

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTWON MAURICE BAYARD,
Appellant,
vs.
E.K. MCDANIEL, WARDEN,
Respondent.

No. 64384

FILED

MAR 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On appeal from the denial of his July 30, 2009, petition, appellant argues that the district court erred in denying 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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant argues that counsel was ineffective for failing to argue that his convictions violated the Double Jeopardy Clause. Appellant fails to demonstrate that counsel was objectively unreasonable or that appellant was prejudiced. Appellant was convicted of, among other things, three counts of sexual assault with substantial bodily harm (counts 1 through 3), one count of battery with intent to commit sexual assault causing substantial bodily harm (count 6), and one count of battery causing substantial bodily harm (count 7). Appellant argues that the battery counts were lesser-included offenses of the sexual assault counts.¹ Appellant's convictions do not violate the Double Jeopardy Clause because the battery crimes and sexual assault crimes each require proof of an element that the other does not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). The sexual assault offenses require penetration, which the battery offenses do not, while the battery offenses require a use of force or violence that the sexual assault offenses do not, and battery with intent to commit sexual assault further requires the specific intent to commit sexual assault, which the sexual assault offenses themselves do not. *Compare* NRS 200.366(1), (2)(a), *with* NRS 200.400(1)(a), (4)(a), *and*

¹Appellant also argues that count 7 is a lesser-included offense of count 6. However, this argument was not raised below, and we need not consider it on appeal in the first instance. *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33. Even assuming appellant is correct, we note that it is of no practical effect on his sentence since the term imposed on count 7 is concurrent to his sentences on counts 3 and 6 of life in prison without the possibility of parole.

NRS 200.481(1)(a), (2)(b). Appellant's attempt to equate "substantial bodily harm" with the use of force or violence is misplaced, for while such harm could be caused by force or violence, it does not have to be. *See, e.g., Turpin v. Sheriff*, 87 Nev. 236, 239-40, 484 P.2d 1083, 1085 (1971) (finding "considerable tearing" of the victim's genitals occasioned by rape to be sufficient evidence of substantial bodily harm). We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for failing to request jury instructions on lesser-included offenses. Appellant fails to demonstrate that counsel was objectively unreasonable or that appellant was prejudiced. Appellant does not identify any lesser-included offenses of which the jury should have been instructed. To the extent appellant refers to instructions regarding the battery charges as lesser-included offenses of the sexual assault charges, that claim fails for the reasons discussed above. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for failing to move to dismiss counts 5 through 7 because they were acquired through the grand jury and in conscious indifference to appellant's rights. Appellant fails to demonstrate that counsel was objectively unreasonable or that appellant was prejudiced. Appellant argues that the State was consciously indifferent to his rights because it improperly sought an indictment after an information had already been filed. While expressing dislike of the "secretive" and "manipulative" nature of the grand jury

process, appellant nevertheless concedes that “nothing in this conduct [was] explicitly illegal.” He thus fails to demonstrate any conscious indifference to his rights. We therefore conclude that the district court did not err in denying this claim.²

Fourth, appellant argues that counsel was ineffective for failing to object to several instances of prosecutorial misconduct in the State’s closing and rebuttal arguments. The State’s rebuttal argument that appellant was no longer presumed innocent was improper, but even if counsel were deficient for failing to object to the comment, appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected where, as here, there was substantial evidence of guilt and appellant does not argue that the jury was not properly instructed on the State’s burden of proof. See *Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006). Appellant failed to demonstrate that counsel was deficient or that appellant was prejudiced by counsel’s failure to object to the State’s rebuttal argument regarding what defense counsel did or did not know as it was not an improper personal attack but rather a rebuttal of the defense’s suggestion that the State blindly believed the victim’s

²Appellant appears to also argue that counsel was ineffective for not raising a claim of vindictive prosecution and for not claiming that the grand jury lacked probable cause to return the indictment because the victim had previously perjured herself at the preliminary hearing. These arguments were not raised below, and we need not consider them on appeal in the first instance. *Davis*, 107 Nev. at 606, 817 P.2d at 1173.

version of events. We therefore conclude that the district court did not err in denying these claims.³

Fifth, appellant argues that counsel was ineffective for failing to object to the State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when it withheld the name of the victim's drug supplier and that someone with the supplier's name had been imprisoned for drug offenses. Appellant fails to demonstrate that counsel was objectively unreasonable or that appellant was prejudiced. Appellant argues that by failing to disclose the evidence prior to trial, he was denied the opportunity to speak with the drug supplier and possibly gain impeachment evidence if it turned out that the victim had lied about the supplier. Appellant has not demonstrated by a preponderance of the evidence that the evidence was favorable or that it was withheld by the State where the evidence was not discovered until the beginning of trial and was introduced at trial. See *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (providing that *Brady* requires the State to "disclose evidence favorable to an accused when that evidence is material either to guilt or to punishment" (quoting *Roberts v. State*, 110 Nev. 1121, 1127, 881 P.2d 1, 5 (1994))). We therefore conclude that the district court did not err in denying this claim.

³Appellant's remaining allegations of prosecutorial misconduct were either not raised below or were not properly before the district court, and we thus decline to consider them on appeal. See *Davis*, 107 Nev. at 606, 817 P.2d at 1173; see also *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006) (setting forth the procedures by which a petitioner may expand from issues previously pleaded).

Sixth, appellant argues that counsel was ineffective for failing to object to an insufficient canvass of appellant at his sentencing hearing regarding his right to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Appellant's claim was not properly before the district court below, and we thus decline to consider it on appeal. See *Davis*, 107 Nev. at 606, 817 P.2d at 1173; *Barnhart*, 122 Nev. at 303-04, 130 P.3d at 651-52. To the extent appellant attempts to argue that counsel was ineffective for failing to speak on his behalf, appellant fails to support the claim with cogent argument, and we therefore decline to consider it. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

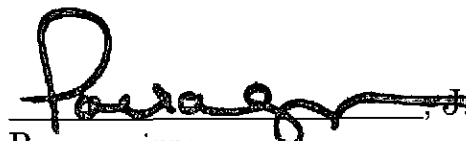
Seventh, appellant argues that the cumulative errors of counsel warrant reversal. Appellant has identified only one potential error: counsel's failure to object to an improper comment in the State's rebuttal argument. Accordingly, there are no errors to cumulate, and we therefore conclude that the district court did not err in denying this claim.

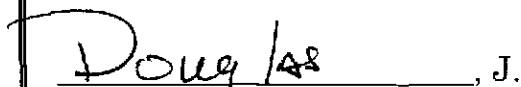
Appellant next argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellant argues that appellate counsel was ineffective because she failed to raise the substantive issues underlying the claims of ineffective assistance of

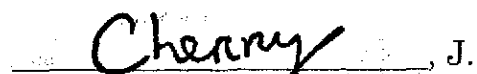
trial counsel discussed above. For the reasons discussed previously, appellant has failed to demonstrate that counsel was objectively unreasonable in not raising the claims or that appellant was prejudiced. We therefore conclude that the district court did not err in denying these claims.

To the extent appellant raises any of the substantive issues underlying his ineffective-assistance claims, those claims are procedurally barred and appellant has not demonstrated cause or actual prejudice to overcome the bar. NRS 34.810(1)(b). Finally, in light of our disposition of appellant's claims, we conclude that his due process rights were not violated by the district court's disposition of his claims, for even if the district court's factual findings were not supported by substantial evidence in the record, the district court reached the correct result. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason). For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre


Douglas, J.


Cherry, J.

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk