

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAWNYELL T. FLYNN,  
Appellant,  
vs.  
JERRY HOWELL, WARDEN; AND THE  
STATE OF NEVADA,  
Respondents.

No. 88368-COA

**FILED**

JAN 31 2025

ELIZABETH A. BRON  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Dawnyell T. Flynn appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 7, 2022, and a supplement filed on April 4, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Flynn argues the district court erred by denying her claims of ineffective assistance of appellate counsel. 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 v. Washington*, 466 U.S. 668, 687 (1984), 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). 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). 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, Flynn claimed that appellate counsel was ineffective for failing to challenge the trial court's ruling that the defense could not confront S. Courtney, a State's witness, regarding her potential bias by cross-examining her about her guilty plea agreement with the State in a separate case.<sup>1</sup> Flynn argued that Courtney was important in the State's case against Flynn because Courtney was a direct witness to the events that occurred and the only witness that identified Flynn as being present when the offenses occurred. Flynn contended that Courtney had an incentive to testify favorably for the State because: (1) she failed to appear at multiple sentencing hearings in her case, thus allowing the State to argue for any legal sentence, including habitual criminal adjudication; (2) the State did not oppose continuing Courtney's sentencing hearing even though the hearing was initially scheduled to occur before Courtney testified in Flynn's criminal case; and (3) Courtney ultimately received probation.

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<sup>1</sup>In this case, Flynn and her codefendant, L. Fuller, were charged in 2012 with conspiracy to commit murder and murder with the use of a deadly weapon. Courtney's separate case arose from events occurring in 2018. Flynn and Fuller were tried together in 2019.

“Generally, the permissible extent of cross-examination is largely within the sound discretion of the trial court.” *Bushnell v. State*, 95 Nev. 570, 572, 599 P.2d 1038, 1039 (1979). However, where bias, as opposed to a witness’s general credibility, is at issue, the court’s discretion is narrowed. *Id.* at 572, 599 P.2d at 1039-40; *see also Leonard v. State*, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001) (providing that a “district court has less discretion to curtail cross-examination where potential bias is at issue”). Where a district court erroneously curtails a defendant’s cross-examination of a witness for bias, reversal is not required if the error is harmless. *See Leonard*, 117 Nev. at 72, 17 P.3d at 409 (providing that any error on the district court’s part in limiting cross-examination of a witness was harmless, in part, where other evidence corroborated the witness’s testimony and the impeachment evidence did not call the witness’s “credibility into serious question”); *see also Brown v. State*, 138 Nev. 464, 473, 512 P.3d 269, 278 (2022) (“[E]ven where a Confrontation Clause error occurs, reversal is not required if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (internal quotation marks omitted)).

Even assuming appellate counsel was deficient for failing to raise this issue on direct appeal,<sup>2</sup> Flynn failed to demonstrate prejudice.

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<sup>2</sup>We note that, in her petition, Flynn highlighted the fact that she and Fuller were tried together, Fuller raised this issue on direct appeal, and the Nevada Supreme Court concluded the trial court erred but that the error was harmless based on overwhelming evidence of Fuller’s guilt. *See Fuller v. State*, No. 80316, 2021 WL 1561364 (Nev. Apr. 20, 2021) (Order of Affirmance).

The district court found that the jury heard other evidence of Courtney's potential bias as a witness in that it heard she had a prior felony conviction for forgery and she changed her story after police told her she could be charged in relation to this case. These findings are supported by the record.

The district court also found that the State presented a "large amount" of evidence of Flynn's guilt independent of Courtney's testimony, including J. Young, who testified that Flynn indicated she wanted the victim dead, that Flynn was present immediately before and immediately after the victim was shot, and that Flynn and Fuller fled the apartment immediately after the victim was shot. These findings are supported by the record. In addition to this evidence, a neighbor testified that she heard gunshots and, when she looked out of her apartment to see what was happening, saw Flynn run to Flynn and Fuller's apartment.

Finally, the district court found Courtney testified that the State made her no promises and that she did not anticipate receiving any benefit in her separate case as the result of her testimony in this case.<sup>3</sup> These findings are supported by the record. Courtney testified at a hearing held outside the presence of the jury that one of her sentencing hearings was continued because she was in the hospital and that another was

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<sup>3</sup>During trial, the trial court conducted an evidentiary hearing, outside the jury's presence, on the issue of cross-examining Courtney about her pending separate case, where both Courtney and her attorney testified. Courtney did not testify during the evidentiary hearing held on Flynn's postconviction claim of ineffective assistance of appellate counsel, and Flynn did not offer any evidence at that hearing that conflicted with Courtney's testimony regarding her plea deal or that demonstrated Courtney received probation because of her testimony.

