


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY COOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84549-COA

FILED

JAN 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jeffrey Cooper appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Cooper argues that the district court erred by denying his July 19, 2019, petition and later filed supplement. In his petition, Cooper first contended 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. *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, Cooper claimed that his trial counsel was ineffective for failing to investigate and present a defense to show that Cooper lacked the mens rea for attempted murder or battery due to his post-traumatic stress disorder (PTSD) and other mental health issues. Cooper also asserted that his counsel should have requested jury instructions concerning his mental state and his inability to form the necessary intent to commit the crimes due to his mental state.

At the evidentiary hearing for Cooper's petition, counsel testified that he reviewed the evidence and discussed potential defenses with Cooper. Counsel testified that Cooper told him that the incident happened because he believed that the victim was a rival gang member. Counsel testified that he was aware that Cooper had some mental health issues but that Cooper did not say anything that would have caused him to believe that Cooper's mental health issues played a role in the shooting. Counsel was very concerned that Cooper's gang history and criminal record would be presented to the jury, and he wished to avoid any defense that had the potential of placing those issues before the jury. Counsel also stated that he reviewed the video surveillance recordings and believed that it would not be easy for the jury to identify Cooper as the person depicted in those recordings. He therefore concluded that a mistaken-identify defense was the best option Cooper had for a favorable result at trial.

The district court found that counsel's testimony was credible, and substantial evidence supports that decision. In light of the testimony presented at the evidentiary hearing, counsel's investigation and preparation were reasonable under the circumstances of this case. Cooper

also failed to demonstrate it was unreasonable for counsel to decline to request instructions concerning his mental issues and those issues' effect on his ability to form the mens rea for attempted murder and battery. Thus, Cooper failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. See *Strickland*, 466 U.S. at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”); see also *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating that strategic decisions of counsel are “virtually unchallengeable absent extraordinary circumstances”). Cooper also failed to demonstrate a reasonable probability of a different outcome had counsel performed additional investigation or preparation in this matter or requested different jury instructions. Therefore, we conclude the district court did not err by denying this claim.

Second, Cooper claimed that his trial counsel was ineffective for failing to present sufficient mitigation evidence concerning Cooper's mental health issues during the sentencing hearing. At the evidentiary hearing, counsel testified that he was aware of Cooper's PTSD and other mental health issues and that he mentioned those issues in his sentencing memorandum. Counsel, however, decided it was in Cooper's best interests to focus on Cooper's positive side. Counsel therefore focused on Cooper's intelligence, his family life, and involvement in church. The district court found that counsel's testimony was credible and substantial evidence supports that decision. In light of the testimony presented at the evidentiary hearing, counsel's presentation of mitigation information to the sentencing court was reasonable under the circumstances of this case. Thus, Cooper failed to demonstrate his counsel's performance fell below an

objective standard of reasonableness. *See Lara*, 120 Nev. at 180, 87 P.3d at 530. Cooper also failed to demonstrate a reasonable probability of a different outcome had counsel presented additional information concerning Cooper's mental health issues to the sentencing court. Therefore, we conclude the district court did not err by denying this claim.

Third, Cooper claimed that his trial counsel was ineffective for failing to object when the State vouched for the credibility of the victim and his girlfriend. "The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted). However, the State is allowed "reasonable latitude" to argue concerning the credibility of witnesses. *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). During closing arguments, the State contended that the victim and his girlfriend had no motive to fabricate their version of events and urged the jury to find them credible. The State's arguments did not provide personal assurances of the witnesses' veracity and, therefore, did not constitute improper vouching. Accordingly, Cooper failed to demonstrate his counsel's performance fell below an objective standard of reasonableness by failing to object to the challenged arguments. Cooper also failed to demonstrate 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, Cooper claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct when the State commented on Cooper's post-arrest silence. "It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent

following his arrest.” *Morris v. State*, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (internal quotation marks omitted). “[T]he prosecutor may . . . assert inferences from the evidence and argue conclusions on disputed issues.” *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). Improper comments on a defendant’s post-arrest silence will be harmless beyond a reasonable doubt if it was a passing reference or there is overwhelming evidence of guilt. *Morris*, 112 Nev. at 264, 913 P.2d at 1267-68.

During rebuttal argument, the State inventoried the testimony and evidence that indicated Cooper’s guilt for the crimes. The State noted that it had presented a substantial amount of circumstantial evidence indicating that Cooper was the person that had shot the victim and then stated, “I mean, short of a - short of him confessing, I don’t know what else you could have.” The challenged statement was an argument concerning the nature and quality of the evidence indicating Cooper’s guilt and was not a comment on Cooper’s decision to remain silent. And to the extent it could have been a comment on Cooper’s decision, it was, at most, a passing reference to Cooper’s post-arrest silence. Accordingly, Cooper did not demonstrate that his counsel’s performance fell below an objective standard of reasonableness due to any failure to object to the challenged comment.

In addition, this court concluded on direct appeal that there was overwhelming evidence of Cooper’s guilt presented at trial. *Cooper v. State*, No. 73558-COA, 2018 WL 3603040 (Nev. Ct. App. July 20, 2018) (Order of Affirmance). Thus, even assuming the challenged statement was improper, it was harmless. Accordingly, Cooper failed to demonstrate a reasonable probability of a different outcome had counsel objected to the challenged

statement. Therefore, we conclude the district court did not err by denying this claim.

Cooper next claimed that his appellate counsel was ineffective. 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means*, 120 Nev. at 1012, 103 P.3d at 33. 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).

Cooper claimed that his appellate counsel was ineffective for failing to argue that the State committed misconduct by asserting in closing that the victim almost died as a result of the shooting. Cooper contended that the State's argument was not supported by the evidence because there was no evidence introduced that showed that the victim almost died. The evidence must support a prosecutor's arguments concerning the facts of a case, but the prosecutor may "assert inferences from the evidence and argue conclusions on disputed issues." *Truesdell*, 129 Nev. at 203, 304 P.3d at 402.

During trial, the evidence demonstrated that the victim was shot twice and survived. Cooper argued in closing that the evidence did not establish that he had an intent to kill the victim. The State responded by

urging the jury to look to Cooper's actions to ascertain his intent and asking, "What could his intention possibly have been when he almost took that young man off the face of this earth for nothing?"

The challenged argument was reasonably based on the evidence introduced at trial and was an appropriate argument concerning a disputed issue. Accordingly, Cooper failed to demonstrate that his appellate counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying issue on appeal or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim.

Cooper next argued he was entitled to relief due to the cumulative effect of counsels' errors. Even assuming any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), Cooper failed to demonstrate multiple errors to cumulate. Therefore, we conclude the district court did not err by denying this claim. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015).

Finally, Cooper argues that the district court erred by adopting the State's proposed order denying the petition. Cooper asserts that the practice of courts adopting proposed orders violates separation of powers principles. Cooper also contends the district court improperly failed to provide guidance to the State concerning the proposed order and that error violated his due process rights.

"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,

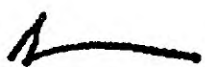
1103 (2009). Here, the district court had the discretion to accept or reject the proposed order, and therefore, the State's act of drafting a proposed order did not encroach on the powers of the district court. Accordingly, Cooper did not demonstrate the district court violated the separation of powers doctrine.


In addition, the district court orally pronounced its findings and conclusions at the end of the evidentiary hearing. And it subsequently directed the State to prepare an order denying the petition pursuant to those findings. The State complied with the district court's direction, and the district court subsequently adopted the proposed order. Therefore, the record belies Cooper's claim that the district court failed to provide guidance concerning the proposed order.

Further, Cooper does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review. Moreover, for the reasons discussed throughout this order, the district court properly denied Cooper's petition. Accordingly, any error concerning the adoption of the proposed order was harmless. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, Cooper is not entitled to relief based on this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk