IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67575

FILED

DEC 18 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY_____
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant Robert Martinez claims the district court erred by denying one of his claims of ineffective assistance of counsel raised in his August 2, 2013, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate 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*). 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

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review the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Martinez claims counsel was ineffective for failing to file a motion to suppress the photo lineup because the process was unnecessarily suggestive and warranted the suppression of the resulting identifications as well as the subsequent in-court identifications. Martinez fails to demonstrate counsel was deficient or resulting prejudice. This court considers the totality of the circumstances to determine whether the photo line-up procedure was "'so unduly prejudicial as to fatally taint [the defendant's] conviction.'" *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (alteration in original) (quoting *Simmons v. United States*, 390 U.S. 377, 383 (1968)).

First, Martinez failed to provide this court with a copy of the photo lineup. "The burden to make a proper appellate record rests on appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *see also Thomas v. State*, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004). Therefore, this court cannot properly review Martinez's claim that counsel was ineffective for failing to assert the photo lineup itself was unnecessarily suggestive.
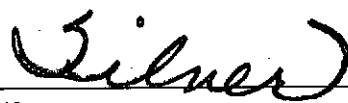
Second, as to Martinez's claim regarding the process of the photo lineup, we conclude the district court did not err in finding the process was not unnecessarily suggestive. Martinez's arguments in support of this claim were that the eyewitnesses were not credible because they withheld information from the police or gave a different description of the robber than matched Martinez. These claims do not undermine the admissibility of the identification but rather go to the credibility of the witnesses. *See Steese v. State*, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998)

(weight and credibility of a witness is for the jury to determine). Therefore, counsel was not ineffective for failing to seek suppression of the identification and the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

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[1]To the extent Martinez argues a detective's statement made shortly before the police lineup was unnecessarily suggestive, this claim was not raised below, and we decline to consider it in the first instance on appeal. *See generally 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).