

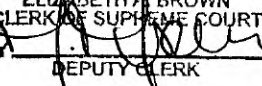
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD T.J. ENGLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84384-COA

FILED

AUG 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Ronald T.J. Engle appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Ineffective assistance of trial counsel

Engle argues that the district court erred by denying his claims of ineffective assistance of trial counsel raised in his December 27, 2019, petition and later-filed supplement. 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, Engle argues that his trial counsel was ineffective for failing to timely file a pretrial petition for a writ of habeas corpus. Engle contends that counsel should have timely pursued dismissal of a charge of attempted murder because the State failed to meet its burden of proof at the preliminary hearing.

At the evidentiary hearing, counsel acknowledged that he did not timely file the pretrial petition. Because counsel did not timely file the pretrial petition for a writ of habeas corpus, counsel's performance fell below an objective standard of reasonableness.

However, Engle does not meet his burden to demonstrate that he was prejudiced. Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." *Sheriff, Washoe Cty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (internal citations omitted). "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense." *Kinsey v. Sheriff, Washoe Cty.*, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

At the preliminary hearing, a deputy testified that he approached Engle's stopped vehicle and viewed Engle kneeling by a rear tire. The deputy talked to Engle, and Engle stated that he was on his way

to pick up his wife from her job. The deputy later conducted a search of the vehicle and discovered a white hose coming out of the vehicle near to where Engle had been kneeling. The deputy subsequently discovered that one end of the white hose had been taped to the vehicle's exhaust pipe, the hose passed into the frame of the vehicle, and it extended into the vehicle's back seat. In addition, the deputy noticed the end of the hose in the back seat was concealed by a jacket. The deputy also testified that Engle had removed a piece of the door lock for the rear driver's side door of the vehicle such that a person would not be able to unlock it from the inside. After the presentation of the evidence at the preliminary hearing, the justice court found that the State met its burden to present slight or marginal evidence necessary to support a charge of attempted murder.

The evidence produced at the preliminary hearing established slight or marginal evidence that Engle acted with a deliberate intention to unlawfully kill his wife, he acted pursuant to that unlawful intent by driving toward her place of employment to pick her up with a vehicle manipulated to create a dangerous environment, and he failed to complete the crime. *See Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988) ("Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill."); *see also Moffett v. State*, 96 Nev. 822, 824, 618 P.2d 1223, 1224 (1980) ("To prove an attempt to commit a crime, the prosecution must establish (1) the intent to commit the crime; (2) performance of some act towards its commission; and (3) failure to consummate its commission."). Therefore, Engle fails to

demonstrate a reasonable probability of a different outcome had counsel timely filed the pretrial petition for a writ of habeas corpus, and we conclude that the district court did not err by denying this claim.¹

Second, Engle argues that his trial counsel was ineffective for stipulating to admission of a video recording of an interview with the victim in which she discussed the sexual conduct at issue in this matter. At the evidentiary hearing, counsel testified that a defense expert witness intended to utilize the video recording to point out inconsistencies between the victim's versions of events. Counsel testified that he therefore decided to stipulate to admission of the video recording at trial. The district court found that counsel made a strategic decision to stipulate to admission of the video. Substantial evidence supports that finding. Moreover, Engle fails to demonstrate extraordinary circumstances warrant challenging counsel's strategic decision. *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)). Therefore, Engle fails to demonstrate that counsel's performance fell below an objective standard of reasonableness.

In addition, Engle fails to demonstrate a reasonable probability of a different outcome had counsel not stipulated to the video's admission. For the foregoing reasons, we conclude that the district court did not err by denying this claim.

¹We note that Engle was acquitted of attempted murder at trial.

Ineffective assistance of appellate counsel

Engle 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).

First, Engle argues that his appellate counsel was ineffective for failing to request trial transcripts or provide an adequate record on appeal such that this court was unable to properly review his arguments. Engle also asserted that counsel's actions caused him to be deprived of a direct appeal and prejudice should therefore be presumed.

At the evidentiary hearing, counsel acknowledged that he failed to include the entire trial transcripts in his appendix and instead only included a small portion of the trial record in the appendix. Counsel asserted that he did so because there were many damaging things about Engle presented at trial and he hoped to keep that sort of information from harming Engle on appeal. However, counsel acknowledged that the

decision not to include the entire trial transcript in the appellate appendix was a mistake. We conclude that counsel's performance fell below an objective standard of reasonableness.

However, Engle does not meet his burden to demonstrate that he was prejudiced. In the context of the deprivation of a direct appeal, "prejudice is presumed" when counsel "fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal." *Hathaway v. State*, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); *cf. Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011) (stating "when the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed").

Appellate counsel did not fail to file a direct appeal after Engle requested a direct appeal, and Engle was not deprived of the right to appeal. Instead, appellate counsel filed a notice of appeal, and Engle's direct appeal was considered by this court. *See Engle v. State*, No. 76929-COA, 2019 WL 5258454 (Nev. Ct. App. Oct. 16, 2019) (Order of Affirmance). And Engle does not demonstrate that counsel's decision regarding the items to include in the appellate appendix for the direct appeal worked to entirely deprive him of a direct appeal such that prejudice should be presumed.

Moreover, Engle does not allege that the arguments he raised on direct appeal were meritorious. Engle thus fails to demonstrate a reasonable probability of a different outcome on direct appeal but for counsel's failure to include the trial transcripts in the appellate appendix on direct appeal. *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.

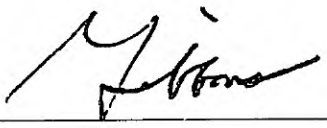
Second, Engle appears to argue that his appellate counsel was ineffective for failing to raise additional arguments on direct appeal. At the evidentiary hearing, counsel testified that he considered raising additional arguments but ultimately chose to focus on issues that he felt were most likely to be successful. The district court found that counsel made a strategic decision to raise only certain issues on direct appeal. Substantial evidence supports that finding. Moreover, Engle fails to demonstrate extraordinary circumstances warrant challenging appellate counsel's strategic decision. *See Lara*, 120 Nev. at 180, 87 P.3d at 530. Therefore, Engle fails to demonstrate that counsel's performance fell below an objective standard of reasonableness.


In addition, the district court found that Engle did not produce evidence at the evidentiary hearing concerning any additional issues that he argued counsel could have raised on direct appeal. The district court therefore found that Engle failed to meet his burden to demonstrate his factual assertions by a preponderance of the evidence. The record supports the district court's decisions. Engle therefore fails to demonstrate a reasonable probability of a different outcome on appeal had counsel raised additional issues. Therefore, we conclude that the district court did not err by denying this claim.

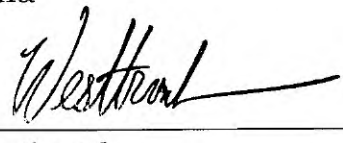
Cumulative effect of counsel's errors

Finally, Engle argues the district court erred by denying his claim that 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), Engle failed to demonstrate he was entitled to relief in light of the significant evidence of his guilt produced at trial. The evidence produced at trial included a video recording depicting the young victim performing sexual acts, Engle's confession that he recorded the video, and the victim's statements concerning Engle's sexual conduct. Therefore, we conclude 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. John Schlegelmilch, District Judge
Ristenpart Law
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk