

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS SHEREEF MCNEAL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68765

FILED

MAR 16 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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; Michael Villani, Judge.

Appellant Marcus Shereef McNeal argues the district court erred in denying his claims of ineffective assistance of counsel raised in his July 10, 2014, petition, without conducting an evidentiary hearing. 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*). 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). To warrant an evidentiary hearing, a petitioner must raise claims that are 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).

First, McNeal argues his trial counsel was ineffective for failing to seek to have an investigator appointed, failing to investigate an anonymous note, and for failing to investigate and locate the Hispanic males that were with McNeal when the shooting occurred. McNeal fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. McNeal does not identify any additional evidence an investigator could have discovered or what a reasonably diligent investigation into these issues would have uncovered. As McNeal does not demonstrate an investigation would have uncovered favorable evidence, he does not meet his burden to demonstrate this claim has merit. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, McNeal argues his trial counsel was ineffective for failing to investigate the victim. McNeal argues counsel should have investigated the victim's employment and criminal records, as McNeal believes the victim did not actually work as a security guard and had a felony conviction. McNeal fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. During trial, counsel

cross-examined the victim regarding his employment and McNeal does not demonstrate reasonably diligent counsel would have performed further actions with respect to the victim's employment record. In addition, McNeal asserts he believes the victim has a prior felony, but does not provide any factual basis for this assertion. A bare and unsupported claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). McNeal fails to demonstrate a reasonable probability of a different outcome at trial had counsel performed further investigation of the victim as he fails to demonstrate counsel would have uncovered favorable information. See *Molina*, 120 Nev. at 192, 87 P.3d at 538. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, McNeal argues his trial counsel was ineffective for raising an untimely *Batson*<sup>1</sup> challenge. McNeal fails to demonstrate prejudice for this claim. After completion of jury selection, McNeal's trial counsel raised a *Batson* challenge because the State had used its preemptory challenges to strike two African-American jurors. The trial court stated the challenge was untimely because the jurors had already left the courtroom and were not available for further proceedings. However, the trial court also permitted McNeal to make a prima facie case of racial discrimination and then permitted the State to present race-neutral reasons for striking the jurors. Following those presentations, the trial court ultimately denied the challenge on its merits. As the trial court

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<sup>1</sup>*Batson v. Kentucky*, 476 U.S. 79 (1986).

proceeded through the three-step analysis of a *Batson* challenge and concluded McNeal's challenge lacked merit, *Conner v. State*, 130 Nev. \_\_\_, \_\_\_, 327 P.3d 503, 508 (2014), he fails to demonstrate a reasonable probability of a different outcome at trial had counsel raised the *Batson* challenge earlier in the trial proceedings.<sup>2</sup> Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, McNeal argues his trial counsel was ineffective for failing to object to references made during opening statements to the contents of an anonymous note and for failing to file a motion in limine to preclude reference to the note's contents. McNeal asserts the contents of the note constituted hearsay and should not have been discussed at trial. McNeal fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. During opening statements, the State informed the jury the police received an anonymous note, and that the note mentioned an individual with the moniker Rock along with a brief description of Rock. Testimony presented at trial demonstrated McNeal was Rock and the note caused the police to focus their investigation upon McNeal. During trial, the district court only permitted the State to question a witness regarding the note as it pertained to his investigation and did not offer the note's contents for the truth of the matter asserted. Under these circumstances, McNeal does not demonstrate his counsel's actions with respect to the discussion of the note during opening statements amounted

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<sup>2</sup>We note McNeal did not provide the portion of the trial transcript containing jury selection in his appendix before this court. As the appellant, it is McNeal's burden to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009).

to objectively unreasonable conduct. *See Rice v. State*, 113 Nev. 1300, 1312-13, 949 P.2d 262, 270 (1997) (explaining overstatements made by a prosecutor during opening statements will not amount to misconduct unless the statement was made in bad faith), *abrogated on other grounds by Rosas v. State*, 122 Nev. 1258, 1265 n.10 147 P.3d 1101, 1106 n.10 (2006). Given the limited discussion of the note and the additional evidence of McNeal's guilt presented at trial, McNeal fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought to further limit discussions of the contents of the note. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

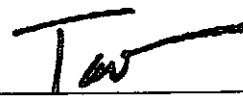
Fifth, McNeal argues his trial counsel was ineffective for failing to object when the State implied McNeal was a drug dealer during opening statements and closing arguments. McNeal fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. As discussed on direct appeal, the district court permitted the victim to explain he viewed McNeal with a group who sold drugs, but he had not seen McNeal personally sell drugs. *McNeal v. State*, Docket No. 64076 (Order of Affirmance, May 13, 2014). A review of the challenged comments during opening statements and closing arguments reveals the State complied with the district court's ruling. *See Garner v. State*, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (stating during opening statements "[i]t is proper for the prosecutor to outline his theory of the case and to propose those facts he intends to prove"); *see also Truesdell v. State*, 129 Nev. \_\_\_, \_\_\_, 304 P.3d 396, 402 (2013) (during closing arguments "the prosecutor may . . . assert inferences from the evidence and argue conclusions on disputed issues"). Accordingly, McNeal fails to


demonstrate objectively reasonable counsel would have objected to the statements or there was a reasonable probability of a different outcome at trial had counsel objected. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Having considered McNeal's claims and concluding he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Michael Villani, District Judge  
Gregory & Waldo  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk