

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARTIN BOZEMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 82596-COA

**FILED**

NOV 05 2021

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

*ORDER OF AFFIRMANCE*

Martin Bozeman appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 29, 2020, and a supplemental petition filed on September 25, 2020. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Bozeman contends the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. 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). To warrant an evidentiary hearing, 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. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Bozeman contended counsel should have argued for a jury instruction that battery constituting domestic violence was a lesser included offense of kidnapping. A lesser included offense is “necessarily included in the charged offense if all of the elements of the lesser offense are included in the elements of the greater offense.” *Alotaibi v. State*, 133 Nev. 650, 653, 404 P.3d 761, 764 (2017) (quotation marks omitted). Additionally, “if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted.” *Id.*

The offense of battery constituting domestic violence requires the defendant to commit a battery against a specific type of person defined by statute. See NRS 33.018(1)(a); NRS 200.481(1)(a). Neither first-degree kidnapping nor second-degree kidnapping contains the specified-person element of domestic violence. See NRS 200.310. Thus, battery constituting domestic violence is not a lesser included offense of either degree of kidnapping, and no jury instruction was warranted. Therefore, Bozeman failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel requested a battery-constituting-domestic-violence jury instruction. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Bozeman contended counsel requested a continuance without his consent and that continuance denied Bozeman his right to a speedy trial. The district court found that counsel was granted a continuance because counsel had a different trial scheduled at the time

Bozeman's trial was originally scheduled. This finding is supported by substantial evidence in the record. Further, counsel did not need to obtain Bozeman's consent. See *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (concluding counsel may waive a client's statutory right to a speedy trial because counsel generally controls scheduling matters). Thus, Bozeman failed to demonstrate counsel's actions fell below an objective standard of reasonableness. Moreover, Bozeman failed to demonstrate a reasonable probability of a different outcome because the Nevada Supreme Court rejected his speedy-trial claim on direct appeal. See *Bozeman v. State*, Docket No. 75684 (Order of Affirmance, September 27, 2019). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Bozeman appeared to argue counsel should have objected to improper hearsay testimony from Sgt. Carroll. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035. Bozeman's bare claim failed to specify any part of Sgt. Carroll's testimony where Sgt. Carroll referenced an out-of-court statement. Thus, Bozeman failed to demonstrate counsel's actions fell below an objective standard of reasonableness or 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.

Bozeman also argues the district court erred by denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. 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).

First, Bozeman contended counsel should have filed a reply brief. Reply briefs are optional pursuant to NRAP 28(c). Bozeman's bare claim did not allege what arguments counsel should have responded to in the reply brief. Thus, Bozeman failed to demonstrate counsel's actions fell below an objective standard of reasonableness or 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.

Second, Bozeman contended counsel should have requested oral argument. This court takes judicial notice that counsel did request oral argument in Bozeman's Docketing Statement filed on June 4, 2018. See *Bozeman v. State*, Docket No. 75684 (Order of Affirmance, September 27, 2019). Thus, Bozeman's claim is belied by the record. Further, Bozeman's bare claim did not allege what counsel should have argued at oral argument or how oral argument would have changed the outcome of the proceedings. Thus, Bozeman failed to demonstrate counsel's actions fell below an objective standard of reasonableness or 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.

Bozeman also contends the district court erred by denying his claim of prosecutorial misconduct. The Nevada Supreme Court has already considered and rejected this claim. See *Bozeman v. State*, Docket No. 75684

(Order of Affirmance, September 27, 2019). Thus, the doctrine of the law of the case prevents further consideration of this claim. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

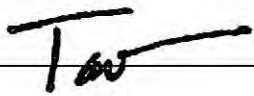
Bozeman also claims the district court erred by denying his claim that the trial court inappropriately applied state law rather than federal law and this application of the law amounted to judicial misconduct. These claims could have been raised on direct appeal and, therefore, were waived absent a demonstration of good cause and prejudice. *See* NRS 34.810(1)(b)(2). Bozeman did not allege any good cause or prejudice to demonstrate why he was unable to raise these claims on direct appeal. Therefore, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Lastly, Bozeman claims the district court erred by denying his motion to appoint counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). Because the district court granted Bozeman leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (4), Bozeman met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. However, the record reveals that the issues in this matter were not difficult, and Bozeman was able to comprehend the

proceedings. For these reasons, the record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Cristina D. Silva, District Judge  
Martin Bozeman  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk