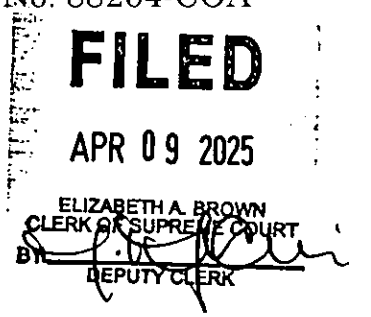
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN RAY KERN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88264-COA



ORDER OF AFFIRMANCE

Stephen Ray Kern, Jr. appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on April 24, 2013, and supplements filed on January 27, 2016; September 20, 2017; and January 11, 2020. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Kern argues the district court erred by denying his claims that trial counsel was 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*). 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

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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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Kern argued trial counsel was ineffective for failing to properly make a fair-cross-section challenge to the jury venire. "The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). "[A]s long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." *Id.* at 940, 125 P.3d at 631.

> A defendant alleging a violation of the right to a jury selected from a fair cross section of the community must first establish a prima facie violation of the right by showing: (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.

Valentine v. State, 135 Nev. 463, 465, 454 P.3d 709, 713 (2019) (quotation marks omitted).

At trial, counsel objected to the makeup of the jury based on the fact that there were only two African Americans in the venire. The trial court denied the objection because the venire had six people who appeared to be minorities. Trial counsel was asked if he wanted to make any additional record, and he declined. In the instant petition, Kern argued trial counsel should have requested an evidentiary hearing regarding whether African Americans were systematically excluded from the jury venire. He asserted there were only two African Americans, a distinctive group, included in the 65-person venire, meaning only 3% of the venire was African American. Referencing the 2010 Clark County Census, Kern argued that 10.5% of the Las Vegas population was African American.[1] Based on these numbers, Kern claimed that the comparative disparity of the venire was 70.4% and that comparative disparities over 50% indicate the representation of a distinct group is likely not fair and reasonable. Finally, Kern argued that the venire was not compiled using the data sources required by NRS 6.045 and that the failure to include this data resulted in systematic exclusion of African Americans. Kern argued that, had trial counsel presented this information to the trial court, counsel would have presented a prima facie case of systematic exclusion and would have been granted an evidentiary hearing at trial regarding his fair cross-section objection.

We agree Kern met the first factor for establishing a prima facie violation of the right to a jury selected from a fair cross section of the

[1]We note that Kern did not provide citation to the 2010 census either in his petition below or on appeal.

community; African Americans are a distinct group. *See Williams*, 121 Nev. at 940, 125 P.3d at 631. However, Kern did not provide this court with the data to support the second factor. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *see also* NRAP 30(b)(3). But even assuming Kern's representations about the data were correct, he has not provided sufficient information to support the third factor.

In this case, just prior to jury selection, the trial court stated the jury commissioner compiled the jury venire from Department of Motor Vehicles records, voter registration records, and power bills.[2] Kern failed to demonstrate that the jury commissioner's use of these sources to compile the jury venire systematically excluded African Americans from the jury venire. And Kern's general allegation regarding the data sources did not demonstrate systematic exclusion of African Americans. *See, e.g.*, *Valentine*, 135 Nev. at 466-67, 454 P.3d at 714-15 (finding Valentine made specific allegations that Hispanics were systematically excluded when he alleged the Eighth Judicial District Court sent an equal number of jury summonses to each ZIP code without ascertaining the percentage of the population in each ZIP code). Thus, because Kern failed to demonstrate a

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[2]We note Kern relies on the wrong version of NRS 6.045. In 2013, NRS 6.045 did not require that the jury commissioner compile the list using specific sources of data. Rather, the statute merely said the jury commissioner was to select "qualified electors of the county not exempt by law from jury duty, whether registered as voters or not," allowing the jury commissioner to select the jurors "by computer whenever procedures to assure random selection from computerized lists are established by the jury commissioner." 2003 Nev. Stat., ch. 255, § 2, at 1348.

prima facie violation of the right to a jury chosen from a fair cross section of the community, Kern failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel made further argument on this issue. *See id.* at 466, 454 P.3d at 714 (stating "it makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant's specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law"). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing on this claim.

Second, Kern argued counsel was ineffective for failing to file a motion to suppress evidence based on NRS 171.123. NRS 171.123 states:

> Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime . . . [and] [a] person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.

After sixty minutes, the detention is considered a de facto arrest which requires probable cause. *See State v. McKellips*, 118 Nev. 465, 471, 49 P.3d 655, 660 (2002).

Kern argued he was detained more than sixty minutes before the lead detective arrested him. Kern was suspected of committing sexual assault and robbery. During the incident, the victim's purse and cell phone were stolen. On the same day the crimes were committed, the police were able to locate the victim's cell phone and spoke with a man who said he

bought the cell phone. The man did not know who sold him the cell phone, but he called the police days later when he saw the seller and gave the police the seller's location. The lead detective conveyed this information and a description of the perpetrator to the "problem-solving unit," who were able to locate and detain Kern. When the lead detective arrived, he noticed Kern was wearing a distinctive necklace matching the victim's description of a necklace the perpetrator wore, and the detective arrested Kern.

There is information in the record that the lead detective who sent the problem-solving unit to detain Kern called the unit at 7:00 p.m. The arrest report indicates Kern was arrested at 8:30 p.m. There is no information as to how long it took the problem-solving unit to arrive at Kern's location or what time the detention began. Thus, it is not clear whether he was arrested within sixty minutes of being detained.

The district court found the police had probable cause to arrest Kern based on their collective knowledge. We agree. The police had a description of the perpetrator from the victim, which matched Kern, the cell phone at issue was sold hours after the crimes, indicating it was likely sold by the perpetrator, and the person who purchased the cell phone[3] identified Kern as the seller and gave police Kern's location. Based on the above, the police had probable cause to arrest Kern when they encountered him. *McKellips*, 118 Nev. at 472, 49 P.3d at 660 ("Probable cause to arrest exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of

[3]We note the person who purchased the cell phone did not match the description of the perpetrator given by the victim.

reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested." (internal quotation marks omitted)). Thus, because the officers had probable cause to support Kern's de facto arrest, Kern failed to demonstrate counsel was deficient for failing to file the motion or a reasonable probability of a different outcome had counsel filed the motion. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing on this claim.

Third, Kern argued counsel was ineffective for failing to file a motion to suppress his statement to police. He argued that his statement was not voluntary and that the police used ruses and lies to get him to confess. He also argued he was under the influence of drugs and alcohol. The court considers the totality of circumstances to determine the voluntariness of a valid waiver, including "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

Kern concedes the first three factors weigh against him as he was not young, he was educated, and he was given the *Miranda*[4] warnings. However, he argued the length of his detention and the repeated and prolonged nature of the questioning demonstrated his statement was not voluntary. Assuming, based on the above, that Kern was detained

[4]*Miranda v. Arizona*, 384 U.S. 436 (1966).

beginning around 7:00 p.m., the record shows his interview commenced at 9:50 p.m. and ended at 10:55 p.m. Thus, at slightly less than four hours, his detention prior to and including the interview was not excessive. And given that the length of the actual interview was just over an hour, Kern failed to demonstrate the questioning was prolonged. As to the nature of the questioning, Kern argued the questioning was inappropriate because the detectives lied about the existence of evidence and made statements about possible prison sentences. The detectives feigned certain items of evidence existed in this case, but "an officer's lie about the strength of the evidence . . . is, in itself, insufficient to make the confession involuntary." *See Sheriff v. Bessey*, 112 Nev. 322, 324-25, 914 P.2d 618, 619-20 (1996). The detectives also made statements about Kern going to prison; however, the statements were not made in the context of the police telling the prosecutor about Kern's alleged failure to cooperate, as was determined to be inappropriate in *Passama*, 103 Nev. at 215, 735 P.2d at 323, and Kern failed to demonstrate the detectives' statements were impermissible.

Kern also argued the use of physical punishment, such as the deprivation of food or sleep, demonstrated his statement was not voluntary. It does not appear Kern was provided with food and drink during his detention, but it also does not appear he requested either. As to prolonged physical pain, Kern did complain of a headache and "seeing things," but when given an opportunity to end the interview at that point, he continued the interview.

Finally, Kern argued his statement was not voluntary because of his drug and alcohol use. Kern stated he had consumed alcohol and ingested controlled substances around 4:00 p.m. that day. However, Kern's

answers to the questions were appropriate, and he was able to participate in the interview. *See Chambers v. State*, 113 Nev. 974, 982, 944 P.2d 805, 809-10 (1997).

Given the totality of the circumstances, Kern failed to demonstrate his statement to police was not voluntary and should have been suppressed. Thus, Kern failed to demonstrate counsel was deficient for failing to file the motion or a reasonable probability of a different outcome had counsel filed the motion. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Kern argued appellate counsel was ineffective. To demonstrate ineffective assistance of appellate 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 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 v. Washington*, 466 U.S. 668, 687 (1984), 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). 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).

Kern claimed appellate counsel should have argued the prosecutor committed prosecutorial misconduct by stating the presumption of innocence no longer applied to Kern. During closing arguments, "[a]

prosecutor may suggest that the presumption of innocence has been overcome; however, a prosecutor may never properly suggest that the presumption no longer applies to the defendant." *Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006).

During closing, the State argued: "the defendant is not presumed innocent anymore. He was presumed innocent at the beginning of this trial. He is not presumed innocent, because all of those witnesses testified and convinced you." This comment by the prosecutor was improper because it suggested the presumption of innocence no longer applied. Trial counsel objected to the statement and preserved the issue for appeal. Although the district court did not sustain counsel's objection, it informed the jury: "That it is presumed innocent till the contrary is proved via a function for the jury." Because of the immediate clarification by the district court regarding the presumption of innocence standard, Kern did not demonstrate this claim would have had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.[5]

Next, Kern argues the cumulative errors of counsel warrant relief. This claim was not raised below; therefore, we decline to consider this claim for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

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[5]Kern also argued appellate counsel was ineffective for failing to argue his jury did not constitute a fair cross section of the community. For the reasons discussed earlier in this order, Kern did not demonstrate this claim had a reasonable probability of success on appeal.

Finally, Kern argues the district court erred by denying as procedurally barred the following claims raised in his pro se petition: (1) the State committed prosecutorial misconduct; (2) the police coerced his confession; and (3) there was an underrepresentation of African Americans on the jury panel. The district court found Kern failed to allege good cause to overcome the procedural bars. On appeal, Kern argues the district court should have construed his petition as alleging ineffective assistance of trial and appellate counsel as good cause to overcome the procedural bars. Even assuming the district court should have so construed Kern's petition, Kern fails to demonstrate good cause and prejudice based on ineffective assistance of trial and appellate for the reasons outlined above.[6] Therefore, we conclude the district court did not err by denying these claims as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

[6]To the extent Kern raised prosecutorial misconduct claims in his pro se petition that differed from the claim raised on appeal, we decline to consider them because Kern does not provide any cogent argument or citation to legal authority to support those claims on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

cc: Hon. Monica Trujillo, District Judge
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