IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER STEWART WOODSTONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84610-COA

ORDER OF AFFIRMANCE

Christopher Stewart Woodstone appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Woodstone argues that the district court erred by denying his April 8, 2019, petition and later-filed supplement. Woodstone first argues 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, Woodstone claims that his trial counsel was ineffective for failing to object when the State improperly engaged in general accusations of tailoring when it implied that Woodstone changed his testimony after hearing the other witnesses testify. During Woodstone's trial testimony, the State asked him whether he had heard the other witnesses' testimonies and whether he was the only witness who was allowed to testify after hearing all of the other witnesses. Woodstone agreed that he had listened to the other witnesses and that he was allowed to testify after listening to them.

On direct appeal the Nevada Supreme Court recognized that the United States Supreme Court deemed general accusations of tailoring to be constitutionally permissible, *Woodstone v. State*, No. 74238, 2019 WL 959244 (Nev. Feb. 22, 2019) (Order of Affirmance), and Woodstone has not asserted that Nevada state courts have issued a decision concluding that such conduct constitutes prosecutorial misconduct. Accordingly, Woodstone has not shown that his counsel provided deficient performance based on a failure to assert that the State committed misconduct by engaging in general accusations of tailoring. *See Steinhorst v. Wainwright*, 477 So. 2d 537, 540 (Fla. 1985) ("The failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel."); *cf. Doyle v. State*, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000) ("The failure of counsel to anticipate a change in the law does not constitute ineffective assistance.").

Moreover, significant evidence of Woodstone's guilt was presented at trial as there was a surveillance video recording that depicted

the events preceding the incident and the battery itself. In addition, Woodstone does not allege that there was a reasonable probability of a different outcome at trial had counsel objected to the challenged questions. For the foregoing reasons, Woodstone fails to demonstrate he was prejudiced as a result of his counsel's actions. *See Johnson v. State*, 133 Nev. 571, 577, 402 P.3d 1266, 1274 (2017) (stating a petitioner "must specifically explain how his attorney's performance was objectively unreasonable and how that deficient performance undermines confidence in the outcome of the proceeding sufficient to establish prejudice"). Therefore, we conclude that the district court did not err by denying this claim.

Second, Woodstone claims that his trial counsel was ineffective for failing to object when the State violated *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003), by asking Woodstone during cross-examination if the testimony of three other witnesses was wrong, incorrect, or false. At the evidentiary hearing, counsel explained that he does not like to object often during the cross-examination of a defendant during trial. Counsel stated his belief that too many objections during the cross-examination of a defendant gives the jury the impression that the defense is trying to hide something or to protect the defendant from answering questions. And for those reasons, he has a strategy of only objecting to issues during the cross-examination of a defendant that have persuasive value to the jury, and he refrains from objecting to every potentially objectionable question. The district court found trial counsel provided credible testimony that he has a strategic plan to raise few objections during the cross-examination of a defendant. Substantial evidence supports the district court's findings. In light of counsel's testimony at the evidentiary hearing and the district

court's findings, Woodstone fails to demonstrate that his counsel's performance fell below an objective standard of reasonableness. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating "trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)).

Moreover, as stated previously, there was significant evidence of Woodstone's guilt presented at trial. In addition, Woodstone does not allege that there was a reasonable probability of a different outcome at trial had counsel objected to the challenged questions. For the foregoing reasons, Woodstone fails to demonstrate he was prejudiced as a result of his counsel's actions. *See Johnson*, 133 Nev. at 577, 402 P.3d at 1274. Therefore, we conclude that the district court did not err by denying this claim.

Woodstone next argues 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).

Woodstone claims that his appellate counsel was ineffective for failing to argue that the sentencing court abused its discretion when

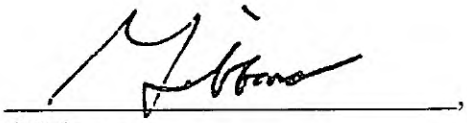
imposing sentence. Woodstone contends that the sentencing court improperly considered bad act evidence and Woodstone's decision to reject a plea offer when it decided to impose a sentence under the large habitual criminal enhancement.

During the sentencing hearing, the parties first presented argument concerning whether the district court should adjudicate Woodstone as a habitual criminal. Only after the district court decided that Woodstone should be adjudicated as a habitual criminal did it entertain argument concerning the sentence that Woodstone would receive pursuant to the habitual criminal enhancement. The State presented information to the sentencing court concerning two simple battery convictions that Woodstone committed after the commission of the offense at issue in this matter. The State urged the sentencing court to consider Woodstone's criminal history, the facts of this offense, and Woodstone's criminal behavior following the commission of this offense.

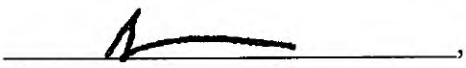
Woodstone does not demonstrate that consideration of the offenses he committed after the commission of the crime at issue in this matter was improper. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). ("Few limitations are imposed on a judge's right to consider evidence in imposing a sentence . . . . Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment."). Moreover, the sentencing court made no reference to Woodstone's decision to reject a plea offer during the sentencing hearing, and he has not demonstrated that the judgement of conviction references his plea decision in this matter.

For the foregoing reasons, Woodstone does not demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to argue that the sentencing court abused its discretion at sentencing. Woodstone also fails to demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim on direct appeal. Therefore, we conclude that the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Connie J. Steinheimer, District Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk