

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ISRAEL HECHAVARRIA-CORREA,  
A/K/A ISREAL HECHAVARRIA-  
CORREA,  
Appellants,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78891-COA

FILED

MAR 19 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO  
CORRECT JUDGMENT OF CONVICTION*

Israel Hechavarria-Correa appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Hechavarria-Correa argues the district court erred by denying the claims of ineffective assistance of counsel raised in his March 9, 2018, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *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 697. To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Hechavarria-Correa claimed his trial counsel was ineffective for failing to have him interviewed by a psychologist or seek a competency hearing. Hechavarria-Correa's claim failed to contain an allegation that he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him when he entered his guilty plea. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983). Accordingly, Hechavarria-Correa failed to demonstrate his counsel acted in an objectively unreasonable manner regarding this issue or a reasonable probability of a different outcome had counsel sought a psychological examination or a competency evaluation. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.<sup>1</sup>

Second, Hechavarria-Correa claimed his trial counsel was ineffective for failing to argue his convictions for attempted murder with the use of a deadly weapon and battery with the use of a deadly weapon constituting domestic violence were improperly duplicative because they arose from the same incident. The Nevada Supreme Court previously rejected the "same conduct" approach, and reiterated its adherence to the "same element" test. *Jackson v. State*, 128 Nev. 598, 601, 291 P.3d 1274, 1276 (2012). Hechavarria-Correa's dual convictions are not improperly duplicative because they are not the same offense under the same element test as each has at least one element that the other does not. *See id.* at 607,

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<sup>1</sup>To the extent Hechavarria-Correa also contended his inability to understand the English language caused him to be incompetent, the record demonstrates a Spanish-language interpreter aided him during the court proceedings. Therefore, Hechavarria-Correa failed to demonstrate his counsel's performance was deficient or resulting prejudice regarding this issue.

291 P.3d at 1280 (noting “[a]ttempted murder requires intent to kill, malice aforethought, and failure to complete the crime of murder, none of which are elements of battery”). Because Hechavarria-Correa’s convictions were not improperly duplicative, he failed to demonstrate his counsel’s performance fell below an objectively reasonable standard. Hechavarria-Correa also failed to demonstrate a reasonable probability of a different outcome had counsel raised this issue before the trial court. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Hechavarria-Correa claimed his trial counsel was ineffective for causing him to waive his right to a preliminary hearing. The record demonstrates that Hechavarria-Correa’s counsel informed the justice court that Hechavarria-Correa wished to waive his right to a preliminary hearing. The justice court asked Hechavarria-Correa if he understood the waiver, whether he had discussed the waiver with his counsel, and whether he actually wished to waive his right to a preliminary hearing. Hechavarria-Correa personally responded that he understood his right to a preliminary hearing and wished to waive that right. Given the record, Hechavarria-Correa failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness. Hechavarria-Correa also failed to demonstrate a reasonable probability of a different outcome had counsel offered different advice concerning the preliminary hearing. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Hechavarria-Correa, claimed his trial counsel was ineffective for failing to object during opening statements. Hechavarria-Correa contended the State improperly stated during its opening statement that he told the victim “if you’re not with me, I am going to kill you.”

Hechavarria-Correa contended it was prejudicial for the State to be the first to mention this statement.

“An opening statement outlines what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole.” *Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 247 (2013) (internal quotation marks omitted). The record reveals the State explained to the jury the evidence it believed would be presented to the jury, including Hechavarria-Correa’s statement to the victim concerning his intent to kill her. The victim later testified that she was in an argument with Hechavarria-Correa and he stated “if I’m not going to be with him, then he was going to kill me.” Based on the record, the State did not make an improper opening statement. Accordingly, Hechavarria-Correa failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel raised objections concerning this issue. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Hechavarria-Correa claimed his trial counsel was ineffective during opening statements when counsel stated the incident was not an accident. During opening statements, Hechavarria-Correa’s counsel stated “the evidence will show in this case that this was not an accident – excuse me – this was an accident, that this was not an attempted murder.” The record demonstrates counsel misspoke and then immediately corrected the error. Given the record, Hechavarria-Correa failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness. Hechavarria-Correa also failed to demonstrate a reasonable probability of a different outcome had counsel uttered a different statement. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Hechavarria-Correa claimed his trial counsel was ineffective for failing to argue that the victim was improperly forced to testify. During trial, the victim testified that she was nervous and testifying was something that she did not really want to do. Nevertheless, the victim testified concerning the events in this matter. Hechavarria-Correa did not identify upon what grounds counsel should have moved to have the victim stricken as a witness and a bare claim, such as this one, was insufficient to demonstrate Hechavarria-Correa was entitled to relief. *Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Hechavarria-Correa failed to demonstrate his counsel's performance fell below an objectively reasonable standard or a reasonable probability of a different outcome had counsel attempted to argue the victim was improperly forced to testify. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Hechavarria-Correa claimed his trial counsel was ineffective for failing to object when the State argued in closing that there was no evidence that the victim was harmed as the result of an accident. This court reviewed the underlying claim for plain error on direct appeal. *Hechavarria-Correa v. State*, Docket No. 71594-COA (Order of Affirmance, December 14, 2017). This court concluded "[t]he State was properly responding to Hechavarria-Correa's claim this was an accident and made a reasonable inference from the evidence presented at trial." *Id.* As this court has already concluded the State's argument was proper, Hechavarria-Correa did not demonstrate his counsel's failure to object to the challenged arguments amounted to the actions of objectively unreasonable counsel or a reasonable probability of a different outcome had counsel raised objections. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Hechavarria-Correa claimed his trial counsel was ineffective for failing to object when the State commented that Hechavarria-Correa did not testify. This claim is belied by the record because the State did not directly comment concerning Hechavarria-Correa's decision to decline to testify. *See Hargrove*, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Hechavarria-Correa failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel raised objections concerning this issue. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ninth, Hechavarria-Correa claimed his trial counsel was ineffective for failing to object during closing arguments when the State argued that a knife is a deadly weapon. During closing arguments the State may "assert inferences from the evidence and argue conclusions on disputed issues." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). The evidence presented at trial demonstrated Hechavarria-Correa used a knife described as a long machete during the commission of the crimes, and, therefore, it was appropriate for the State to assert that the knife constituted a deadly weapon. *See* NRS 193.165(6)(c) (including within the definition of deadly weapons those specifically described in certain statutes, including those described in NRS 202.350); NRS 202.350(1)(d)(2) (listing a machete as a weapon that a person may not carry in a concealed manner). Accordingly, Hechavarria-Correa failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel raised objections concerning this issue. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Tenth, Hechavarria-Correa claimed his trial counsel was ineffective for failing to object when the State discussed his prior convictions

and bad acts during the sentencing hearing. Hechavarria-Correa failed to demonstrate his counsel's performance fell below an objective standard of reasonableness by not objecting when the State discussed his prior convictions because the sentencing court may properly consider a defendant's criminal history and prior bad acts when imposing sentence. *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment."). Hechavarria-Correa failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected to discussion of this information. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Eleventh, Hechavarria-Correa claimed that the cumulative effect of trial counsel's errors violated his right to a fair trial. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there was nothing to cumulate because Hechavarria-Correa failed to demonstrate any such deficiencies. Accordingly, we conclude the district court did not err by rejecting this claim without conducting an evidentiary hearing.

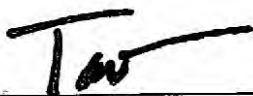
Twelfth, Hechavarria-Correa argues the district court erred by denying the petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. See NRS 34.750(1). A review of the record reveals the issues in this matter were not difficult, Hechavarria-Correa was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. See *id.* Therefore, Hechavarria-Correa fails to demonstrate the district court abused its discretion by denying the petition without appointing postconviction

counsel. *See Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

Finally, the judgment of conviction reflects that Hechavarria-Correa's conviction arose out of a guilty plea. However, the record before this court demonstrates he was convicted pursuant to a jury verdict. We therefore remand this matter to the district court for the limited purpose of correcting the clerical error in the judgment of conviction. *See* NRS 176.565; *Ledbetter v. State*, 122 Nev. 252, 265, 129 P.3d 671, 680-81 (2006). Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Carolyn Ellsworth, District Judge  
Israel Hechavarria-Correa  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk