

PIN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEONIS DAVIS,
Appellant,
vs.
WILLIAM GITTERE, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 88845-COA

FILED

JUL 30 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

Keonis Davis appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 29, 2020. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Davis 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. 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 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, Davis claimed counsel was ineffective for failing to argue the State vindictively prosecuted him. "To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." *United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995) (internal quotation marks and citation omitted). Whether a prosecutor has acted vindictively depends "upon the totality of the circumstances surrounding the prosecutorial decision at issue." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980). "Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." *Montoya*, 45 F.3d at 1299 (internal quotation marks omitted).

Davis claimed the vindictiveness stemmed from the fact that Davis had previously asserted his right to a trial and an appeal in another criminal matter and won and that the prosecutor who tried him on the previous case was the prosecutor in the instant matter. He argues the prosecutor's vindictiveness was demonstrated by: (1) the State referring to his prior crime as attempted murder in a pretrial motion to admit other act evidence even though he had been acquitted of attempted murder; (2) the State trying to coerce his codefendant into pleading guilty, which prevented Davis from calling the codefendant at trial; (3) the State, in the codefendant's case, referring to a jail recording between Davis and the

codefendant when questioning the codefendant regarding his involvement in the crime but the jail recording did not exist;¹ (4) the State not informing the defense immediately that a witness told the prosecutor the night before testifying that Davis attempted to buy the witness's testimony; and (5) "the prosecutor failed to disclose proffers or a plea agreement made by the codefendant until immediately before the trial was scheduled to take place."²

The district court found Davis failed to demonstrate, under the totality of the circumstances, that the State vindictively prosecuted him. We conclude the record supports the decision of the district court. While the motion to admit other act evidence did state in a heading that Davis's prior conviction was for attempted murder, the text of the motion informed the district court that he was convicted of battery with the use of a deadly weapon. Further, Davis failed to demonstrate that the attempts to get his codefendant to plead guilty were improper, and the Nevada Supreme Court previously found that the statement regarding the jail recording was a misstatement by the prosecutor. *See Davis v. State*, No. 76500, 2019 WL 5490851, at *1 (Nev. Oct. 24, 2019) (Order of Affirmance). As to the attempt

¹It appears that Davis's codefendant entered a guilty plea but subsequently withdrew that plea. It was at a hearing on the codefendant's motion to withdraw the plea that the State referred to the jail phone call. It further appears that Davis's codefendant reentered his guilty plea at a later time.

²Davis claims on appeal that he requested the plea agreement and proffers from the State and that the district court order the State to disclose them. Davis does not cite to the record to support this claim. *See* NRAP 28(e).

to buy a witness's testimony, the State did not immediately inform the defense because it wanted to verify the information. Once verified, the State asked for a sidebar and informed the defense and the district court. Finally, Davis failed to demonstrate the alleged late disclosure by the State of the guilty plea and proffers, under the totality of the circumstances, was direct evidence of actual vindictiveness or warranted an appearance of vindictiveness. Therefore, Davis failed to demonstrate that trial counsel's performance was deficient or that there was a reasonable probability of a different outcome had trial counsel alleged vindictive prosecution. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.³

Second, Davis claimed trial counsel was ineffective for failing to argue the coercion of his codefendant violated Davis's rights because the State's actions prevented Davis from calling his codefendant at trial. While Davis asserts actions by the State prevented him from calling the codefendant at trial, he failed to allege how these actions prevented him from calling Davis. Thus, he failed to support this claim with specific facts not belied by the record that, if true, would entitle him to relief. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, we conclude Davis failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had counsel made this

³Davis alleges an additional ground on appeal, that the State failed to disclose that one of the eyewitnesses received a benefit by testifying against Davis, to support his vindictive prosecution claim. This ground was not raised below, and we decline to consider it for the first time on appeal. See *State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

argument. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Davis claimed trial counsel was ineffective for failing to argue that one of the witnesses could have inadvertently shot the victim. He argues counsel could have pointed out that the victims were purchasing drugs and that the individual who fled immediately after the shooting was later arrested for carrying a concealed weapon. At trial, counsel focused on the inconsistencies with the eyewitnesses' testimony and the lack of forensic evidence tying Davis to the crime. Davis failed to demonstrate a reasonable probability of a different outcome at trial had counsel argued that one of the eyewitnesses may have shot the victim. The two eyewitnesses identified Davis as the shooter and testified Davis had a gun. The eyewitness's arrest for carrying a concealed weapon occurred two years after the instant crime was committed and does not appear to be related to the instant offense. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Davis claimed trial counsel was ineffective for failing to challenge the composition of the jury venire. Specifically, he claimed counsel should have made a fair-cross-section challenge that African Americans and Hispanics were not properly reflected in the jury venire. 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) "the group alleged to be excluded is a 'distinctive' group in the community"; (2) "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) "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) (emphasis omitted). “[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.” *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005).

Davis alleged African Americans were underrepresented because they comprised only 6.2% of his venire but 11.2% of the population in Clark County. Further, he alleged Hispanics were underrepresented because they comprised only 18.5% of his venire but 32.3% of the population in Clark County. The parties agree that African Americans and Hispanics are a “distinctive group,” see *Valentine*, 135 Nev. at 465, 454 P.3d at 714, such that Davis satisfied the first prong for a prima facie violation. Under the second prong, the relevant determination is “[w]hether a certain percentage [of a distinctive group] is a fair representation of [the] group.” and that “is measured by the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community.” *Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. Further, where “the given disparities . . . fail to sufficiently show underrepresentation . . . analysis of the third prong is unnecessary.” *Morgan v. State*, 134 Nev. 200, 208, 416 P.3d 212, 222 (2018).

Here, the absolute disparity between the representation of African Americans in Davis’s venire amounted to 5% and the comparative disparity was 44.6%. The absolute disparity between the representation of Hispanics in Davis’s venire amounted to 13.8% and the comparative

disparity was 42.7%. After an evidentiary hearing on this issue, the district court found these disparities did not demonstrate underrepresentation.⁴ We conclude the record and caselaw support the findings of the district court. *See id.* (holding a comparative disparity of 43.2% “fail[ed] to sufficiently show underrepresentation”); *Evans v. State*, 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996) (providing a comparative disparity under 50% is likely insufficient to show underrepresentation); *see also Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 (stating “[c]omparative disparities over 50% indicate that the representation of African Americans is likely not fair and reasonable”). Therefore, Davis failed to demonstrate counsel’s performance was deficient or a reasonable probability of a different outcome had trial counsel pursued a fair-cross-section claim. Thus, we conclude the district court did not err by denying this claim.⁵

Fifth, Davis claimed trial counsel was ineffective for failing to convey plea offers to him. He alleged he was only told about one offer—plead to first-degree murder and receive a sentence of 20 years to life in

⁴The district court’s specific findings on this issue were made at the conclusion of the evidentiary hearing. We conclude these findings are sufficient to support the denial of Davis’s claim.

⁵To the extent Davis argues that an unpublished case, *Mungai v. State*, No. 75274, 2021 WL 4452836 (Nev. Sept. 28, 2021) (Order Vacating Judgment and Remanding), supports his claim that Clark County’s procedures resulted in the systematic exclusion of minority groups, we conclude that case is not dispositive of his claim. In *Mungai*, the Nevada Supreme Court specifically stated it was not “expressing any opinion regarding the merits of the district court’s order” finding systematic exclusion. *Mungai*, No. 75274, 2021 WL 4452836, *1.

prison. He claimed counsel did not explain the terms of this plea deal to him. Further, he claimed counsel never told him about counteroffers that were made or whether the State made other offers. As to the first offer, Davis failed to explain what other terms counsel was supposed to tell him about or how counsel's purported omission affected his decision to reject the plea offer. As to other offers, counsel and the State made a record, in front of Davis, about the State's plea offer and other counteroffers made. Counsel informed the district court that Davis rejected the State's offer which included a sentence of 20 years to life but was willing to plead to second-degree murder with a stipulated sentence of 10 to 25 years. The State countered with an offer of second-degree murder with the right to argue at sentencing. Thus, Davis knew about the other offers, and he does not specifically allege other offers or counteroffers existed. Therefore, he failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had counsel further communicated these offers to him. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Davis claimed the cumulative errors of trial counsel entitled him to relief. Even assuming any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Davis failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate"). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Davis argues the district court erred by denying his claims that appellate counsel was ineffective. 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. 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, Davis argued appellate counsel was ineffective for failing to consult with him regarding an appeal. He claimed he would have told counsel to challenge the sufficiency of the evidence at trial had counsel consulted with him. In his pleadings below, Davis failed to present any facts or argument in support of his claim that there was insufficient evidence presented at trial. Because Davis failed to allege specific facts not belied by the record that, if true, would entitle him to relief, *see Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225, we conclude he failed to demonstrate counsel's performance was deficient or a reasonable probability of success on appeal.⁶

⁶To the extent Davis alleges facts and arguments on appeal in support of his claim that the evidence was insufficient, we decline to consider those

Further, taking the evidence in the light most favorable to the State, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008), we conclude the evidence presented by the State was sufficient to convict Davis of conspiracy to commit robbery, robbery with the use of a deadly weapon, first-degree murder with the use of a deadly weapon, and two counts each of assault with the use of a deadly weapon and attempted robbery with the use of a deadly weapon, *see* NRS 193.165 (use of a deadly weapon); NRS 199.480 (conspiracy); NRS 200.030 (first-degree murder); NRS 200.380 (robbery); NRS 200.471 (assault with the use of a deadly weapon). Two eyewitnesses identified Davis as the shooter and saw a gun in his hand. Davis also demanded the property of the murder victim and the witnesses. Further, video surveillance showed Davis in the area of the incident on the date in question and supported the statements given by the witnesses. "This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell*, 124 Nev. at 816, 192 P.3d at 727. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Davis claimed appellate counsel was ineffective for failing to argue vindictive prosecution and a fair-cross-section violation on appeal. As discussed above, Davis failed to demonstrate that the State engaged in vindictive prosecution or that the jury composition was not a fair cross-section of the population. Therefore, Davis likewise failed to

for the first time on appeal. *See Wade*, 105 Nev. at 209 n.3, 772 P.3d at 1293 n.3.

demonstrate that appellate counsel's performance was deficient or that these claims had a reasonable probability of success on appeal. Thus, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Third, Davis claimed appellate counsel was ineffective for failing to federalize an evidentiary issue on appeal.⁷ Davis argued that, had the claim been federalized, it could be reviewed by a federal court in the future. He also argued that, while the evidentiary issue may have been correctly decided on state law grounds, the evidentiary issue could be error under federal law. Davis failed to demonstrate deficiency or resulting prejudice because he failed to demonstrate he would have gained a more favorable standard of review or a more favorable result on direct appeal had appellate counsel federalized the arguments as Davis did not support his argument that the evidentiary issue could be error under federal law with relevant authority or cogent argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

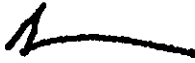
Fourth, Davis claimed the cumulative errors of appellate counsel entitled him to relief. Even assuming that any such errors may be cumulated, *see McConnell*, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17, Davis failed to demonstrate multiple errors to cumulate, *see Burnside*, 131 Nev.

⁷The evidentiary issue regarded one of the eyewitness's rebuttal testimony that Davis offered to buy the witness's testimony. The supreme court concluded this evidence was not improperly admitted in rebuttal. *See Davis*, No. 76500, 2019 WL 5490851, *1.


at 407, 352 P.3d at 651. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Davis argues the district court erred by denying the substantive claims underlying his trial- and appellate-counsel claims. The substantive claims were procedurally barred because Davis could have raised them on direct appeal. *See* NRS 34.810(1)(b). Thus, Davis was required to demonstrate cause and actual prejudice to overcome the procedural bar. Davis argued the district court should consider these claims as standalone claims because he needed to exhaust them for purposes of federal court review. Exhaustion of claims for federal court review is insufficient to demonstrate cause to excuse the procedural bars. *See Brown v. McDaniel*, 130 Nev. 565, 575 n.9, 331 P.3d 867, 874 n.9 (2014). Therefore, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Nevada State Public Defender's Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk