IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PENNY BARTLETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69448

ORDER OF AFFIRMANCE

Appellant Penny Bartlett appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 3, 2013, and her supplemental petitions filed on January 13, 2014, and August 29, 2014. Seventh Judicial District Court, White Pine County; J. Charles Thompson, Senior Judge.

Bartlett claims the district court erred by denying her claims of ineffective assistance of counsel.[1] 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.

[1]To the extent Bartlett's claims on appeal address arguments not encompassed in the district court's order, we decline to address them because Bartlett failed to provide copies of the petitions she filed below. *See* NRAP 30(b)(2); *Thomas v. State*, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with portions of the record essential to determination of issues raised in appellant's appeal." (internal quotation marks omitted)).

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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). Tactical decisions are "virtually unchallengeable absent extraordinary circumstances." *See Doleman v. State*, 112 Nev. 843, 847-48, 921 P.2d 278, 280-81 (1996). 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, Bartlett claims the district court erred by denying her claim that counsel were ineffective for failing to call Dr. Mark Chambers at trial and present a battered woman syndrome defense. The district court concluded counsel were not deficient for failing to call Dr. Chambers because it was a tactical decision. The district court further concluded there was no reasonable probability of a different outcome at trial had Dr. Chambers testified given Bartlett's own statements and actions. Substantial evidence supports the decision of the district court and we conclude the district court did not err by denying this claim.

Second, Bartlett claims the district court erred by denying her claim that counsel were ineffective for failing to call Summer Hauser at trial. The district court concluded counsel were not deficient for failing to call Hauser because it was a tactical decision. Counsel testified at the evidentiary hearing that Hauser was a drug addict and counsel did not believe the jury would find her credible. Substantial evidence supports

the decision of the district court, and we conclude the district court did not err by denying this claim.

Third, Bartlett claims the district court erred by denying her claim that counsel were ineffective for failing to call a DNA expert at trial. The district court concluded counsel were not deficient for failing to call the DNA expert at trial because it was a tactical decision. The attorneys testified at the evidentiary hearing and deposition that the DNA expert would have testified similarly to that of the State's expert, and therefore, it was not necessary to call him. Further, the district court concluded it was not clear what the DNA expert's testimony would have established, and therefore, Bartlett failed to support this claim with specific facts which, if true, would entitle her to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

Bartlett also claims one of her counsel was ineffective because she was inattentive and lacked involvement in trial preparations and cumulative error entitles her to relief. It is not clear these claims were raised below because Bartlett failed to provide this court with copies of her petitions filed below and the district court's order does not address these claims. Bartlett's petitions are essential documents this court needs to determine what claims were raised below and to review the district court's order. *See* NRAP 30(b)(2); *Thomas*, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4. Because Bartlett failed to provide these documents, we are unable to determine whether the district court erred in denying these claims or whether they were even raised below. Accordingly, we decline to address them on appeal.

Finally, Bartlett argues the State failed to respond to several of her claims, and the failure should be treated as a confession of error. Specifically, Bartlett claims the State failed to respond to her claims regarding the DNA expert, the district court's error about hearsay and prior bad acts,[2] his counsel's ineffectiveness regarding her inattentiveness, and cumulative error. Although we could treat the State's failure to respond to these claims a as confession of error, *see Polk v. State*, 126 Nev. 180, 184-85, 233 P.3d 357, 359-60 (2010), we decline to do so where, as here, the claims clearly lack merit or the record does not demonstrate they were raised below. *See Hewitt v. State*, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), *overruled on other grounds by Martinez v. State*, 115 Nev. 9, 11-12, 974 P.2d 133, 134-35 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[2]We note the district court did not make any findings regarding prior bad acts.

cc: Seventh Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Justice Law Center
Attorney General/Carson City
Sears Law Firm, Ltd.
White Pine County Clerk