

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FREDERICK HAROLD HARRIS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.


No. 81255-COA

FREDERICK HAROLD HARRIS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 81257-COA

**FILED**

JUN 07 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Frederick Harold Harris, Jr., appeals from an order of the district court denying a November 16, 2018, postconviction petition for a writ of habeas corpus and a supplemental petition filed in district court case number A-18-784704-W (Docket No. 81257) and a supplemental petition filed in district court case number C-13-291374-1 (Docket No. 81255). These cases were consolidated on appeal. *See* NRAP 3(b). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Harris first contends the district court erred in denying his claims of ineffective assistance of trial counsel. 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, Harris contended trial counsel was ineffective for failing to investigate and prepare for trial because trial counsel inadequately consulted with Harris. A petitioner claiming counsel did not conduct an adequate investigation must show 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). Harris failed to allege in his pleadings what a better investigation and consultation would have revealed. Harris's bare claim failed to demonstrate he was entitled to relief. Therefore, we conclude the district court did not err in denying this claim.

Second, Harris contended trial counsel was ineffective during jury selection for failing to retain an expert jury consultant and failing to seek individual sequestered voir dire. Harris asserted individual sequestered voir dire and a retained jury expert would have helped discover hidden biases that jurors may have held regarding childhood sexual abuse. However, Harris did not identify any signs of bias that trial counsel failed to recognize or any questions trial counsel should have but failed to ask the potential jurors. Additionally, Harris failed to allege that the empaneled

jury was not impartial. Therefore, Harris failed to demonstrate trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had trial counsel acted differently during jury selection. Accordingly, we conclude the district court did not err in denying this claim.

Third, Harris contended trial counsel was ineffective for failing to file a pretrial motion to compel a psychiatric examination of two victims, one of whom had been diagnosed with general anxiety disorder while the other had been diagnosed with a learning disability. A trial court should only order an independent psychological evaluation of a child victim if the defendant presents a compelling reason and after considering several factors set forth in *Koerschner v. State*, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000). See *Abbott v. State*, 122 Nev. 715, 727, 138 P.3d 462, 470 (2006) (reaffirming the test set forth in *Koerschner*). Harris's bare claim did not mention the *Koerschner* factors and failed to allege that he could satisfy them. Therefore, Harris failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's alleged deficiency. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, Harris claimed trial counsel was ineffective for failing to effectively cross-examine a witness and to present an effective closing argument. Harris's bare claims failed to allege what counsel should have done differently or how those actions would have affected the outcome. Harris has thus not demonstrated trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err in denying these claims.

Fifth, Harris claimed trial counsel was ineffective for failing to object to the State's improper vouching during closing argument. "The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted). In closing, the State expressed doubt that all of the victims and their family "could have concocted all of this," argued they could not, and then argued the evidence showed Harris was guilty. The State's argument did not amount to improper vouching because the State did not offer personal assurances of a witness's veracity. Accordingly, Harris did not demonstrate counsel's failure to object was objectively unreasonable. Harris also failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the State's arguments. Therefore, we conclude the district court did not err in denying this claim.

Sixth, Harris claimed trial counsel was ineffective during sentencing for failing to file a sentencing memorandum and failing to present any witnesses to provide mitigation testimony. Harris did not allege what information should have been presented in a sentencing memorandum. Harris also did not allege what witnesses should have been called to present mitigation testimony or what the potential witnesses would have testified to had they been called. Harris's bare claim failed to demonstrate counsel was deficient or that he was prejudiced. Therefore, we conclude the district court did not err in denying this claim.

Seventh, Harris claimed trial counsel was ineffective in preparing for and arguing the motion for a new trial. Specifically, Harris claimed trial counsel failed to secure a witness's signature on an affidavit



prior to the evidentiary hearing on Harris's motion and the witness then refused to fully acknowledge the facts in the affidavit during her testimony. The district court found that counsel prepared an affidavit for the witness to sign, but the witness refused to sign, claiming she did not want to get involved. These findings are supported by the record before this court. Because trial counsel cannot force anyone to sign a document, Harris failed to demonstrate trial counsel's performance fell below an objective standard of reasonableness. Further, the witness testified at the evidentiary hearing for the motion that the statements contained in the unsigned affidavit were true. Therefore, Harris failed to demonstrate a reasonable probability of a different outcome had the witness signed the affidavit. Accordingly, we conclude the district court did not err in denying this claim.

Harris next argues the district court erred in denying his claim of ineffective assistance of appellate counsel. 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. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). We give deference to the 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*, 121 Nev. at 686, 120 P.3d at 1166.

First, Harris contended appellate counsel should have argued that Harris's aggregate sentence of life in prison with the possibility of parole after 720 months amounted to cruel and unusual punishment because it exceeded the length of many homicide cases. Harris did not allege that his sentences were outside the statutory limits. Further, he was convicted of 36 counts, including sexual assault with a minor under 14 years of age; lewdness with a child under the age of 14; child abuse, neglect, or endangerment; first degree kidnapping; coercion; administration of a drug to aid in the commission of a crime; sexual assault with a minor under 16 years of age; sexual assault; battery with intent to commit sexual assault; pandering; and living from the earnings of a prostitute. Harris failed to demonstrate the total sentence imposed is grossly disproportionate to the crimes. Therefore, Harris failed to demonstrate appellate counsel's performance fell below an objective standard of reasonableness or that this issue would have had a reasonable probability of success on appeal. See *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) ("A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." (internal quotation marks omitted)). Accordingly, we conclude the district court did not err in denying this claim.

Second, Harris contended appellate counsel should have argued the trial court erred in limiting Harris's right to cross-examination of essential witnesses in the case. Harris's bare claim did not specify which witnesses or how his right to cross-examine them was limited. Harris thus failed to demonstrate appellate counsel's performance fell below an objective standard of reasonableness or that this issue would have had a

reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Third, Harris contended appellate counsel should have argued that the trial court erred by failing to restrain prejudicial vouching during the State's closing argument. As discussed previously, the excerpt Harris cited did not constitute improper vouching. Therefore, Harris failed to demonstrate appellate counsel's performance fell below an objective standard of reasonableness or that this issue would have had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.<sup>1</sup>

Harris next argues the district court erred by denying his claim that the cumulative effect of counsel's errors in this case warrants reversal. 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), Harris did not demonstrate instances of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018).

Finally, Harris argues his sentence amounted to cruel and unusual punishment. This claim was reasonably available to be raised on direct appeal and, thus, is procedurally barred. *See* NRS 34.810(1)(b). And Harris has not alleged good cause and prejudice to overcome the procedural

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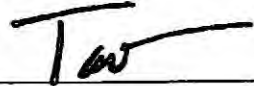
<sup>1</sup>Harris also argues on appeal appellate counsel should have argued that the accumulation of prosecutorial misconduct amounted to plain error. We decline to consider this argument as it was not raised in the district court in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

bar. See NRS 34.810(1). Accordingly, we conclude the district court did not err by denying this claim.<sup>2</sup>

For the foregoing reasons, we conclude Harris is not entitled to relief, and we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Michelle Leavitt, District Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>The application of procedural bars is mandatory. *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). We therefore conclude the district court erred by reaching the merits of Harris's claim. We nevertheless affirm the district court's decision for the reasons stated above. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).