


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVONTAE AMARRI WHEELER,
Appellant,
vs.
GABRIELA NAJERA, WARDEN,
Respondent.

No. 86086-COA

FILED

NOV 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Davontae Amarri Wheeler appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 29, 2022. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Ineffective assistance of trial counsel

Wheeler claimed trial counsel rendered ineffective assistance. 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). 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. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Wheeler claimed counsel was ineffective for failing to investigate his alibi. Wheeler contended that he informed counsel that approximately 30 minutes prior to the shooting, he left the group of four individuals who were involved in the shooting and boarded a City Area Transit (CAT) bus. Wheeler claimed that counsel should have (1) located the bus driver to determine whether they remembered Wheeler boarding the bus, and (2) determined whether there was surveillance video of Wheeler boarding the bus. Wheeler claimed he was memorable because he was openly carrying a firearm on his right hip.

The district court denied this claim without conducting an evidentiary hearing because (1) counsel requested that the trial be continued to ensure he had time to go through all of the evidence; and (2) Wheeler did not allege certain specific facts regarding his alibi, such as what bus stop he used or whether surveillance video actually existed.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Counsel’s motion to continue trial does not belie Wheeler’s claim that counsel failed to investigate his alibi, nor does it otherwise indicate that counsel made a reasonable decision not to investigate Wheeler’s claim. Moreover, Wheeler alleged facts indicating that (1) prior to the crime, he left the four individuals involved in the shooting by taking a CAT bus; (2) he took the bus at 11:30 to 11:35 p.m., and the bus was headed south on Jones Blvd. to the Park Way Villas Apartments; (3) he advised counsel of these facts; and (4) counsel did not

investigate his claim. Wheeler also identified specific avenues of inquiry counsel could have investigated, e.g., whether the driver or surveillance video could corroborate his alibi, and alleged that there is a reasonable probability of a different outcome at trial had counsel investigated his claim, implying counsel would have discovered evidence to rebut the State's position that he was present at the scene of the crime.

Wheeler alleged specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Accordingly, we conclude the district court erred by denying this claim, and we remand this matter to the district court for an evidentiary hearing on this claim.¹

Second, Wheeler claimed counsel was ineffective for failing to request a jury instruction to respond to a jury question regarding conspiracy law. During deliberations, the jury submitted a written question asking, "If a person is aware of a crime being planned, but does nothing and wasn't there, is he guilty of conspiracy?" Wheeler contended that this question indicated that one or more jurors believed he did not participate in the underlying offense or further the objective of a conspiracy, and Wheeler claimed counsel should have requested an instruction stating, "Mere knowledge or approval of, or acquiescence in, the object and purpose of a

¹Wheeler also claimed counsel was ineffective for failing to investigate potential passengers on the bus who might have remembered him. Wheeler did not identify who those passengers were or how counsel might identify them. Rather, this portion of his claim was merely a speculative allegation that an investigation might have revealed passengers and was "merely a hoped-for conclusion." *Sheriff v. Warner*, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996) (quotation marks omitted). Therefore, Wheeler failed to allege specific facts regarding the investigation of potential passengers that indicated counsel's performance was deficient or a reasonable probability of a different outcome at trial but for counsel's errors.

conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy.”

The district court determined that the jury was provided with adequate instruction on conspiracy law and that the parties were able to explain the law of conspiracy to the jury. The district court’s determinations are not supported by substantial evidence. The jury did not receive an instruction encompassing the principle that “absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.”² *Bolden v. State*, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005) (quotation marks omitted), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). Moreover, none of the parties attempted to explain this aspect of conspiracy law in their closing arguments.³

In light of the aforementioned jury question, Wheeler alleged specific factual allegations that are not belied by the record and, if true, may entitle him to relief. Accordingly, we conclude the district court erred by

²We note that the jury received a similar instruction stating mere presence at the scene of the crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense *as an aider or abettor* unless it finds beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

³We note that the State argued that “mere presence at the scene of the crime and knowledge that a crime is being committed” was not sufficient to convict; however, these statements merely reflected the instructions given regarding an aiding and abetting theory of liability and did not purport to explain conspiracy law.

denying this claim, and we remand this matter to the district court for an evidentiary hearing on this claim.

Third, Wheeler claimed counsel was ineffective for failing to request additional jury instructions to respond to the aforementioned jury question, including instructions regarding the definition of a conspiracy, when a person becomes a party to a conspiracy, and the types of proof that may be offered to establish a conspiracy. These additional instructions would not have addressed the jury's question. Moreover, some of these instructions were either given to the jury or were substantially covered by instructions given to the jury. Therefore, Wheeler failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome at trial but for counsel's errors. *See Rose v. State*, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (recognizing a district court may refuse a jury instruction "when the law in that instruction is adequately covered by another instruction given to the jury" (quotation marks omitted)). Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Wheeler claimed counsel was ineffective for failing to investigate whether he was the only individual dressed in red. Wheeler contended that his red apparel substantiated his claim that he was not present at the scene of the crime because a witness described the four individuals at the scene of the crime as wearing dark clothing.

A witness testified that Wheeler wore a maroon sweater the night of the shooting, and counsel argued in closing that Wheeler wore a red or maroon sweater and that this fact provided reasonable doubt that Wheeler was present at the scene of the crime because a witness testified that the four individuals at the scene of the crime wore dark clothing.

Wheeler did not specify what additional action counsel should have taken or how any additional investigation regarding his red apparel would have affected the outcome at trial. Therefore, Wheeler failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome at trial but for counsel's errors. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Wheeler claimed counsel was ineffective for failing to adequately cross-examine the witness who observed the four individuals at the scene of the crime. In particular, Wheeler claimed counsel should have had the witness confirm that (1) he saw only four black males, (2) those four individuals were wearing dark clothing, (3) he did not see any of them openly carrying a firearm on their right hip, and (4) he did not see any of them wearing any other color.

The district court found that counsel had the witness confirm on cross-examination that he saw four individuals at the scene of the crime and that all four were wearing black hoodies. The district court's findings are supported by substantial evidence. Although counsel did not ask the witness whether he saw any of the individuals openly carrying a firearm, the witness stated on cross-examination that he could not identify anything specific about the four individuals. Therefore, Wheeler failed to allege specific facts indicating counsel's performance was deficient or a reasonable

probability of a different outcome at trial but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim.

Sixth, Wheeler claimed counsel was ineffective for failing to blame his codefendants. Specifically, Wheeler contended that codefendant DeShawn R. fabricated Wheeler's involvement in the crime. Counsel argued in closing that DeShawn's testimony was unreliable and untrustworthy and that there was insufficient or no evidence to corroborate DeShawn's testimony. Wheeler did not specify what additional actions counsel should have taken to blame his codefendants. Therefore, Wheeler failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome at trial but for counsel's errors. *See Chappell v. State*, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (stating a petitioner "must *specifically explain* how his attorney's performance was objectively unreasonable" (quotation marks omitted)). Accordingly, we conclude the district court did not err by denying this claim.

Seventh, Wheeler claimed counsel was ineffective for failing to challenge the authenticity of a text message prior to trial. Wheeler did not specify what arguments counsel should have raised in challenging the authenticity of the text message. Moreover, counsel objected at trial to the admission of the text message on several grounds, including authenticity, and the trial court overruled the objection. Wheeler did not specify why the result would have been different had counsel raised the objection earlier. Therefore, Wheeler failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome at trial but for counsel's errors. *See id.* Accordingly, we conclude the district court did not err by denying this claim.

Ineffective assistance of appellate counsel

Wheeler also claimed appellate counsel rendered ineffective assistance. 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.

Wheeler claimed appellate counsel was ineffective for failing to challenge the sufficiency of the evidence for his convictions of conspiracy to commit robbery and of second-degree murder. In particular, Wheeler contended that he could not be held criminally liable as a conspirator because the State failed to prove he acted to further the object of a conspiracy or that he otherwise participated in the underlying offense.

When reviewing a challenge to the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the prosecution and determines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Moreover, "it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

A conspiracy is "an agreement between two or more persons for an unlawful purpose." *Nunnery v. Eighth Judicial Dist. Court*, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008) (quotation marks omitted). "A person

who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator.” *Sena v. State*, 138 Nev., Adv. Op. 34, 510 P.3d 731, 749 (2022) (quotation marks omitted).

“[R]obbery is defined as ‘the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property.’” *Cortinas v. State*, 124 Nev. 1013, 1030, 195 P.3d 315, 326 (2008) (quoting NRS 200.380). Murder is defined as the unlawful killing of a human being with malice aforethought, either express or implied. NRS 200.010(1). Second-degree murder is defined in opposition to first-degree murder, *see* NRS 200.030(2) (“Murder of the second degree is all other kinds of murder.”), and is a general intent crime, *see Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (recognizing second-degree murder does not require “a specific intent to kill”). “[V]icarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a reasonably foreseeable consequence of the object of the conspiracy.” *Bolden*, 121 Nev. at 923, 124 P.3d at 201 (internal quotation marks omitted).

At trial, the jury heard evidence that four individuals, including Wheeler, planned to rob a house together. The jury heard testimony that these four individuals went to a convenience store shortly before the robbery attempt, which was corroborated by surveillance video. The jury also heard testimony that these four individuals left the convenience store to rob the house; that three of these individuals, including Wheeler, brought firearms with them to rob the house; and that Wheeler was present during the robbery attempt and grabbed the victim before the victim was shot.

Given the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that Wheeler entered into an agreement with two or more persons for an unlawful purpose, i.e., to commit robbery, and that Wheeler acted to further the object of the conspiracy or otherwise participated therein. A rational trier of fact could have also found beyond a reasonable doubt that the killing was a reasonably foreseeable consequence of the object of the conspiracy. *See Burnside v. State*, 131 Nev. 371, 394, 352 P.3d 627, 644 (2015) (recognizing that robbery involves “dangerous conduct that creates a foreseeable risk of death”). Therefore, Wheeler failed to allege specific facts indicating that the State failed to prove essential elements of the crimes beyond a reasonable doubt and that the omitted issue would have a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err by denying this claim.

For the foregoing reasons, 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.


_____. C.J.
Gibbons


_____. J.
Bulla


_____. J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Davontae Amarri Wheeler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk