

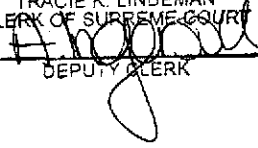
IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY WAYNE PERKINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60118

**FILED**

FEB 27 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On appeal from the denial of his April 2, 2009, petition, and May 20, 2011 supplemental petition, appellant argues that the district court erred in denying some of his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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*). To warrant an evidentiary hearing, a petitioner's claims must be supported by specific factual allegations relevant to each component of the inquiry that, if true and not repelled by the record, would entitle him to relief. *See Strickland*, 466 U.S. at 697; *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant argues that counsel was ineffective for failing to retain a urologist. Appellant has failed to demonstrate deficiency or prejudice. Appellant points to evidence given by the victims suggesting that appellant was not circumcised and states that a urologist would have testified that he was circumcised, thereby impeaching the victims in general and their testimony regarding offenses that involved appellant's penis in particular. However, the interviewing detective admitted that the terminology they suggest to child victims to describe whether a male is circumcised is not precise. Moreover, one of the victims testified that she did not understand the terminology suggested by the detective while the other did not initially recall what she had told the detective. Appellant fails to demonstrate that counsel was objectively unreasonable in not retaining an expert to rebut evidence that was already equivocal, and he does not demonstrate a reasonable probability of a different outcome had counsel retained such an expert. We therefore conclude that the district court did not err in denying this claim without an evidentiary hearing.

Second, appellant argues that counsel was ineffective for failing to investigate and call as witnesses other members of appellant's family. Appellant has failed to support these claims with specific facts that, if true, would have entitled him to relief. Appellant's daughter testified at trial on his behalf, and counsel attempted but was unable to reach appellant's son.<sup>1</sup> Appellant does not specify whether and when he advised counsel of other witnesses' names and contact information and, thus, did not demonstrate that counsel's failure to contact them was

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<sup>1</sup>To the extent appellant challenges the diligence of counsel's investigation, he failed to state what else counsel could have done to reach the son, for whom appellant had invalid contact information.

objectively unreasonable. Moreover, appellant fails to specify what information any additional witnesses would have revealed beyond that presented at trial. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). We therefore conclude that the district court did not err in denying this claim without an evidentiary hearing.

Third, appellant argues that counsel was ineffective because she suffered from an actual conflict of interest. Appellant has failed to support these claims with specific facts that, if true, would have entitled him to relief. Appellant claims that counsel had a conflict of interest because she gave his discovery to his family without his permission, pressured him to accept a guilty plea offer from the State, and yelled at him on the telephone the day before trial. Even if true, appellant's claims do not indicate any divided loyalties such "that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). We therefore conclude that the district court did not err in denying this claim without an evidentiary hearing.

Fourth, appellant argues in his reply brief that counsel was ineffective for failing to provide competent advice during the plea negotiation process and that the district court's order failed to comport with the requirements of NRS 34.830. Arguments on appeal may not be raised for the first time in a reply brief, see NRAP 28(c); *Browning v. State*, 120 Nev. 347, 368, n.53, 91 P.3d 39, 54 n.53 (2004), and we therefore decline to consider them on their merits.<sup>2</sup>

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<sup>2</sup>In light of our disposition regarding this claim of ineffective assistance of trial counsel, respondent's motion to strike these arguments from the reply brief is denied as moot.

Appellant also argues that the district court erred in denying one of his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such 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). 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).

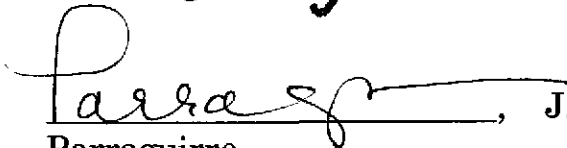
Appellant argues that counsel was ineffective for failing to challenge on direct appeal the sufficiency of the evidence. Appellant claims that there was insufficient evidence to support his conviction because of the inconsistencies and contradictions in the testimony of the State's witnesses and because appellant's oral statement and written apology to the victims did not contain specific statements that supported the victims' allegations. However, any such claim would have been futile and thus was not objectively unreasonable not to raise. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). It is the province of the jury, not the appellate court, to determine the weight and credibility to give conflicting evidence. *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007). The appellate court looks only to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 202, 163 P.3d at 414 (emphasis omitted) (quoting *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d

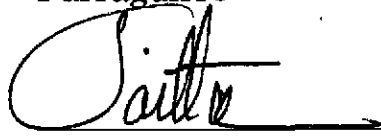
1378, 1380 (1998)). So long as a victim testifies with some particularity as to the incident, that testimony alone is sufficient evidence to uphold the conviction. *Id.* at 203, 163 P.3d at 414. Appellant does not allege that the victims failed to testify with some particularity. We therefore conclude that the district court did not err in denying this claim without an evidentiary hearing.

Finally, appellant argues that the cumulative errors of counsel entitle him to relief. However, appellant has failed to demonstrate that counsel committed any error and thus that there was any cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Douglas W. Herndon, District Judge  
Legal Resource Group  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk