

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNATHAN BRADLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82006-COA

FILED

SEP 13 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Johnathan Bradley appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 20, 2020. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Bradley claims the district court erred by denying his claims of ineffective assistance of trial counsel without first conducting an evidentiary hearing. 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.*

21-26355

Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). A petitioner claiming counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). 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 him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Bradley alleged counsel failed to investigate his alibi defense. The district court denied this claim on two grounds. The first was that Bradley failed to show what a better investigation would have uncovered. Bradley asserted counsel failed to interview T. Negash, who was with Bradley and would have testified to a timeline of events that placed Bradley away from the crime scene immediately before the time of the crimes. Bradley also asserted counsel failed to obtain surveillance footage from a 7-Eleven convenience store that would have shown he was at the store and not at the crime scene at the time of the crimes. Accordingly, Bradley alleged what a better investigation would have revealed.

The district court's second ground was that counsel did not investigate Bradley's alibi. Prior to sentencing, Bradley filed a pro se motion in the trial court to withdraw and substitute counsel. In his motion, Bradley claimed, among other things, that counsel failed to investigate his alibi defense. Bradley also alleged he had witnesses willing to testify to the facts surrounding his alibi defense. During this motion hearing, the trial court took no evidence but engaged in a brief colloquy with counsel. Counsel

explained to the trial court that he needed to check his notes, but he stated his investigator reached out to “some” of Bradley’s witnesses and could not find any of them. The trial court found counsel looked into interviewing alibi witnesses but also asked counsel to supplement the record with his investigator’s notes. The trial court’s finding that counsel investigated *alibi* witnesses was not supported by the testimony, and counsel did not supplement the record as directed with the investigator’s notes. Further, the trial court made no findings regarding the surveillance video. Accordingly, the district court’s finding that counsel investigated an alibi defense is not supported by substantial evidence in the record.

Bradley supported his alibi claims with specific factual allegations that were not belied by the record and, if true, would have entitled him to relief. Therefore, we conclude the district court erred by denying this claim without conducting an evidentiary hearing. Accordingly, we reverse the district court’s denial of this claim and remand this claim to the district court to hold an evidentiary hearing.

Second, Bradley claimed counsel failed to adequately communicate and consult with him. The district court denied this claim on three grounds. The first was that Bradley met and spoke with counsel on different occasions. During the January 4, 2018, calendar call, Bradley made a spontaneous, pro se oral motion to the trial court to substitute counsel and claimed counsel was not communicating with him. Counsel explained to the trial court that both he and his investigator had met with Bradley. The district court’s finding does not address the adequacy of the communication. Bradley asserted he attempted to contact counsel on

multiple occasions to provide counsel with pertinent details about the case, such as his alibi defense, and counsel did not return his calls. Bradley also asserted that his witnesses, including Negash, attempted to contact counsel via phone and email, and counsel did not respond to them. Moreover, Bradley submitted multiple exhibits with his petition in support of his claim. Bradley supported his claims of inadequate communication and consultation with specific factual allegations that were not belied by the record and, if true, would have entitled him to relief. Therefore, we cannot conclude the district court did not err by denying the claim on this ground without an evidentiary hearing.

The district court's second ground for denial was that this claim was barred by the doctrine of res judicata based upon the January 4, 2018, calendar call. As an initial matter, we note that the Nevada Supreme Court has abandoned the catchall term "res judicata" in favor of the terms "claim preclusion" and "issue preclusion" and has articulated separate rules for applying each of these separate doctrines. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), *holding modified on other grounds by Weddell v. Sharp*, 131 Nev. 233, 235, 350 P.3d 80, 81 (2015). Assuming without deciding that issue preclusion and claim preclusion may be raised in postconviction habeas proceedings, Bradley's ineffective-assistance-of-counsel claim was not brought before the trial court, and to the extent that Bradley brought the issue before the trial court during the calendar call, the issue was not actually and necessarily litigated. *See id.* at 1054-55, 194 P.3d at 713. Thus, neither claim

preclusion nor issue preclusion bars Bradley's claim, and we conclude the district court erred by denying the claim on this ground.

The district court's third ground for denial was that this claim was barred by the doctrine of the law of the case, citing to *Bradley v. State*, Docket No. 75464 (Order of Affirmance, March 28, 2019). However, that order did not address this ineffective-assistance-of-counsel claim. *See id.* (noting ineffective assistance of counsel arguments were improperly raised on direct appeal). Bradley properly raised this ineffective-assistance-of-counsel claim through this instant postconviction petition. Therefore, we conclude the district court erred by denying the claim on this ground. For the foregoing reasons, we reverse the district court's denial of this claim and remand this claim to the district court to hold an evidentiary hearing.

Third, Bradley claimed counsel should have consulted with an independent DNA expert in preparation for trial and should have filed a motion to continue the trial until he consulted with the independent DNA expert. Bradley did not explain how an independent DNA expert would have arrived at different results. Accordingly, he failed to allege how investigation into the DNA evidence would have resulted in a more favorable outcome. We therefore conclude the district court did not err denying this claim without conducting an evidentiary hearing.

Fourth, Bradley claimed counsel failed to receive and review the report by the State's DNA expert in a timely manner. Bradley alleged that, had counsel received and reviewed the report earlier, counsel would have conducted an effective cross-examination. The district court found that counsel extensively questioned the expert regarding the strength of the

DNA evidence. These findings are supported by the record. During cross-examination, the DNA expert conceded that the sample used to generate the DNA profile was a mixture, indicating that it contained more than one person's DNA, and that the only two DNA references used for comparison were Bradley and his codefendant. The expert further conceded that the profile was not very robust, noting there were locations on the profile where the DNA was not present or did not meet internal thresholds for comparison. Finally, when asked about the probability of Bradley being 78,500 times more likely than anyone else to be a contributor to the DNA mixture profile, the expert conceded this probability was "not great." Thus, Bradley failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial had counsel acted differently regarding the report and expert witness. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Bradley claimed counsel should have filed a motion to suppress the DNA expert's testimony because the State failed to disclose the DNA expert's report, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). "*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material to either guilt or to punishment." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). The three elements of a *Brady* violation are that "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Id.* at 67, 993 P.2d at 37. Even assuming the State withheld the

report, the report was not exculpatory because it identified Bradley as the source of the DNA evidence. Further, in light of the trial evidence discussed in the preceding paragraph, the report would not have resulted in either a reasonable possibility or a reasonable probability of a different result had the evidence been disclosed.¹ See *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (explaining the materiality test depending on whether the defendant made a specific request for the evidence). Therefore, Bradley failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Bradley claimed counsel failed to effectively argue the facts regarding the DNA evidence in closing. The district court found that counsel pointed out the DNA issues in the case. This finding is supported by the record. Thus, Bradley failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial had counsel argued differently. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Bradley alleged counsel failed to review the indictment and challenge the alleged defects in the indictment and its associated jury instruction. Bradley claimed the State incorrectly charged alternate theories of criminal liability and that the indictment was not

¹It is unclear whether counsel requested or received the report.

specific enough to provide notice because it did not specify which codefendant performed which act. The indictment must include “a statement of the acts constituting the offense in ordinary and concise language” and put the defendant on notice of the State’s theory of prosecution. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005) (internal quotation marks omitted); accord NRS 173.075(1). And the State may allege alternative theories in a single count. See NRS 173.075(2). The indictment in this case was sufficiently detailed to put Bradley on notice that the State was pursuing alternate theories of criminal liability: (1) Bradley directly committed the crimes, (2) he aided and abetted in crimes by acting in concert with another, and/or (3) he conspired to commit the crimes. Thus, Bradley failed to demonstrate that counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial had counsel objected to the indictment and the associated jury instruction. Therefore, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Eighth, Bradley claimed counsel was ineffective for failing to investigate and interview the victim regarding the photographic lineup identification. Bradley also asserted counsel failed to effectively cross-examine or otherwise challenge the victim’s identification of Bradley at trial. The district court found the victim testified at trial that he was unable to identify Bradley during the lineup. The district court also found counsel cross-examined the victim about his failure to identify Bradley. Additionally, the victim did not identify Bradley in court. These findings

are supported by substantial evidence in the record before this court. Because the jury heard evidence that the victim never identified Bradley, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness for failing to investigate or challenge any identification or that he was prejudiced by counsel's alleged deficiency. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.²

Ninth, Bradley claimed counsel failed to interview and investigate State witness K. Gnidjiw and that, had he done so, he would have learned of her prior inconsistent statements and testimony and could have impeached her with them. The district court found that the State impeached Gnidjiw on direct examination with her prior inconsistent statements and testimony implicating Bradley and his codefendant, and the record supports the district court's finding. In light of these facts, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel acted differently regarding this witness. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Tenth, Bradley claimed counsel was ineffective for failing to object to prosecutorial misconduct regarding Gnidjiw's testimony. Bradley claimed the State knowingly elicited perjured testimony from Gnidjiw and

²To the extent that Bradley claimed counsel should have filed a pretrial motion to suppress the photographic lineup identification, his claim failed for the reasons just discussed.

counsel should have moved to suppress her testimony. Bradley asserted that Gnidjiw's statement to the police on the night of the crime was false, and Gnidjiw's testimony to the grand jury, which was consistent with her statement to the police, was perjured. At trial, Gnidjiw testified that she had previously lied and was coerced into implicating Bradley to the police and at the grand jury. Gnidjiw also testified that she did not know Bradley and did not recall her interview with police, and she began laughing on the stand. Gnidjiw's uncorroborated "confession" to fabricating her previous statements did not necessarily demonstrate that her statements implicating Bradley were false. It was the jury's role to determine Gnidjiw's credibility and the amount of weight to give to her testimony. *See Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006). Therefore, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected or moved to suppress her testimony. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.³

Eleventh, Bradley claimed counsel should have filed a motion to sever his trial from his codefendant's. The district court found that it was counsel's intentional trial strategy to conduct a joint trial. The record supports the district court's findings. Bradley made this allegation during a hearing prior to sentencing. At that hearing, counsel explained to the trial

³To the extent Bradley claimed counsel should have objected to the State impeaching its own witness, the State properly impeached Gnidjiw with her prior inconsistent statements. *See* NRS 50.075; NRS 51.035(2)(a).

court that he made a strategic decision to keep the cases together. Bradley did not allege any extraordinary circumstances that would indicate the strategy was unreasonable. Accordingly, Bradley failed to demonstrate trial counsel's performance fell below an objective standard of reasonableness, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances.").

Twelfth, Bradley claimed counsel should have objected to several jury instructions because they misled the jury into believing that a defendant may be convicted of specific-intent crimes, including burglary, under a "conspiracy" theory of liability. Bradley appeared to claim that direct liability is the only valid theory of liability for specific intent crimes. Conspiracy and aiding and abetting are valid theories of liability for specific intent crimes as long as the defendant also has the requisite intent. *See Bolden v. State*, 121 Nev. 908, 922, 124 P.3d 191, 200-01 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008); *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). "Jury instructions relating to intent must be read together, not disconnectedly, and a single instruction to the jury may not be judged in isolation, but must be viewed in context of the overall charge." *Greene v. State*, 113 Nev. 157, 167-68, 931 P.2d 54, 61 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

Jury instructions nos. 11 and 14 explained that specific intent was required under a "conspiracy" theory of liability. The jury instructions

properly explained that a defendant cannot be liable for a coconspirator's acts unless the defendant also had the requisite intent. Thus, when considered as a whole, the jury instructions properly instructed the jury regarding specific intent crimes and "conspiracy" theory of liability. Therefore, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object, and we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Thirteenth, Bradley claimed counsel should have objected to jury instruction no. 13 because it instructed the jury that defendants may be liable under the natural and probable consequences doctrine and it was the same jury instruction disapproved of in *Bolden*. *Bolden* held that "a defendant may not be held criminally liable for a specific intent crime committed by a co-conspirator simply because that crime was a natural and probable consequence of the object of the conspiracy," and thus, the State must prove the defendant possessed the requisite intent to commit the crime. 121 Nev. at 922, 124 P.3d at 200-01. *Bolden* did not, however, disapprove of the use of the jury instruction insofar as it applied to general intent crimes. *See id.* at 922-23, 124 P.3d at 201.

Bradley was charged with general intent crimes. And jury instruction no. 14 further explained that "a defendant cannot be liable under a conspiracy theory of liability for acts committed by a coconspirator unless the defendant also had the intent necessary for the particular crime." Therefore, when considered as a whole, the jury was correctly instructed that, for specific-intent crimes, Bradley had to have the specific intent to

commit the crime, even if the act was actually committed by a coconspirator. *See Greene*, 113 Nev. at 167-68, 931 P.2d at 61. Bradley thus failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourteenth, Bradley asserted that counsel should have objected to jury instructions that conflicted as to whether jurors should consider the guilt of anyone else in deciding Bradley's guilt. Jury instruction no. 6 admonished the jury to ignore anyone else's culpability in determining whether Bradley was guilty, and this instruction was appropriate and necessary because his codefendant was charged with many of the same crimes. *See Guy v. State*, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992) (approving the same jury instruction where an accomplice participated in the crimes). Jury instruction no. 13 properly explained when a coconspirator may be liable for the acts of other coconspirators. *See Bolden*, 121 Nev. at 922-23, 124 P.3d at 201. These two jury instructions did not conflict. Therefore, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object. Thus, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifteenth, Bradley claimed that counsel should have objected to jury instruction no. 30, which instructed the jury regarding crimes committed during the course of a burglary or home invasion. Jury instruction no. 30 was substantively identical to NRS 205.070. Therefore,

Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixteenth, Bradley appeared to claim counsel should have objected to the jury instruction defining attempt because he was improperly charged and convicted of both grand larceny of a firearm and attempted grand larceny of a firearm. Bradley asserted that a defendant cannot "do and no[t] do at the same time." However, each relevant count referred to a separate firearm that Bradley stole or attempted to steal. Therefore, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Bradley argued counsel should have objected to jury instruction no. 10 because it explained that a defendant can be found guilty "whether present or not" while jury instruction no. 45 explained that "each defendant is entitled to have his case determined from his own acts or statements and the other evidence in the case which may be applicable to him." Bradley claimed these two jury instructions conflicted and, therefore, misled the jury. Jury instruction no. 10 instructed the jury regarding the aiding and abetting theory of liability, under which a defendant does not need to be present. *See* NRS 195.020. Jury instruction no. 45 explained that each defendant is entitled to separate consideration of his case, and this explanation does not conflict with the instruction on aiding and

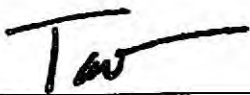
abetting. Because the instructions do not conflict, Bradley failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's failure to object. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Bradley also claims the district court erred by denying his claim that the trial court exhibited bias by denying his motions for substituting counsel. This claim was reasonably available to be raised on direct appeal and, thus, is procedurally barred. *See* NRS 34.810(1)(b). Bradley has not alleged good cause and prejudice to overcome the procedural bar. *See* NRS 34.810(1). Accordingly, we conclude the district court did not err by denying this claim.

Having concluded Bradley is entitled only to the relief described herein, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴On remand, the district court may reconsider its decision on whether to appoint counsel to represent Bradley in these proceedings. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017).

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 21
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Attorney General/Carson City
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