

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN OWEN REDENIUS,  
Appellant,  
vs.  
JACK PALMER, WARDEN,  
Respondent.

No. 63005

**FILED**

**MAR 27 2014**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On appeal from the denial of his March 9, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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*); see also *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, 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, appellant argues that trial counsel was ineffective for using the transcript of the victim's oral statement to the police during trial and for failing to move to pierce Nevada's rape shield statute. These claims were not raised in appellant's petition or first supplement below, and the district court's finding that appellant did not satisfy the requirements set forth in *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006), for expanding pleadings is supported by substantial evidence before this court. Appellant's claims that he filed two motions to further supplement his petition do not provide relief as he neither alleged nor demonstrated that the district court granted either motion. See NRS 34.750(5). Because appellant's claims were not properly before the court below, we decline to address them on appeal. *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Second, appellant argues that trial counsel was ineffective for failing to produce a DNA expert to testify as to possible cross-contamination of evidence and the identity of the third-party donor. Appellant failed to demonstrate deficiency or prejudice. Appellant presented no expert evidence during the four-day evidentiary hearing as to the possibility and likelihood of cross-contamination or the identity of the third-party donor and, thus, failed to demonstrate the underlying facts by a preponderance of the evidence. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that trial counsel was ineffective for failing to produce character witnesses to testify as to appellant's honesty. Appellant failed to demonstrate deficiency or prejudice. Appellant, who did not testify at trial, does not challenge the district court's finding that appellant's honesty was not at issue during the trial. Appellant thus failed to demonstrate that counsel was objectively unreasonable for not producing evidence to rebut something that was not in dispute at trial and failed to demonstrate a reasonable probability of a different outcome had counsel produced the desired witnesses. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant argues that trial counsel was ineffective for failing to object to the prosecutor's repeated references to the victim as a "little girl." Appellant failed to demonstrate deficiency or prejudice. Appellant identified no basis on which counsel could have successfully objected where the references to the victim's age were factually accurate and all but two of the identified references were made in closing argument. *See State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant argues that trial counsel was ineffective for advising appellant not to testify at trial. Appellant failed to demonstrate deficiency or prejudice. Appellant testified at the evidentiary hearing that counsel advised him his testimony was not necessary since, in her opinion, the State had not met its burden of proof. This advice alone was not objectively unreasonable. *See Strickland*, 466 U.S. at 689 (holding that

there is a strong presumption that counsel was objectively reasonable). Further, appellant did not testify that he wanted to testify at trial or that he would have testified had counsel advised him to do so. Accordingly, appellant did not demonstrate the underlying facts of his claim by a preponderance of the evidence. Moreover, appellant failed to demonstrate a reasonable probability of a different outcome at trial had he testified, because although he stated at the hearing that he would have absolutely denied the alleged acts at trial, he also reiterated his statements to the police—which were admitted at trial—that he could not in fact recall a lot of what happened that night, thereby negating the effect of any absolute denial. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant argues that trial counsel was ineffective for failing to object to the jury's having had access to the victim's videotaped statement to the police where the video was not played in open court. Appellant also contends that appellate counsel was ineffective for failing to argue on direct appeal that the submission of the unplayed videotape to the jury during deliberations was structural error requiring an automatic reversal of the conviction and a new trial. Appellant failed to demonstrate prejudice. The videotape was inaudible and the jury was presented with a transcript of the victim's statement. Appellant has neither presented any evidence that jurors in fact viewed the videotape<sup>1</sup> nor identified anything

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<sup>1</sup>Appellant refers to a comment by the jury foreperson, which he characterizes as "discussing" the video. However, the comment was made in the context of requesting a transcript of appellant's statement to the police and merely acknowledged to the trial court that the jury had the video of appellant's interview and a transcript of the victim's statement.

in the videotape that the jurors should not have seen and thus failed to demonstrate a reasonable probability of a different outcome at trial.

Furthermore, appellant's reliance on *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996) (holding that it was structural error to allow the jury to take into deliberations tapes that had not been played in the courtroom because the evidence had not been "presented and tested in front of the jury, judge and defendant"), *as amended*, 140 F.3d 1244 (9th Cir. 1998), is unavailing, because two years later, the court decided *Eslaminia v. White*, in which it essentially limited the holding in *Noushfar* to its facts—the jury was given access to 14 tapes of conversations in which the defendants incriminated themselves, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998). The *Eslaminia* court instead examined for harmless error the jury's consideration of an unadmitted recording of a conversation by the defendant's brother, who did not testify at trial, that "seriously impact[ed]" the defendant's credibility but did not directly incriminate him.<sup>2</sup> *Id.* at 1237 & n.1. In light of the lack of a directly on-point case by the United States Supreme Court or even the Ninth Circuit Court of Appeals, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had appellate counsel raised the issue on direct appeal. We therefore conclude that the district court did not err in denying these claims.

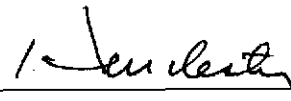
Finally, appellant claims that cumulative error warrants the reversal of his conviction. Because appellant failed to demonstrate error, he necessarily failed to demonstrate cumulative error.

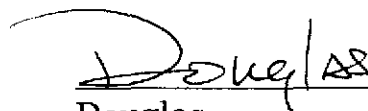
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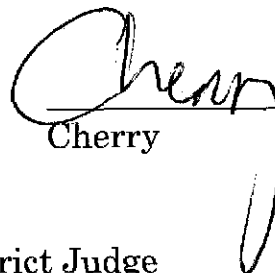
<sup>2</sup>In contrast, the parties agree that the videotape at issue here was admitted into evidence.

Having considered appellant's claims and found them to lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. Jerome Polaha, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk