


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEREK RYAN FOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86117-COA

FILED

JAN 25 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Derek Ryan Fox appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 26, 2022, and a supplement filed on October 3, 2022. Eighth Judicial District Court, Clark County; Bitu Yeager, Judge.

Fox argues the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. 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. 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). 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Fox claimed that counsel should have objected to the district court's limitation of his ability to voir dire the jury venire members regarding their preconceived notions and/or prejudices against someone, like Fox, who has a tear drop tattoo. Fox contended that counsel's failure to object affected both the trial proceedings and the ability to fully present the issue on direct appeal because it was not preserved. A criminal defendant has a constitutional right to be tried by a fair and impartial jury. U.S. Const. amend. VI; Nev. Const. art. 1, § 3. "The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given." *Whitlock v. Salmon*, 104 Nev. 24, 27, 752 P.2d 210, 212 (1988).

The district court found that Fox failed to allege or otherwise demonstrate that any of the seated jurors were not fair and impartial. These findings are supported by substantial evidence in the record. Accordingly, Fox failed to demonstrate a reasonable probability of a different outcome had counsel objected to the district court's limitation of voir dire. *See Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (stating that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice" resulting from district court's limitation of voir dire). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Fox claimed that counsel should have objected to the trial exhibits depicting the tattoo. Fox contended this precluded any

objection to the display of the face tattoo for purposes of the trial proceedings and on direct appeal. The district court found that Fox failed to identify the exhibits counsel should have challenged or a legal basis for the objection, and it concluded the claim was essentially bare. These findings are supported by substantial evidence in the record. Accordingly, Fox failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected to the exhibits. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Bitu Yeager, District Judge
Law Office of Amanda Pellizzari, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk