IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEON KYUN PARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76760-COA

FILED

JUN 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Keon Kyun Park appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 10, 2016, and supplemental petition filed on December 28, 2017. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Park contends the district court erred by denying his claims that trial-level counsel was ineffective. To demonstrate ineffective assistance of 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 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).

For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions, *Strickland*, 466 U.S. at

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690, and "counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances," *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (internal quotation marks omitted). We give deference to the district court's factual findings that are supported by substantial evidence and not clearly wrong 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, Park claimed counsel should have objected to an argument in the State's sentencing memorandum that Park did not show remorse because he pleaded pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Park failed to demonstrate deficiency or prejudice. Park's claim did not reflect the tenor of the State's argument. The State argued that Park had never expressed remorse and then added that he entered an *Alford* plea. Park failed to demonstrate counsel was objectively unreasonable for not objecting to this argument. Further, the district court found Park expressed remorse at his sentencing hearing, and this finding is supported by substantial evidence in the record. Park has failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected. We therefore conclude the district court did not err by denying this claim.

Second, Park claimed counsel should have objected when the sentencing court failed to articulate its reasons for the overall sentencing decisions. Park failed to demonstrate deficiency or prejudice. There was no basis to object because the sentencing court was not required to state its reasons for imposing a particular sentence, *see Campbell v. Eighth Judicial Dist. Court*, 114 Nev. 410, 414, 957 P.2d 1141,1143 (1998), and Park failed to demonstrate a reasonable probability of a different sentence had counsel

objected. We therefore conclude the district court did not err by denying this claim.[1]

Third, Park claimed counsel should have objected when the sentencing court failed to make specific, required findings before announcing the sentences for the deadly weapon enhancements. *See* NRS 193.165(1), (2); *Mendoza-Lobos v. State*, 125 Nev. 634, 643, 218 P.3d 501, 507 (2009). Park failed to demonstrate by a preponderance of the evidence that counsel was objectively unreasonable for not objecting or that there was a reasonable probability of a different outcome at sentencing had counsel objected. We therefore conclude the district court did not err by denying this claim.[2]

Fourth, Park claimed counsel should have objected when the sentencing court stated it was imposing "equal and consecutive" sentences for some deadly weapon enhancements. Park argued that, because this language mirrored an older version of the deadly-weapon-enhancement statute that did not apply to him, it indicated the sentencing court was sentencing him under that older, inapplicable version of the statute. *Compare* 1995 Nev. Stat., ch. 455, § 1, at 1431 (providing for an equal and

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[1]The district court found this claim was decided on appeal and was thus barred by the law of the case. The district court was mistaken. Park did not raise—and the Nevada Supreme Court did not address—any ineffective-assistance-of-counsel claims on appeal. 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).

[2]The district court found this claim was also decided on appeal and was thus barred by the law of the case. For the reasons stated above and in footnote 1, *supra*, we nevertheless affirm the district court's decision.

consecutive sentence for deadly weapon enhancements), *with* 2007 Nev. Stat., ch. 525, § 13, at 3188 (providing for a sentence of not less than one year and not more than 20 years for deadly weapon enhancements). Park failed to demonstrate deficiency or prejudice. The sentencing court did not impose equal and consecutive sentences for every deadly weapon enhancement, thereby belying Park's claim that the sentencing court mistakenly applied the wrong version of the enhancement statute. We therefore conclude the district court did not err by denying this claim.[3]

Fifth, Park claimed counsel should have provided to the sentencing court statements made by Park's codefendant (Chang) to the police. Park claimed they substantiated Chang's dominion over Park and Park's belief that he could not refuse to go along with Chang's plan. Park failed to demonstrate deficiency or prejudice. Counsel's sentencing memorandum already explained Chang's sway over Park as a matter of their shared Korean culture and included specific examples from their relationship. Neither Chang's single statement suggesting he initiated the conversation about killing the victim, nor his acknowledgement that Park was younger than him, demonstrated his dominion over Park. We therefore conclude the district court did not err by denying this claim.

Park also contends the district court erred by denying his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of

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[3]The district court found this claim was also decided on appeal and was thus barred by the law of the case. For the reasons stated above and in footnotes 1 and 2, *supra*, we nevertheless affirm the district court's decision.

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). Appellate counsel is not required to—and will be most effective when she does not—raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983), *as limited by Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

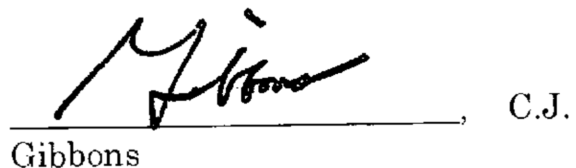
First, Park claimed counsel should have argued that the State's *Alford* comment constituted misconduct and the district court improperly relied on the comment. For the reasons stated previously, this argument lacked merit. Further, nothing in the record suggests the district court relied on the State's comment. We therefore conclude the district court did not err by denying this claim.

Second, Park claimed counsel should have argued that the district court erred by failing to state its reasons for imposing the deadly weapon enhancements that it did. Park failed to demonstrate deficiency or prejudice. Counsel testified at the evidentiary hearing in this matter that she was aware the sentencing court was obligated to make specific findings and, had trial-level counsel objected, she would have raised the issue on appeal. Counsel further testified that she was focused on the appellate arguments with the best chance of reversing Park's first-degree-murder sentence: life without the possibility of parole. Park failed to demonstrate that counsel's strategy was objectively unreasonable. Even had counsel objected, Park could not demonstrate a reasonable probability of success on appeal, because nothing in the record suggested the sentencing court's failure to make the required findings had any bearing on its sentencing

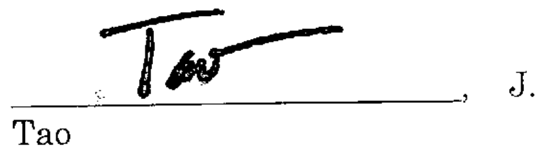
decision. *See Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 508. We therefore conclude the district court did not err by denying this claim.[4]

Finally, Park claimed the cumulative errors of counsel warranted 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), Park did not identify any instances of deficient performance to cumulate. We therefore conclude the district court did not err by denying this claim. Accordingly, we

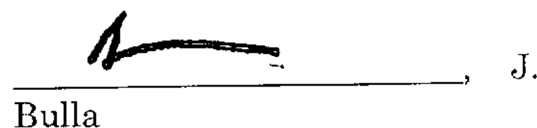
ORDER the judgment of the district court AFFIRMED.



_______________________, C.J.
Gibbons



_______________________, J.
Tao



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[4]Park now contends that, had counsel been successful in reversing any part of any sentence (e.g., a deadly weapon enhancement), he would have been entitled to a new sentencing hearing on every part of every count, including the primary murder sentence of life without the possibility of parole. This new argument was not properly raised before the district court below. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). We therefore need not consider it on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Moreover, Park's argument lacks merit. *See Dolby v. State*, 106 Nev. 63, 67, 787 P.2d 388, 390 (1990) (holding only the unlawful, enhancement sentence—and not the lawful, primary sentence—may be vacated).

cc: Hon. Ronald J. Israel, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk