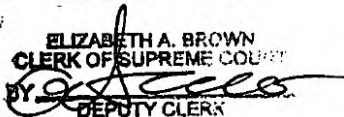


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA,
Appellant,
vs.
THE STATE OF NEVADA; AND JERRY
HOWELL, WARDEN,
Respondents.

No. 84321-COA

FILED
DEC 12 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Jose Fernando Monay-Pina appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 18, 2020, and a supplemental petition filed on March 29, 2021. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Monay-Pina argues the district court erred by denying his claims of ineffective assistance of trial counsel raised in his supplemental petition. 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, 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, Monay-Pina claimed counsel was ineffective for failing to hire an investigator and conduct an investigation into the relationships between Monay-Pina, his girlfriend, and the victim. Monay-Pina argued that an investigation would have revealed information that could be used to impeach the victim and that he had no motive to be involved in an altercation with the victim. Monay-Pina did not explain how the results of the investigation would have resulted in a better outcome at trial.¹ Therefore, Monay-Pina failed to demonstrate a reasonable probability of a different outcome had counsel hired an investigator and conducted an investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (providing that a petitioner claiming counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Accordingly, we conclude the district court did not err by denying this claim.

Second, Monay-Pina claimed counsel was ineffective for failing to file a motion to sever the trial. In particular, Monay-Pina argued that such a motion was necessary because he had a defense to the axe incident—that he was merely present during the attack and did not know his

¹On appeal, Monay-Pina argues an investigation would have changed the outcome of the trial because it would have revealed that the victim and Monay-Pina's codefendant had issues with each other and that this information could have been used to bolster a defense that Monay-Pina was merely present during the attack. This argument was not raised in Monay-Pina's petition below; therefore, we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

codefendant was going to attack the victim—but was unable to present this defense because it would have required him to implicate his codefendant. A defendant may testify in an effort to exonerate himself and inculcate a codefendant, and antagonistic defenses are not, “in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial.” *Marshall v. State*, 118 Nev. 642, 648, 56 P.3d 376, 379 (2002). Because severance was not necessary to allow Monay-Pina to present a mere-presence defense, he failed to demonstrate that his counsel’s performance fell below an objective standard of reasonableness by failing to file a motion to sever the trial.

Moreover, even if counsel had filed a motion to sever and it were granted, both the victim and the victim’s sister testified that Monay-Pina pointed a gun at the family through a window while Monay-Pina’s codefendant attacked the victim. Several of the victim’s belongings also went missing after the attack, and many of these items were found on or near Monay-Pina’s person when Monay-Pina was apprehended by the police. In light of this evidence, Monay-Pina failed to demonstrate a reasonable probability of a different outcome had counsel filed a motion to sever the trial. Accordingly, we conclude the district court did not err by denying this claim.

Third, Monay-Pina claimed counsel was ineffective for failing to review surveillance video with him prior to trial and by failing to explain how the video could be used against him. Counsel testified at the evidentiary hearing that he did not review the surveillance video with Monay-Pina because the video matched Monay-Pina’s description of events. Moreover, Monay-Pina did not allege that the outcome of the trial would have been different had counsel reviewed the video with him or explained

how the State could use the video against him.² Therefore, Monay-Pina failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel reviewed the video with him or explained how it could be used by the State. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Monay-Pina claimed that cumulative error warranted reversal. In particular, Monay-Pina argued that counsel's failure to visit him in jail, to review discovery with him, to discuss his defenses with him, and to cross-examine the witnesses left him with no defense and that the cumulative nature of these errors resulted in prejudice.

Counsel testified that although he visited Monay-Pina only once in jail, he spoke to Monay-Pina several times over the phone and he had reviewed the written discovery with Monay-Pina. Counsel further testified that Monay-Pina wanted him to go with the mistaken-identity defense, he had discussed this defense with Monay-Pina on several occasions, and he did not believe a defense of mere presence was viable because there was direct testimony contradicting that position. Monay-Pina also did not identify which witnesses counsel failed to cross-examine. Therefore, Monay-Pina failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness with respect to these alleged errors.


²On appeal, Monay-Pina argues that had his counsel reviewed the video with him, he could have made the decision to not go to trial and he would have understood that he needed another defense other than mistaken identity. These arguments were not raised in Monay-Pina's petition below; therefore, we decline to consider them on appeal in the first instance. See *McNelson*, 115 Nev. at 415-16, 990 P.2d at 1275-76.

Even assuming that multiple claims of ineffective assistance of counsel may be cumulated to demonstrate prejudice, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Monay-Pina failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require “multiple errors to cumulate”). Accordingly, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Linda Marie Bell, District Judge
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk