

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN MICHAEL RONNIE GOODE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72031

FILED

FEB 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Shawn Michael Ronnie Goode appeals from an order of the district court dismissing in part and denying in part the postconviction petition for a writ of habeas corpus he filed on May 22, 2014, and the supplemental petition he filed on July 16, 2015. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Goode claims the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *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 697, 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, Goode claimed counsel was ineffective for failing to file a motion to declare and enforce the plea agreement. Goode failed to demonstrate counsel was deficient or resulting prejudice. The district court held an evidentiary hearing and made the following findings: an offer was extended on July 13, 2012, and was set to expire on July 30, 2012; as of July 27, 2012, Goode rejected the offer; he did not attempt to accept the offer until July 31, 2012; and the State rejected the acceptance because it was one day late. The district court concluded the State is the master of its offer and the district court is powerless to participate in the plea negotiations. *See State v. Crockett*, 110 Nev. 838, 843, 877 P.2d 1077, 1079 (1994). Therefore, the district court denied this claim.

We conclude substantial evidence supports the decision of the district court. Goode failed to demonstrate counsel should have filed a motion to declare and enforce the plea agreement or that such a motion would have been successful. Plea agreements are generally governed by contract principles.¹ *Id.* at 842, 877 P.2d at 1079. The plea agreement was not accepted by Goode within the reasonable time limit set by the State. Therefore, there was no plea agreement to declare and enforce. *See id.* at 843, 877 P.2d at 1079 (“As a general rule, then, we think that either party would be entitled to modify its position or even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.” quoting *United States v. Savage*, 978 F.2d 1136,

¹We decline Goode’s request to revisit, overrule, or limit *Crockett*.

1138 (9th Cir. 1992)). Accordingly, we conclude the district court did not err by denying this claim.

Second, Goode claimed counsel was ineffective for failing to object to jury instructions regarding the deadly weapon enhancement and for failing to propose instructions regarding the operability of the airsoft gun. Goode claims counsel should have proposed an instruction stating “you are instructed that a toy firearm can be a deadly weapon within the meaning of this instruction, but only if at the time of the offense(s) the Defendant was capable of using it in a way to inflict death or great bodily harm.” Goode claims this language is in line with *McIntyre v. State*, 104 Nev. 622, 624, 764 P.2d 482, 483 (1988), and *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989), which he claims say a toy gun cannot be a firearm unless the toy gun is proven to have actual deadly capabilities at the time of the crime.²

The district court concluded this was not the correct standard because of amendments made to the deadly weapon statute, see NRS 193.165, and subsequent case law interpreting that statute, see *Berry v. State*, 125 Nev. 265, 276-77, 212 P.3d 1085, 1093 (2009) *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). Specifically, *Berry* states a firearm is a deadly weapon if it meets the statutory definition regardless of whether it was unloaded or inoperable at the time of the crime. *Id.* Substantial evidence supports the decision of the

²The gun used in this case was an airsoft pistol and there was testimony presented at trial it was capable, at the time it was purchased, of firing a metallic object. See *Goode v. State*, Docket No. 62224 (Order of Affirmance, September 18, 2013).

district court, and we conclude the district court did not err by denying this claim.

Third, Goode claimed counsel was ineffective for failing to object to one of the deadly weapon enhancement instructions that stated a firearm is a deadly weapon. Goode claimed this statement unconstitutionally creates a presumption that a toy gun is a firearm. Goode cites to a Ninth Circuit case where the court instructed the jury a flare gun was a firearm, but a flare gun was not specifically enumerated in the statute as a firearm. *See Medley v. Runnels*, 506 F.3d 857 (9th Cir. 2007). The Ninth Circuit determined this unconstitutionally created a presumption and did not require the jury to determine whether a flare gun met the definition of a firearm.

The district court determined *Medley* was distinguishable from the instant case because in this case, the jury was not instructed the airsoft pistol was a firearm. Instead, the jury was given the definition of a firearm and the jury had to determine whether the airsoft pistol was a firearm. Therefore, there was no presumption created. Substantial evidence supports the decision of the district court. Accordingly, we conclude the district court did not err by denying this claim.


Finally, Goode claims the district court erred by denying his claim counsel was ineffective for failing to propose a theory of the case jury instruction regarding identification. Goode appears to claim counsel should have offered an instruction pursuant to *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) because Goode's theory of defense was misidentification or mistaken identification by the victims.³ Further, Goode


³Goode incorporates his arguments below by reference. This is improper. *See* NRAP 28(e)(2).

claims the district court erred by finding *Nevius v. State*, 101 Nev. 238, 248, 699 P.2d 1053, 1059-60 (1985) was not overruled by *Perry v. New Hampshire*, 565 U.S. 228 (2012).

Goode failed to demonstrate the district court erred by denying this claim. Even assuming counsel should have sought a jury instruction regarding identification, Goode failed to demonstrate that, in light of the instructions that were given regarding credibility and the proof required to convict, the outcome of trial would have been different. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. David A. Hardy, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk