

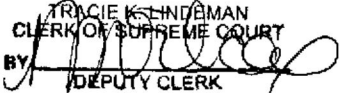
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERNANDO GALLEGOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 64502

**FILED**

APR 15 2015

TRACIE K. HINDMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus following a conviction for first-degree murder. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

*Evidentiary hearing*

Appellant Fernando Gallegos contends that the district court erred by rejecting four of his claims without conducting an evidentiary hearing.<sup>1</sup> “We review the district court’s determination that a petitioner is not entitled to an evidentiary hearing for abuse of discretion.” *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010).

A district court may reject a claim without conducting an evidentiary hearing when the claim (1) is belied by the record; (2) is not supported by specific facts, which, if true, would entitle petitioner to relief; or (3) is procedurally barred and the petitioner has failed to overcome the procedural bar. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). To state a meritorious claim of ineffective

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<sup>1</sup>The Honorable Patrick Flanagan, District Judge, rejected all but one of Gallegos’ claims when ruling upon the State’s motion to dismiss the petition and supplemental petition for a writ of habeas corpus.

assistance of counsel, a petitioner must allege specific facts that show that counsel's performance was deficient and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, the district court considered the parties' pleadings and made the following findings: (1) Gallegos' claim that the police violated his *Miranda* rights was procedurally barred because it could have been raised on direct appeal. (2) Gallegos' claim that counsel was ineffective for not objecting to the use of his nickname was insufficient to show ineffective assistance of counsel because Gallegos failed to show that he was prejudiced by counsel's performance. (3) Gallegos' claim that counsel was ineffective for failing to investigate Antonio Barajas as the real killer was insufficient to show ineffective assistance of counsel because Gallegos failed to show that counsel knew or should have known to investigate Barajas. And (4) Gallegos' claim that counsel was ineffective for eliciting testimony that Gallegos physically and verbally abused a witness was insufficient to show ineffective assistance of counsel because Gallegos failed to show that counsel's strategic choices in examining witnesses fell below an objective standard of reasonableness.

The record supports the district court's findings, and we conclude that Gallegos has not demonstrated that the district court abused its discretion in this regard.

*Ineffective assistance of counsel*

Gallegos contends that the district court erred by denying his claim that trial counsel provided ineffective assistance of counsel during the prosecutor's closing argument. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Here, the district court conducted an evidentiary hearing on Gallegos' claim that counsel was ineffective for failing to object to various statements made by the prosecutor during closing argument. It made the following findings: (1) The prosecutor corrected his statement that a witness "said he heard what he thought to be a door being kicked in" by further remarking that "it was not a quiet entry." (2) The prosecutor merely asked the jury to conclude that his interpretation of the evidence was reasonable when he stated, "I submit to you, [that the witness heard] some of the final words of [the victim]. 'I ain't got no dope. I don't have any dope.' And then he heard 'Ow.'" (3) Trial counsel responded to the prosecutor's statement about a witness' description of the males as being Hispanic by exploiting the uncertainty of the witness and the nature of the identification during his closing argument. (4) The prosecutor's characterization of statements that Gallegos made to a witness as the truth, rather than boasts, was permissible and there was no objection that trial counsel could make. (5) The prosecutor's statement that Gallegos and Barajas "washed their hands and used bleach to take [the victim's] blood off the knife" reflected the prosecutor's theory that the two worked in concert and did not prejudice Gallegos. (6) Trial counsel responded to the prosecutor's statement that "They're bloody denim pants and they have [the victim's] blood on them" by stressing that it was single drop of blood the size of a dime during his closing argument. And (7) Gallegos failed to show that he was prejudiced or that trial counsel's performance fell below a reasonable standard.

Our review of the record reveals that the district court's factual findings are supported by substantial evidence and are not clearly wrong, and Gallegos has not demonstrated that the district court erred as a matter of law. *See Strickland*, 466 U.S. at 687 (establishing two-part test for ineffective assistance of counsel); *Kirksey v. State*, 112 Nev. 980,


987, 923 P.2d 1102, 1107 (1996) (adopting the test in *Strickland*); see also *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (“Tactical decisions are virtually unchallengeable absent extraordinary circumstances.”). Accordingly, we conclude that Gallegos has not demonstrated he was deprived of effective assistance of counsel.


*Cumulative error*

Gallegos contends that the cumulative effect of the various trial errors alleged in his petition violated his rights to due process of law, equal protection of the laws, and a reliable sentence. However, this claim was not raised in the court below and we decline to consider it here. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

Having concluded that the district court did not err by denying Gallegos’ petition, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Lidia Stiglich, District Judge  
Law Office of Thomas L. Qualls, Ltd.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk