

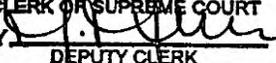
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GENARO RICHARD PERRY,  
Appellant,  
vs.  
THE STATE OF NEVADA; AND JERRY  
HOWELL, WARDEN,  
Respondents.

No. 85042-COA

**FILED**

FEB 14 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Genaro Richard Perry appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 7, 2017, and a first amended petition for a writ of habeas corpus filed on April 29, 2022. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Perry contends the district court erred by denying his claims that trial counsel was ineffective 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. 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). 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, Perry claimed that trial counsel was ineffective for failing to call a specific, independent medical expert to refute the State's medical expert as to the substantial bodily injury suffered by the victim. Perry provided a copy of a report prepared by the medical expert. In this report, the medical expert disputes the treatment the victim received before and after the injury to her eye. However, the report does not dispute that the victim's orbital bone was broken or that she lost several teeth as a result of the injuries she received. Therefore, Perry failed to demonstrate that counsel was deficient, or a reasonable probability of a different outcome had counsel presented the independent medical expert's testimony. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Perry claimed that trial counsel was ineffective for failing to call a security guard to testify about an incident involving the victim. He argued the security guard's testimony would have supported his self-defense claim. Counsel attempted to call this witness at trial, but the trial court did not allow it based on the fact that Perry did not hear the story about the incident from the security guard and, therefore, the security guard's testimony was not relevant to Perry's self-defense claim. Perry also claimed the security guard's testimony could have been used to impeach the witness. However, "[i]mpeachment by use of extrinsic evidence is prohibited when collateral to the proceedings." *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004); *see also* NRS 50.085(3). Further, the victim testified about the incident that the security guard witnessed. Thus,

Perry failed to demonstrate that counsel was deficient or that he was prejudiced. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Perry claimed that trial counsel was ineffective for failing to interview and investigate the security guard. Perry does not allege how interviewing the security guard or investigating him would have changed the trial court's decision not to allow the security guard to testify. Thus, Perry failed to demonstrate a reasonable probability of a different outcome at trial had counsel done further investigation. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Perry claimed that trial counsel was ineffective for failing to have the knife used in the attack tested for DNA and fingerprints. Perry claimed that had the knife been tested, it would have shown that his fingerprints were not on the knife and the only blood on the knife was his. He alleges the victim cut him across the chest.

Evidence presented at trial showed that Perry and the victim had a prior domestic relationship. After pushing the victim downstairs, Perry grabbed a knife belonging to the victim and cut the victim's hand. Further, the victim testified that she bit Perry's hand prior to him handling the knife and he bled. Thus, because both Perry's and the victim's DNA and fingerprints could have been found on the knife, any fingerprint or DNA evidence would not have resulted in a reasonable probability of a different outcome at trial. Further, because the evidentiary value of the DNA and fingerprints would have been low, Perry cannot demonstrate counsel was deficient for failing to have the knife tested. Accordingly, we conclude the

district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Perry claimed that trial counsel was ineffective for failing to challenge the charging document because it did not list the address of the incident. Perry failed to demonstrate that the address had to be listed in the charging document. *See* NRS 173.075. Therefore, he failed to demonstrate that counsel was deficient for failing to challenge the charging document or a reasonable probability of a different outcome had counsel challenged it. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.<sup>1</sup>

Sixth, Perry claimed that trial counsel was ineffective for failing to object to the removal of the self-defense instructions. Counsel proposed the self-defense instructions, and the trial court declined to read them. Perry failed to demonstrate that further objection would have changed the trial court's decision or provided him with a more favorable standard of review on appeal. This court reviewed the trial court's decision, found it was error, but determined that the error was harmless. *See Perry v. State*, No. 69139-COA, 2016 WL 7377159 (Nev. Ct. App. Dec. 14, 2016) (Order of Affirmance). Therefore, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial or on appeal had counsel objected to the trial court's decision. Accordingly, we conclude the

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<sup>1</sup>Perry also argued that counsel should have raised this claim on appeal. Because Perry failed to demonstrate the charging document needed the address where the crime was committed, he failed to demonstrate this claim would have had a reasonable probability of success on appeal. Thus, he failed to show counsel was deficient for failing to raise this claim on appeal, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventh, Perry claimed that trial counsel was ineffective for waiving the preliminary hearing. Perry claimed that had a preliminary hearing been held, the victim would have been discredited and the charges would have been reduced or dismissed. The record demonstrates that Perry, not counsel, waived the right to his preliminary hearing. Thus, Perry failed to demonstrate counsel was deficient. Further, Perry failed to demonstrate a reasonable probability of a different outcome with respect to his charges because he was convicted of all charges after trial and the burden of proof is higher at trial. *Cf. Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (holding that a conviction at trial “under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings”). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eighth, Perry claimed that trial counsel was ineffective for failing to have the victim psychologically examined prior to trial because the victim has mental health issues. Perry did not allege what those mental health issues were, and Perry failed to demonstrate that counsel could have compelled the victim to be psychologically examined based on his allegation that she suffered from mental health issues. Therefore, he failed to demonstrate that counsel was deficient. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding that counsel is not deficient for failing to make futile motions). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Ninth, Perry claimed that trial counsel was ineffective for calling him a “drug addled maniac” in closing argument. During closing

arguments, counsel stated that the victim testified that maybe Perry acted this way because he was on drugs. Counsel used this statement, along with other statements from the victim, to demonstrate the victim was not credible. Thus, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel not used this phrase during closing arguments. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Tenth, Perry claimed that trial counsel was ineffective for failing to conduct a pretrial investigation into the victim's past. Perry claimed counsel would have discovered that the victim was involved in a scheme where she was selling prescription pills. Perry failed to allege that the victim had been convicted of any crime associated with selling prescription pills or that this evidence would have been admissible at trial. *See* NRS 50.085(3). Further, counsel did ask the victim if she was selling her prescription pain medications and she denied doing so. Therefore, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel done further investigation. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eleventh, Perry claimed that trial counsel was ineffective for failing to interview the State's doctor prior to trial. Specifically, Perry claimed the doctor testified as an expert in abuse but he was not actually an expert in abuse. First, the witness did not state he was an expert in abuse. Instead, the witness testified that this type of orbital fracture usually occurs from blunt force trauma and the injury was consistent with the type of assault claimed by the victim. He also stated the victim claimed

she was abused. Second, counsel questioned the doctor extensively regarding his use of the word abuse and whether the doctor could conclusively say the injury was the result of abuse. Given this record, Perry failed to demonstrate that counsel was deficient for failing to interview the State's doctor prior to trial and failed to show a reasonable probability of a different outcome at trial had counsel interviewed the doctor. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Twelfth, Perry claimed that trial counsel was ineffective for failing to raise the conflict of interest between the court-appointed investigator and the justice court judge assigned to this case. He claimed the investigator and justice court judge were married and that this relationship somehow affected the investigator's ability to investigate. Perry waived his preliminary hearing and he failed to allege how the investigator's relationship with the justice court judge, who no longer had jurisdiction over the case, affected the investigator's ability to investigate his case. Thus, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel raised a conflict-of-interest claim. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Thirteenth, Perry claimed that trial counsel was ineffective for failing to argue the assault with a deadly weapon and the battery causing substantial bodily harm constituting domestic battery "overlapped" and one of them should have been dismissed. This claim fails for two reasons. First, assault with a deadly weapon and battery causing substantial bodily harm constituting domestic battery do not violate double jeopardy and are not redundant. *See Jackson v. State*, 128 Nev. 598, 607, 611, 291 P.3d 1274,

1280, 1282-83 (2012). Thus, Perry failed to demonstrate that the charges “overlap” and should have been dismissed. Second, the facts alleged for each charge were different and, therefore, they constituted different crimes. The assault was charged for threatening the victim with a knife. The battery was charged for grabbing the victim, striking her head against or into the floor, and/or for kicking her in the face. Thus, Perry failed to demonstrate counsel was deficient for failing to argue that one of the charges should be dismissed. He also failed to demonstrate a reasonable probability of a different outcome had counsel so argued. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourteenth, Perry claimed that trial counsel was ineffective for failing to investigate and question the victim about the bleach that Perry alleged the victim had poured on his clothing. No bleached clothing was found by the police officers at the crime scene. Therefore, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel attempted to investigate the bleached clothing. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifteenth, Perry claimed that trial counsel was ineffective for failing to investigate the blood on the floor and walls. He claimed counsel should have investigated whether the victim fabricated evidence because she put blood throughout the home and because the pictures she took at the crime scene were the only ones used by the State at trial. At trial, the victim admitted that she placed blood throughout the home. She claimed she did this because she was afraid Perry would kidnap or kill her and she wanted the police to see there was a struggle. Further, the State used photographs

taken by the crime scene analyst and three photos taken by the victim. Because the victim admitted to placing blood throughout the home and the State used more photos than just those provided by the victim, Perry failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had he done further investigation. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixteenth, Perry appears to claim that trial counsel was ineffective for failing to object to the victim referring to the State and police as her “legal team” at sentencing. Perry claimed this showed that the victim tried to have him maliciously prosecuted. For a person to be guilty of malicious prosecution, the person must “cause[ ] or attempt[ ] to cause another person to be arrested or proceeded against for any crime of which that person is innocent.” NRS 199.310. The victim’s statement does not indicate Perry was innocent of the charges against him. Therefore, he failed to demonstrate the victim committed a malicious prosecution. Thus, counsel was not deficient for failing to make a futile objection, *see Donovan*, 94 Nev. at 675, 584 P.2d at 711, and Perry did not demonstrate a reasonable probability of a different outcome at trial had counsel objected. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventeenth, Perry claimed that trial counsel was ineffective for failing to correct errors in his presentence investigation report (PSI). Perry claimed the PSI had incorrect dates for past issues and contained incomplete sentences and an untruthful victim impact statement. Perry failed to support this claim with specific factual allegations that are not belied by the record and, if true, would entitle him to relief. He did not

allege what the incorrect dates were, which sentences were incomplete, or what parts of the victim impact statement were untruthful. Thus, he failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel corrected the alleged errors in his PSI. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

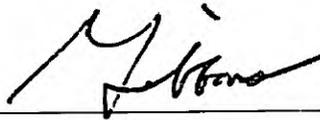
Eighteenth, Perry claimed that trial counsel was ineffective for failing to file a motion for new trial because the trial court improperly refused to give instructions regarding self-defense. As stated previously, this court has already concluded that the trial court's failure to read the self-defense instructions was harmless. *See Perry*, No. 69139-COA, 2016 WL 7377159, at \*1. Thus, Perry failed to demonstrate that a motion for new trial would have had a reasonable probability of success, and counsel is not deficient for failing to make futile motions. *Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Perry claimed the cumulative errors of trial and appellate counsel entitled him to relief. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Perry did not identify multiple instances of deficient performance to cumulate. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Perry claimed postconviction counsel was ineffective with respect to her handling of the petition for genetic marker testing and fingerprint analysis. Perry had no right to the effective assistance of postconviction counsel. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d

867, 870 (2014). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Having concluded that Perry is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Department 17  
Genaro Richard Perry  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk