate cause of the victim’s death. Therefore, he did not demonstrate that any failure by counsel to request a proximate cause instruction fell below an objective standard of reasonableness. Based on the facts of the offense, Brown also failed to demonstrate a reasonable probability of a different outcome had counsel requested a proximate cause instruction. Therefore, we conclude the district court did not err by denying this claim.

Third, Brown argued his trial counsel was ineffective for failing to request an involuntary manslaughter jury instruction. The evidence produced at trial established that Brown shot and killed the victim following a dispute concerning five dollars. At trial, Brown contended that he was provoked when the victim struck him and that he acted in self-defense. Based on the facts produced at trial, Brown’s actions did not meet the statutory definition of involuntary manslaughter because Brown did not act without the intent to kill. *See* NRS 200.070. Accordingly, Brown did not demonstrate any failure by counsel to request an involuntary manslaughter instruction fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Brown argued his trial counsel was ineffective for failing to request a mistrial after his mother was involved in a traffic

accident with the victim's sister near the courthouse. Brown contended jurors could have been aware of the accident and asserted counsel should have presented information to the trial court demonstrating that the jurors were overheard discussing the accident.

Following the traffic accident, the trial court questioned the jurors regarding their knowledge of that incident. Only one juror was aware of it but did not know that it involved persons interested in Brown's trial. Following questioning of the jurors, Brown's counsel informed the trial court that he did not believe any of the jurors had been tainted by the accident and did not believe any further action was necessary. The trial court subsequently admonished the jurors not to talk amongst themselves or anyone else about any subjects related to Brown's trial.

In light of the circumstances in this case, Brown failed to demonstrate counsel's actions fell below an objective standard of reasonableness. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). Moreover, the trial court questioned the jurors regarding their knowledge of the accident and the jurors stated they were unaware it concerned Brown. The trial court also admonished the jurors not to engage in discussions regarding any matter related to Brown's trial, and jurors are presumed to follow the court's instructions, *see McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004). Given the record regarding this issue, Brown failed to demonstrate a reasonable probability of a different outcome had counsel moved for a mistrial or

attempted to demonstrate that the jurors were aware of the traffic accident. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Brown argued his trial counsel was ineffective for failing to call his girlfriend to testify regarding his good character. The evidence produced at trial demonstrated that Brown and the victim engaged in a dispute concerning five dollars. The victim struck Brown during the dispute, and Brown subsequently left the area to retrieve a firearm. After obtaining the firearm, Brown returned and shot the victim. In light of the evidence produced at trial, Brown did not demonstrate a reasonable probability of a different outcome had counsel attempted to present a witness to testify regarding his good character. Therefore, we conclude the district court did not err in denying this claim.

Next, Brown argues the State failed to disclose information regarding the criminal histories of witnesses and the victim. Brown also argues the State failed to disclose information relating to statements made by witnesses, the victim's toxicology report, and video recordings depicting the traffic accident involving his mother and the victim's sister. In addition, Brown argues trial counsel was ineffective for failing to investigate his version of events or potential defense witnesses, present mitigation witnesses at the sentencing hearing, report to the trial court threatening statements made by witnesses, and object during jury selection. Brown did not raise these claims in his petition, and we decline to consider them for the first time on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

Next, Brown argues the district court erred by conducting a hearing concerning his postconviction petition outside of his presence. A criminal defendant does not have an unlimited right to be present at every proceeding. *See Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). A “defendant must show that he was prejudiced by the absence.” *Kirksey v. State*, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely announced it denied the petition and directed the State to prepare an order denying it. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002) (concluding a petitioner’s statutory rights were violated when she was not present at hearing where testimony and evidence were presented). Brown does not demonstrate he was prejudiced by his absence from the relevant hearing. Accordingly, we conclude the district court did not err in this regard.

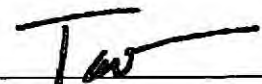
Finally, Brown argues the district court violated the separation of powers doctrine and his due process rights by directing the State to prepare an order denying his petition. Brown also contends that the district court’s decision to direct the State to prepare a proposed order demonstrated it was biased against him.

“The purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch.” *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 291-92, 212 P.3d 1098, 1103 (2009). Here, the district court had the discretion to accept or reject

the proposed order, and therefore, the State's act of drafting a proposed order did not encroach on the powers of the district court. Accordingly, Brown did not demonstrate the district court violated the separation of powers doctrine. Moreover, Brown does not demonstrate he suffered from a violation of his right to due process. In addition, the "rulings and actions of a judge during the course of official judicial proceedings do not establish" that a district court was biased against a party, *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988), and Brown fails to demonstrate that the district court's decision to request the State to draft a proposed order was improper. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court Dept. 3
Asa Javon Brown
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk