

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERICK MEDINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87971-COA

FILED

DEC 09 2022

ELIZABETH A. BR
CLERK OF SUPREME
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Erick Medina appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 6, 2022, and a supplemental petition filed on December 8, 2022. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Medina argues the district court erred by denying his claims that trial and appellate counsel were ineffective. 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*). 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, 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).

Medina claimed that trial counsel were ineffective for failing to object to prosecutorial misconduct when the State questioned Medina regarding Medina's communications with his counsel for a child custody matter in California and his trial counsel. Medina identified three incidents at trial where he alleged that the State improperly asked about communications with counsel.

First, the State asked Medina questions about the child custody petition he filed in California. Medina responded by telling the State what his California counsel told him—that his ex-girlfriend filed a custody petition first—and also by telling the State that his California counsel told him to wait until the instant case was resolved before proceeding further on the custody petition. Later, in response to a question as to why Medina included a particular untrue statement in his custody petition, Medina testified that his California counsel put that information in the petition.¹ Medina failed to demonstrate counsel were deficient for failing to object because Medina offered the testimony about his California counsel in response to questions that were not specifically about counsel. Further, at an evidentiary hearing on Medina's postconviction habeas petition, one of

¹During closing argument, and to impeach Medina, the State argued that Medina was hiding behind his California counsel as to why there were lies in the custody petition.

Medina's counsel testified he did not object to these questions as Medina's answers were helpful to the defense because they put the blame for filing false statements on Medina's California counsel rather than on Medina. Thus, the decision to not object was a strategic one, and strategic decisions are virtually unchallengeable absent extraordinary circumstances which are not present here. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (“[C]ounsel’s strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances.” (internal quotation marks omitted)). Further, Medina failed to demonstrate a reasonable probability of a different outcome at trial given this testimony provided an excuse as to why Medina's petition contained untrue statements. Therefore, we conclude that the district court did not err by denying this claim.

Second, the State asked questions about whether trial counsel practiced Medina's testimony with him. Medina testified he did not practice his testimony. We conclude counsel were deficient for failing to object. *See* NRS 49.095 (explaining the general rule of privilege between counsel and client.). However, Medina failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected because Medina testified he did not practice his testimony and the State did not bring this questioning up again. Therefore, we conclude that the district court did not err by denying this claim.

Third, the State asked Medina about when he hired trial counsel. Medina argued this questioning intimated that Medina hired counsel because he had a guilty mind. While this question may have been improper and counsel should have objected, Medina failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. The State asked one fleeting question and did not argue to the jury that

Medina's hiring of counsel showed a guilty mind. Therefore, we conclude that the district court did not err by denying this claim.²

Next, Medina claimed that trial counsel were ineffective for failing to request a voluntary intoxication jury instruction. Medina argued that there was evidence presented of his intoxication on the night of the incident and the jury was interested in how much he drank based on a question asked by a juror. The district court found that counsel's decision not to request a voluntary intoxication instruction was a strategic decision made in consultation with Medina. Further, the district court found that Medina testified to specific facts related to the incident that were contrary to presenting a voluntary intoxication defense. The record supports the findings of the district court.

At the evidentiary hearing, trial counsel testified that they did not pursue a voluntary intoxication defense because Medina was against that defense. Specifically, counsel testified that Medina did not want to present a defense that was not true. Further, counsel testified that a voluntary intoxication defense was antagonistic to the defense that Medina wanted to present—that the incident at question did not happen. Counsel made a strategic decision, in consultation with Medina, to not pursue a voluntarily intoxication defense and thus to not seek related jury instructions. And strategic decisions are virtually unchallengeable absent

²Medina also argued that appellate counsel was ineffective for failing to raise these unobjected-to prosecutorial misconduct claims on appeal. Given our resolution of these claims above, we conclude that Medina failed to demonstrate these claims had a reasonable probability of success on appeal. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (stating that, to demonstrate plain error, an appellant must show there was an error, the error was plain or clear, and the error affected appellant's substantial rights).

extraordinary circumstances which are not present here. *See Lara*, 120 Nev. at 180, 87 P.3d at 530. Further, Medina testified at trial that, while he had been drinking that day, he was not very intoxicated. Thus, we conclude that counsels' performances were not deficient and that Medina failed to demonstrate a reasonable probability of a different outcome at trial had counsel requested a voluntary intoxication instruction. Therefore, we conclude that the district court did not err by denying this claim.

Next, Medina claimed that trial counsel were ineffective for failing to make a proper fair-cross-section challenge to the jury venire. The jury venire for Medina's trial was 16% Hispanic whereas the community at large was 32% Hispanic. Although trial counsel objected to the venire, Medina argued in his petition that counsel should have requested an evidentiary hearing because the jury list did not include data from all of the required state agencies.

A defendant has the right to a "jury selected from a representative cross-section of the community." *Valentine v. State*, 135 Nev. 463, 464, 454 P.3d 709, 713 (2019) (quotation marks omitted). To establish a prima facie violation of the right to a jury selected from a fair cross-section of the community, a defendant must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 465, 454 P.3d at 713 (emphasis omitted). "[A]n evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima

facie violation of the fair-cross-section requirement.” *Id.* at 466, 454 P.3d at 714.

The district court found that counsel did make a proper objection to the jury venire and that it would have been futile to further challenge the venire based on the testimony provided by the jury commissioner at the evidentiary hearing on Medina’s postconviction habeas petition. Moreover, the district court found that Medina failed to demonstrate systematic exclusion of Hispanics from the jury list. These findings are supported by the record. At the evidentiary hearing, the jury commissioner testified that the jury list was created by considering the statutorily required information, including data from the Nevada Department of Motor Vehicles, Nevada Energy, voter rolls, and the Department of Employment, Training, and Rehabilitation. Medina did not present any additional information to demonstrate the underrepresentation of Hispanics in the venire was due to systematic exclusion. Thus, we conclude that Medina failed to demonstrate counsels’ performance were deficient because he has not shown specific allegations that, if true, would have established a prima facie violation and thus has not shown counsel acted unreasonably in not requesting an evidentiary hearing. We further conclude that Medina has not demonstrated a reasonable probability of a different outcome had trial counsel requested an evidentiary hearing at trial on this issue. Therefore, we conclude that the district court did not err by denying this claim.³

³Medina also argued that appellate counsel was ineffective for failing to raise the fair cross-section claim on appeal. Given our conclusions above, we conclude that Medina failed to demonstrate this claim had a reasonable probability of success on appeal

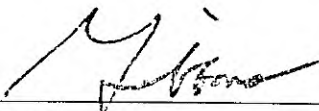
Next, Medina claimed that trial counsel were ineffective for failing to meaningfully challenge and impeach the State's expert, a nurse who performed the forensic interview of the victim. Specifically, he claimed that counsel should have been aware of national standards with regard to forensic interviews and should have questioned the expert regarding: (1) the length of time between the incident, the disclosure, and the interview; (2) the setting of the interview room, and (3) the expert's lack of skillful questions to challenge the veracity of the victim's statements.

The district court found that the questioning of the expert was both strategic and thoughtful. Further, the district court found that, based on the evidence presented at trial, Medina failed to demonstrate a reasonable probability of a different outcome at trial had counsel further questioned the expert. These findings are supported by the record. The counsel that questioned the expert at trial testified at the evidentiary hearing that he had taken several continuing legal education classes and read numerous pieces of literature on forensic interviews during his career. He testified that, while not familiar with the standards referenced by Medina at the evidentiary hearing, he was familiar with how forensic interviews were conducted and what questions to ask. Counsel also testified that he purposely did not want to highlight the forensic interview in fear of bolstering the victim's credibility. Given this testimony, counsel's questioning of the expert was a strategic decision, *see Lara*, 120 Nev. at 180, 87 P.3d at 530, and Medina failed to demonstrate that counsel's performance was deficient. We further conclude that Medina failed to show a reasonable probability of a different outcome at trial had counsel further questioned the expert because counsel was able to introduce the information Medina identified through the expert and others testifying at trial.

Therefore, we conclude that the district court did not err by denying this claim.

Finally, Medina claimed that the cumulative errors of counsel entitled him to relief. Even if multiple instances of deficient performance could 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), we conclude that Medina failed to demonstrate the cumulative errors of counsel entitled him to relief. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating the relevant factors to consider in evaluating a claim of cumulative error). Therefore, we conclude that the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

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