

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAUL GONZALES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86489-COA

FILED

JUN 13 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

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

Raul Gonzales appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 22, 2021, and supplemental pleadings. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Gonzales argues the district court erred by denying his claims of ineffective assistance of trial counsel.<sup>1</sup> 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

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<sup>1</sup>This court previously ordered supplemental briefing to address whether the petition was procedurally barred. After reviewing the supplemental briefing, under the circumstances presented in this case we conclude that the petition should be addressed on the merits.

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).

First, Gonzales claimed that counsel was ineffective for failing to properly argue for a voluntary manslaughter jury instruction. Gonzales contended that counsel should have argued the evidence supported a voluntary manslaughter instruction based on heat of passion because there was evidence that Gonzales (1) had been using drugs and was extremely high, (2) was agitated because he and the victim were supposed to meet prior to the victim being shot but they kept missing each other and because the victim was out to get him, and (3) believed his life was in danger because the victim found out Gonzales was working for law enforcement.

After the State rested its case, counsel filed a written motion seeking a voluntary manslaughter instruction. Counsel thereafter argued that the instruction was warranted because T. Casillas testified that Gonzales was in an "agitated state" prior to the shooting, and because of conversations Ms. Casillas had with the victim, "there was in all likelihood some sort of confrontation between the two if they had met." After argument from the State, the district court stated that it had not heard evidence supporting voluntary manslaughter and denied Gonzales' motion. In light of counsel's actions to secure the instruction, we conclude Gonzales failed to demonstrate deficiency.

Gonzales also failed to demonstrate prejudice. The district court concluded that Gonzales failed to demonstrate that the record supported voluntary manslaughter because (1) Gonzales failed to identify evidence of a highly provoking injury or attempted injury, (2) the evidence showed the killing was deliberate and planned, (3) there lacked evidence of

provocation and (4) Gonzales' actions after the killing did not demonstrate he acted in a heat of passion.

The district court found that Gonzales drove to the victim's house while it was dark, parked away from the victim's house, left the car running, knocked on the victim's garage door, waited for the entryway light to turn off, shot the victim through the door while the victim was inside the house and Gonzales was outside, disposed of the shell casings, and immediately took a shower to wash away evidence. These findings are supported by the record. Thus, the proffered evidence Gonzales alleged counsel should have argued in favor of the instruction did not support voluntary manslaughter because it did not demonstrate that Gonzales shot the victim based on an "irresistible impulse of passion . . . caused by a serious and highly provoking injury, or attempted injury, sufficient to excite such passion in a reasonable person." *Allen v. State*, 98 Nev. 354, 356, 647 P.2d 389, 390-91 (1982). Accordingly, Gonzales failed to demonstrate a reasonable probability of a different outcome at trial had counsel acted differently. Therefore, we conclude that the district court did not err by denying this claim.

Second, Gonzales claimed that counsel was ineffective for failing to retain a false-confessions expert to explain how Gonzales' confession could have been coerced, mistaken, or otherwise unreliable. Gonzales argued that the expert could explain to the jury why characteristics possessed by Gonzales at the time of the interrogation and the tactics police used during Gonzales' interrogation could contribute to a false confession.

The district court found that counsel "strategically chose to present to jurors the same issues that the expert would have presented at

trial.” While counsel did elicit testimony and argue many of the points Gonzales’ false-confessions expert raised in her report, nothing contained in the record demonstrates that counsel’s decision not to call the expert was strategic. Further, Gonzales alleged counsel interviewed the jurors after trial and that jurors stated they would have acquitted Gonzales without his confession. Thus, issues related to Gonzales’ confession were key to his case. In light of these circumstances, the district court erred by denying this claim without conducting an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (determining an evidentiary hearing is required where a petitioner raises claims supported by specific facts that are not belied by the record and that, if true, would entitle the petitioner to relief). 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.

Third, Gonzales claimed that counsel was ineffective for failing to present a defense based on Gonzales’ cooperation with the FBI pursuant to *United States v. Burrows*, 36 F.3d 875, 881 (9th Cir. 1994). Gonzales alleged that counsel should have asserted a “public authority” defense or argued that Gonzales lacked the intent necessary to commit murder based on his honest belief he was acting in cooperation with the government.

A public authority defense is an affirmative defense where “the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a covert activity.” *Burrows*, 36 F.3d at 881 (citation and internal punctuation omitted). Where the government official has no authority to empower the defendant to perform the acts in question, the defendant may not rely on the defense. *Id.* (citation and internal punctuation omitted). An assertion that the

defendant lacked intent based on his honest belief “he was performing the otherwise-criminal acts in cooperation with the government, . . . is not a defense *per se*, but a defense strategy aimed at negating the mens rea for the crime, an essential element of the prosecution’s case.” *Id.* (citation and internal punctuation omitted).

With regard to a public authority defense, the district court found that the defense was not available to Gonzales because he failed to allege specific facts demonstrating he had authority to kill the victim as the documents Gonzales attached in support of his petition provided that the FBI cannot authorize a confidential informant to participate in acts of violence or initiate or instigate a plan or strategy to commit a crime. This finding is supported by the record.

Gonzales is also unable to demonstrate that a “lack of intent” defense strategy would have been successful because he failed to allege specific facts demonstrating that he honestly believed he killed the victim in cooperation with the government. In light of these circumstances, Gonzales failed to demonstrate counsel’s performance was deficient or a reasonable probability of a different outcome at trial had counsel presented a defense based on Gonzales’ cooperation with the FBI. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Gonzales claimed that counsel was ineffective for failing to adequately investigate or obtain documents related to Gonzales’ cooperation with the FBI. Gonzales contended that assertion of a defense based on his lack of intent to commit murder would have shifted the burden to the State to produce the FBI documents related to his cooperation. The district court found that counsel attempted to obtain the documents. This finding is supported by the record. Further, as stated above, Gonzales failed

to demonstrate he lacked intent based on his alleged cooperation with the FBI. And the district court found that Gonzales failed to allege what additional actions counsel should have taken to obtain the documents. This finding is supported by the record.

In addition, Gonzales failed to allege what the results of any investigation would have been. In light of these circumstances, Gonzales failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel further investigated or attempted to obtain the FBI documents. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim.

Fifth, Gonzales claimed that counsel was ineffective for failing to impeach two State witnesses, Ms. Casillas and J. Gascon, based on their prior felony convictions or discuss their credibility during closing arguments. The district court found that both witnesses testified about their prior felony convictions during direct examination by the State and that counsel cross-examined Ms. Casillas about her criminal history. These findings are supported by the record. And Gonzales failed to explain how counsel should have impeached the witnesses or what arguments counsel should have made during its closing argument. In light of these circumstances, Gonzales failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel acted differently regarding Ms. Casillas and Ms. Gascon. Therefore, we conclude the district court did not err by denying this claim.



Gonzales next argues the district court erred by denying his claim alleging the ineffective assistance of appellate counsel. 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).

Gonzales claimed that counsel should have argued on appeal that the district court erred by denying Gonzales a voluntary manslaughter jury instruction. As stated above, Gonzales failed to demonstrate he was entitled to a voluntary manslaughter jury instruction. Accordingly, he necessarily failed to demonstrate that counsel was deficient or that this claim would have had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Finally, Gonzales argues that 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), Gonzales failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we

conclude the district court did not err by denying this claim. 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.<sup>2</sup>

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

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

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

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

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<sup>2</sup>To the extent Gonzales raises new argument and/or facts on appeal, we decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Insofar as Gonzales raises other arguments on appeal that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.