[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12696
Non-Argument Calendar

D.C. Docket No. 6:17-cv-01490-GKS-DCI

DOUGLAS GORDON,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(August 6, 2019)

Before WILLIAM PRYOR, MARTIN, and GRANT, Circuit Judges.

PER CURIAM:

Douglas Gordon, a Florida prisoner proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. This Court granted a certificate of appealability on the issue of "[w]hether the state habeas court unreasonably applied clearly established federal law in denying Gordon's claim that his counsel was ineffective for conceding, without his consent, that he shot the victim." After careful review, we affirm.

I.

In 2011, Gordon was charged with one count of aggravated battery with a firearm. At trial in 2012, the government presented evidence that early on the morning of April 5, 2011, Gordon awoke Carol Dilligard (his then-girlfriend), mumbled that he "couldn't live like this," and then walked out of their shared bedroom. When Gordon returned to the bedroom, Dilligard asked him to repeat what he had said. Instead of doing so, he raised a gun, pointed it at her, and fired. The bullet struck Dilligard's upper arm and travelled through her shoulder and jaw. Dilligard remained conscious and walked out of the home where she dialed 911. At trial, she identified Gordon as the person who shot her. Additionally, the government introduced into evidence a recording of Dilligard's 911 call during which she identified Gordon as her shooter, and an officer testified Dilligard told him Doug Gordon shot her.

After officers arrived on the scene, one officer learned Gordon was the suspect and recalled that he knew Gordon's ex-wife. Officers went to the ex-wife's nearby residence to see if she might help encourage Gordon to come out of his home. She agreed to join the officers. At some point, Gordon came out of his home and police took him into custody. Gordon's ex-wife then accompanied officers to the police station where she asked to speak with Gordon. Officers permitted her to do so and video recorded their discussion. During the discussion, which was played for the jury, Gordon admitted to shooting Dilligard.

During closing arguments, Gordon's trial counsel argued the State had not proved its case of aggravated battery beyond a reasonable doubt. Counsel asked the jury to consider the possibility that the evidence introduced at trial might indicate a scuffle, a self-inflicted wound, or an accidental shooting. He then described the evidence supporting each proposed scenario. Afterward, counsel discussed lesser included crimes the jury could consider if it did not believe the State met its burden of establishing Gordon committed aggravated battery. Counsel explained:

> If you feel like it was an accidental scuffle, shooting, you should render a verdict on the felony battery charge. . . . At worst, felony battery. And then the Judge is going to instruct you on unlawful exhibition of a firearm. Obviously a gun went off. There's no doubt he shot Ms. Dilligard, sadly.

After deliberating, the jury found Gordon guilty of one count of aggravated battery. Gordon was sentenced to 25 years in prison. He later appealed his conviction and sentence to the Florida Fifth District Court of Appeal, which per curiam affirmed without written opinion. See Gordon v. State, 128 So. 3d 813 (Fla. 5th DCA 2013).

In December 2014, Gordon filed a pro se motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. As relevant here, Gordon argued his counsel rendered ineffective assistance by conceding guilt when he said in closing that there was "no doubt [Gordon] shot [the victim], sadly."

The judge who presided over Gordon's trial conducted an evidentiary hearing on the post-conviction motion, and Gordon's trial counsel testified at the hearing. Counsel explained his theory of defense was that Gordon accidentally shot Dilligard. He said he did not see any evidence suggesting someone other than Gordon may have pulled the trigger. Counsel also said he discussed this strategy with Gordon, who "just kind of gave [him] free reign to do whatever [he] could possibly do." According to counsel, Gordon was intoxicated on the night of the shooting and could not remember much about what happened that night.

Before ruling on the motion, the trial judge noted that he "remember[ed] th[e] case very well." He recalled thinking during trial that it was "clear what had happened." The judge then applied the two-prong standard for evaluating

allegations of ineffective assistance of counsel as set out in Strickland v. Washington, 466 U.S. 668, 687 104 S. Ct. 2052, 2064 (1984). Strickland requires a petitioner to prove that counsel's performance was constitutionally deficient and that counsel's deficient performance prejudiced the defense. Id. The judge explained:

> [Regarding] the argument about concession of guilt during closing argument. Well, that was his theory of the case, and there wasn't any other theory of the case. It was accidental, so to say that he shot the gun, he did shoot the gun. That's not a[n] issue in the case. There was no deficiency on the part of Counsel in that regard. It was unfortunately a very, very clear[-]cut set of facts in this case. There was no conflict in the evidence or lack of evidence for that matter.

In a written order after the hearing, the judge reiterated his findings that there was "no other defense to be argued," "[c]ounsel was not deficient[,] and the defendant was not prejudiced by counsel's actions." Gordon appealed the denial of his motion to Florida's Fifth District Court of Appeal, which per curiam affirmed without written opinion. Gordon v. State, 226 So. 3d 849 (Fla. 5th DCA 2017).

Gordon then filed a 28 U.S.C. § 2254 motion, raising the same claim of ineffective assistance of counsel. After ordering and receiving a response from the State, the district court denied Gordon's motion. The district court explained that the state court's rejection of Gordon's ineffective-assistance-of-counsel claim was neither contrary to Strickland nor based on an unreasonable determination of the

facts. Gordon timely appealed, and this Court granted him a certificate of appealability on the issue of "[w]hether the state habeas court unreasonably applied clearly established federal law in denying Gordon's claim that his counsel was ineffective for conceding, without his consent, that he shot the victim." We now consider that issue.

II.

We review de novo a district court's denial of a 28 U.S.C. § 2254 habeas petition based on ineffective assistance of counsel. Johnson v. Sec'y, DOC, 643 F.3d 907, 929 (11th Cir. 2011). We may not grant a § 2254 petition unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398 (2011) (quotation marks omitted). "To justify federal habeas relief, the state court's decision must be so lacking in justification that there was an error beyond any possibility of fairminded disagreement." Nance v. Warden, Ga. Diagnostic

Prison, 922 F.3d 1298, 1301 (11th Cir. 2019) (quotation marks omitted and alteration adopted).

III.

Gordon argues his counsel's closing statement indicating he accidentally shot Dilligard "was deficient because it was confusing and incoherent and it undermined a viable defense that was introduced." Gordon says, absent his counsel's statement, a juror might have believed Dilligard "played a part in the shooting that she was trying to hide." He also says a juror might have "discredited [Dilligard's] testimony at least enough to conclude that . . . even if he did fire the shot, [he] did not do so knowingly and intentionally." Gordon maintains his "counsel ineptly sabotaged that possibility by telling the jury that the gun discharged accidentally without explaining how this occurred."

When a petitioner raises an ineffective-assistance-of-counsel claim under Strickland, he must show that trial counsel's performance was constitutionally deficient and that counsel's deficient performance prejudiced the defense. 466 U.S. at 687, 104 S. Ct. at 2064. When considering whether counsel's performance was deficient, we "review counsel's actions in a highly deferential manner" and apply "a strong presumption . . . of reasonable professional assistance." Johnson, 643 F.3d at 928 (quotation marks omitted). To overcome this presumption, a petitioner must show that "no competent counsel would have taken the action that

his counsel did take." Id. (quotation marks omitted). To establish prejudice, a petitioner must show "that, but for . . . counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In reviewing the denial of a § 2254 petition raising a Strickland claim, we may not disturb the state court decision denying the claim if there is "any reasonable argument that counsel satisfied Strickland's deferential standard." Mendoza v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1213, 1236 (11th Cir. 2014) (quotation marks omitted).

The state post-conviction court reasonably applied Strickland in deciding Gordon was not denied effective assistance of counsel. First, the record indicates Gordon's trial counsel's performance was "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. At the evidentiary hearing on Gordon's state post-conviction motion, counsel explained he made the strategic decision to argue in closing that Gordon accidentally shot Dilligard. As a general matter, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy." Ward v. Hall, 592 F.3d 1144, 1164 (11th Cir. 2010) (quotation marks omitted).

Given Gordon's arguments on appeal, it appears he takes issue with his counsel's execution of the strategy rather than his counsel's choice of defense. He says his counsel "t[old] the jury that the gun discharged accidentally without explaining how this occurred." But the trial record shows counsel in fact offered three detailed explanations for how the gun may have accidentally discharged— a scuffle, a self-inflicted wound, or an accidental shooting. It may be that counsel undermined the self-inflicted-wound theory when he said, "[t]here's no doubt [Gordon] shot Ms. Dilligard, sadly." But, as counsel explained at the hearing on Gordon's post-conviction motion, there was no evidence indicating anyone other than Gordon pulled the trigger. A reasonable attorney could have elected to focus the jury's attention on a theory plausibly supported by the evidence as opposed to one lacking any support. Cf. Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000) (explaining an attorney did not act unreasonably in declining to pursue a self-defense theory at trial where that theory was inconsistent with the petitioner's own description of the killing). The state court reasonably applied Strickland's deficiency prong.

In any event, the state court reasonably concluded Gordon did not suffer prejudice as a result of his counsel's performance. Gordon imagines a juror might have believed Dilligard "played a part in the shooting that she was trying to hide," but he identifies no evidence supporting this theory. He also fails to contend with

the overwhelming evidence that he pulled the trigger. Dilligard testified Gordon (her former boyfriend) was the one who shot her. Her call to 911 and her statements to police immediately after the shooting support this testimony. Additionally, the jury saw a video recording in which Gordon told his ex-wife that he shot Dilligard. Irrespective of counsel's closing comment, it is improbable a jury would have rejected substantial evidence showing Gordon pulled the trigger and would have instead adopted a view for which there is no evidentiary support.

Gordon has not shown the state court's conclusion that he was not denied effective assistance of counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d).

AFFIRMED.