

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEANGELO R. CARROLL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78081-COA

**FILED**

FEB 11 2020

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

*ORDER OF AFFIRMANCE*

Deangelo R. Carroll appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 10, 2017, and a supplemental petition filed on August 31, 2018. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

*Ineffective assistance of trial counsel*

Carroll first contends the district court erred by denying his claims of ineffective assistance of trial counsel. 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 697.

First, Carroll claimed counsel failed to properly present and address a *Batson*<sup>1</sup> challenge. Carroll argued he did not have to demonstrate

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<sup>1</sup>*Batson v. Kentucky*, 476 U.S. 79 (1986).

prejudice because a *Batson* error is structural error that must be reversed. When a *Batson* claim is preserved at trial and then successfully raised on direct appeal, it demonstrates a structural error at trial that necessitates automatic reversal. See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018), *cert. denied*, 139 S. Ct. 415 (2018); *Brass v. State*, 128 Nev. 748, 752, 291 P.3d 145, 148 (2012). However, in the context of a postconviction petition for a writ of habeas corpus, a petitioner must demonstrate prejudice by showing that counsel's deficiency "rendered the trial fundamentally unfair." *Weaver v. Massachusetts*, 582 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1899, 1913 (2017). Carroll failed to allege this. Accordingly, we cannot conclude the district court erred by denying this claim.<sup>2</sup>

Second, Carroll claimed counsel should have moved to suppress recordings of conversations he had with his coconspirators on the ground that the recordings were derived from a *Miranda*<sup>3</sup> violation and were thus fruit of the poisonous tree. On direct appeal, the Nevada Supreme Court held that, although Carroll's statement to police was not coerced, Carroll was subjected to custodial interrogation without the benefit of adequate *Miranda* warnings and his entire statement to detectives should have been suppressed as a result. *Carroll v. State*, 132 Nev. 269, 280, 285-87, 371 P.3d 1023, 1031, 1034-35 (2016).

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<sup>2</sup>The district court concluded the trial court properly completed all three steps of the *Batson* analysis. This conclusion is not supported by the record before this court. We nevertheless affirm the district court's decision for the reasons stated above. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

<sup>3</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

During the custodial interrogation, Carroll volunteered to wear a wire when he next spoke with his coconspirators. He was then released from custody and taken home. Three days later, Carroll met with law enforcement to be fitted with a wire and to record the first conversation. Even if Carroll's initial offer to wear a wire were the product of the custodial interrogation, the three days out of custody were sufficient to render the recordings too attenuated from the *Miranda* violation to justify exclusion. See *Oregon v. Elstad*, 470 U.S. 298, 312-14 (1985) (recognizing the causal connection between a violation and an ultimate decision to cooperate may be too speculative and attenuated to warrant exclusion). And Carroll did not contend he was subjected to custodial interrogation at the time he was fitted with and was wearing the wire. We therefore conclude the district court did not err by denying this claim.

Third, Carroll claimed counsel failed to present exculpatory evidence and impeach Rontae Zone with evidence that Zone had admitted to murdering Timothy Hadland himself. Zone was the only percipient witness to the murder who testified at Carroll's trial. Zone's testimony indicated Carroll facilitated Hadland's murder and codefendant Kenneth Counts was the shooter. Prior to Carroll's trial, Zone testified to substantially the same information at Counts' trial. At Counts' trial, Zone was impeached with the testimony of Calvin Williams, who testified that Zone implicated himself as Hadland's shooter. Counts was acquitted. Carroll argued that he, too, would have enjoyed a more favorable outcome at trial had Williams' testimony been admitted at trial.

Williams' testimony constituted extrinsic evidence. And extrinsic evidence that is not directly connected to the issue in dispute is inadmissible. *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004).

The State pursued a theory that Carroll was culpable for murder as a coconspirator but that Counts was the shooter. Thus the primary issue at Carroll's trial was his intent, not the identity of the shooter. Because the shooter's identity was not in dispute, Williams' testimony would have been inadmissible under the collateral fact rule. As a result, it would have been futile for counsel to seek to admit Williams' testimony to impeach Zone. And counsel cannot be ineffective for failing to make futile gestures. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Moreover, Carroll failed to demonstrate a reasonable probability of a different outcome had Williams' testimony been admitted. As stated previously, any suggestion that the State misidentified the shooter would not have been exculpatory because Carroll was not prosecuted under a theory that he was the triggerman. And trial counsel thoroughly impeached Zone's credibility on the witness stand, demonstrating repeatedly that Zone had lied under oath on previous occasions. We therefore conclude the district court did not err by denying this claim.

Fourth, Carroll claimed counsel should have objected to the prosecutor's rebuttal argument that "it would be a travesty of justice if you did anything less than the truth, the absolute truth." Carroll argued the comments amounted to prosecutorial misconduct because "travesty of justice" was highly inflammatory and arguing that only the State's version of events was the "truth" amounted to improper vouching and/or an attack on the defense. The prosecutor's rebuttal argument was merely an exhortation of the jurors not to compromise in their verdict. Such comments were not inflammatory, vouching, or an attack on the defense. Accordingly,

counsel was not objectively unreasonable for not objecting to the argument. We therefore conclude the district court did not err by denying this claim.

Fifth, Carroll claimed counsel should have objected to the prosecutor's rebuttal argument that there was no basis to charge Zone with any crime or that there was no evidence Zone was anything other than a bystander. Carroll claimed this was prosecutorial misconduct because the prosecutor knew this to be false information. Carroll mischaracterized the prosecutor's argument. The prosecutor was summarizing Carroll's closing argument that the State should have charged Zone with a crime. The prosecutor further explained that, even if the State disbelieved Zone, that disbelief was not a reason to refrain from pressing charges against Carroll. It was not improper for the prosecutor to respond to Carroll's argument. Carroll thus failed to demonstrate counsel was objectively unreasonable for not objecting to the argument. We therefore conclude the district court did not err by denying this claim.

Sixth, Carroll claimed counsel should have objected to the prosecutor's rebuttal argument that, if the jury were doing its job, it would come back and tell Carroll that they know Carroll intended to kill Hadland. Carroll argued it was prosecutorial misconduct for the prosecutor to tell the jury they had a duty to convict. Carroll mischaracterized the prosecutor's argument. The prosecutor reminded the jury to look at more than just Carroll's confession—that they had a duty to look at all of the evidence. The prosecutor then expressed his confidence that once the jury had done that duty, they would reach the result urged by the State. Carroll failed to demonstrate this argument was improper and, accordingly, that counsel was objectively unreasonable for not objecting to it. We therefore conclude the district court did not err by denying this claim.

Seventh, Carroll claimed counsel failed to move to exclude improperly noticed expert testimony of a cellular phone carrier's custodian of records. Carroll did not specify what the expert testified to, specify how the testimony impacted the verdict, or demonstrate that it would have been excluded at trial. *See Burnside v. State*, 131 Nev. 371, 384, 352 P.3d 627, 637 (2015) ("We are not convinced that the appropriate remedy for the error would have been exclusion of the testimony."). Carroll's bare claim thus failed to demonstrate that counsel was objectively unreasonable for not objecting to the testimony or that an objection would have had a reasonable probability of resulting in a better outcome at trial. Accordingly, we cannot conclude the district court erred by denying this claim. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (requiring claims be supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief).

*Ineffective assistance of appellate counsel*

Carroll also contends 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 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). Appellate counsel is not required to—and will be most effective when he does not—raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983), *as limited by Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

First, Carroll claimed counsel was ineffective for not challenging the trial court's admission of the wire recordings on the ground that the recordings were derived from *Miranda* violations and thus fruit of the poisonous tree. Carroll also claimed counsel should have challenged as prosecutorial misconduct the State's rebuttal arguments regarding a "travesty of justice"/"truth", Zone's testimony, and the jury's "duty" to convict. Finally, Carroll claimed counsel should have challenged the admission of the unnoticed expert testimony of the cellular phone carrier's custodian of records. For the reasons discussed above, Carroll failed to demonstrate counsel was objectively unreasonable or a reasonable probability of a different outcome on appeal had counsel acted differently. We therefore conclude the district court did not err by denying these claims.

Second, Carroll claimed counsel should have challenged the trial court's *Batson* ruling. A *Batson* analysis involves three steps:

- (1) [T]he opponent of the peremptory challenge must make out a prima facie case of discrimination,
- (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and
- (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination.

*Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). To satisfy the first prong, the opponent of the challenge must assert more than that the proponent used a peremptory challenge to exclude a member of a cognizable group. *Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014). The only reason trial counsel gave for asserting the *Batson* claim was that the excused juror was Black. Accordingly, trial counsel did not satisfy the first prong. As such, it would have been futile for appellate counsel to claim on appeal that a *Batson* violation occurred at trial. And, because counsel cannot be ineffective for failing to raise futile claims, see *Ennis*, 122 Nev. at

706, 137 P.3d at 1103, we conclude the district court did not err by denying this claim.

Third, Carroll claimed counsel should have challenged the State's rebuttal argument that Hadland might have shot himself and that involuntary manslaughter must be "an accident." Carroll mischaracterized the State's argument. In rebuttal, the prosecutor characterized Carroll's argument regarding Hadland's cause of death as being similar to being pushed and hitting one's head on a curb or a child finding a firearm and shooting himself. The trial court sustained defense counsel's objection to the characterization. The prosecutor then argued that Carroll wanted the jury to believe that Hadland's shooting was somehow just an accident. Trial counsel again objected, noting that was not what the defense had argued. The trial court did not explicitly sustain the objection, but it did admonish jurors to rely on their own recollection of the defense arguments. In light of the trial court's instructions, the jury should not have considered this portion of the rebuttal argument. Because we presume juries follow their instructions, *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), any challenge by appellate counsel would have been futile. Carroll has thus failed to demonstrate counsel was deficient or that he was prejudiced. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. We therefore conclude the district court did not err by denying this claim.

Fourth, Carroll claimed counsel should have challenged the giving of the flight instruction to the jury. The State argued the flight instruction was warranted because Carroll drove away from the remote location where the crime occurred and did not call for emergency services. The trial court gave the instruction over defense counsel's objection. The record does not contain evidence of flight that would warrant giving the





flight instruction. See *Potter v. State*, 96 Nev. 875, 876, 619 P.2d 1222, 1222 (1980) (“Flight is more than merely leaving the scene of the crime.”). Had counsel raised the claim, it would have been subject to a harmless error standard of review. See *Guy v. State*, 108 Nev. 770, 777-78, 839 P.2d 578, 583 (1992). Although the jury was given the flight instruction, the State did not argue it in closing. And in light of the evidence presented at trial, the error was harmless. Accordingly, he failed to demonstrate appellate counsel’s failure to raise this claim was objectively unreasonable because there was no reasonable probability of a different outcome on appeal had counsel raised the claim. We therefore conclude the district court did not err by denying this claim.

Finally, Carroll also claimed he was entitled to relief due to the cumulative effect of counsels’ errors. Even assuming that multiple deficiencies of counsel may be cumulated to establish prejudice, see *McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009), Carroll has failed to demonstrate he was prejudiced by any potential deficiencies. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Valerie Adair, District Judge  
Resch Law, PLLC d/b/a Conviction Solutions  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk