

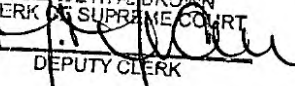
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRETT THEIL,  
Appellant,  
vs.  
KRIS KARBERG,  
Respondent.

No. 85951-COA

FILED

MAY 01 2024 -

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brett Theil appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 18, 2021, and supplemental pleadings. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Theil first 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). 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). "[T]rial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances." *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (internal quotation marks omitted). 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).

First, Theil argues that counsel mishandled hearsay objections. He claims counsel did not understand the rules governing the admission of hearsay. Theil's claim consists largely of bare allegations that the hearsay arguments counsel made were deficient. He fails to allege what counsel should have argued, how a different argument would have changed the district court's ruling, or how a different ruling would have affected the outcome of trial. Accordingly, Theil fails to allege specific facts that demonstrated counsel's performance was objectively unreasonable or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by denying this claim.

Second, Theil argues that counsel offered "inapplicable and confusing defense theories." Theil offers only one example in support of this argument in his opening brief. He claims that in opening statements, counsel anchored Theil's entire defense on the idea that the victim had

copied her allegations from two sexually explicit movies when counsel had no evidence the victim had seen either movie. And when questioned later at trial, the victim denied ever having seen the movies. The analysis of postconviction claims starts with the presumption that counsel's actions were reasonable. See *Strickland*, 466 U.S. at 690. Yet counsel was not asked at the evidentiary hearing about the use of this defense theory. Accordingly, Theil fails to demonstrate that counsel's actions were objectively unreasonable or a reasonable probability of a different outcome. Therefore, we conclude the district court did not err by denying this claim.<sup>1</sup>

Third, Theil argues that counsel mishandled the testimony of Theil's expert witness, Dr. Chambers, who was noticed to give testimony about false allegations of child abuse. Theil contends that counsel's questioning led to Dr. Chambers testifying about changes or degradation in memory, that testimony did not support the theory that the victim fabricated the allegations, but it instead bolstered the victim's testimony by offering credible expert testimony explaining why her recollection might not be consistent.

The district court found that the content and direction of counsel's questions were strategic. This finding is supported by the record. Dr. Chambers testified at the evidentiary hearing that degradation in memory was not necessarily inconsistent with fabrication and he recalled a number of times when he discussed both theories in the same testimony. Counsel testified that he thought that asking Dr. Chambers about both theories was "logical and rational"; both theories supported his defense of

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<sup>1</sup>To the extent Theil contends counsel presented the inconsistent theories of false memory and fabrication, this claim fails for the reasons discussed in the next issue.

the case; and based on Dr. Chambers' testimony, counsel "was fairly confident towards the end of trial we would win." Because Dr. Chambers' testimony established that the two theories were not mutually exclusive and supported counsel's belief that both theories supported the defense, we conclude that counsel's strategy was objectively reasonable. And Theil fails to demonstrate extraordinary circumstances to challenge counsel's strategic decision. Accordingly, Theil fails to demonstrate that counsel's actions were objectively unreasonable or a reasonable probability of a different outcome. Therefore, we conclude the district court did not err by denying this claim.

Theil next argues the district court erred by denying his 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).

Theil argues that appellate counsel was ineffective for failing to make cogent arguments, cite relevant authority, or attach the necessary documents required for review of several of his claims raised on direct appeal.<sup>2</sup> He also argues that in addition to the above errors, appellate counsel was ineffective for failing to demonstrate that a challenged report

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<sup>2</sup>Specifically, Theil claims appellate counsel was ineffective in regard to the appellate claims that the trial court (1) improperly admitted as prior consistent statements the victim's written statement and the testimony of a state investigator, (2) improperly admitted text messages between the victim and Theil, (3) improperly admitted social media messages between the victim and her ex-boyfriend, and (4) erred in how it referred to the victim.

had been admitted into evidence. In support of all of these claims, Theil points to various comments in the supreme court's order affirming Theil's conviction that state appellate counsel failed to include challenged evidence in the appendix on appeal, failed to provide cogent argument or cite legal authority, and failed to identify where in the record it showed the challenged report was admitted into evidence. *See Theil v. State*, No. 78839, 2021 WL 620371, at \*1 n.1, 2-3 (Nev. Feb. 16, 2021) (Order of Affirmance). Theil did not ask counsel any questions at the evidentiary hearing as to why counsel failed to include any of the foregoing. Moreover, Theil fails to indicate what arguments counsel should have made, what authority counsel should have cited, and how any of his claims would have had a reasonable probability of success on appeal. Accordingly, we conclude Theil fails to demonstrate that counsel's actions were objectively unreasonable or a reasonable probability of success had counsel performed differently on appeal. Therefore, we conclude the district court did not err by denying this claim.

Finally, Theil argues the district court erred by denying his remaining claims as procedurally barred without conducting an evidentiary hearing. Theil's remaining claims were that the jury panel was biased and that the trial court improperly admitted evidence. These claims could have been raised on direct appeal and were thus waived absent a showing of good cause and actual prejudice. *See* NRS 34.810(1)(b); NRS 34.810(3). To warrant an evidentiary hearing on arguments of good cause and prejudice, such arguments must be supported by specific factual allegations that are not belied by the record and, if true, would overcome the procedural bars. *See Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154-55 (2015).

Theil's arguments on appeal do not demonstrate that he alleged specific facts that are not belied by the record and, if true, would overcome the procedural bars. Therefore, we cannot conclude that the district court erred by denying these claims as procedurally barred without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Erika D. Ballou, District Judge  
The Draskovich Law Group  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk