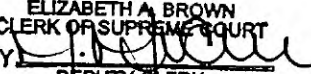


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY KYLE CHAPPELL,
Appellant,
vs.
TIM GARRETT, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 86731-COA

FILED
SEP 19 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Randy Kyle Chappell appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on September 28, 2021, and supplemental pleadings. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Chappell argues the district court erred by denying his claims of ineffective assistance of trial counsel. 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 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).

First, Chappell claimed that counsel were ineffective for failing to question the victim's competency as a witness. Chappell argued that the victim's age, her nonsensical or nonresponsive answers during a pretrial interview, her inability to communicate or remember during her trial testimony, and her being coached or coaxed by the State into answering questions during trial demonstrated her lack of competency as a witness. "The standard of competence for a child witness is that the child must have the capacity to receive just impressions and possess the ability to relate them truthfully." *Wilson v. State*, 96 Nev. 422, 423, 610 P.2d 184, 185 (1980). Some relevant factors to be considered when determining whether a child witness is competent include: "(1) the child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of 'coaching' and 'rehearsing'; (4) the child's ability to remember; (5) the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony." *Felix v. State*, 109 Nev. 151, 173, 849 P.2d 220, 235 (1993), *superseded on other grounds by statute as stated in Evans v. State*, 117 Nev. 609, 625, 28 P.3d 498, 509 (2001).

The district court conducted an evidentiary hearing regarding Chappell's petition where David Bass, Mario Walther, and Chappell

testified.¹ Referencing the victim's pretrial statements and her trial testimony, Chappell asked Bass why he did not question the victim's competency. Bass testified that he saw nothing, whether in the victim's pretrial interview or during her testimony, that raised concerns about her competency. Bass explained that the victim's answers were commensurate with a child of her age and that her answers and actions were more about her age and immaturity as opposed to competence.²

We conclude Chappell failed to demonstrate counsel was objectively unreasonable in not challenging the victim's competency as a witness. Although Chappell argued that the victim was coached or coaxed by the State through its use of leading questions recalling previous conversations the victim had with her mother regarding the abuse, the record of the victim's trial testimony does not suggest any amount of coaching or rehearsing. Further, we conclude the victim's testimony was clear, relevant and coherent. *See Lanoue v. State*, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983). While she could not identify her grandfather in court and often responded in short answers indicating simply yes or no, the material facts she testified to, including that Chappell had touched her genital area on more than one occasion and that she informed her mother about the abuse, were consistent with her prior accounts and Chappell's voluntary admissions to law enforcement that he touched the victim's bare

¹David Bass, Esq. and Mario Walther, Esq. represented Chappell after his arraignment and through trial. Bass served as lead counsel.

²The victim was six years old when she testified at trial.

vagina with his hand on four separate occasions. In addition, her testimony was not “inherently improbable,” and did not demonstrate the “inability to differentiate between fact and fantasy” or “confusion between truth and falsehood.” *Evans v. State*, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). And to the extent Chappell identifies the victim’s inconsistencies, “[i]nconsistencies in testimony go to the weight to be given the evidence by the jury rather than to the question of competence.” *Wilson*, 96 Nev. at 423-24, 610 P.2d at 185. Therefore, we conclude Chappell failed to demonstrate counsel was deficient in this regard.

Chappell is also unable to demonstrate prejudice. The district court found that it had determined the victim was competent in ruling on the State’s pretrial motion to admit the victim’s statements. Specifically, the district court noted that the victim’s competency was discussed at a pretrial hearing and that the court referenced the *Felix* factors to determine the victim’s statements were admissible under NRS 51.385 if the victim testified at trial. This finding is supported by the record. *See Pantano v. State*, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (providing that “subject to general rules of admissibility, a district court may properly admit a statement under [NRS 51.385] when a competent child witness testifies”). The district court also found that the State established the victim was competent during trial “by asking her a series of questions related to the *Felix* factors.” This finding is also supported by the record. Therefore, Chappell failed to demonstrate a reasonable probability of a different

outcome had counsel questioned the victim's competency as a witness. We therefore conclude the district court did not err by denying this claim.

Second, Chappell claimed that counsel were ineffective for failing to investigate the victim's claims of abuse against William. Bass cross-examined the victim's mother about William during trial. She testified that William was a boy who lived in the neighborhood and that one day she walked into the victim's room to see the victim exposing herself to William "per his request." Bass testified at the evidentiary hearing that he questioned the victim's mother about William before trial and learned the incident with William took place after the victim's initial disclosure to her mother about Chappell's abuse. Chappell did not offer any evidence as to what additional investigation would have uncovered nor did he demonstrate the results of any investigation would have changed the result of the trial, particularly considering Chappell's admissions to law enforcement. In light of these circumstances, Chappell failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's failure to further investigate William. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim.

Third, Chappell claimed that counsel were ineffective for failing to object to a detective's testimony regarding the victim's statements as cumulative and prejudicial hearsay. Chappell contended that, because the

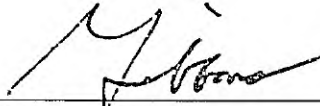
jury heard from the victim and the victim's mother about the allegations as well as saw the recorded interview with the detective, the detective's testimony was repetitious and prejudicial. "[T]he repetition of multiple hearsay statements may unfairly magnify the testimony of a victim and call into question the fundamental fairness of the trial." *Felix*, 109 Nev. at 202, 849 P.2d at 254. However, "[t]here are numerous instances in which a child witness cannot remember the specifics of an incident, such as when an assault took place or the sequence of events, but may have clearly recited them at a prior time." *Id.* at 201, 849 P.2d at 253. Thus, when a child victim testifies, "the State should be able to elicit additional testimony recounting the child-victim's hearsay accusations . . . if the child has not fully and accurately described the crime and its surrounding facts and circumstances." *Id.*


Here, the victim's trial testimony contained inconsistent descriptions of the crimes and their surrounding facts and circumstances, with the victim at times testifying that she did not remember specific details. Thus, the district court properly allowed the State to present additional testimony recounting the victim's accusations. But even assuming counsel was deficient for failing to object to the detective's testimony as cumulative, Chappell failed to demonstrate a reasonable probability of a different outcome at trial given the state of the evidence against him, including his admissions to law enforcement that he touched the victim's bare vagina with his hand on multiple occasions. Therefore, we conclude the district court did not err by denying this claim.


Chappell also argues that the cumulative effect of trial counsel's errors entitled him to 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), Chappell failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we conclude the district court did not err by denying this claim.

Finally, Chappell argues that the trial court committed structural error by allowing an out-of-state attorney to practice in Nevada without proper supervision. This claim was not raised below, and we decline to consider it on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. John Schlegelmilch, District Judge
Ristenpart Law
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk