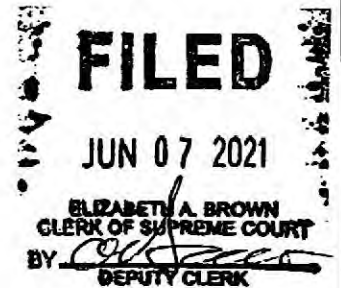


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PIERRE TERRELL DEVLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81824-COA



ORDER OF AFFIRMANCE

Pierre Terrell Devlin appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Devlin argues that the district court erred by denying his claims of ineffective assistance of trial counsel raised in his June 4, 2020, petition. 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).

First, Devlin claimed his trial counsel was ineffective for failing to investigate his voluntary intoxication, present expert testimony on intoxication, and pursue a voluntary-intoxication defense at trial. Devlin contended counsel should have obtained surveillance video recordings depicting him consuming alcohol at casinos and should have presented additional information regarding his intoxication level in an attempt to prove he was unable to form the intent to commit the crimes due to his intoxication level. Devlin also asserted counsel should have requested a voluntary-intoxication instruction during trial.

“No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but . . . the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.” NRS 193.220. “In order for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings.” *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

At trial, Devlin testified as to his alcohol consumption and its effects on him. He had consumed alcohol prior to the incident, had not consumed alcohol for approximately 45 minutes prior to the incident, and

was able to remember the majority of the events at issue. In addition, Devlin's testimony concerning his actions during and following the shootings demonstrated his mental state. Devlin said he and a victim engaged in a verbal confrontation, he became concerned by the number of people in the victim's group, and he retrieved a firearm from his vehicle due to that concern. Devlin testified he fired a warning shot so that the group of people would decide to move away from him, and then he got into the driver's seat of his vehicle and placed the firearm on the center console. Finally, Devlin testified that he drove his vehicle and was surprised when his codefendant used the firearm to shoot at the victims.

The evidence produced at trial, including Devlin's testimony concerning his intoxication level, his mental state during the incident, and his actions during the incident, demonstrated that Devlin was not so intoxicated that he was unable to form the intent to commit the crimes. Based on the evidence, Devlin did not demonstrate a reasonable probability of a different outcome at trial had counsel attempted to investigate his intoxication or seek an expert witness regarding his intoxication, argue at trial that Devlin was unable to form specific intent due to his voluntary intoxication, or request an instruction on voluntary intoxication. Therefore, we conclude the district court did not err by denying this claim.

Second, Devlin claimed his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus to challenge the grand jury's finding of probable cause. The State presented sufficient evidence to support the grand jury's probable cause finding. *See Sheriff,*

Washoe Cty. v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (explaining the State need only present slight or marginal evidence to demonstrate probable cause to support a criminal charge). Therefore, Devlin did not demonstrate counsel's performance fell below an objective standard of reasonableness by failing to challenge the probable cause finding. In addition, Devlin failed to demonstrate prejudice relating to the grand jury proceedings because he was ultimately convicted at trial of the charges of battery, assault, and discharge of a firearm beyond a reasonable doubt. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986). Therefore, we conclude the district court did not err by denying this claim.

Third, Devlin claimed his trial counsel was ineffective for failing to sever his case from his codefendant's case. Devlin asserted the failure to sever the cases caused him to lose the opportunity to question his codefendant about the incident. Counsel moved to sever the cases, and Devlin did not demonstrate counsel's performance in that regard fell below an objective standard of reasonableness. In addition, on direct appeal the Nevada Supreme Court concluded Devlin was not prejudiced by any potential misjoinder because "it had no substantial or injurious effect on the jury's verdict" in light of the significant evidence of Devlin's guilt presented at trial. *Devlin v. State*, Docket No. 73518 (Order of Affirmance, September 12, 2019). In light of the record, Devlin did not demonstrate a reasonable probability of a different outcome at trial had counsel raised additional arguments regarding severance of the cases. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Devlin claimed his trial counsel was ineffective for failing to participate in pretrial negotiations with the State. Devlin acknowledged he received a plea offer from the State but asserts counsel should have engaged in additional negotiations in an attempt to receive additional plea offers. Devlin did not provide specific facts to support this claim or allege that there was a reasonable probability counsel could have obtained a plea offer from the State that he would have accepted absent counsel's alleged deficiency, the State would not have withdrawn its plea offer in light of intervening circumstances, or the district court would have accepted such an offer. *Cf. Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 147 (2012) (requiring a showing of "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time"). Accordingly, Devlin did not demonstrate a reasonable probability of a different outcome had counsel engaged in additional plea negotiations with the State. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Devlin claimed his trial counsel was ineffective for failing to preserve his right to a speedy trial. Devlin waived his right to a speedy trial. Devlin did not demonstrate counsel's performance concerning his right to a speedy trial fell below an objective standard of reasonableness. In addition, Devlin did not allege prejudice related to his speedy-trial rights, and therefore, he did not demonstrate a reasonable probability of a different outcome had counsel performed different actions regarding this issue. See

Furbay v. State, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000) (“When determining whether the right to a speedy trial was violated, four factors should be considered: (1) length of delay; (2) the reason for the delay; (3) the defendant’s assertion of his right; and (4) prejudice to the defendant.”). Therefore, we conclude the district court did not err by denying this claim.

Sixth, Devlin claimed his trial counsel was ineffective for failing to present evidence concerning the trajectory of the shot he fired and its final impact point. During trial, surveillance video footage depicting Devlin firing a gunshot into the ground was presented to the jury. Devlin and other witnesses also testified concerning that shot. Given the evidence and testimony presented at trial regarding Devlin’s shot, he did not demonstrate it was objectively unreasonable for counsel to decline to present additional evidence or information concerning that shot. Devlin also failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented additional evidence regarding the shot. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Devlin claimed his trial counsel was ineffective for failing to compel the trial court to conduct an investigation into juror misconduct. During trial, a bailiff notified the trial court that a juror informed him that another juror made a comment during the lunch break concerning a defendant’s body language. The trial court stated to the parties that it intended to again admonish the jurors that they were not to discuss the trial amongst themselves. Devlin’s counsel indicated that he understood the trial court’s decision regarding this issue. The trial court

subsequently admonished the jurors not to engage in discussions regarding any matter related to Devlin's trial, and jurors are presumed to follow the court's instructions. *See McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004).

Given the trial court's decisions and actions regarding the underlying issue, Devlin did not demonstrate any failure by counsel to seek an investigation into the juror's comment fell below an objective standard of reasonableness. In addition, the Nevada Supreme Court reviewed the underlying issue on direct appeal under a plain error standard and concluded Devlin did not show a reasonable probability that juror misconduct affected the verdict. *Devlin v. State*, Docket No. 73518 (Order of Affirmance, September 12, 2019). In light of the record and the Nevada Supreme Court's review of the underlying issue, we conclude Devlin did not demonstrate a reasonable probability of a different outcome at trial had counsel sought an investigation into the juror's comment. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Devlin claimed his trial counsel was ineffective for failing to pursue a diminished-capacity defense or request an instruction on diminished capacity due to intoxication. However, Nevada does not recognize the technical defense of diminished capacity based upon intoxication. *See Crawford v. State*, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005) (“[T]he technical defense of diminished capacity is not available in Nevada.”); *see also Diminished Capacity, Black's Law Dictionary* (11th ed. 2019) (defining “diminished capacity” as “[a]n impaired mental condition—

short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime.”). Accordingly, Devlin did not demonstrate counsel’s failure to pursue a diminished-capacity defense or request a diminished-capacity instruction fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Ninth, Devlin claimed his trial counsel was ineffective for withholding discovery from him. Devlin did not explain how the failure to provide him with discovery affected the outcome of the trial proceedings. Therefore, Devlin failed to allege specific facts that demonstrated a reasonable probability of a different outcome had counsel performed different actions concerning the discovery. Accordingly, we conclude the district court did not err by denying this claim.

Tenth, Devlin claimed his trial counsel was ineffective for failing to be in the courtroom when the trial court decided to give the jury an *Allen*¹ charge during deliberations. During deliberations, the jury notified the trial court of difficulties reaching a unanimous verdict. The trial court discussed the jury’s notification with the parties, but Devlin’s counsel appeared via telephone due to other commitments. An associate of Devlin’s trial counsel also appeared in person for the discussion. The

¹*Allen v. United States*, 164 U.S. 492 (1896).

parties agreed with the trial court's decision to instruct the jury that it should continue to deliberate and attempt to reach a unanimous verdict. Because Devlin's counsel appeared via telephone and an associate appeared in person for the discussion of the underlying issue, Devlin did not demonstrate his counsel's performance fell below an objective standard of reasonableness. Devlin also did not demonstrate a reasonable probability of a different outcome had trial counsel appeared in person for the relevant discussion. Therefore, we conclude the district court did not err by denying this claim.

Next, Devlin claimed his 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, Devlin claimed his appellate counsel was ineffective for failing to argue that the State did not present sufficient evidence to prove his guilt. Devlin asserted that the evidence was insufficient to convict him under a direct, aiding-or-abetting, or conspiracy theory of criminal liability

because there was no evidence presented that he wished for his codefendant to shoot at the victims. Evidence is sufficient when, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The evidence produced at trial revealed Devlin engaged in a verbal confrontation with a group of people. Following the verbal confrontation, Devlin retrieved a firearm from his vehicle and fired a shot into the ground within view of the group. Devlin and his codefendant got into Devlin’s vehicle and Devlin drove toward the group while his codefendant shot at them. Several members of the group were struck by bullets and injured.

Given the evidence and testimony, any rational juror could have found beyond a reasonable doubt that Devlin committed assault with the use of a deadly weapon, battery with the use of a deadly weapon causing substantial bodily harm, and discharge of a firearm from or within a structure or vehicle, *see* NRS 200.471(1)(a), (2)(b); NRS 200.481(1)(a), (2)(e)(2); NRS 202.287(1), and did so under direct, aiding-or-abetting, and/or conspiracy theories of criminal liability, *see* NRS 195.020 (defining criminal liability as a principal and as an aider or abettor); *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (stating “[a] conspiracy is an agreement between two or more persons for an unlawful purpose” and “a conspiracy conviction may be supported by a coordinated series of acts, in furtherance

of the underlying offense, sufficient to infer the existence of an agreement”) (internal quotation marks omitted), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury’s verdict will not be disturbed on direct appeal where substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Because there was sufficient evidence produced at trial to support the jury’s finding of guilt, Devlin did not demonstrate that counsel’s failure to raise the underlying claim on appeal fell below an objective standard of reasonableness or a reasonable likelihood of success on appeal had counsel done so. Therefore, we conclude the district court did not err by denying this claim.


Second, Devlin claimed his appellate counsel was ineffective for failing to argue that the jury improperly issued a general verdict. “When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories.” *Bolden v. State*, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). As explained previously, the evidence presented at trial was sufficient to support the alternate theories of liability. Accordingly, Devlin did not demonstrate counsel was objectively unreasonable for declining to challenge the jury’s general verdict or a reasonable likelihood of success on appeal had counsel

done so. Therefore, we conclude the district court did not err by denying this claim.

Next, Devlin asserted the grand jury improperly found probable cause to support the charges against him and the trial court violated his right to a speedy trial. These claims could have been raised on direct appeal, and Devlin did not demonstrate good cause for the failure to do so and actual prejudice. Therefore, he is not entitled to relief. See NRS 34.810(1)(b). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 21
Pierre Terrell Devlin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk