

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KURTIS RAY RICHARDS,  
Appellant,  
vs.  
WILLIAM A. GITTERE, WARDEN,  
Respondent.

No. 83658-COA

**FILED**

**APR 11 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kurtis Ray Richards appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 18, 2021, and an amended petition filed on May 20, 2021. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Richards claims the district court erred by denying his claims that trial counsel was ineffective without first conducting an evidentiary hearing. 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. 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 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). 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, Richards claimed trial counsel was ineffective for failing to file a motion to suppress a female witness's identification of him. Specifically, Richards claimed counsel should have argued the identification was inadmissible as unnecessarily suggestive because the witness was only shown one photograph rather than a lineup and she was coerced by detectives into identifying Richards. "The applicable test is whether, in light of the totality of the circumstances, the identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law." *Bolin v. State*, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998), *abrogated on other grounds by Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002).

Testimony presented at trial was that while the witness had only recently met Richards, she spent a significant amount of time with him prior to the incident. Prior to being shown the photograph, she identified Richards by his nickname and provided a description to police officers. Further, while officers threatened to handcuff or arrest her during her interview because they were unsure of her involvement in the murder for which Richards was standing trial, Richards failed to demonstrate how those threats influenced the witness's ability to make a reliable identification given the amount of time she spent with Richards prior to the incident. Thus, given the totality of the circumstances, Richards failed to demonstrate a motion to suppress the identification would have been successful, and counsel is not deficient for failing to file futile motions. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Further, Richards was also identified by another witness as being the perpetrator.

Therefore, Richards failed to demonstrate that there was a reasonable probability of a different outcome at trial even had the female witness's identification been suppressed. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Richards claimed trial counsel was ineffective for failing to object to bad act evidence being admitted at trial. Richards claimed the kidnapping and assault of the female witness should not have been admitted at trial because he was not involved with the conduct and it was more prejudicial than probative.

Only relevant evidence is admissible, *see* NRS 48.025, and evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable," NRS 48.015. Generally, evidence of other crimes or bad acts cannot be admitted at trial solely for the purposes of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(1). However, evidence of other crimes, wrongs, or acts may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1). Unfair prejudice substantially outweighs relevant evidence when "it encourages the jury to convict the defendant on an improper basis." *Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013).

Here, evidence was presented at trial that the female witness was kidnapped and assaulted by persons other than Richards. The female

witness testified that during the ordeal she saw Richards once, he told her that he "might have to keep her," and then she begged him not to and said she would not talk to the police. The purpose of introducing the evidence was to show Richards tried to keep her from talking to the police and that he had knowledge of the murder. When presenting the evidence and when discussing it in closing argument, the State made sure the jury knew that Richards was not involved in the kidnapping or assault and they only introduced the evidence to show the threat he made to the witness.

Because the evidence was introduced to show knowledge and that the witness had been threatened by Richards, the evidence was relevant. Further, the probative value of the evidence outweighed the danger of unfair prejudice because the State was careful to limit the use of the evidence, and Richards cannot demonstrate the jury was encouraged to convict him on an improper basis. Therefore, Richards failed to demonstrate an objection by counsel to this evidence would have been successful, and counsel is not deficient for failing to make futile objections. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Further, even had the evidence not been admitted at trial, Richards failed to demonstrate a reasonable probability of a different outcome at trial given the other evidence presented. Accordingly, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Richards claimed trial counsel was ineffective for failing to impeach the female witness with her statement that she did not see anyone from the night of the murder on the day she was kidnapped. He further claimed counsel should have used the fact that her kidnapper told her she was being hurt because of her involvement with the victim's death and not as an attempt to keep her from talking to the police. Both of these

statements came out at trial; therefore, Richards failed to demonstrate counsel was deficient. Further, because another witness testified to witnessing the murder, Richards failed to demonstrate a reasonable probability of a different outcome at trial had counsel done more to impeach the witness with these statements. Therefore, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Richards argues the district court erred by denying his claims that appellate counsel was ineffective without first 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*, 466 U.S. at 687. 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).

First, Richards claimed appellate counsel was ineffective for failing to argue the identification was suggestive and should not have been admitted. As stated above, Richards failed to demonstrate the identification should have been suppressed. Thus, he failed to demonstrate counsel was deficient for failing to raise this claim or that the issue had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Richards claimed appellate counsel was ineffective for failing to argue that the district court erred by admitting the bad act evidence. As stated above, Richards failed to demonstrate it was error to admit the evidence at trial; therefore, he failed to demonstrate appellate counsel was deficient for failing to raise this claim or that the issue had a reasonable probability of success on appeal. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Richards claimed appellate counsel was ineffective for failing to argue the district court erred by allowing hearsay testimony at trial. Richards cites to one passage of testimony in the record where counsel objected to the female witness testifying about what another person said to her. The district court sustained this objection. Because the objection was sustained, Richards failed to demonstrate there was any error to raise on appeal. Therefore, Richards failed to demonstrate counsel was deficient for failing to raise this claim or that the issue had a reasonable probability of success on appeal. Thus, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

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

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Cristina D. Silva, District Judge  
Kurtis Ray Richards  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk