

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AARON KAPLAN,
Appellant,
vs.
BRIAN E. WILLIAMS, SR., WARDEN
OF HIGH DESERT STATE PRISON,
AND THE STATE OF NEVADA,
Respondents.

No. 90109-COA

FILED

MAR 18 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Aaron Kaplan appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on November 5, 2019,¹ and a supplemental petition filed on September 8, 2023. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

¹The appendix submitted by Kaplan does not include a copy of Kaplan's petition, which is required to be included. See NRAP 30(b)(2)-(3). To the extent Kaplan argues the district court erred by denying claims contained in his petition, because Kaplan does not include this essential portion of the record for review, he fails to demonstrate the district court erred. See *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); see also *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

In January 2016, Kaplan pleaded guilty to second-degree kidnapping with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm constituting domestic violence, home invasion, and battery constituting domestic violence-strangulation. In March 2016, Kaplan moved to continue his sentencing based on counsel's belief that Kaplan had brain damage and other mental deficiencies. Thereafter, Kaplan retained new counsel, and the district court granted a continuance so Kaplan could undergo a neurocognition assessment.

In January 2017, Kaplan moved to withdraw his guilty plea based, in part, on the results of that assessment. After an evidentiary hearing in February 2017, the court denied Kaplan's motion and scheduled his sentencing for March 23, 2017. A day before his scheduled sentencing hearing, Kaplan filed a substitution of counsel and an emergency motion to continue his sentencing again. At the sentencing hearing held on March 24, 2017, the court denied Kaplan's request for additional time for his new counsel to prepare and imposed an aggregate sentence of 18 to 50 years in prison with credit for time served.

On direct appeal, Kaplan raised three major issues—that the trial-level court erred in allowing My Entertainment TV to film the proceedings of his case; that the court abused its discretion when it denied his request to withdraw his guilty plea; and that the court abused its discretion when it denied his request to continue the sentencing. In May 2019, the supreme court rejected these arguments and affirmed his convictions.

In November 2019, Kaplan filed a postconviction petition for a writ of habeas corpus and a request to file a supplement through counsel. After counsel withdrew and new counsel was confirmed, Kaplan's

supplemental petition was filed in September 2023. In January 2024, Kaplan moved to disqualify the Clark County District Attorney's Office, alleging a conflict of interest based, in part, on its prior agreement with My Entertainment TV to film the reality show. The district court orally denied that motion.

Over a two-day period in April and June 2024, the district court held an evidentiary hearing on Kaplan's arguments that he received ineffective assistance of counsel at the entry of plea and at sentencing. The court entered its findings of fact and conclusions of law in January 2025.

Kaplan timely appealed. On appeal, Kaplan alleges ineffective assistance of both trial and appellate counsel, and he argues the district court abused its discretion in denying his motion to disqualify the District Attorney's Office.

Ineffective Assistance of Trial-Level Counsel

Kaplan first argues the district court erred by denying his claims of ineffective assistance of trial-level counsel.² To demonstrate ineffective assistance of 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going

²Kaplan was represented by multiple attorneys during the trial-level proceedings.

to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—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).

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). An appellant alleging the district court erred by denying their claims of ineffective assistance of counsel must specifically articulate counsel's alleged deficiency and prejudice for each claim in their appellate briefing. See *Chappell v. State*, 137 Nev. 780, 787-88, 501 P.3d 935, 949-50 (2021). 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). "This court will not reweigh the evidence or 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).

Kaplan's challenges impacting the guilty plea proceedings

The district court declined to reach the merits of Kaplan's challenges to trial-level counsel's actions that predated his guilty plea, concluding that because he entered a valid guilty plea, those challenges were waived pursuant to NRS 34.810(1)(a). This was error. Each of Kaplan's pre-plea claims alleged the ineffective assistance of counsel in relation to Kaplan's guilty plea. Thus, Kaplan's claims were within the

scope of a postconviction habeas petition stemming from a guilty plea. See NRS 34.810(1)(a) (stating a district court “shall dismiss a petition that challenges the validity of a judgment of conviction or sentence if the court determines that . . . [t]he petitioner’s conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel”); *Gonzales v. State*, 137 Nev. 398, 403, 492 P.3d 556, 562 (2021) (stating “[t]he core claims prohibited by NRS 34.810(1)(a) are independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea” (internal quotation marks omitted)).

The district court should have addressed Kaplan’s pre-plea claims on the merits, rather than deeming them waived. Nonetheless, we conclude the district court properly denied the claims for the reasons discussed below. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

Turning to Kaplan’s claims, Kaplan first argued counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging him being bound over for battery constituting domestic violence—strangulation.³ Kaplan alleged there was insufficient evidence

³Following preliminary hearings in two separate cases, Kaplan was bound over and charged in the district court with: battery constituting domestic violence—strangulation; coercion; burglary; invasion of the home; first-degree kidnapping resulting in substantial bodily harm; battery resulting in substantial bodily harm constituting domestic violence; and battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence. After the cases were consolidated, Kaplan ultimately pleaded guilty to the crimes recounted above.

presented at the preliminary hearing that he strangled the victim and that counsel should have presented evidence of Kaplan's mental health challenges or Kaplan's use of prescription medications prior to the crime.

A defendant may be bound over for trial if the evidence at the preliminary hearing is sufficient to establish probable cause that a crime was committed by the defendant, which may be based on slight or marginal evidence. *See Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). NRS 200.481(1)(a) defines battery as "any willful and unlawful use of force or violence upon the person of another," and NRS 33.018(1)(a) states a battery may constitute an act of domestic violence. In this context, strangulation means "intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of death or substantial bodily harm." 2009 Nev. Stat., ch. 42, § 3, at 88. "[I]f an inference of criminal agency can be drawn from the evidence it is proper for the magistrate to draw it." *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971).

At the preliminary hearing, the victim testified that during an altercation with Kaplan, Kaplan got on top of her, placed his hands around her neck, and applied pressure to her neck, causing her to be "frightened." The victim also testified that Kaplan placed a shirt around her neck and applied pressure that left "marks from [her] necklace." When asked if she was able to breathe when the shirt was around her neck she answered, "I just screamed and jumped and got away." In light of this testimony, the magistrate could find the State provided slight or marginal evidence that Kaplan strangled the victim such that counsel's failure to file a pretrial writ on this claim was not objectively unreasonable.

To the extent Kaplan alleged counsel should have challenged this count by presenting evidence of his mental health challenges and his use of prescription medications, he failed to allege how this evidence would have impacted, let alone negated, the general intent required for battery constituting domestic violence—strangulation. *See Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014) (holding that battery is a general intent crime). For these reasons, Kaplan failed to demonstrate counsel's failure to file a pretrial writ on this claim was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Second, Kaplan argued counsel was ineffective for failing to properly guide him regarding the plea agreement. In particular, Kaplan alleged counsel failed to provide guidance to him regarding: (1) the second-degree kidnapping count given the evidence presented at the preliminary hearing and the fact that the deadly weapon enhancement was not charged until the plea negotiation; (2) the count alleging battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence given the State's concession that there was insufficient evidence to support the substantial bodily harm portion; (3) the home invasion count because the evidence supported the conclusion that Kaplan was residing in the victim's home and he thus could not be guilty of the crime; and (4) the strangulation count because the elements of strangulation were not present.⁴

⁴Kaplan also argues on appeal that counsel was ineffective for failing to discuss the kidnapping count with him because the State confirmed during the evidentiary hearing held on Kaplan's petition that he did not block the only exit during the commission of the offenses. This claim was

However, Kaplan failed to allege specific facts and offered no testimony demonstrating how counsel's failure to guide him on these issues impacted his decision to plead guilty. The district court found that Kaplan understood the plea agreement, including its potential consequences, notwithstanding the opinions of Dr. Jones-Forrester, Dr. Piasecki, and Dr. Kinsora, which the court did not find credible.⁵ *See Mitchell*, 124 Nev. at 816, 192 P.3d at 727 (stating that evaluation of credibility is the responsibility of the trier of fact). This finding is supported by the record, including the contents of the signed plea agreement and the transcript from the entry-of-plea hearing. The written plea agreement provided that Kaplan had discussed with counsel the elements of the original charges against him, all possible defenses to the charges, and facts and circumstances that might be favorable to him. Additionally, the agreement

not raised in Kaplan's supplemental petition. To the extent Kaplan attempted to present this argument near the conclusion of the evidentiary hearing held on his petition, the district court did not exercise its discretion to allow him to assert a claim he had not previously pleaded. *Cf. Barnhart v. State*, 122 Nev. 301, 303, 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 supplemental 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 address argument that was not raised in the pleadings, and we decline to consider this argument for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

⁵Dr. Kinsora evaluated Kaplan and provided findings in support of Kaplan's motion to withdraw his guilty plea. In relation to the postconviction proceedings, Kaplan was evaluated by Dr. Jones-Forrester, Dr. Piasecki, and Dr. Snyder, and all three providers offered their testimony on his behalf at the evidentiary hearing held on Kaplan's petition.

notified Kaplan that the State would have to prove all the elements of each charge at trial. The agreement also provided that all of the elements and consequences had been explained to Kaplan by his counsel and that Kaplan believed pleading guilty was in his best interest. In addition, the agreement provided that Kaplan admitted the facts which supported all elements of the offenses to which he pleaded guilty.

Counsel certified in the plea agreement that he had fully explained to Kaplan the allegations and charges to which Kaplan was pleading guilty. During the entry-of-plea hearing, Kaplan stated that he had a chance to discuss the charges with counsel, that he understood the nature and elements of each charge, and that he committed the charges as alleged. Further, the district court found credible counsel's testimony from the evidentiary hearing held on Kaplan's motion to withdraw his plea⁶ that counsel: discussed the case more extensively with Kaplan than he would a "normal" client; went over the plea agreement and its potential consequences in detail with Kaplan and that Kaplan understood the plea agreement and its potential consequences; and was aware Kaplan may have suffered from neurological or psychological health and reading deficits but that Kaplan actively discussed the plea offers and their associated consequences and sent counsel coherent written communications. In

⁶Kaplan did not call counsel to testify at the evidentiary hearing held on his petition. The district court found the parties instead relied on counsel's testimony contained in the transcript from the motion to withdraw hearing. Kaplan does not challenge this finding on appeal, and it is supported by the record. The district court stated that, in addition to the transcript, it also reviewed the audiovisual record from the hearing to "better assess the testimony and its credibility."

addition, the district court found Kaplan's testimony that counsel and his staff failed to discuss and explain the plea agreement not credible.

We note that Kaplan received a substantial benefit in exchange for his plea. Instead of facing a potential sentence of life without the possibility of parole for the first-degree kidnapping charge alone, Kaplan ultimately faced a possible 7-to-60-year aggregate prison sentence in exchange for his guilty plea.⁷ Accordingly, Kaplan failed to demonstrate counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Third, Kaplan argued counsel was ineffective for failing to ensure the State amended the charging document before he entered his guilty plea. More than a year before Kaplan entered his guilty plea, the State, at a hearing, stated it would amend the count alleging battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence to remove the allegation that the offense resulted in substantial bodily harm.

While the charging document was ultimately not amended to remove this allegation, the record reflects that Kaplan knowingly and voluntarily pleaded guilty to the second amended information which alleged that Kaplan committed battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence. And in doing so, Kaplan admitted the facts supporting all elements of this offense.

⁷The State argued for an aggregate 24-to-60-year prison sentence. As recounted above, the sentencing court ultimately imposed an aggregate 18-50-year prison sentence.

Further, at the evidentiary hearing held on his petition, Kaplan did not testify he was unaware the State represented it would amend the charging document as to that count prior to the entry of his plea and offered no testimony regarding how counsel's alleged error impacted his decision to plead guilty. Finally, Kaplan fails to specifically argue in his opening brief on appeal how he was prejudiced by counsel's inaction. For these reasons, Kaplan failed to demonstrate counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's failure to ensure the charging document was amended. Therefore, we conclude the district court did not err by denying this claim.⁸

Fourth, Kaplan argued counsel was ineffective for failing to adequately challenge the media request filed by My Entertainment TV to film a reality show involving the District Attorney's Office during Kaplan's case. During pre-plea proceedings, counsel filed an objection to the media request and argued that (1) Kaplan received insufficient notice of the request; (2) counsel was told that Kaplan would have to give his permission to be included in the reality show and Kaplan did not give his permission; and (3) My Entertainment TV was not a legitimate news company as contemplated by the Nevada Supreme Court Rules. Kaplan contended counsel should have *also* argued that he suffered prejudice because the District Attorney's Office had a conflict of interest as it was compensated for its participation in the show and was thus motivated not by its duty to

⁸To the extent Kaplan argues that all his subsequent attorneys were ineffective for the same reasons alleged in this claim, for the reasons discussed above, Kaplan failed to demonstrate a reasonable probability of a different outcome but for counsels' alleged errors. Therefore, we conclude the district court did not err by denying this claim.

pursue justice but rather by its desire to provide entertainment content to prolong its compensation agreement. Kaplan claimed the compensation agreement “casts grave doubts on the legitimacy” of the plea agreement and provided a fair and just reason to withdraw his plea.

Kaplan failed to allege specific facts demonstrating that a compensation agreement between My Entertainment TV and the District Attorney’s Office impaired its prosecutors from carrying out their duties impartially. *See Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1220 (1982) (providing that a district attorney’s office has a conflict of interest where the prosecutorial function cannot be carried out impartially), *overruled on other grounds by State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 164, 321 P.3d 882, 886 (2014). Thus, Kaplan failed to demonstrate that counsel’s failure to make this argument in his objection to My Entertainment TV’s media request fell below an objective standard of reasonableness.

Kaplan is also unable to demonstrate prejudice because he failed to allege specific facts showing how counsel’s failure to make this argument impacted his decision to plead guilty, particularly in light of the substantial benefit Kaplan received in exchange for his plea discussed earlier. Accordingly, Kaplan failed to demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel’s alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Kaplan argued counsel was ineffective for failing to object to the “quick and rote” plea canvass or to make a record of the “defective” guilty plea agreement. Kaplan failed to allege specific facts or offer testimony demonstrating how counsel’s failure to challenge the plea

canvass or make a record of the alleged deficiencies in the guilty plea agreement impacted his decision to plead guilty. The district court found, based on the record and the evidence presented at the evidentiary hearing, that counsel explained, and Kaplan understood, the plea agreement, including its potential consequences. These findings are supported by the record. Accordingly, Kaplan failed to demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Kaplan argued counsel were ineffective for failing to adequately investigate his mental health challenges and comprehension deficits before the entry of his plea. Kaplan failed to allege specific facts or offer testimony demonstrating that the failure to investigate Kaplan's mental health challenges and comprehension deficits impacted his decision to plead guilty. While Kaplan presented evidence during postconviction proceedings about how Kaplan's mental health challenges and comprehension deficits may have impacted Kaplan's ability to understand the plea agreement, Kaplan offered no testimony about how counsel's *failure to investigate* Kaplan's mental health challenges and comprehension deficits impacted his decision to plead guilty. Further, the district court found, based on the record and the evidence presented at the evidentiary hearing, that Kaplan understood the plea agreement, and that the opinions offered by Kaplan's doctors suggesting an inability to understand the plea agreement were not credible. Substantial evidence supports this finding. Accordingly, Kaplan failed to demonstrate a reasonable probability he would not have pleaded guilty but for counsel's failure to adequately conduct a pre-plea investigation into his mental health challenges and

comprehension deficits. Therefore, we conclude the district court did not err by denying this claim.

Kaplan's challenges related to the motion to withdraw his guilty plea

Seventh, Kaplan argued counsel was ineffective for failing to adequately investigate his mental health challenges and comprehension deficits in support of Kaplan's motion to withdraw his plea. In support of his claim, Kaplan argued: (1) that Dr. Jones-Forrester opined Kaplan has "significant," "long-standing" neurocognitive deficits affecting attention, concentration, processing speed, memory, and learning disorders that would have made it difficult to read, process, and recall the plea agreement; (2) Dr. Piasecki reviewed Kaplan's medical history with a focus on his medication and opined that irregular use or withdrawal from medications, including Remeron, could have impacted his behavior at the time of the crimes and during his interactions with the district court during the entry of his plea; and (3) Dr. Snyder concluded that a brain scan conducted on Kaplan confirmed the presence of brain damage.

The district court found that this information was "largely documented" in reports by Dr. Kinsora and Dr. Roitman (who was retained by Kaplan's entry-of-plea counsel years before the entry of Kaplan's plea). This finding is supported by the record. Counsel sought withdrawal of Kaplan's guilty plea based on Kaplan's mental health and comprehension issues, including neonatal hypoxic brain damage, learning problems, special education, and the fact that he had been "subjected to medically prescribed polypharmacy since the ninth grade to treat, inter alia, anxiety, depression, and attention problems." Counsel highlighted Dr. Kinsora's report in which he opined that Kaplan suffered from "lifelong problems with concentration, memory, [and] reading comprehension." Further, in a letter directed to the

trial-level court, Dr. Kinsora concluded that Kaplan “exhibits problems with cognitive processing that affects language comprehension. Thus, one should not assume that he understands what is said to him.” The letter further explained that written materials “should not be given to [Kaplan] without going over each paragraph, followed by asking him to explain, in his own words, what was just read to him.” In addition, the letter explained that “[c]omplicating matters is the presence of a chronic anxiety condition that [Kaplan] has always suffered from.”

Dr. Roitman’s reports reference Kaplan’s use of neurological medications, problems with attention and tracking the conversation, and that Kaplan’s mother informed Dr. Roitman that Kaplan’s oxygen deprivation during childbirth “caused brain damage that had an adverse effect on his cognitive function and caused him to have tics, twitches, poor ability to process his thoughts, feelings and perceptions, anxiety, impaired thinking, mood disorder, impulsivity and compulsivity.” Kaplan’s mother also reported that Kaplan had been enrolled in special education. Although counsel did not file Dr. Roitman’s reports in support of Kaplan’s motion to withdraw his plea, counsel was aware of Dr. Roitman’s reports, made arguments in Kaplan’s motion to withdraw his plea that were consistent with the information contained in the reports, and indeed questioned Kaplan’s entry-of-plea counsel about Dr. Roitman during the evidentiary hearing held on Kaplan’s motion to withdraw his plea.

As the evidence Kaplan offered in support of his petition was largely duplicative of what was known to and argued by counsel in support of Kaplan’s motion to withdraw his plea, Kaplan failed to demonstrate that counsel’s performance was deficient or a reasonable probability of a different outcome had counsel conducted additional investigation into

Kaplan's mental health challenges and comprehension deficits. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 200 (2011) (concluding that there was no reasonable probability that "new" mitigation evidence would have changed the jury's verdict regarding a sentence of death, in part because "[t]he 'new' evidence largely duplicated the mitigation evidence at trial"). Additionally, the district court did not credit the opinions of Kaplan's doctors to the extent they suggested he could not understand the guilty plea agreement. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Kaplan argued counsel was ineffective in handling Kaplan's presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and a district court may grant the motion "for any reason where permitting withdrawal would be fair and just," *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). "[T]he district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." *Id.* at 603, 354 P.3d at 1281.

Kaplan alleged counsel should have: (1) argued Kaplan had a fair and just reason to withdraw his plea because the trial-level court's plea canvass was deficient in that it did not sufficiently address Kaplan's understanding of the plea agreement in light of his mental health challenges and comprehension deficits; (2) conducted a more thorough cross-examination of Kaplan's entry-of-plea counsel at the evidentiary hearing held regarding Kaplan's motion, including asking him about why he advised Kaplan to enter into a defective plea and his lack of visits with Kaplan; and (3) offered evidence at the evidentiary hearing regarding the "full range" of Kaplan's neurological defects consistent with the findings of

Dr. Jones-Forrester, Dr. Piasecki, and Dr. Snyder that Kaplan offered in support of his petition.

With regard to the plea canvass and counsel's failure to cross-examine entry-of-plea counsel about his advice to Kaplan concerning the plea agreement or his lack of visits with Kaplan, the district court found, based on the record and the evidence presented at the evidentiary hearing, that counsel explained the plea agreement to Kaplan and Kaplan understood the plea agreement. This finding is supported by the record. Further, with regard to evidence demonstrating Kaplan's "full range" of mental health challenges and comprehension deficits, the evidence Kaplan offered from Dr. Jones-Forrester, Dr. Piasecki, and Dr. Snyder in support of his petition was largely duplicative of the evidence and arguments counsel made in support of Kaplan's motion to withdraw his plea. In light of these circumstances, Kaplan failed to demonstrate that counsel's performance was deficient or a reasonable probability of a different outcome related to his motion to withdraw his guilty plea but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Kaplan's challenges related to sentencing

Ninth, Kaplan argued his initial sentencing counsel was ineffective for failing to go over the presentence investigation report (PSI) with him. Kaplan asserted the PSI was "filled with errors." The district court found credible counsel's testimony that he would have gone over the PSI with Kaplan had Kaplan not replaced him as counsel.⁹ Further, the district court found that Kaplan failed to identify the errors allegedly contained in the PSI. This finding is supported by the record. Finally,

⁹Kaplan did not allege that replacement counsel was ineffective for failing to go over the PSI with him.

Kaplan did not file a motion to have the PSI transmitted for our review. See NRAP 30(b)(6). Thus, we presume the PSI supports the district court's decision to deny this claim. See *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). For these reasons, Kaplan failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Tenth, Kaplan argued counsel was ineffective for failing to communicate with Kaplan and/or his family prior to the sentencing hearing and to file a sentencing memorandum in mitigation. Kaplan averred the memorandum should have contained information related to his mental health challenges and comprehension deficits and character letters. The district court found credible counsel's testimony that he met with Kaplan's mother after the motion to withdraw plea hearing and asked her to supply character letters for sentencing but she did not contact him again after that hearing. Kaplan's mother testified that she would have provided character letters in mitigation had she been asked to do so but did not testify as to what the contents of the letters would have been. Further, the district court found that, in litigating Kaplan's motion to withdraw his plea, counsel presented "in detail" significant evidence evaluating Kaplan's "psychological and cognitive issues and medication use." The district court found that this evidence was considered by the sentencing court and "likely covered much of what would have been counsel's sentencing argument." Finally, the district court found that the sentencing court "largely rejected [Kaplan's] contention that his acts were driven by his mental health conditions" and instead "focused on what he found to be the 'horrific' nature

of [Kaplan's] conduct." These findings are supported by the record. Considering these circumstances, Kaplan failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Kaplan argued his second sentencing counsel was ineffective at the sentencing hearing by failing to argue mitigating facts and circumstances of the crimes because counsel was unfamiliar with those facts and by failing to point out the "obvious" anomalies in the plea agreement related to Kaplan's plea to allegedly fictitious offenses based on those facts. During the evidentiary hearing held on Kaplan's petition, counsel testified that his focus was on Kaplan's mental state at the time of the crimes and how Kaplan did not deserve the high sentence the State was requesting. The district court found that counsel made a strategic decision at the sentencing hearing to focus on Kaplan's psychological and medication issues to mitigate the crimes. The record supports the decision of the district court. And Kaplan fails to demonstrate extraordinary circumstances to challenge counsel's strategic decision. Accordingly, Kaplan failed to demonstrate that counsel's performance was deficient or a reasonable probability of a different sentencing outcome but for counsel's alleged errors. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("[C]ounsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances." (internal quotation marks omitted)). Therefore, we conclude the district court did not err by denying this claim.

Twelfth, Kaplan argued counsel was ineffective at the sentencing hearing for failing to object to the sentencing court's failure to make particularized findings in support of the deadly weapon enhancement



pursuant to NRS 193.165(1). Aside from the facts and circumstances of the crimes, *see* NRS 193.165(1)(a), Kaplan did not allege what arguments counsel should have made related to the remaining findings required by NRS 193.165(1). Further, Kaplan did not ask counsel why he did not object to the district court's failure to make those findings during the evidentiary hearing held regarding his petition. Finally, the district court found the sentencing court considered the relevant factors in its "detailed discussion of the case and [its] reasons for [the] sentence." The district court's finding is supported by the record, and Kaplan does not challenge this finding on appeal. Accordingly, Kaplan failed to demonstrate that counsel's performance was deficient or a reasonable probability of a different sentencing outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Kaplan argued counsel was ineffective at the sentencing hearing for failing to object to the imposition of two deadly weapon enhancements for the same act—hitting the victim with a towel rod. The district court found that each of the offenses at issue—the kidnapping count and the count charging battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence—"required proof of one or more separate facts the other does not and were different offenses." This finding is supported by the record. Accordingly, Kaplan failed to demonstrate that counsel's performance was deficient or a reasonable probability of a different sentencing outcome but for counsel's failure to object. *See Crew v. State*, 100 Nev. 38, 47, 675 P.2d 986, 991 (1984) ("Enhancement of each count is proper unless there is truly only one offense. The test is whether each count requires proof of an additional fact which the other does not."); *see also* NRS 193.165 (providing an enhancement

penalty for a person who uses a deadly weapon during the commission of a crime); NRS 200.310(2) (defining the elements of second-degree kidnapping); NRS 200.481(1)(a) (defining the elements of battery); NRS 200.481(2)(e)(2) (proscribing the penalty for battery that is committed with the use of a deadly weapon resulting in substantial bodily harm). Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Kaplan argued counsel were ineffective for failing to adequately investigate his mental health challenges and comprehension deficits to use as mitigation evidence at sentencing. The district court found: (1) the evidence Kaplan admitted during postconviction proceedings related to his mental health challenges and comprehension deficits was “largely documented” in the reports by Dr. Kinsora and Dr. Roitman; (2) counsel provided these reports to the sentencing court, and the sentencing court considered them before imposing sentence; (3) counsel made a strategic decision at sentencing to focus on Kaplan’s psychological and medication issues in mitigation; and (4) the sentencing court “largely rejected [Kaplan’s] contention that his acts were driven by his mental health conditions” and instead “focused on what he found to be the ‘horrific’ nature of [Kaplan’s] conduct.” These findings are supported by the record. Accordingly, Kaplan failed to demonstrate that counsel’s performance was deficient or a reasonable probability of a different sentencing outcome but for counsel’s alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Fifteenth, Kaplan argued counsel were ineffective for failing to investigate the details of a prior robbery conviction to mitigate the State’s argument that his criminal history justified a harsher sentence. In support of his claim, Kaplan offered a newspaper article related to his participation

in the robbery of a Florida bank to demonstrate he was having a mental health crisis at the time and that his commission of the crime did not involve a deadly weapon. The district court found: (1) that in imposing Kaplan's sentence, the sentencing court "focused on what he found to be the 'horrific' nature of [Kaplan's] conduct [in this case]"; (2) counsel made a strategic decision at sentencing to focus on Kaplan's psychological and medication issues in mitigation; and (3) the sentencing court made clear the prior conviction at issue did not play a significant role in its sentencing decision by stating, "But let's not kid ourselves, this is about what happened in this case. I mean, this is about trying to find what an appropriate sentence [is] for what occurred in this case." These findings are supported by the record. Accordingly, Kaplan failed to demonstrate that counsels' performance was deficient or a reasonable probability of a different sentencing outcome but for counsels' alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Ineffective assistance of appellate counsel

Kaplan next argues the district court erred by denying his claim that appellate counsel was ineffective. 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, 1113-14 (1996). An appellant alleging the district court erred by denying their claims of ineffective assistance of counsel must specifically articulate counsel's alleged deficiency and prejudice for each claim in their appellate briefing. *See Chappell v. State*, 137 Nev. 780, 787-88, 501 P.3d 935, 949-50 (2021). This court need not consider a claim that

is not cogently argued or supported by relevant authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Kaplan's claim on appeal is largely a list of the things appellate counsel should have presented to the supreme court on direct appeal, without cogent argument regarding either deficiency or prejudice. Therefore, we decline to consider this claim.

Motion to disqualify

Kaplan next argues the district court erred by denying his motion to disqualify the District Attorney's Office from participating in the postconviction proceedings. Kaplan claimed that not only did the District Attorney's Office have a conflict of interest by receiving compensation for its participation in the aforementioned reality show, the prosecutors working on Kaplan's case made improper comments about Kaplan's character and perpetuated a false narrative about his medication history and its impact on his behavior in a portion of the show depicting Kaplan's case, amounting to bias. A district attorney's office should be disqualified from prosecuting the case where a conflict of interest "would render it unlikely that the defendant would receive a fair trial." *State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 165, 321 P.3d 882, 886 (2014). "The disqualification of a prosecutor's office rests with the sound discretion of the district court." *Collier v. Legakes*, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982). The district court should consider all the facts and circumstances in exercising its discretion. *See id.* at 310, 646 P.2d at 1220.

The district court found, based on the facts and circumstances in this matter, that Kaplan's allegations were insufficient to demonstrate (1) the District Attorney's Office's actions amounted to error; (2) a conflict of interest existed based on the District Attorney's Office's involvement in the reality show; and (3) even if there had been a conflict of interest "eight

years ago," that any conflict continued to exist such that it would bar the District Attorney's Office's from participating in postconviction proceedings. We conclude that based on our review of the record, Kaplan fails to demonstrate that the district court's oral findings are clearly erroneous. Accordingly, Kaplan fails to demonstrate the district court abused its discretion in denying his motion to disqualify the District Attorney's Office.

Declining to consider all claims at the evidentiary hearing

Finally, Kaplan argues the district court erred by not conducting an evidentiary hearing on all the claims raised in his supplemental petition. 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). Because we have concluded Kaplan failed to present specific factual allegations for all the aforementioned claims, we conclude the district court did not err by denying his supplemental petition without allowing an evidentiary hearing on every claim raised. For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Eric Johnson, District Judge
Attorney General/Carson City
Clark County District Attorney
Waldo Law, LLC
Eighth District Court Clerk