

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARIM J. CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81925-COA

FILED

NOV 05 2021

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

ORDER OF AFFIRMANCE

Carim J. Cruz appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 19, 2019, and a later-filed supplement. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

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

First, Cruz claimed trial counsel was ineffective for failing to object to the admission of evidence of Cruz's history of gun possession on the grounds that it constituted improper extrinsic evidence used to impeach on a collateral matter. Generally, "[i]t is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter." *Jezdik v. State*, 121 Nev. 129, 137, 110 P.3d 1058, 1063 (2005) (alteration in original) (internal quotation marks omitted). However, the State may introduce extrinsic evidence "to show a specific contradiction with the adversary's proffered testimony" where the evidence "squarely contradict[s] the adverse testimony." *Id.* at 139, 110 P.3d at 1065. The testimony of a witness used for the purpose of contradicting the defendant's testimony is "clearly distinguishable from the use of specific acts of misconduct to impeach the accused's character or credibility." *Bostic v. State*, 104 Nev. 367, 372, 760 P.2d 1241, 1244 (1988).

During its case in chief, the defense called two witnesses who both testified they had never seen Cruz with a gun. Cruz then took the stand and testified that he does not carry a gun and had not had a gun for a number of years. Thereafter, the State introduced into evidence images from Cruz's social media page depicting him with guns during the time period when Cruz claimed he did not possess one. The State later called a rebuttal witness who testified that she saw Cruz carry a briefcase with a gun in it during the time period when Cruz claimed he did not have a gun.

This extrinsic evidence squarely contradicted evidence presented during the defense's case regarding Cruz's lack of history of gun possession. Moreover, the Nevada Supreme Court determined on direct appeal that overwhelming evidence supported Cruz's guilt. *See Cruz v. State*, Docket No. 71431 (Order of Affirmance, September 28, 2018). Accordingly, Cruz 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 evidence as constituting improper extrinsic evidence used to impeach on a collateral matter. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Cruz claimed counsel was ineffective for failing to object and move for a mistrial when the State introduced the above-referenced social media images, because the State failed to disclose them prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The three elements of a *Brady* violation are that "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Cruz failed to explain how the images were favorable to him. Accordingly, Cruz 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 images or sought a mistrial due to their admission at trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Cruz claimed counsel was ineffective for failing to conduct an adequate investigation. Specifically, Cruz argued that, had counsel filed a pretrial motion for discovery, Cruz would have received the social media images of him and allowed him to prepare for their impact on his trial. Cruz's bare claim failed to explain how counsel was ineffective for failing to discover images Cruz himself possessed. And overwhelming evidence supported Cruz's guilt. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel conducted an investigation to Cruz's satisfaction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Cruz claimed trial counsel was ineffective for failing to object to the admission of evidence of Cruz's history of gun possession on the grounds that it constituted prior-bad-act evidence. Cruz's bare claim failed to explain how the challenged evidence was of a bad act. And overwhelming evidence supported Cruz's guilt. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected that the challenged evidence amounted to prior-bad-act evidence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Cruz claimed counsel was ineffective for failing to object to a witness's testimony that Cruz's brother gave Cruz another gun after the shooting. Cruz argued the testimony lacked foundation and amounted to prior-bad-act evidence. Cruz's bare claim failed to explain how the

testimony lacked foundation or described a bad act. And overwhelming evidence supported Cruz's guilt. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected that the challenged testimony lacked foundation and amounted to prior-bad-act evidence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Cruz claimed counsel was ineffective for failing to move to strike the jury venire on the ground that it did not represent a fair cross-section of the community. To make a fair-cross-section challenge, a defendant must, among other requirements, make a prima facie showing that there was "underrepresentation [of a distinctive group in the community] due to systematic exclusion of th[at] group in the jury-selection process." *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005) (emphases and internal quotation marks omitted). The district court found that Cruz failed to allege there was systemic exclusion that resulted in the underrepresentation of African-Americans in the jury venire. This finding is supported by substantial evidence in the record. Accordingly, Cruz failed to allege facts that demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel moved to strike the jury venire. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Cruz claimed counsel was ineffective for failing to request a jury instruction that murder is a specific intent crime or object to the lack of such an instruction. Cruz also claimed that a jury instruction on

transferred intent undermined the specific intent requirement. “To hold a defendant criminally liable for a specific intent crime, Nevada requires proof that he possessed the state of mind required by the statutory definition of the crime.” *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

Jury instruction no. 8 provided that first-degree murder “is perpetrated by means of any kind of willful, deliberate, and premeditated killing.” The instruction defined willfulness as “the intent to kill,” and likewise defined deliberation and premeditation. It also instructed that willfulness, deliberation, and premeditation must be proven beyond a reasonable doubt. Jury instruction no. 11 instructed “that the doctrine of transferred intent provides that where a person unlawfully attempts to kill a certain person, but by mistake or inadvertence kills or injures a different person, the crime committed is the same as though the intended victim had been killed or injured.”

Those instructions informed the jury on the specific intent required to find Cruz guilty of first-degree murder, and Cruz failed to explain how they were incorrect. *See* NRS 200.030(1)(a) (defining first-degree murder); *Ochoa v. State*, 115 Nev. 194, 200, 981 P.2d 1201, 1205 (1999) (providing that “the doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended victim is injured”). Additionally, there was overwhelming evidence of Cruz’s guilt. Accordingly, Cruz failed to demonstrate a reasonable probability of a different outcome had counsel argued the jury was improperly instructed

on the specific intent for first-degree murder. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth. Cruz claimed counsel was ineffective for failing to object to a jury instruction on general intent. Cruz claimed the instruction was misleading in light of his being charged with specific-intent murder. Cruz was charged with battery with the use of a deadly weapon, which is a general intent crime. *Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014). Therefore the district court properly instructed the jury regarding general intent. *See Rossana v. State*, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997) (requiring juries be instructed on “the basic elements of the offense charged”); *see also* NRS 193.190 (providing that “[i]n every crime or public offense there must exist a union, or joint operation of act and intention”). Accordingly, Cruz failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the general intent jury instruction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ninth. Cruz claimed counsel was ineffective for failing to request a special cautionary jury instruction regarding a State witness’s testimony. Cruz claimed the witness was mentally challenged and assisted the police in the case against him and, therefore, the witness’s credibility was in question. Cruz argued he was entitled to an instruction consistent with *Champion v. State*, 87 Nev. 542, 490 P.2d 1056 (1971). However, *Champion* is distinguishable because it involved an addict-informer whom the State conceded was unreliable and whose testimony was the only

evidence that the defendant had committed a crime. *See id.* at 543-44, 490 P.2d at 1057. Cruz's bare claim failed to explain why such an instruction is warranted here where the State has not conceded the witness was unreliable and evidence in addition to the relevant witness's testimony supported Cruz's conviction. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel requested the jury instruction sought by Cruz. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Cruz next argues the district court erred by denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that 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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. 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).

First, Cruz claimed appellate counsel was ineffective for failing to argue the district court erred by admitting a witness's testimony explaining that Cruz's brother gave Cruz another gun after the shooting. Cruz claimed counsel should have argued that the testimony lacked

foundation and amounted to prior-bad-act evidence. Cruz's bare claim failed to allege specific facts demonstrating he is entitled to relief, and overwhelming evidence supported Cruz's guilt such that any error would have been harmless. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel challenged the admissibility of the testimony on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Cruz claimed counsel was ineffective for failing to argue the district court erred by giving a flight instruction to the jury. "Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest." *Potter v. State*, 96 Nev. 875, 876, 619 P.2d 1222, 1222 (1980). The district court found that Cruz fled the scene of the crime, he stayed at different places to avoid arrest, he had conversations about leaving the country, and his car was found in California. These findings are supported by substantial evidence in the record, and we conclude there was sufficient evidence of Cruz's flight to warrant giving the flight instruction. Additionally, there was overwhelming evidence of Cruz's guilt. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel challenged the giving of the flight jury instruction on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Cruz claimed counsel was ineffective for failing to argue the trial court erred by not advising the jury that the court would sentence

Cruz on the deadly weapon enhancement. The imposition of a sentencing enhancement falls outside the province of the jury. *Menendez-Cordero v. State*, 135 Nev. 218, 228, 445 P.3d 1235, 1243 (2019). And even though the trial court in *Menendez-Cordero* explained to the jury that the court would determine the sentence for the deadly weapon enhancement, nothing in the *Menendez-Cordero* decision suggests the trial court was required to do so. Accordingly, Cruz failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised the issue on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Cruz claimed counsel was ineffective for failing to "federalize" his prosecutorial misconduct claims on appeal. Cruz failed to explain how he would have gained a more favorable standard of review on direct appeal had his appellate counsel raised arguments under federal laws. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Accordingly, Cruz failed to demonstrate a reasonable probability of success on appeal had counsel raised further arguments based upon federal laws. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Cruz also claimed he was entitled to relief due to the cumulative effect of counsel's errors. Even assuming that multiple deficiencies of counsel may be cumulated to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Cruz has failed to demonstrate he was prejudiced by any combination of alleged

deficiencies. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Cruz also argues on appeal that the district court erroneously failed to make specific findings of fact or conclusions of law to support its denial of each of the claims raised in his initial, pro se petition as required under NRS 34.830(1). Because this court is nevertheless able to address the merits of Cruz's claims on appeal, any error by the district court was harmless. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, we conclude Cruz is not entitled to relief on this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

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