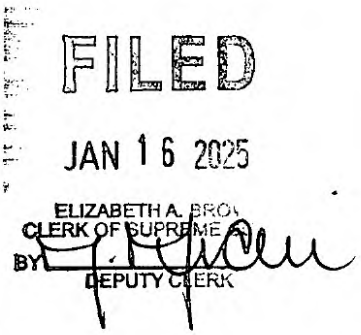
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALAN HONEYESTEWA,
Appellant,
vs.
JAMES DZURENDA, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 87815-COA



ORDER OF AFFIRMANCE

Alan Honeyestewa appeals from a district court order dismissing a postconviction petition for a writ of habeas corpus filed on May 11, 2023. Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Honeyestewa argues the district court erred by denying his claims of ineffective assistance of 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. 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

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allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Honeyestewa claimed trial counsel was ineffective for failing to raise a *Batson*[1] challenge to the State's exercise of a peremptory strike against prospective juror no. 1. Honeyestewa contended that both he and the prospective juror were Native American, that the prospective juror was the only Native American, and that counsel "had raised the issue of [Honeyestewa's] ethnicity during" voir dire. If a defendant makes a *Batson* objection at trial, the district court must use the following three-step process to resolve the objection: "(1) the opponent of the peremptory challenge make[s] a prima facie showing of discrimination" based on race or gender; "(2) if the prima facie showing is made, the proponent present[s] a nondiscriminatory explanation for the peremptory challenge; and (3) the district court determin[es] whether the opponent has proven purposeful discrimination." *Dixon v. State*, 137 Nev. 217, 219, 485 P.3d 1254, 1257 (2021).

Although Honeyestewa contended that he could have satisfied the first step of the *Batson* inquiry had such a challenge been raised, the district court found there was a race-neutral explanation for the strike: the prospective juror stated during voir dire that she and Honeyestewa grew up together and that she did not know if she could be fair and impartial. The district court's finding is supported by the record.[2] Moreover, Honeyestewa

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[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

[2]We note that this court previously recognized "the record reveal[ed] a nondiscriminatory basis for the challenge." *Honeyestewa v. State*, No.

did not allege that any race-neutral reasons were merely a pretext for engaging in purposeful discrimination. Therefore, Honeyestewa failed to allege specific facts indicating a *Batson* challenge would have been successful or that counsel was deficient for failing to raise such a challenge. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Honeyestewa appeared to claim counsel was ineffective for failing to have a bullet removed from his body.[3] Honeyestewa contended that removal of the bullet would show it came from his codefendant T. Lopez's gun and would support Honeyestewa's theory of defense that he did not intend to rob the victim and was instead lured to the victim's house by Lopez under false pretenses because it would show Lopez intended to kill him.

Prior to trial, counsel and the State entered a stipulation wherein they agreed that two bullets inside Honeyestewa's body might be relevant to Honeyestewa's case and that the Elko County Sheriff should

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82351-COA, 2022 WL 1183536, at *4 (Nev. Ct. App. Apr. 20, 2022) (Order of Affirmance).

[3]In his petition, Honeyestewa requested that the district court order the removal of the final bullet in his body because it may have evidentiary value. Although Honeyestewa did not specify how counsel was deficient in failing to have this bullet removed previously, he did contend counsel was ineffective for failing to investigate and pursue "crucial defense leads." The State and district court interpreted Honeyestewa's petition as including a claim that counsel was ineffective for failing to have the bullet removed, and Honeyestewa does not challenge the district court's construal of this claim on appeal.

make arrangements with a medical facility or authorized medical professional to have the bullets removed. As a result of this stipulation, the trial court entered an order requiring the Elko County Sheriff to make such arrangements. Although Honeyestewa contended that a bullet remains in his body, he failed to allege why the bullet was not removed from his body or what further actions counsel should have taken to pursue this evidence. *See Chappell v. State*, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (reiterating "a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently" but must instead "*specifically explain* how his attorney's performance was objectively unreasonable" (quotation marks omitted)).

Moreover, even assuming the removal of the bullet could demonstrate what Honeyestewa alleged—that the bullet came from Lopez's gun—this fact would not constitute strong evidence that Lopez intended to kill Honeyestewa or that Honeyestewa had no intention to rob the victim when he arrived at the victim's house.[4] Therefore, Honeyestewa failed to

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[4]At trial, Honeyestewa testified that he owned and carried a Springfield XD 40 subcompact handgun and that he pulled out this weapon and fired it during a confrontation at the victim's home. The victim's girlfriend testified that she was lying in bed with the victim when she heard her front door being kicked. She testified that the front door was locked, that it was kicked in, and that two people entered the home. She also testified that these individuals kicked in her bedroom door, aggressively confronted her and the victim, and that a firefight ensued. An eyewitness also testified that he saw three individuals walk to the victim's front door, he heard sounds like someone kicking the door, and shots were fired immediately afterwards. Forensic evidence indicated that the gun belonging to Honeyestewa fired at least 12 bullets, one of which penetrated the victim's upper abdomen, and that Honeyestewa was the only person of those present at the shooting who had held the handgrip portion of his gun. Another witness testified that she saw Honeyestewa shortly after the

allege specific facts indicating counsel was deficient for failing to have the bullet removed or a reasonable probability of a different outcome at trial but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Honeyestewa claimed counsel was ineffective for failing to interview and call key witnesses to testify at trial: R. Malendez, who was in jail with Lopez prior to Honeyestewa's trial,[5] and D. Grate, a private investigator. Malendez purportedly informed Grate that Lopez had told him (1) Lopez shot Honeyestewa and intended to set Honeyestewa up to take the fall for a botched robbery; (2) Lopez and the victim's girlfriend had planned the robbery and murder so that the victim's girlfriend could collect on the victim's life insurance policy; and (3) Lopez and the victim's girlfriend were having an affair. Honeyestewa contended that these statements supported his claim that he had no intention of committing a robbery or a murder and that Lopez wanted to set him up for the botched robbery and murder.

Lopez's purported statements to Malendez constitute hearsay if testified to by Malendez and double-hearsay if testified to by Grate. *See* NRS 51.035 (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted); *see also* NRS 51.067 (stating "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception to the hearsay rule").

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shooting, that it looked like he was about to die, and that when she tried calling 9-1-1, Honeyestewa stated "No cops, no cops" and grabbed the phone from her.

[5]The parties do not dispute that Lopez pleaded guilty to first-degree murder and was sentenced before Honeyestewa's trial.

Honeyestewa contended that the statements would fall under the state-of-mind exception to the hearsay rule.[6] *See* NRS 51.105(1) ("A statement of the declarant's *then existing* state of mind, . . . such as intent, plan, motive. design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule." (emphasis added)). However, Lopez's statements were allegedly made at some unspecified time after the offense occurred; they do not reveal Lopez's then-existing state of mind, but rather recall what Lopez had previously intended or planned. Therefore, Lopez's statements would not be admissible under the state-of-mind exception to the hearsay rule.[7] *See* NRS 51.105(2) ("A statement of memory or belief to prove the fact remembered or believed is inadmissible under the hearsay rule . . . ."); *see also Carter v. State*, 121 Nev. 759, 768, 121 P.3d 592, 598 (2005) (holding NRS 51.105(1) did not apply where "the statements were made some months after the alleged sexual assault").

Honeyestewa failed to identify any testimony from Malendez or Grate that would have been admissible at trial. Therefore, he failed to allege specifics facts indicating counsel was deficient for failing to interview or call these witnesses or a reasonable probability of a different outcome at

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[6]Honeyestewa also appeared to claim that Lopez's statements would not constitute hearsay because they would not be offered for the truth of the matter asserted. We reject this claim. Honeyestewa conceded that these statements were hearsay if used to prove that Lopez wanted to kill him. Although Honeyestewa claimed these statements could also be used to show why Lopez shot him, such use would still be for the truth of the matter asserted.

[7]We note that this court previously concluded that the district court did not abuse its discretion in excluding statements Lopez made to a private investigator as inadmissible hearsay. *See Honeyestewa*, No. 82351-COA, 2022 WL 1183536, at *2-4.

trial but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
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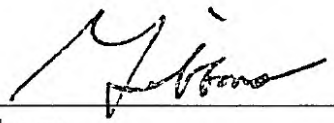

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Kriston N. Hill, District Judge
Kirsty E. Pickering Attorney at Law
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk