


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS ANTHONY MCDANIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85994-COA

FILED

NOV 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Nicholas Anthony McDaniel appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 2, 2021, and a supplemental petition filed on September 7, 2021. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

McDaniel argues the district court erred by denying his claims of ineffective assistance of appellate counsel. 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 v. Washington*, 466 U.S. 668, 687 (1984), 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). 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). 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, McDaniel claimed counsel was ineffective for failing to challenge the sufficiency of the evidence supporting his convictions for assault with the use of a deadly weapon. The State alleged McDaniel committed the offenses by causing J. Hurt and his minor son to fear for their safety by using a gun to break multiple windows of a house that the victims were in. McDaniel contended that there was no evidence the gun was fired, it was an antique and was not loaded, he was outside and never entered the residence, and the victims were not in fear for their lives.

Assault with a deadly weapon requires proof that the defendant used, or was presently able to use, a deadly weapon to place another person in apprehension of immediate bodily harm. NRS 200.471(1)(a)(2), 2(b). A gun is a deadly weapon regardless of whether it is fired or capable of firing. *Cf. Allen v. State*, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980) (holding that even an inoperable firearm is considered a deadly weapon for purposes of the sentence enhancement "because its use may provoke a deadly reaction from the victim or from bystanders"), *overruled on other grounds by Berry v. State*, 125 Nev. 265, 277, 212 P.3d 1085, 1093-94 (2009).

The district court found that Mr. Hurt's trial testimony showed that both he and his son, the victims, were in reasonable apprehension of immediate bodily harm because Mr. Hurt saw that McDaniel possessed a gun before McDaniel broke the windows, Mr. Hurt did not know whether the windows were being shot out or broken, and Mr. Hurt dropped to the

ground to protect his son. These findings are supported by substantial evidence. Mr. Hurt further testified that his son was scared and crying. Based on this evidence, any rational trier of fact could have found beyond a reasonable doubt that McDaniel committed assault with a deadly weapon as to both victims by using an inoperable firearm to place them in reasonable apprehension of immediate bodily harm. Accordingly, McDaniel failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (stating that the standard of review for a claim of insufficient evidence is to review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Therefore, we conclude the district court did not err by denying this claim.

Second, McDaniel claimed counsel was ineffective for failing to argue on appeal that, pursuant to *Powell v. State*, 113 Nev. 258, 934 P.2d 224 (1997), he could not be convicted of both counts of assault arising from the same incident. However, *Powell* is not dispositive here because Powell was convicted of assault arising from his unlawful attempt to commit violent injury to persons, *Powell*, 113 Nev. at 263, 934 P.2d at 227, and McDaniel was convicted of assault by placing persons in apprehension of immediate bodily harm. *Powell* is also distinguishable because the Nevada Supreme Court concluded that Powell could not be convicted of three counts of assault when he fired a single shot in the direction of three people. *Id.* at 264, 934 P.2d at 228. Here, McDaniel used a deadly weapon to break out multiple windows in a residence, including the son's window, and both

victims were in fear based on McDaniel's conduct. Accordingly, McDaniel failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not err by denying these claims.

Third, McDaniel claimed counsel was ineffective for failing to challenge the State's improper closing argument. McDaniel averred that the prosecutor made a "conscience of the community" argument to the jury by stating it was not the jury's duty to do justice between the victim and the State or the victim and the defendant, but rather to do justice between the defendant and the State. The State's argument does not constitute a "conscience of the community" argument but instead suggested that it was the jury's duty to do equal and exact justice between McDaniel and the State. Accordingly, McDaniel failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. *See Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (holding the "equal and exact justice" instruction did not undermine the presumption of innocence or lessen the State's burden of proof). Therefore, we conclude the district court did not err by denying this claim.

McDaniel also argues the district court erred by denying his claims of ineffective assistance of trial counsel for failing to challenge the sufficiency of the evidence supporting his convictions for assault with the use of a deadly weapon, his ability to be convicted of two counts of assault arising from the same incident, and the State's improper closing argument. McDaniel does not cogently argue these claims as they pertain to trial counsel. Therefore, we decline to consider them. *See Maresca v. State*, 103

Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Finally, McDaniel argues the district court erred by denying his claim that cumulative error warrants reversing his conviction. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), McDaniel did not identify multiple instances of deficient performance to cumulate. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

¹McDaniel argues on appeal that trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence supporting McDaniel's convictions for sexual assault with the use of a deadly weapon, kidnapping with use of a deadly weapon, and false imprisonment with use of a deadly weapon. McDaniel failed to raise these claims in his pleadings below or properly present them to the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider these arguments on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

cc: Hon. John Schlegelmilch, District Judge
Karla K. Butko
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk