

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CELESTIN GLENN TAPPIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84154-COA

FILED

NOV 08 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Celestin Glenn Tappin, Jr., appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on November 13, 2019. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Tappin argues the district court erred by denying his claims that counsel were 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 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). 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, Tappin claimed that counsel were ineffective for failing to challenge the charging document or file a motion for judgment notwithstanding the verdict because the charges of battery with the use of a deadly weapon causing substantial bodily harm and mayhem with the use of a deadly weapon were redundant and violated double jeopardy. The Double Jeopardy Clause prohibits “multiple punishments for the *same* offense.” *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) (emphasis added). Similarly, redundancy is concerned with multiple punishments for the same or lesser-included offenses. *See id.* at 611, 291 P.3d at 1282-83. Separate acts may “result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time.” *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (internal quotation marks omitted).

Double jeopardy does not prohibit the dual convictions here because each hit with the machete to the victim’s person constituted its own distinct act of violence, resulting in distinct injuries to distinct body parts. Therefore, each conviction stems from a separate act constituting a criminal offense. Further, because these were separate offenses, redundancy is not implicated. The State’s charging document also supports this interpretation because it specifies separate acts that provided the bases for each charge. Specifically, Tappin was convicted of battery with the use of a

deadly weapon causing substantial bodily harm for striking the victim's "face, and/or arms, and/or head, and/or wrist, and/or hand," whereas the conviction for mayhem with the use of a deadly weapon was based on slitting the victim's nose, ear, or lip. Therefore, Tappin failed to demonstrate counsel were deficient or a reasonable probability of a different outcome at trial had counsel challenged the charging document or the verdict. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Tappin claimed that counsel were ineffective for failing to request a continuance when the victim was unable to appear at trial because he was in the hospital.¹ Tappin claimed, based on testimony presented at the preliminary hearing, that the victim would testify favorably for him at trial.

At trial, it was learned that the victim was in the hospital and would be unable to testify. Based on the victim's unavailability, the State sought to introduce the victim's preliminary hearing testimony. At first, Tappin objected to the use of the testimony. The State interviewed the victim at the hospital where the victim made several statements that supported the State's case at trial. A recording of this interview was provided to counsel but was not admitted at trial. Counsel then withdrew the objection to the use of the preliminary hearing testimony, agreeing with

¹We note he was in the hospital for reasons other than the injuries he received in this case.

the district court that counsel changed their position because “certain information was not helpful” after listening to the recording.

Based on this information, we conclude counsel made a strategic decision not to object to the preliminary hearing testimony being used or to seek any further remedy for the unavailability of the victim, including requesting a continuance of trial. Tappin thus failed to demonstrate counsel were deficient. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (holding that counsel’s strategic decisions are “virtually unchallengeable absent extraordinary circumstances” (internal quotation marks omitted)). Further, outside of what the victim already testified to at the preliminary hearing, which was presented at trial, Tappin failed to allege what other exculpatory information the victim would have provided to demonstrate a reasonable probability of a different outcome at trial had counsel requested the continuance. Therefore, Tappin failed to demonstrate he was prejudiced. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Tappin claimed that counsel were ineffective for failing to object to the admission at trial of a recording of an interview between the victim and a police officer that occurred shortly after the attack. Tappin claimed the introduction of this recording violated his confrontation rights because the victim did not testify at trial and was not cross-examined regarding the recording at the preliminary hearing. The district court found that counsel had a strategic reason for not objecting to the recording because the recording included exculpatory statements made by the victim, and

counsel used these statements in their closing argument to the jury. Further, the district court found that there was no reasonable probability of a different outcome at trial had counsel objected and been successful. Evidence at trial showed that Tappin had the victim's blood on his hands and feet, Tappin's DNA was on the machete used in the attack, and Tappin made an incriminating statement to the police: "No face, no trial." Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Tappin claimed that counsel were ineffective for failing to move to dismiss or move for a judgment of acquittal notwithstanding the verdict on the mayhem charge when the State did not prove the victim was permanently disfigured. Tappin argued that the injuries suffered by the victim were not permanent as the injuries could have been repaired by a surgeon.

Mayhem consists of unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If a person cuts out or disables the tongue, puts out an eye, slits the nose, ear or lip, or disables any limb or member of another, or voluntarily, or of purpose, puts out an eye, that person is guilty of mayhem

NRS 200.280. For the charge to be mayhem rather than assault, the injury inflicted must result in permanent disfigurement. NRS 200.300. "We do not believe the skill of a surgeon in correcting a disfigurement by plastic surgery should give license to one desirous of committing mayhem." *Lamb v. Cree*, 86 Nev. 179, 182, 466 P.2d 660, 663 (1970).

Here, evidence was presented at trial that the victim's nose was split in two, his lip was deeply lacerated, and he had multiple facial fractures. This was sufficient to prove that the victim suffered permanent disfigurement despite the possibility that a surgeon might be able to correct the disfigurement. Therefore, we conclude that Tappin failed to demonstrate counsel were deficient for failing to file a motion to dismiss or a judgment notwithstanding the verdict, or resulting prejudice. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk