

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHENAFI GEBRE ABERHA,  
Appellant,  
vs.  
WILLIAM A. GITTERE, WARDEN OF  
ESP; AND THE STATE OF NEVADA,  
Respondents.

No. 79051-COA

**FILED**

AUG 10 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Ashenafi Gebre Aberha appeals from an order of the district court denying a postconviction petition for writ of habeas corpus filed on February 28, 2019. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

*Ineffective assistance of trial counsel claims*

Aberha argues the district court erred by denying the ineffective-assistance-of-trial-counsel claims raised in his petition. To prove ineffective assistance of trial counsel, a petitioner must demonstrate 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, 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). 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). To warrant an evidentiary hearing, 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).

Aberha claimed counsel was ineffective for failing to investigate. First, he claimed counsel should have traveled to England to investigate whether the victim was promiscuous in England or whether she had falsely reported allegations against other men. Aberha claimed England has a "notorious drinking and pub culture," and therefore, counsel should have investigated whether the victim was involved in that culture. Aberha's claim was based merely on speculation, and he failed to demonstrate a reasonable attorney would have traveled to England to investigate this evidence. Further, evidence that the victim may have been promiscuous would not have been admissible at trial. *See* NRS 50.090. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, he claimed counsel should have investigated Rodarte, the second man in the room. Specifically, he claimed counsel should have investigated whether Rodarte was a participant in the event and why Rodarte did not immediately report the incident. Aberha failed to allege how further investigation into Rodarte would have revealed he was a participant in the event. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable). Further, testimony was presented at

trial that Rodarte did not immediately report the incident. And Aberha failed to demonstrate further investigation into why Rodarte did not report the incident would have had a reasonable probability of a different outcome at trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Aberha claimed counsel should have investigated the hotel key lock logs because he was in the room for at least 15 minutes, not the one minute purported by the State. Given the testimony and evidence presented at trial, Aberha failed to demonstrate that any further investigation into the key lock logs would have created a reasonable probability of a different outcome. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Aberha claimed counsel should have investigated whether the victim's employer had disciplined her for "escapades" or sexual misconduct in the past. Aberha failed to specify any facts that would have led objectively reasonable counsel to conduct such an investigation. Further, Aberha failed to demonstrate that any such evidence would have been admissible at trial. *See* NRS 50.090. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to make appropriate arguments to the trial court as to how the "romance kit" was admissible. He claimed counsel should have argued the romance kit was not sexual history or conduct. Aberha claimed this evidence would have undermined the victim's assault claim and would call into question her character because she had a boyfriend back in England.

Counsel attempted to admit the romance kit, and the trial court concluded it was related to her sexual history or conduct and was barred by NRS 50.090. Further, the trial court concluded it was not relevant to the issue of consent pursuant to NRS 48.069. The Nevada Supreme Court concluded the district court erred by finding it was barred by NRS 50.090 but found that the trial court correctly concluded it was not relevant to the issue of consent under NRS 48.069. *See Aberha v. State*, Docket No. 73121 \*8-9 (Order of Affirmance, October 31, 2018). The Nevada Supreme Court explained it was not relevant for any purpose because the probative value of the evidence was substantially outweighed by the danger of undue prejudice. *See id* at 9. Therefore, Aberha failed to demonstrate counsel was deficient. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to seek an acquittal after the jury hung in his 2016 trial. Aberha failed to demonstrate an acquittal would have been granted, and therefore, he failed to demonstrate counsel was deficient for failing to seek an acquittal. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha argued counsel was ineffective for failing to file a motion to suppress his statements to the police. Aberha claimed he did not speak English well and did not understand the *Miranda*<sup>1</sup> warnings. Prior to Aberha's 2016 trial, counsel filed a motion to suppress Aberha's statements. Before the trial court made a ruling on the motion, the State agreed not to use Aberha's statements to the police in its case-in-chief. The

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<sup>1</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

State reserved the right to use the statements for impeachment purposes if Aberha decided to testify. Because this is the relief Aberha would have received had his motion been granted, *see Allen v. State*, 103 Nev. 512, 515, 746 P.2d 138, 140 (1987) (statements taken in violation of *Miranda* can be used for impeachment purposes), counsel withdrew the motion as moot. The State did not seek to introduce the statements at either trial. Therefore, Aberha failed to demonstrate counsel was deficient, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha argued counsel was ineffective for failing to file a motion to suppress the DNA evidence because he claimed he did not understand what he was consenting to when he agreed to give a DNA sample. Even assuming Aberha did not understand what he was consenting to, Aberha failed to demonstrate the evidence would not have otherwise been obtained and admitted at trial. *Nix v. Williams*, 467 U.S. 431, 444 (1984) (evidence will not be suppressed based on improper police conduct if the prosecution can prove by a preponderance of the evidence that it would ultimately be discovered by lawful means). Had Aberha refused consent, the State could have received the DNA through other means. *See* NRS 176.09123(2)(b) (authorizing law enforcement to collect DNA from an individual arrested for a felony). Counsel was not deficient for failing to file a futile suppression motion. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha argued counsel was ineffective for failing to properly cross-examine Rodarte. Specifically, he claimed counsel failed to use Rodarte's prior statements to impeach him. This claim is belied by the

record because counsel did use Rodarte's prior statements to impeach him. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha argued counsel was ineffective for failing to "implement and enforce double jeopardy protections." He claimed he did not have the intent to commit sexual assault when he entered the room. Further, he claimed he did not take anything of value; therefore, he could not have committed a burglary with intent to commit sexual assault.

First, Aberha's claim did not implicate double jeopardy. *See Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) (discussing the types of double jeopardy claims). Second, counsel argued that the sexual contact was consensual, thereby arguing that Aberha did not have the intent to commit sexual assault. Finally, the State was not required to prove Aberha took anything to prove the burglary. *See* NRS 205.060(1). Therefore, Aberha failed to demonstrate counsel was deficient, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for using coercion and scare tactics to prevent him from testifying. Aberha claimed that had he testified, he could have corrected misrepresented evidence. Aberha also claimed he did not know that only he could waive the right to testify. Aberha was canvassed regarding his right to testify by the district court, and he acknowledged he understood the right to testify was his choice and not counsel's. Aberha failed to support his claim with specific facts that are not belied by the record and, if true, would entitle him to relief. Therefore, Aberha failed to demonstrate counsel was deficient. Accordingly, we

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

Next, Aberha claimed counsel was ineffective for failing to seek a motive-to-lie instruction. Aberha failed to demonstrate he was entitled to an instruction on motive to lie and further failed to allege what this instruction would have said.<sup>2</sup> Therefore, Aberha failed to demonstrate counsel was deficient, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to challenge for cause a juror whose sister was the victim of sexual assault. During jury selection, a juror admitted his sister had been sexually assaulted by a family member as a child. The juror stated numerous times that that experience would not affect his ability to be impartial during this trial. Because the juror stated he could be impartial, Aberha failed to demonstrate a challenge for cause would have been successful. Thus, Aberha failed to demonstrate counsel was deficient. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to argue two jurors committed misconduct for falling asleep during trial. Aberha failed to support this claim with specific facts, and there is no evidence in the record that any jurors fell asleep during trial. Therefore, Aberha failed to demonstrate counsel was deficient for failing to argue this claim. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

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<sup>2</sup>We note the jury was instructed regarding the credibility of witnesses.

Next, Aberha claimed counsel was ineffective for failing to hire a DNA expert. Aberha failed to specify what a DNA expert would have testified to. He therefore failed to demonstrate counsel was deficient or how hiring a DNA expert would have created a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to differentiate Aberha from Rodarte based on their physical features. Aberha failed to allege how differentiating them based on their physical features would have led to a reasonable probability of a different outcome at trial. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed counsel was ineffective for failing to “sequester” the jury to determine why it rendered a guilty verdict. The jury has no obligation to speak with counsel after trial. Therefore, Aberha failed to demonstrate counsel was deficient. Further, finding out why the jury chose to convict Aberha would have had no effect on the outcome of the trial. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

*Ineffective assistance of appellate counsel claims*

Next, Aberha argues the district court erred by denying his ineffective-assistance-of-appellate-counsel claims. 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, 1113-14 (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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. 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.

Aberha claimed appellate counsel was ineffective for failing to investigate the victim's past, Rodarte's involvement in the incident, and the key lock logs. Aberha failed to allege any claims counsel could have raised on appeal had counsel investigated these issues. To the extent Aberha claimed counsel could have raised ineffective assistance of counsel claims on appeal, Aberha failed to demonstrate counsel was deficient. Ineffective assistance of counsel claims are generally not appropriate for review on direct appeal. *See Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed appellate counsel was ineffective for failing to argue his statements to the police should have been suppressed. Aberha's statements to the police were not admitted at trial; therefore, counsel was not deficient for failing to raise this claim on appeal. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed appellate counsel was ineffective for failing to argue the DNA evidence should have been suppressed because he did not understand what he was consenting to. As stated above, Aberha

failed to demonstrate the DNA evidence would have been suppressed. Therefore, Aberha failed to demonstrate this claim had a reasonable probability of success on appeal, and counsel was not deficient for failing to raise this claim. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed appellate counsel was ineffective for failing to argue his double jeopardy claim. Specifically, he claimed he lacked the intent to commit sexual assault when he entered the room and he did not take anything of value from the room. First, as stated above, this claim did not implicate double jeopardy. Second, the State presented sufficient evidence that he intended to commit sexual assault when he entered the room, and Aberha failed to demonstrate a challenge to this evidence would have been successful. Third, the State was not required to prove Aberha took anything from the room to prove a burglary. *See* NRS 205.060(1). Therefore, Aberha failed to demonstrate counsel was deficient or this claim would have had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Aberha claimed appellate counsel was ineffective for failing to make alternative arguments as to how the romance kit and hotel bills were admissible. Appellate counsel did argue that the district court erred by concluding the romance kit and hotel bills were inadmissible. The Nevada Supreme Court denied these claims. *See Aberha v. State*, Docket No. 73121 \*7-11 (Order of Affirmance, October 31, 2018). Aberha failed to demonstrate counsel was deficient in not raising alternative arguments or that any alternative arguments would have had a reasonable probability of

success on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

*Remaining claims*

Aberha also argues the district court erred by denying several of his claims of State and trial court error. He claimed the State committed prosecutorial misconduct at trial, the State destroyed evidence by failing to gather fingerprints, some key lock reports are missing, a detective's report racially stereotyped him, the district court should have excused juror 554 for cause because he admitted his sister had been sexually assaulted, the district court should have given a curative instruction or made an inquiry into two jurors who fell asleep during trial, and the district court erred by not allowing the defense a DNA expert. These were all claims Aberha could have raised on direct appeal. His failure to do so means these claims were procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(1)(b)(2). Aberha did not allege good cause and prejudice for failing to raise these claims on appeal. Therefore, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Next, Aberha claimed the district court erred by using video of the victim testifying from the first trial instead of requiring her presence at the subsequent trial. This claim was raised on direct appeal, and was rejected by the Nevada Supreme Court. See *Aberha v. State*, Docket No. 73121 \*8-9 (Order of Affirmance, October 31, 2018). Therefore, this claim was barred by the doctrine of law of the case, which cannot be avoided by more detailed and precisely focused argument. See *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the

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

Next, Aberha claimed he was actually innocent. Specifically, he claimed the Nevada Supreme Court made its determination based on an unreasonable determination of facts. He also claimed the victim was required to resist within her means and she did not do so, the romance kit the victim purchased after the assault was evidence she consented, and she and Rodarte had motives to lie.<sup>3</sup> The Nevada Supreme court has never held that a freestanding claim of actual innocence, such as Aberha raised, can be raised in a postconviction petition for a writ of habeas corpus. *See Berry v. State*, 131 Nev. 957, 966 n.2, 967 n.3, 363 P.3d 1148, 1154 nn.2,3 (2015) (noting that it is not clear whether a free-standing claim of actual innocence may be raised in a postconviction petition for a writ of habeas corpus). The Legislature, however, has recently created a new mechanism for a person who has been convicted to assert his or her factual innocence based on newly discovered evidence. *See* NRS 34.900-990. In light of the new remedy, we decline to consider Aberha's freestanding claim of innocence as he may raise this claim in a petition filed pursuant to NRS 34.900.

Finally, Aberha claimed the cumulative errors of trial and appellate counsel entitled him to relief. Because Aberha's claims of trial court error were procedurally barred and not considered on the merits, we decline to consider whether those claims of errors could be cumulated. And even assuming that multiple deficiencies of counsel may be cumulated to

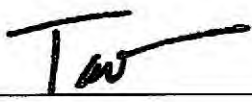
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<sup>3</sup>Aberha did not argue actual innocence as a means of overcoming the procedural bar to his direct appeal claims. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (describing gateway claim of actual innocence), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12.

establish prejudice, see *McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Aberha failed to demonstrate he was prejudiced by any potential deficiencies. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.<sup>4</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

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

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

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

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<sup>4</sup>Aberha also raises several claims on appeal that were not raised in his petition below. Specifically, he argues the district court erred by denying his claims that counsel failed to object to the trial court's dismissals of jurors, the trial court erred by allowing a racially unequal jury, the trial court erred by refusing to ask the jury if they had questions for a witness, the trial court erred by allowing pictures of Aberha's penis, the police report was falsified, and appellate counsel was ineffective because of typos in the opening brief. Because these claims were not raised below, we decline to consider them for the first time on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

<sup>5</sup>Aberha argues the district court erred by denying his petition as a pretrial petition. After reviewing the district court's order, we conclude the district court's reference to a pretrial petition in the caption was a clerical error and did not affect the district court's analysis in the order. Therefore, we conclude Aberha has failed to demonstrate he is entitled to relief on this claim. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

cc: Hon. Jacqueline M. Bluth, District Judge  
Ashenafi Gebre Aberha  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk