

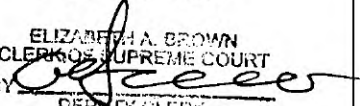
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAEKWON SETREY ROBERTSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 85932-COA

FILED

AUG 07 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Raekwon Setrey Robertson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 29, 2020, and later-filed supplements. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Robertson argues the district court erred by denying his claims of ineffective assistance of trial counsel without 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. 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). 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). We review the district court's decision not to conduct an evidentiary hearing for an abuse of discretion. *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015).

First, Robertson claimed counsel was ineffective for failing to object to evidence admitted during trial on the grounds that it constituted prior bad acts. The State introduced an electronic message sent from Robertson to a coconspirator on the day of the offenses asking him if he and the coconspirator's brother wanted to "hit a house tonight." Robertson explained that the group would include himself, the two brothers, and another coconspirator who had "already said yeah." Robertson was charged with conspiring with the others in the group to rob the victim, attempting to rob the victim, and murdering the victim. Robertson claimed that because he was not charged with burglary or home invasion, the messages were not relevant to the conspiracy or his intent to rob the victim.

Robertson disputed that he planned or was with the group when they committed the offenses. The message was relevant to establish that Robertson sought to engage in a criminal association with the others in the group and that his criminal relationship with them developed prior to the offenses. Accordingly, the evidence was admissible, *see Fields v. State*, 125 Nev. 785, 792-93, 220 P.3d 709, 714 (2009) (applying cases and holding that evidence of an uncharged criminal conspiracy may be admitted for a nonpropensity purpose under NRS 48.045(2)), and Robertson failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for

counsel's alleged error. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Second, Robertson claimed counsel was ineffective for failing to seek severance of his trial from that of D. Wheeler's, the only codefendant with whom Robertson was jointly tried. Robertson claimed he was prejudiced at trial by his and Wheeler's mutually antagonistic defenses. The district court found that Robertson's defense theory was that the State could not prove beyond a reasonable doubt he killed the victim and that Wheeler's defense theory was that Wheeler was not a member of the foursome that killed the victim because he left the group before the victim was killed. The district court also found that the jury could have found both defense theories viable and acquitted both defendants. The district court's findings are supported by substantial evidence. Robertson's and Wheeler's defenses were not mutually exclusive. Robertson thus failed to demonstrate that his defense was mutually antagonistic to Wheeler's defense such that he was entitled to a severed trial. *See* NRS 174.165 (providing when a defendant is entitled to a severed trial); *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 122-123 (2002) (describing antagonistic defenses as "mutually exclusive"). Accordingly, Robertson failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Third, Robertson claimed counsel was ineffective for failing to investigate his mental health conditions or present evidence of them during trial to demonstrate he did not have the specific intent to commit the crimes.

Robertson alleged (1) he was off his mental health medications at the time of the offenses; (2) when he was off his medications, he would hear voices and suffer from paranoia and blackouts; and (3) he had no memory of the offense.

The district court denied relief because it found (1) that counsel's failure to raise the issue at trial was not evidence that counsel failed to investigate the issue and (2) that counsel made a strategic decision. The district court did not properly apply the evidentiary hearing standard. In determining whether an evidentiary hearing was required, the district court must to assume the petitioner's factual allegations were true unless the allegations were belied by the record. *See Hargrove*, 100 Nev. at 503, 686 P.2d at 225. Robertson's claims are not belied by the absence of evidence in the record. *See Berry*, 131 Nev. at 969, 363 P.3d at 1156 (explaining when a claim is belied by the record). Accordingly, we conclude the district court abused its discretion by denying this claim without conducting an evidentiary hearing. Therefore, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Fourth, Robertson claimed counsel was ineffective at sentencing for failing to argue for specific sentences and present to the court his mental health issues or other mitigating evidence. Robertson alleged that counsel failed to communicate with him in advance of sentencing and had no discernable plan or strategy for presenting mitigating evidence or arguments. Robertson supported his argument with specific factual allegations that are not belied by the record and, if true, would have entitled him to relief. Accordingly, we conclude the district court abused its discretion by denying this claim without conducting an evidentiary hearing.

Therefore, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Robertson also 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). 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, Robertson claimed counsel was ineffective for failing to communicate with him during the appellate process. Robertson alleged the lack of communication prevented him from having any input in the appeal process. Robertson failed to explain what input he would have offered during the appeal process.<sup>1</sup> Accordingly, Robertson failed to demonstrate a reasonable probability of a different outcome on appeal but for counsel's alleged errors. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Second, Robertson claimed counsel was ineffective because his opening brief on appeal failed to argue certain facts from Robertson's trial

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<sup>1</sup>Robertson alleges for the first time in his reply brief on appeal what his input into the appeal process would have been. Because these arguments were not raised below, we need not consider them. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

in support of his claim that insufficient evidence supported his convictions. After viewing the evidence in the light most favorable to the prosecution, the Nevada Supreme Court concluded there was sufficient evidence to support Robertson's convictions. *See Robertson v. State*, No. 81400, 2021 WL 1964229 (Nev. May 14, 2021) (Order of Affirmance). Accordingly, Robertson failed to demonstrate a reasonable probability of success had counsel raised on appeal the facts Robertson alleged in his petition. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (providing the standard for reviewing sufficiency of the evidence includes "viewing the evidence in the light most favorable to the prosecution" (quotation marks omitted)). Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Third, Robertson claimed counsel should have challenged on appeal the district court's denial of his fair-cross-section claim. In his petition, Robertson claimed the trial court had found that African Americans were underrepresented but that Robertson had failed to demonstrate the underrepresentation was due to systematic exclusion. Robertson did not allege any facts that demonstrated the trial court's decision was erroneous, nor did he allege what appellate counsel should have argued on appeal. Accordingly, Robertson failed to allege specific facts that demonstrated counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Finally, Robertson claimed that counsel was ineffective for failing to challenge on appeal the admission of the message sent from

Robertson to his codefendant inviting him and another to “hit a house tonight.” For the reasons discussed above, Robertson failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Michelle Leavitt, District Judge  
Steven S. Owens  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk