

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRELL LEE CHRISTY, JR.,
Appellant,
vs.
THE STATE OF NEVADA; AND JERRY
HOWELL, WARDEN,
Respondents.

No. 79523-COA

FILED

MAY 11 2020

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

ORDER OF AFFIRMANCE

Derrell Lee Christy, Jr., appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 3, 2018. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Ineffective assistance of trial counsel

Christy claims the district court erred by denying his petition because trial counsel was ineffective. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 (1984). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Id.* at 697. We give deference to the district court's factual findings if supported by substantial evidence and not clearly wrong 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, Christy claimed trial counsel was ineffective for failing to view and obtain a copy of the surveillance video from the Jack in the Box restaurant because the video would have demonstrated that he did not follow the victim to the Jack in the Box. This court previously determined that “the State did not impound the surveillance video, there is no record as to what was depicted on the video, and the defense was able to impeach the State witnesses’ Jack-in-the-Box testimonies without the video.” *Christy v. State*, Docket No. 72486-COA (Order of Affirmance, May 15, 2018). And Christy’s own statements indicate the defense investigator looked for and was unable to locate the video. Therefore, we conclude Christy did not demonstrate that counsel was ineffective and the district court did not err by rejecting this claim.

Second, Christy claimed trial counsel was ineffective for failing to present the victim’s medical records because they would have demonstrated that the victim was shot in the back and therefore could not have seen who shot him. The record demonstrates the victim testified he was shot in the front abdomen, the left side, and the back, and then he stood up, lifted his shirt, and showed the jury scars from his wounds. Christy’s own statements indicate that counsel had the victim’s medical records and chose not to present them to the jury. We conclude counsel’s decision not to present the medical records was a tactical decision, Christy failed to show that he was prejudiced by that decision, and the district court did not err by rejecting this claim. *See generally Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (“Tactical decisions are virtually unchallengeable absent extraordinary circumstances.”).

Third, Christy claimed trial counsel was ineffective for failing to investigate and inform the jury of the fact that both he and his

codefendant owned separate gray Dodge Chargers. He appeared to argue that counsel did not know there were two gray Dodge Chargers in this case and that presenting this information to the jury would have weakened the State's case. However, the record demonstrates that the jury heard testimony that Deon Smalley owned a silver or gray Dodge Charger, Christy owned a gray Dodge Charger, and the victim recorded the license plate number for Christy's Charger. Given this record, we conclude Christy did not demonstrate that a better investigation would have made a more favorable outcome probable and, therefore, the district court did not err by rejecting this claim. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable).

Fourth, Christy claimed trial counsel was ineffective for failing to consult with a medical expert as to whether trauma, blood loss, and pain killers may have affected the victim's memory. He appeared to argue that a medical expert's testimony would have shown the victim's prior statements and in-court testimony were unreliable. However, the record demonstrates that the jury heard the victim's testimony that he was heavily medicated when he gave his first statement, he gave a second statement after the medication wore down and he could remember more, and his medications and surgeries made it hard for him to remember. Given this record, we conclude Christy did not demonstrate that a better investigation would have made a more favorable outcome probable and, therefore, the district court did not err by rejecting this claim. *See id.*

Fifth, Christy claimed trial counsel was ineffective for failing to consult with a firearms or ballistics expert as to whether the nine shell

casings recovered from the crime scene came from the same firearm. He appeared to argue that a firearms or ballistics expert could have determined the number of shooters by examining the spent shell casings, and evidence that there was just one shooter would have proven his innocence. However, he failed to demonstrate that a firearms or ballistics expert would have found that all of the shell casings came from the same firearm and that the shell casings evidence would have made a more favorable outcome probable.¹ *See id.* Therefore, we conclude the district court did not err by rejecting this claim.

Sixth, Christy claimed trial counsel was ineffective for failing to investigate whether the victim had a motive to make false accusations. He appeared to argue that the victim must have had a motive for falsely accusing him of being one of the shooters. We conclude the district court properly determined that Christy's claim was a bare allegation and the district court did not err by rejecting it on that basis. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims are bare and lack specific factual allegations).

Seventh, Christy claimed trial counsel was ineffective for failing to interview the State's witnesses prior to trial. He argued that counsel must not have interviewed these witnesses because their trial testimony was inconsistent with his discovery and the things his trial counsel told him. And he asserted that if counsel had interviewed these

¹Christy was charged under the alternative theories of criminal liability that (1) he directly performed the criminal act, (2) he acted pursuant to a conspiracy with others in performing the criminal act, or (3) he aided and abetted others with intent that the criminal act be performed.

witnesses then counsel would have been better prepared for the trial and could have proved that Christy did not follow the victim to the Jack in the Box. We conclude the district court properly determined that Christy's claim was a bare allegation and the district court did not err by rejecting it on that basis. *See id.*

Eighth, Christy claimed trial counsel was ineffective for failing to request and obtain full discovery prior to trial. He appeared to argue that counsel gave him incomplete discovery, he did not receive the discovery from his codefendant's case when their cases were joined, and the lack of full discovery left counsel unprepared for trial. We conclude the district court properly determined that Christy's claim was a bare allegation and the district court did not err by rejecting it on that basis. *See id.*

Ninth, Christy claimed trial counsel was ineffective for failing to keep his and his codefendant's cases separate and for engaging in "antagonistic conduct." He appeared to argue that counsel should have objected to the joinder and should not have presented a defense that was antagonistic to the defense that Christy wanted to present. The district court made the following findings: Counsel was not ineffective because both Christy and his codefendant were charged under the same charging document for the same criminal conduct. "[I]t was proper for them to be tried jointly absent compelling circumstances such as manifest prejudice." And Christy failed to show that he was prejudiced as a result of the joint trial. We conclude these findings are supported by the record and are not clearly wrong. We further conclude that counsel's decisions as to the joinder and what defenses to present during closing argument were tactical decisions, Christy failed to show he was prejudiced by those decisions, and the district court did not err by rejecting this claim. *See Rhyne v. State*, 118

Nev. 1, 8, 38 P.3d 163, 167 (2002) (counsel's decisions regarding if and when to object and what defenses to develop are tactical decisions).

Tenth, Christy claimed trial counsel was ineffective for failing to object when the prosecutor committed misconduct by allowing the victim to falsely testify that he was shot in the abdomen. The district court found that Christy's prosecutorial misconduct claim was belied by the record because the record demonstrated that the prosecutor did not ask improper questions and the victim testified that he was shot in the abdomen, the side, and the back. We conclude the record supports the district court's findings and the district court did not err by rejecting Christy's claim. *See Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made.").

Eleventh, Christy claimed trial counsel was ineffective for failing to object when the prosecutor committed misconduct during her closing argument by falsely stating the attackers went to the victim's home wearing masks. The district court found that the prosecutor incorrectly stated that Christy and his codefendants were wearing masks, Christy was not prejudiced by the prosecutor's incorrect statement, and the jury was instructed not to rely upon the arguments of counsel. We conclude these findings are supported by the record, Christy failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance by a preponderance of the evidence).

Twelfth, Christy claimed trial counsel was ineffective for failing to impeach Detective Kevin Beck's trial testimony with his prior

inconsistent statement regarding the contents of the Jack in the Box surveillance video. The district court's finding that Detective Beck did not question Kelci Sizemore about the video is plainly belied by the record, which plainly demonstrates that Beck asked Sizemore "Why do we have video over at the Jack in the Box of uh [sic] his car in the parking lot driving around?" And Beck's question appears to be inconsistent with his trial testimony that he was not sure if the video was played for the police officers, he did not see the video, and he did not know whether Officer Sabb saw the video. Nevertheless, decisions regarding how to examine witnesses are tactical decisions and Christy did not demonstrate extraordinary circumstances warranting a challenge to counsel's cross-examination of Beck, particularly as there was no record as to what was depicted on the video. *See Rhyne*, 118 Nev. at 8, 38 P.3d at 167. Accordingly, we conclude the district court did not err by rejecting this claim. *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).

Thirteenth, Christy claimed trial counsel was ineffective for failing to challenge a defect in the charging document. He appeared to argue that NRS 193.330 is a punishment statute and does not define a crime, and therefore, the State improperly used NRS 193.330 to accuse him of committing attempted murder. However, any challenge to the charging document on this basis would have been futile because NRS 193.330(1) plainly defines the crime of an attempt to commit a crime as "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it" and NRS 193.330(2) states "[a] person may be convicted of an attempt to commit a crime." Therefore, we conclude Christy did not demonstrate that counsel was ineffective and the district court did not err by rejecting this

claim. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel cannot be deemed ineffective for failing to make futile objections).

Fourteenth, Christy claimed trial counsel was ineffective for failing to seek an evidentiary hearing to view all of the evidence the State planned to present at trial and for failing to seek the suppression of a photograph of the victim's camera because it did not depict the correct time and date. However, Christy did not demonstrate he would have been entitled to an evidentiary hearing on the State's evidence. And any error in the photograph would have gone to its weight and not its admissibility. *See generally Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972). Therefore, we conclude Christy did not demonstrate that counsel was ineffective and the district court did not err by rejecting this claim. *See id.*

Ineffective assistance of appellate counsel

Christy claims the district court erred by denying his petition because appellate counsel was ineffective. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient and resulted in prejudice. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Appellate counsel's performance is prejudicial if an "omitted issue would have a reasonable probability of success on appeal." *Id.* at 998, 923 P.2d at 1114. The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697.

Christy claimed that appellate counsel was ineffective for failing to consult and communicate with him while preparing his direct appeal. However, other than his Jack-in-the-Box-surveillance-video claim, he did not identify any other substantial and meritorious claims that were not raised due to his lack of communication with appellate counsel. And

the record demonstrates that the Jack-in-the-Box-surveillance-video claim was in fact raised on direct appeal. *See Christy v. State*, Docket No. 72486-COA (Order of Affirmance, May 15, 2018). Therefore, we conclude that Christy failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. *See Means*, 120 Nev. at 1012, 103 P.3d at 33.

Christy also claimed that appellate counsel was ineffective for failing to challenge the State's misrepresentation of the evidence. He argued that the prosecutor's misconduct in telling the jury that he and his codefendants wore masks was highly prejudicial and should have been raised on direct appeal. And he further argued that appellate counsel, who was also his trial counsel, did not raise this claim due to a conflict of interest that arose when counsel failed to object to the misconduct during the trial. However, we conclude that Christy failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. *See id.*; *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (discussing plain error review of claims of prosecutorial misconduct).

Cumulative error

Christy claimed the cumulative effect of counsel's errors deprived him of a fair trial. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there was nothing to cumulate because Christy failed to demonstrate any such deficiencies. Therefore, we conclude the district court did not err by rejecting this claim.

Subject matter jurisdiction

Christy claimed the district court lacked subject matter jurisdiction because the charging document was defective. He appears to have argued that he was charged under statutes that do not define a criminal course of conduct. However, even assuming that this claim was properly raised in his petition, we conclude it lacks merit because NRS 193.330(1) and NRS 200.030(1) & (2) define the crimes that the district court has subject matter jurisdiction over. *See Nev. Const. art. 6, § 6; NRS 171.010; United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[T]he term jurisdiction means . . . the court’s statutory or constitutional power to adjudicate the case.” (internal quotation marks omitted)). Therefore, the district court did not err by rejecting this claim.

Jury instructions

Christy claimed the jury was not properly instructed on the theory of vicarious coconspirator liability. However, “claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.” *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). Because Christy did not pursue his jury instruction claim on direct appeal, we conclude the district court properly determined that it was waived and did not err by rejecting this claim.


Evidentiary hearing

Christy claimed he was entitled to an evidentiary hearing on the claims he raised in his petition. We review a district court’s decision not to hold an evidentiary hearing for abuse of discretion. *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015). A district court may reject

a claim without conducting an evidentiary hearing when the claim is belied by the record; is not supported by specific facts, that, if true, would entitle the petitioner to relief; or is procedurally barred and the petitioner has failed to overcome the procedural bar. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). Because Christy's claims were waived, belied by the record, or lacked specific facts that would entitle him to relief, we conclude the district court did not abuse its discretion by deciding his petition without an evidentiary hearing.

Having concluded Christy is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Valerie Adair, District Judge
Derrell Lee Christy, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk