

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN KIRKLAN A/K/A CALVIN LEE
KIRKLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62884

FILED

FEB 13 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant's conviction for second-degree murder arose from the following event. While driving with four passengers, appellant stopped at a red light, during which, the occupants passed around a loaded gun. The gun discharged while in appellant's possession, the bullet shattering the passenger's window and striking the victim while she sat in an adjacent car, killing her. Appellant argues that the district court erred by denying his post-conviction motion to withdraw his guilty plea on the ground that counsel was ineffective for misrepresenting the probable outcome of a trial. In this, he contends that because the question of whether his actions amounted to second-degree murder was fact-intensive, counsel should have advised him that the decision was dependent upon the credibility of the witnesses, who gave conflicting statements about the event. According to appellant, the shooting was accidental and the credibility problems with the witnesses could have dissuaded a jury from convicting him of second-degree murder. Appellant further argues that

counsel's concern about the imposition of a deadly weapon enhancement should he reject the plea negotiation was unfounded in light of the factors a district court must consider, see NRS 193.165(1), before imposing the enhancement and counsel was ineffective for "relay[ing] it to [him] as the deciding factor to avoid through a plea."

We presume that a guilty plea is valid, and the defendant bears the burden of establishing that the plea was not entered knowingly and intelligently. *Rubio v. State*, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008); *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). "A guilty plea is knowing and voluntary if the defendant 'has a full understanding of both the nature of the charges and the direct consequences arising from a plea of guilty.'" *Rubio*, 124 Nev. at 1038, 194 P.3d at 1228 (emphasis omitted) (quoting *Little v. Warden*, 117 Nev. 845, 849, 34 P.3d 540, 543 (2001)). The district court must "look beyond the plea canvass to the entire record and the totality of the circumstances" to determine the validity of a plea. *Id.* (footnote omitted). A defendant may be allowed to withdraw his plea to "correct manifest injustice." NRS 176.165. "A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel." *Rubio*, 124 Nev. at 1039, 194 P.3d at 1228.

After conducting an evidentiary hearing, the district court concluded that counsel's testimony showed that he "went to great lengths to explain the nature of the charges and the consequences of the plea" and that counsel "also professionally handled [appellant's] case with no improper pressure being applied on [appellant] in order to persuade him to plead guilty." The district court further found that the plea canvass and the guilty plea agreement demonstrated that appellant understood the

nature of the charges and the consequences of the plea. The district court's factual findings are supported by counsel's testimony that (1) he had many discussions with appellant regarding second-degree murder and the consequences of the plea, (2) he believed that the shooting was an accident but that the evidence did not support that defense, (3) appellant admitted that he had the gun when it fired and the eyewitnesses supported that admission, (4) any discrepancies in witness statements were not significant enough to influence the jury, and (5) he did not pressure appellant to accept the plea negotiation. *See id.* at 1039, 194 P.3d at 1229 (observing that we give deference to the district court's factual findings if they are not clearly erroneous and supported by substantial evidence). And despite appellant's attempt to minimize the risk of a deadly weapon enhancement that would have required a consecutive sentence, counsel's concern was reasonable and nothing in the record suggests that the possibility of a deadly weapon enhancement was the driving force behind counsel's recommendation that appellant accept the plea negotiation. We conclude that the district court did not err by denying appellant's motion to withdraw his guilty plea. *See id.* (observing that this court will not reverse the district court's determination on manifest injustice absent an abuse of discretion but will review a claim of ineffective assistance de novo as a mixed question of law and fact).

Appellant also argues that the district court denied his motion based solely on a review of the plea canvass rather than the entire record. That contention lacks merit as the district court's comments at the evidentiary hearing coupled with its written order show that the district court looked beyond the plea canvass and considered the totality of the circumstances in rendering its decision.

Having considered appellant's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Douglas Smith, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk