

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT GEOFFREY DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84325-COA

FILED

FEB 21 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Geoffrey Davis appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Davis argues that the district court erred by denying his October 23, 2017, petition and later filed supplement without considering all of his claims at the evidentiary hearing. 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). 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).

Ineffective assistance of trial counsel

Davis first claimed that his trial counsel were 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.

First, Davis claimed that his trial counsel were ineffective for failing to argue that the jury instruction concerning a willful, deliberate, and premeditated killing was erroneous. Davis contended that the relevant instruction failed to properly explain, as required by *Byford v. State*, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000), the heat of passion necessary to reduce murder to voluntary manslaughter. Davis also appeared to assert that the instructional error was compounded by counsel's failure to argue in closing that he acted under the heat of passion.

The *Byford* court explained that instructions concerning a willful, deliberate, and premeditated killing should state that "in all cases the [deliberate] determination must not be formed in passion, or if formed in passion, it must be carried out *after there has been time for the passion to subside and deliberation to occur.*" *Id.* (emphasis added). The instruction in this matter contained an error as it omitted the portion of the instruction italicized above. Despite the erroneous instruction, Davis did not demonstrate prejudice stemming from the error.

The district court conducted an evidentiary hearing concerning a different claim, but testimony relevant to this issue was produced at that hearing. During her testimony at the evidentiary hearing, counsel explained her decision to argue for finding Davis not guilty of both murder and voluntary manslaughter. Counsel testified that she reviewed the facts and thought that it was reasonable for Davis to be afraid of the victim and,

thus, to have acted in self-defense. Counsel stated that based on the circumstances of this case, she did not argue at trial that Davis should be found guilty of any of the lesser-included offenses of first-degree murder but rather that he should be found not guilty because he reasonably acted in self-defense.

Counsel's testimony demonstrated that it was a strategic decision to seek acquittal based upon a theory of self-defense rather than argue that Davis acted under a heat of passion and was thus guilty of voluntary manslaughter. Trial counsel's strategic decisions are "virtually unchallengeable absent extraordinary circumstances," *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (internal quotation marks omitted), and Davis did not demonstrate that extraordinary circumstances existed in this matter, see *Ennis v. State*, 122 Nev. 694, 704-05, 137 P.3d 1095, 1102 (2006) ("In order to avoid the distorting effects of hindsight, the evaluation begins with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (internal quotation marks omitted)).

In light of counsel's strategic decision and the circumstances surrounding the killing, Davis failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the instruction concerning the heat of passion necessary to reduce murder to voluntary manslaughter or argued that theory to the jury. See *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining that under the *Strickland* prejudice standard, "[t]he likelihood of a different result must be substantial, not just conceivable"). Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Davis claimed that his trial counsel were ineffective for failing to argue that the jury instructions concerning self-defense were erroneous. Davis contended that the instructions did not match the standard instructions and failed to explain when Davis was justified in using deadly force without retreating. In *Runion v. State*, the Nevada Supreme Court provided sample self-defense instructions but instructed district courts to “tailor instructions to the facts and circumstances of a case, rather than simply rely[] on ‘stock’ instructions.” 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000). The challenged instructions correctly explained the law regarding the use of self-defense and the circumstances in which a person is justified in using deadly force without retreating. Accordingly, Davis did not demonstrate that his counsel’s performance fell below an objective standard of reasonableness by failing to object to the challenged instructions 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 without considering it at the evidentiary hearing.

Third, Davis claimed that his trial counsel, who were deputy public defenders, were ineffective because they had a conflict of interest as the Public Defender’s Office previously represented the victim in a prior, unrelated case. Davis asserted that the office had information concerning the victim that may have been helpful to his defense and that loyalty to a prior client may have hindered his counsel’s ability to utilize that information.

“Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” *Clark v. State*, 108

Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if “counsel ‘actively represented conflicting interests’” and the “conflict of interest adversely affected [the defendant’s] lawyer’s performance.” *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)).

The trial court had conducted a hearing concerning this issue. The attorneys assigned to represent Davis explained that they did not personally represent the victim in the prior case and information their office possessed stemming from that case would be screened from them. Counsel also explained that they would have to discover relevant information related to the victim independent of the files stemming from the prior case but that any helpful information discovered concerning the victim would be permissible for them to use in Davis’ defense. The trial court subsequently concluded that Davis’ counsel could represent him.

Davis did not demonstrate that counsel’s performance was adversely affected by the Public Defender’s Office’s previous representation of the deceased victim. At trial, Davis pursued a self-defense strategy, and counsel argued at length that Davis acted in a reasonable manner given the victim’s actions. In light of the circumstances in this matter, Davis failed to demonstrate he was entitled to relief based on this claim. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fourth, Davis claimed that his trial counsel were ineffective for urging the district court to impose a sentence with a maximum term of life rather than 50 years. At the sentencing hearing, counsel urged the district court to consider the tragic circumstances of this matter and that the victim had caused others to be afraid of him. Counsel also requested the district

court to consider Davis' good behavior during his time in custody. Counsel ultimately requested the district court to impose a sentence of life in prison with the possibility of parole for the murder conviction and the minimum available sentence for the deadly weapon enhancement. Davis did not demonstrate that counsel's performance during the sentencing hearing fell below an objective standard of reasonableness. Davis also did not demonstrate a reasonable probability of a different outcome had counsel requested a different sentence. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fifth, Davis appeared to claim that his trial counsel were ineffective during closing argument by failing to argue that Davis was not guilty due to voluntary intoxication. "[V]oluntary intoxication may negate specific intent," but "the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

During closing argument, counsel urged the jury to find that Davis was not guilty because he acted in self-defense. In light of counsel's argument regarding self-defense, Davis did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by any failure to also pursue a voluntary-intoxication defense. Davis also failed to demonstrate 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 without considering it at the evidentiary hearing.

Ineffective assistance of appellate counsel

Davis 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, 1113-14 (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, Davis claimed that his appellate counsel was ineffective for failing to argue that the jury instruction concerning a willful, deliberate, and premeditated killing was erroneous because it did not properly explain heat of passion. As explained previously, the relevant instruction contained an error. Because “[c]hallenges to unobjected-to jury instructions are reviewed for plain error,” *Bowman v. State*, 132 Nev. 757, 764, 387 P.3d 202, 207 (2016), Davis would not have been entitled to relief absent a demonstration that the error affected his substantial rights, *see Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). As previously discussed, Davis’ trial counsel urged the jury to find Davis not guilty due to self-defense. And Davis’ trial counsel did not argue that Davis acted under a heat of passion but rather argued that the jury should find Davis not guilty of voluntary manslaughter. In light of counsel’s argument and the circumstances in this matter, Davis did not demonstrate the error contained within the relevant instruction amounted to error affecting his substantial rights. *See id.* at 51, 412 P.3d at 49 (stating “a plain error affects a

defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)" (internal quotation marks omitted)). As a result, Davis did not demonstrate a reasonable probability of a different outcome on direct appeal had counsel raised the underlying claim. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Davis claimed that his appellate counsel was ineffective for failing to argue that the jury instructions concerning self-defense were erroneous. As explained previously, the challenged instructions correctly explained the law regarding the use of self-defense and the circumstances in which a person is justified in using deadly force without retreating. Accordingly, Davis failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying claim 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 without considering it at the evidentiary hearing.

Third, Davis claimed that his appellate counsel was ineffective for failing to argue that the State improperly commented during closing arguments on Davis exercising his right to remain silent. "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).

During closing argument, the State discussed how people act during stressful situations and also how people reflect on appropriate behavior in such situations. The State noted that Davis may have been better prepared to act in an appropriate manner during the incident involving the victim if he had reflected on how to appropriately behave when faced with a stressful situation. The challenged statement was an argument concerning Davis' thoughts and was not a comment on his decision to remain silent. Accordingly, Davis did not demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to argue that the challenged statement was a comment on his right to remain silent. Davis also failed to demonstrate 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 without considering it at the evidentiary hearing.

Fourth, Davis claimed that his appellate counsel was ineffective for failing to argue that the State improperly commented during closing arguments on its burden to prove that Davis did not act in self-defense. During closing arguments, the State acknowledged that it had the burden to prove that Davis did not act in self-defense, and it stated that it gladly accepted that responsibility. Davis did not demonstrate that the State's comment regarding its burden to prove a lack of self-defense was improper. *See Hill v. State*, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982) ("Without doubt, the burden of proving absence of justification or excuse for the homicide resides with the state."). Accordingly, Davis failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying claim 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 without considering it at the evidentiary hearing.

Fifth, Davis claimed that the State improperly used the term “we” when arguing that the evidence showed Davis did not act in self-defense. During closing arguments, the State discussed the evidence regarding self-defense and used the term “we” when discussing the evidence the parties viewed during the trial and when it made assertions based upon the evidence. Davis does not cite to any authority that directs the State to refrain from utilizing the term “we” during closing arguments, and we are aware of none. Davis therefore did not demonstrate that the State improperly utilized the term “we” when discussing the evidence regarding Davis’ self-defense theory. Accordingly, Davis failed to demonstrate that his counsel’s performance fell below an objective standard of reasonableness by any failure to raise the underlying claim 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 without considering it at the evidentiary hearing.

Sixth, Davis appeared to claim that his appellate counsel was ineffective for failing to argue that the State committed misconduct when it displayed an improper PowerPoint slide during its closing argument. However, counsel raised the underlying claim on direct appeal, and the Nevada Supreme Court concluded that Davis did not demonstrate plain error. *Davis v. State*, No. 69414, 2017 WL 1532719, *2 (Nev. Apr. 26, 2017) (Order of Affirmance). Accordingly, Davis did not demonstrate that his counsel’s performance fell below an objective standard of reasonableness concerning the underlying issue. Davis also failed to demonstrate a reasonable probability of a different outcome had counsel performed

different actions regarding the underlying issue. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Seventh, Davis appeared to claim that his appellate counsel was ineffective because of a conflict of interest as the Public Defender's Office previously represented the victim in a prior, unrelated case. Davis did not demonstrate that his counsel's performance was adversely affected by the Public Defender's Office's previous representation of the deceased victim. In light of the circumstances in this matter, Davis failed to demonstrate he was entitled to relief based on this claim. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Eighth, Davis appeared to claim that his appellate counsel was ineffective for failing to argue that the sentencing court abused its discretion by imposing a sentence that amounted to cruel and unusual punishment. The sentencing court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Generally, this court will not interfere with a sentence imposed by the sentencing court that falls within the parameters of relevant sentencing statutes "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*,

112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The sentence of life in prison with the possibility of parole after 20 years for first-degree murder and a consecutive term of 24 to 60 months in prison for the deadly weapon enhancement is within the parameters provided by the relevant statutes, *see* NRS 193.165(1); NRS 200.030(4)(b)(1), and Davis did not demonstrate that those statutes are unconstitutional. Davis also did not demonstrate that the sentencing court relied on impalpable or highly suspect evidence. Davis therefore failed to demonstrate that the sentencing court abused its discretion when imposing sentence. Davis also failed to demonstrate that the sentence imposed was grossly disproportionate to the crime, and he therefore did not demonstrate it constituted cruel and unusual punishment. Accordingly, Davis failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying claim 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 without considering it at the evidentiary hearing.

Cumulative error

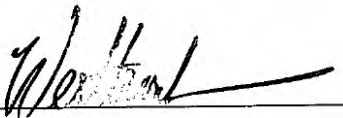
Next, Davis claimed he was entitled to relief due to the cumulative effect of counsel's errors. Even assuming any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009) (recognizing the Nevada Supreme Court has never

adopted a standard to evaluate such claims in postconviction proceedings), Davis failed to demonstrate he was entitled to relief even if any errors are considered cumulatively. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Scott N. Freeman, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk