

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICTOR ORLANDO CRUZ-GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77647-COA

FILED

FEB 11 2020

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

ORDER OF AFFIRMANCE

Victor Orlando Cruz-Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 3, 2017, and a supplemental brief filed on July 17, 2017. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

First, Cruz-Garcia claims the district court erred by denying his claims that trial counsel was ineffective. 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). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Cruz-Garcia claimed counsel was ineffective for failing to investigate a witness prior to trial. He claimed counsel admitted at trial he did not know this witness was going to testify more substantially than what was contained in his police statement. Cruz-Garcia claimed the lack of investigation caused counsel to not be prepared for cross-examination.

A petitioner claiming that counsel should have conducted investigation must identify what the investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Cruz-Garcia failed to allege what further information counsel could have learned had counsel investigated this witness. Therefore, Cruz-Garcia failed to demonstrate deficiency or prejudice. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Cruz-Garcia also claimed counsel was ineffective for failing to review the police interview tape before stipulating to it being introduced at trial. Cruz-Garcia claimed trial counsel forgot that there was a 27-minute portion of the tape that occurred prior to the interview. And because counsel failed to view the video prior to trial, counsel was unable to articulate reasons to object to that portion of the video.

In his petition, Cruz-Garcia failed to articulate any reasons as to why the 27-minute portion of the video would have been objectionable. Therefore, he failed to demonstrate deficiency or prejudice. Accordingly, we

conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Cruz-Garcia further claimed counsel was ineffective for failing to object to the premeditation and deliberation instruction, the reasonable doubt instruction, the express malice instruction, and the exact and equal justice instruction.

Cruz-Garcia failed to demonstrate counsel was deficient because the district court gave the instruction on premeditation and deliberation set forth in *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000), and the reasonable doubt instruction set forth in NRS 175.211(1). Further counsel could not have successfully challenged the malice and equal and exact justice instructions. *See, e.g., Leonard v. State (Leonard II)*, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (holding “abandoned and malignant heart” language is essential and informs the jury of the distinction between express and implied malice); *Byford*, 116 Nev. at 232, 995 P.2d at 712 (upholding malice instruction where the jury is properly instructed on the presumption of innocence); *see also Leonard v. State (Leonard I)*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (providing that where the jury has been instructed that the defendant is presumed innocent and that the State bears the burden of proving guilt beyond a reasonable doubt, the equal-and-exact-justice instruction does not deny the presumption of innocence or lessen the burden of proof). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Cruz-Garcia claimed counsel was ineffective for eliciting his custody status in the presence of the jury. At trial, counsel asked the psychologist who evaluated Cruz-Garcia whether he was

administered any psychotropic drugs. The witness responded that he was given these drugs initially at the Clark County Detention Center (CCDC), but he was not on them very long. Shortly thereafter, counsel asked the witness whether he had recent CCDC notes in his binder. To which the witness responded in the affirmative. Cruz-Garcia argued these references prejudiced him in front of the jury because it informed the jury he was in custody.

These two mentions of Cruz-Garcia's custody status were mere passing references, and Cruz-Garcia failed to demonstrate that had counsel not elicited these responses, the result of the trial would have been different. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Cruz-Garcia claims the district court erred by denying his claims that appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such 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 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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. We give deference to the 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*, 121 Nev. at 686, 120 P.3d at 1166.

Cruz-Garcia claimed counsel was ineffective for failing to argue the trial court improperly denied three of his for-cause challenges during jury selection. He claims that three jurors indicated either they could not understand the proceedings or be impartial, stating they would not consider mitigation evidence.

A trial court's determination of a for-cause challenge is reviewed for an abuse of discretion, *Stephans v. State*, 127 Nev. 712, 722, 262 P.3d 727, 734-35 (2011), and Cruz-Garcia failed to demonstrate the trial court erred by denying his for-cause challenge. After questioning, the trial court found the jurors understood the proceedings well enough and the jurors indicated they would consider mitigation evidence and could be impartial. Further, even if the "district court abused its discretion by denying a for-cause challenge to a juror, the error [is] not reversible where the defendant failed to show, or even argue, 'that any juror actually empaneled was unfair or biased.'" *Sayedzada v. State*, 134 Nev. 283, 285, 419 P.3d 184, 189 (Ct. App. 2018) (quoting *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005)). Here, Cruz-Garcia did not argue that any juror actually empaneled was unfair or biased. Therefore, Cruz-Garcia failed to demonstrate this claim had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

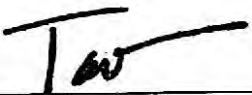
Cruz-Garcia also claimed counsel was ineffective for failing to argue the district court erred by giving the reasonable doubt instruction, the exact and equal justice instruction, the express malice instruction, and the premeditation and deliberation instruction. As explained above, the jury was correctly instructed by the district court. Therefore, Cruz-Garcia failed to demonstrate deficiency or prejudice. Accordingly, we conclude the

district court did not err by denying this claim without first holding an evidentiary hearing.

Third, Cruz-Garcia claimed the cumulative errors of counsel entitled him to relief. 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), Cruz-Garcia did not identify instances of deficient performance to cumulate. Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk