NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ERNEST FRANKLIN EVANS, Defendant - Appellant.	No. 23-617 D.C. No. 3:19-cr-00481-MO-2 MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Submitted April 4, 2024[**]
Portland, Oregon

Before: OWENS and FRIEDLAND, Circuit Judges, and RAYES, District Judge.[***]

Ernest Franklin Evans appeals from the district court's denial of his motion

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

for a new trial following his conviction on one count of Hobbs Act robbery and one count of using and carrying a firearm in commission of a crime of violence and a drug trafficking crime. As the parties are familiar with the facts, we do not recount them here. We affirm.

Though a habeas action is the preferred vehicle to raise an ineffective assistance of counsel claim, we will consider such a claim on direct review where "the record is sufficiently developed to permit review and determination of the issue, or the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013) (quoting *United States v. Rivera–Sanchez*, 222 F.3d 1057, 1060 (9th Cir. 2000)).

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to the first prong, a defendant must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness." *Id.* at 688. As to the second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Reasonable probability of a different result, in turn, means a "'substantial,' not just 'conceivable,' likelihood of a different result."

Shinn v. Kayer, 592 U.S. 111, 118 (2020) (per curiam) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

Evans was not prejudiced by his counsel's performance in cross-examining his ex-girlfriend. Counsel's errors, if any, regarding his treatment of Evans's ex-girlfriend were not sufficiently damaging; had Evans's counsel refrained from asking his two poor questions or pursued the two avenues of impeachment Evans suggests, it is not substantially likely that the result would be different. As the district court pointed out, because the ex-girlfriend was "angry about testifying" and "radiated anger towards the defense," the jury could have "assume[d] a level of bias from those facts alone."

Moreover, key testimony from other witnesses corroborated his ex-girlfriend's statements that (1) she saw Evans with the shotgun on the day of the robbery; (2) Evans admitted to shooting two people at a robbery; and (3) there was a large amount of marijuana at their home during the summer of 2017. The other witnesses' testimony duplicated Evans's ex-girlfriend's account on each of these three points.

Specifically, co-defendant Brian Long testified that Evans had shown him the shotgun during their meeting at Evans's house right before the robbery. Co-defendant Likee Finney confirmed that Evans had the shotgun during that meeting and brought it with him to the robbery. Finney also testified that he was standing

right next to Evans when the shots rang out and that, apart from the two shooting victims, no one else was in the parking lot. After the robbery, Evans admitted to Long that he had shot both drug dealers.

As for the stolen marijuana, Finney described that, following the shooting, Evans left with the container of drugs. Long, based on his own eye-witness account, confirmed that fact. Both Finney and Long described reconvening at Evans's house to divide up the drugs.

Evans argues that the government's heavy reliance on his ex-girlfriend's testimony in closing argument indicates prejudice. But ultimately, regardless of what the government argued in closing, the prosecution had offered substantial evidence—independent of her testimony—that supported Evans's conviction on both counts. Because there was no "'substantial,' not just 'conceivable,' likelihood of a different result," Evans was not prejudiced. *Id.* (quoting *Pinholster*, 563 U.S. at 189).

Because the lack of prejudice is fatal to Evans's claim, we do not reach the question of his counsel's performance.

Our affirmance is without prejudice to any effort to assert a similar ineffective assistance of counsel claim in a habeas petition on an expanded record.

AFFIRMED.