continued because she wanted time to get her dogs situated. Courtney further testified she understood that failing to appear at the sentencing hearings violated the plea agreement, thus allowing the State to argue for any legal sentence, including habitual criminal adjudication. She explained that she feared being sentenced to prison for her offenses but wanted to be finished testifying in this case because she did not want to be transported back and forth from the prison and would not seek another continuance. She further explained the sentencing judge never said anything to her about testifying in this case, and she did not know what the sentencing judge knew about her testifying in this case. Courtney described the sentencing judge as "mean" and explained she did not feel the sentencing judge would give her favorable treatment based on her testimony in this case. Courtney's attorney largely confirmed the reasons why Courtney had not yet been sentenced, and she and the prosecutor in this case represented that the State had no hand in having Courtney's sentencing hearings continued. To the contrary, Courtney's counsel explained that the State was against having her sentencing continued on at least one occasion.

Because the jury heard other evidence of Courtney's potential bias and strong evidence of Flynn's guilt independent of Courtney's testimony, and because there is no evidence that the State made promises or that Courtney anticipated a benefit in exchange for her trial testimony, we conclude that Flynn failed to demonstrate the omitted issue would have

a reasonable probability of success on appeal. Accordingly, the district court did not err by denying this claim.<sup>4</sup>

Second, Flynn claimed that appellate counsel was ineffective for failing to challenge the district court's rejection of her requested jury instructions regarding corroborating accomplice testimony. In her supplemental petition, Flynn claimed that Courtney and Young were accomplices because: (1) Young testified that he went back to the scene and took the murder weapon as well as drugs; (2) Courtney testified that she and Young took Flynn's and Fuller's belongings out of the apartment to cover up that they were ever there; (3) Courtney and Young fled at the same time as Flynn and Fuller; and (4) Young and the victim had a confrontation over drugs on the night of the shooting and S. Toyama testified that Young resembled the shooter.<sup>5</sup>

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<sup>4</sup>Flynn contends the district court applied the wrong legal standard when it concluded that Flynn had "not established that, but for this error, the result would have been different." Flynn argues the court was required to consider whether there was a reasonable probability of a better result. We disagree. In order to demonstrate prejudice, Flynn was required to show that the issue appellate counsel failed to raise "would have a reasonable probability of success on appeal." *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. The district court cited this caselaw and its disposition comports to the required analysis. Therefore, we discern no error.

<sup>5</sup>On appeal, Flynn also argues that Courtney should have been considered an accomplice because law enforcement threatened to charge Courtney as an aider and abettor. Flynn did not raise this argument in her pleadings below. To the extent Flynn attempted to present this argument near the conclusion of the evidentiary hearing held on her petition, the district court did not exercise its discretion to allow her to assert a claim she had not previously pleaded. *Cf. Barnhart v. State*, 122 Nev. 301, 303-04,

“A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it.” *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). Nevada prohibits the conviction of a defendant based solely on the testimony of an accomplice. NRS 175.291(1). An accomplice’s testimony must be “corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense.” *Id.* An accomplice is defined as one liable to prosecution for the identical offense charged against the defendant, or who is “culpably implicated in, or unlawfully cooperates, aids or abets in the commission of the crime charged.” *Orfield v. State*, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989).

Flynn and Fuller were charged with conspiracy to commit murder and murder with the use of a deadly weapon. The district court found that the evidence presented at trial was that neither Courtney nor Young had a gun or made any effort toward killing the victim. The district

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130 P.3d 650, 651-52 (2006) (noting that “the only issues that should be considered by the district court at an evidentiary hearing on a post-conviction habeas petition are those which have been pleaded in the petition or a supplement petition” but commenting that “the district court may exercise its discretion under certain circumstances to permit a petitioner to assert claims not previously pleaded”). We conclude the district court did not abuse its discretion in declining to hear arguments that were not raised in the pleadings, and we decline to consider these arguments for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

court further found that “[i]f anything, [Young] was liable for selling [the victim] drugs, and Courtney was potentially liable for attempting to cover up [the victim’s] murder after the fact.” These findings are supported by the record. And while the jury heard testimony that the victim argued with Young over drugs prior to the victim’s murder, Toyama testified that she could not identify Young as the shooter. Thus, no evidence was presented at trial establishing that Young or Courtney met the definition of an accomplice under Nevada law. For these reasons, we conclude that Flynn failed to demonstrate appellate counsel was deficient or that the omitted issue would have a reasonable probability of success on appeal. Accordingly, the district court did not err by denying this claim.

Finally, Flynn claimed that the cumulative errors of counsel entitled her to relief. Even if multiple instances of deficient performance could 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), Flynn 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). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



Bulla

, C.J.



Gibbons

, J.



Westbrook

, J.



cc: Hon. Carli Lynn Kierny, District Judge  
Michael Lasher LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk