

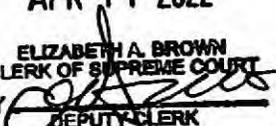
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82740-COA

FILED

APR 11 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Jorge Mendoza appeals from a judgment of conviction and from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Bitu Yeager, Judge.

Appeal from judgment of conviction

This court's review of Mendoza's appeal from his judgment of conviction reveals jurisdictional defects. Specifically, the notice of appeal was untimely filed. *See* NRAP 4(b); *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). In addition, Mendoza has previously appealed the judgment of conviction, *see Mendoza v. State*, No. 71939-COA, 2017 WL 6806099 (Nev. Ct. App. Dec. 29, 2017) (Order of Affirmance), and a second duplicate appeal may not be pursued. Accordingly, we dismiss this portion of Mendoza's appeal.

Appeal from denial of postconviction relief

Mendoza argues the district court erred by denying his October 18, 2019, postconviction petition for a writ of habeas corpus and later-filed

supplement. In his petition, Mendoza claimed that his trial counsel was ineffective. 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.¹ *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 687, 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).

First, Mendoza claimed that his trial counsel was ineffective for failing to accurately explain self-defense law to him. Mendoza contended the failure to properly explain self-defense coerced him into testifying at trial. At the evidentiary hearing, counsel testified that he believed self-defense was the only possible defense, he and Mendoza discussed self-defense at length, and Mendoza agreed to pursue that defense at trial.

¹Mendoza appears to argue he did not need to demonstrate prejudice stemming from errors committed by his counsel. However, Mendoza's argument lacks merit. Prejudice under *Strickland* is presumed in limited circumstances, see *United States v. Cronin*, 466 U.S. 648, 659-60, 661 n.28 (1984), which are not presented in this case.

Mendoza failed to meet his burden to demonstrate that counsel's advice was objectively unreasonable. In addition, Mendoza failed to specify any facts to support his contention that counsel coerced him into testifying. *Cf. Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015) (“[U]ndue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act.” (internal quotation marks omitted)). Accordingly, Mendoza failed to demonstrate counsel's discussions with him concerning self-defense fell below an objective standard of reasonableness.

In addition, there was strong evidence of Mendoza's guilt presented at trial. The evidence produced at trial demonstrated that Mendoza and his codefendants agreed to rob the victims and they approached the victims' home armed with firearms. The codefendants attempted to break into the home, and the victims shot at them. Mendoza attempted to flee, but he was shot in the leg. Mendoza shot at the victims and then attempted to hide. Police later discovered Mendoza near the scene of the crime and transported him to a hospital. In light of the strong evidence of Mendoza's guilt presented at trial, Mendoza failed to demonstrate a reasonable probability of a different outcome had counsel explained self-defense law to him in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Second, Mendoza claimed that his trial counsel was ineffective during opening statements by stating that the defense would pursue a self-defense strategy. At the evidentiary hearing, counsel stated that he concluded a self-defense strategy was Mendoza's only chance at a successful

outcome in light of the very strong evidence of his guilt and that Mendoza agreed to pursue a self-defense strategy. As both counsel and Mendoza decided to pursue a self-defense strategy at trial, Mendoza failed to demonstrate that counsel's decision to discuss self-defense during opening statements 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."). In addition, as there was strong evidence of Mendoza's guilt presented at trial, Mendoza failed to demonstrate a reasonable probability of a different outcome at trial had counsel offered a different opening statement. Therefore, we conclude the district court did not err by denying this claim.

Third, Mendoza claimed that his trial counsel was ineffective during closing arguments by improperly conceding that Mendoza was guilty of murder. Counsel acknowledged during closing argument that Mendoza killed the victim, but counsel did not concede that Mendoza was guilty of murder. Instead, counsel urged the jury to find that Mendoza did not have the intent to kill the victim. Counsel also argued in closing that the jury should find that Mendoza was no longer engaged in criminal activity when the shooting occurred, and therefore, he was not liable under the felony-murder rule. Accordingly, counsel did not concede that Mendoza was guilty of murder during closing arguments, and Mendoza did not demonstrate that counsel's performance during closing arguments fell below an objective standard of reasonableness. In addition, there was strong evidence of Mendoza's guilt presented at trial, and Mendoza thus failed to demonstrate a reasonable probability of a different outcome had counsel made different

statements during closing arguments. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Mendoza claimed that his trial counsel was ineffective for failing to properly cross-examine witnesses to show that another person may have shot the victim. At the evidentiary hearing, counsel testified that the evidence demonstrated that Mendoza was the one that shot the victim. Counsel also testified that he wished for the jury to believe that Mendoza acted in fear of his life and he felt that attempts to argue that his codefendants shot the victim may have detracted from that effort. In addition, the bullets that struck the victim were consistent with the type used by Mendoza's firearm. In light of the circumstances in this case, Mendoza failed to demonstrate counsel's actions fell below an objective standard of reasonableness. *See id.* In addition, there was strong evidence of Mendoza's guilt presented at trial, and Mendoza therefore failed to demonstrate a reasonable probability of a different outcome had counsel questioned witnesses in an attempt to show that a codefendant shot the victim. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Mendoza claimed that his trial counsel was ineffective for failing to move to suppress his statements made to the police while he was in the hospital. Mendoza asserted that his statements should have been suppressed because he was sedated, in pain, not free to leave the hospital, and the detectives took advantage of his situation. A defendant's statements to the police are admissible if they were made freely and voluntarily. *Gonzales v. State*, 131 Nev. 481, 487, 354 P.3d 654, 658 (Ct.

App. 2015). “Voluntariness must be determined by reviewing the totality of the circumstances, including such factors as the defendant’s age, education, and intelligence; his knowledge of his rights; the length of his detention; the nature of the questioning; and the physical conditions under which the interrogation was conducted.” *Id.* at 488, 354 P.3d at 658.

The district court found that the detectives advised Mendoza during their conversation that he was not under arrest, Mendoza could have terminated the conversation if he wished, and he was therefore not in custody during the discussion. *See Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (“If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect’s position would feel at liberty to terminate the interrogation and leave.” (internal quotation marks omitted)). The district court also found that Mendoza’s age, education, and intelligence had no bearing upon his ability to voluntarily make statements to the detectives. In addition, the district court found that Mendoza was not subject to a prolonged interview or that the detectives used inappropriate interview tactics. Moreover, the district court found there was no indication that Mendoza had any issues comprehending the nature of the conversation. Finally, the district court found that Mendoza did not demonstrate that he was in so much pain due to his injury that it would render his statements involuntary. Substantial evidence supports the district court’s findings. Accordingly, the totality of the circumstances indicate that Mendoza’s confession was voluntary. Thus, Mendoza did not demonstrate his counsel’s performance fell below an objective standard of reasonableness by failing to move to suppress the statements or a

reasonable probability of a different outcome had counsel moved to suppress his statements. Therefore, we conclude the district court did not err by denying this claim.

Having concluded that Mendoza is not entitled to postconviction relief, we conclude the district court did not err by denying Mendoza's petition. Accordingly, we

ORDER the appeal from the judgment of conviction DISMISSED and ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Bitá Yeager, District Judge
Chief Judge, Eighth Judicial District Court
Hon. Carolyn Ellsworth, Senior Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk