

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SAM VAH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86734-COA

FILED

MAY 31 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Sam Vah appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on May 28, 2020, and supplemental pleadings. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Vah argues the district court erred by denying his claims that counsel was ineffective. The State contends Vah waived and/or abandoned all of his claims except for one because he did not address or incorporate them in his supplemental pleadings and he did not raise them during oral argument or at the evidentiary hearing on Vah's petition.

Vah was not required to address or incorporate his prior claims in his supplemental pleadings. *See Pleading, Black's Law Dictionary* (11th ed. 2019) (stating "a supplemental pleading merely adds to the earlier pleading and does not replace it"). Moreover, the State does not cite any authority to support the proposition that a petitioner waives and/or

abandons claims if counsel fails to present argument or evidence in support of those claims at a hearing, and the record does not indicate that postconviction counsel intended to abandon any claims raised. Rather, the record indicates that the district court held oral argument and an evidentiary hearing on the petition and supplemental pleadings, that these hearings were intended to encompass all claims raised in the pleadings, and that counsel simply chose to focus on what he believed to be Vah's "best" claim.<sup>1</sup> Therefore, we conclude that Vah did not waive or abandon his claims, and we consider them below.

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, 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

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<sup>1</sup>For this reason, we reject Vah's contention that the district court failed to hold an evidentiary hearing on several of his claims.

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). A petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle them to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Vah claimed counsel was ineffective for failing to present exculpatory forensic evidence at trial. Vah was charged with, and convicted of, sexually assaulting his roommate's romantic partner. Vah contended that a forensic test indicated "a partial mixture of semen found on [his] penis was *inconclusive* to [the victim's] blood type" and that the mixture did not "belong[ ]" to the victim but rather to Vah's girlfriend. The district court held an evidentiary hearing, in which only Vah was called to testify. Vah testified that counsel told him that he could not use the report because the police did not swab Vah's penis. The district court found Vah's testimony was not credible, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Vah did not present any other evidence as to why counsel declined to introduce the report into evidence; thus, he failed to overcome the presumption that counsel performed effectively, see *Johnson v. State*, 133 Nev. 571, 577, 402 P.3d 1266, 1274 (2017).

Moreover, the report does not indicate that the penile swabs were inconclusive “to [the victim’s] blood type” or that the “mixture belonged to [his] girlfriend.” Rather, the report states that “[t]he partial DNA profile obtained from the epithelial fraction of the penile swabs . . . is consistent with a mixture of two people with at least one being male” and that although the major DNA profile is consistent with Vah, no conclusions could be made regarding the minor contributor. The report also states that “[c]onclusions with regard to the sperm fraction of the penile swabs . . . cannot be reached because the profile is not suitable for comparison.” The district court also concluded that it was reasonable for counsel not to introduce the report in light of a homicide detective’s testimony that it was common in sexual assault cases not to have DNA results. In light of the foregoing, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel presented the results of the forensic test. Accordingly, we conclude the district court did not err by denying this claim.

Second, Vah claimed counsel was ineffective for failing to call an expert to testify to the coercive elements of Vah’s confession and to the culture and history of Liberia. Approximately three weeks before trial was set to begin, counsel requested that the trial be continued so he could retain an expert to testify to the coercive nature of Vah’s confession, and the court declined to move the trial date. Vah did not allege what counsel should have done in light of the trial court’s order. Moreover, Vah did not present

any evidence as to what an expert on the culture and history of Liberia would have testified to. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel called such an expert. Accordingly, we conclude the district court did not err by denying this claim.

Third, Vah claimed counsel was ineffective for failing to present evidence of Vah's suffering during his coerced confession. In particular, Vah contended he had no food or sleep for 48 hours while in police custody and that the police ignored his complaints of severe stomach pain. Vah did not present any evidence in support of this claim at the evidentiary hearing and thus failed to demonstrate the underlying facts by a preponderance of the evidence. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel presented this evidence. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Vah claimed counsel was ineffective for failing to offer a jury instruction on the voluntariness of a confession and/or for failing to correct the trial court's instruction. The trial court instructed the jury that it could not consider Vah's confession against him unless it first determined that the confession was freely and voluntarily made and was not the result of inducement, coercion, intimidation, threat, violence, or duress. Vah's bare claim failed to specify what alternative instruction counsel should have

offered or how counsel should have corrected the trial court's instruction. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel offered an instruction or corrected the trial court's instruction. Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Vah claimed counsel was ineffective for failing to object to the State's motion for consolidation. Vah was initially charged with sexual assault. He failed to appear on the second day of the trial, and the jury was excused. Thereafter, Vah was charged with failure to appear, and the State filed a motion to consolidate the cases. In its motion, the State contended that consolidation was appropriate because, *inter alia*, evidence of Vah's failure to appear would be admissible at trial on the sexual assault charge as evidence of Vah's consciousness of guilt. See NRS 173.115(1) (stating "[t]wo or more offenses may be charged in the same . . . information in a separate count for each offense if the offenses charged" are "[b]ased on two or more acts or transactions connected together"); see also *Rimer v. State*, 131 Nev. 307, 322, 351 P.3d 697, 708-09 (2015) (stating charges are "connected together" if "evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge").

Vah did not contend in his petition why the State's argument for consolidation lacked merit.<sup>2</sup> And although Vah contended that joinder of the offenses was more prejudicial than probative, Vah did not contend that simultaneous trial of the offenses "render[ed] the trial fundamentally unfair, and hence, result[ed] in a violation of due process" such that severance was required. *Id.* at 323-24, 351 P.3d at 709 (quotation marks omitted). Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel opposed the State's motion for consolidation. Accordingly, we conclude the district court did not err by denying this claim.

Sixth, Vah claimed counsel was ineffective for failing to cross-examine the victim with a prior inconsistent statement. In particular, Vah claimed that (1) at his first trial, the victim testified that she woke up from a blackout and found a man having sex with her and that she stated "no" in Icelandic because she initially believed it was her boyfriend who spoke Icelandic, but (2) at his second trial, the victim testified that she stated "no" without specifying that she said this in Icelandic. Vah contended that whether Vah understood the victim as saying "no" was an exculpatory factor that could show Vah believed the sex was consensual.

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<sup>2</sup>We note that, in his closing argument, trial counsel argued that although Vah failed to appear after being released on his own recognizance, the fact that Vah returned was indicative of Vah's innocence.

Although the victim's prior testimony was more detailed, it was not inconsistent with her testimony at the second trial. Moreover, whether Vah understood the victim to consent to sex was irrelevant to Vah's theory of defense, which was that he did not have sex with the victim and that his confession to the contrary was coerced. Finally, even if counsel elicited this information on cross-examination, the victim's testimony still indicated that Vah began having sex with her while she was asleep such that she could not have consented. *See* NRS 200.366(1)(a) (stating a person is guilty of sexual assault if they subject another person to sexual penetration "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of the perpetrator's conduct"). In light of the foregoing, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel cross-examined the victim on this statement. Accordingly, we conclude the district court did not err by denying this claim.

Seventh, Vah claimed counsel was ineffective for failing to object when the State elicited testimony from him that the trial court had previously found his confession admissible. Vah contended that the State used the trial court's evidentiary ruling to vouch for the confession's reliability. Even assuming counsel was deficient for failing to object to this testimony, (1) Vah testified that his confession was coerced; (2) the State



did not argue that the trial court's evidentiary ruling indicated Vah's confession was freely and voluntarily made; and (3) as previously discussed, the jury was instructed that it was its duty to determine whether Vah's confession was freely and voluntarily made. Jurors are presumed to follow the trial court's instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, Vah failed to demonstrate a reasonable probability of a different outcome had counsel objected to this testimony. Accordingly, we conclude the district court did not err by denying this claim.

Eighth, Vah claimed counsel was ineffective for failing to object when the State improperly vouched for witnesses in its rebuttal argument. During its rebuttal, the State informed the jury that a witness was "being honest with you." The trial court interrupted the State and reminded the State not to vouch for the credibility of witnesses. Immediately thereafter, the State informed the jury that the witness "was honest" about certain testimony and that other witnesses had no "issue relaying what happened in an honest – or excuse me –." The trial court interrupted the State again and called a bench conference. The State thereafter reminded the jury that it was its job to determine who was being honest.

Vah did not demonstrate that objectively reasonable counsel would have objected to the challenged remarks after the trial court had addressed them sua sponte, nor did he allege that counsel should have requested any specific relief beyond that provided by the trial court.

Moreover, the challenged remarks were limited, made in the context of responding to Vah's credibility argument, and quickly stopped by the district court in the view of the jury. In light of the foregoing, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel objected to these remarks. Accordingly, we conclude the district court did not err by denying this claim.

Ninth, Vah claimed counsel was ineffective for failing to object when the State asked Vah whether other witnesses were lying on cross-examination. This court previously determined that the State's questioning was improper because Vah had not challenged the truthfulness of the witnesses during his direct examination. *See Vah v. State*, No. 74938-COA, 2019 WL 3379721, at \*3 (Nev. Ct. App. July 25, 2019) (Order of Affirmance). As such, we conclude counsel was deficient for failing to object to this line of questioning. However, Vah did not demonstrate that there was a reasonable probability of a different outcome at trial had counsel objected to this line of questioning, especially in light of the evidence presented that Vah had confessed to the crime and written six apology letters. Accordingly, we conclude the district court did not err by denying this claim.

Tenth, Vah claimed counsel was ineffective for failing to share discovery with him. Vah's bare claim did not specify what discovery counsel failed to share or how the disclosure of any such discovery would have affected the outcome of trial. Therefore, Vah failed to demonstrate that

counsel was deficient or a reasonable probability of a different outcome had counsel shared discovery with him. Accordingly, we conclude the district court did not err by denying this claim.

Eleventh, Vah claimed counsel was ineffective for failing to prepare him for trial. Vah's bare claim did not specify how counsel should have prepared him for trial or how any such preparation would have affected the outcome of trial. To the extent Vah suggested counsel should have told him to listen to the State's questions before answering them, Vah failed to demonstrate that any such advice would have affected the outcome of the proceedings. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel prepared him for trial. Accordingly, we conclude the district court did not err by denying this claim.

Twelfth, Vah claimed counsel was ineffective for failing to object to the admission of Vah's confession to preserve the issue for appeal. This issue was preserved for appeal. Prior counsel filed a motion to suppress Vah's confession, the trial court denied the motion, Vah filed a direct appeal in which he challenged the denial of his motion to suppress, and the claim was disposed of under a standard of review consistent with a preserved issue. *See id.* at \*2-3. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had

counsel objected to the admission of Vah's confession. Accordingly, we conclude the district court did not err by denying this claim.

Thirteenth, Vah claimed counsel was ineffective for failing to offer evidence to contradict the testimony of a sexual assault nurse examiner. In particular, Vah contended the nurse examiner testified that no semen was found in the victim's vagina, but there was evidence indicating semen was found in the victim and that the semen belonged to the victim's boyfriend. The facts underlying Vah's claim are belied by the record. The nurse examiner did not testify that no semen was found. Rather, she testified that sexual assault nurse examiners "cannot see nor detect semen," that she took vaginal and other swabs, and that the Las Vegas Crime Lab would analyze the swabs for the presence of sperm because sperm contains DNA. Moreover, a homicide detective testified that a swab of the victim's vagina revealed her and her boyfriend's DNA and did not reveal Vah's DNA. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel offered evidence to contradict the nurse examiner's testimony. Accordingly, we conclude the district court did not err by denying this claim.

Fourteenth, Vah claimed counsel was ineffective for failing to request that the jury be polled after there was a hold out by a juror during deliberation. Vah's bare claim did not allege what the circumstances of the alleged hold out were or what polling the jury would have revealed.

Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel requested to have the jury polled. Accordingly, we conclude the district court did not err by denying this claim.

Fifteenth, Vah claimed counsel was ineffective for failing to use written statements to impeach State witnesses. Vah's bare claim did not specify how any statement should have been used to impeach a witness or how such impeachment would have affected the outcome of the trial. Therefore, Vah failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel used written statements to impeach witnesses. Accordingly, we conclude the district court did not err by denying this claim.

Sixteenth, Vah claimed counsel was ineffective for failing to lay a foundation for the admission of photographs of the victim and two witnesses at clubs on the night of the offense and in Los Angeles after the offense. Several photographs of the victim and witnesses at clubs and in Los Angeles were admitted without objection from the State. Vah did not contend how any non-admitted photographs differed from those that were presented to the jury or how admitting any such photographs would have affected the outcome of the trial. Therefore, Vah failed to demonstrate a reasonable probability of a different outcome had counsel laid a foundation

for the admission of photographs. Accordingly, we conclude the district court did not err by denying this claim.

On appeal, Vah also argues the district court erred by failing to include specific findings of fact and conclusions of law with respect to most of his claims of ineffective assistance of counsel in its order denying his petition. We agree. *See* NRS 34.830(1) (“Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court.”). Nevertheless, for the reasons discussed above, the district court’s failure to issue findings of fact and conclusions of law did not hinder our ability to review the denial of Vah’s petition, and thus, the error did not affect Vah’s substantial rights, *see* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). Therefore, we conclude Vah is not entitled to relief on this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge  
Steven S. Owens  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk