

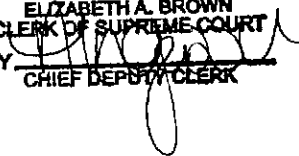
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THAD MONOLETTI AUBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68534

FILED

NOV 18 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Thad Aubert appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on February 5, 2014. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Aubert claims the district court erred in denying his petition because he received ineffective assistance of trial and appellate counsel. To establish ineffective assistance of trial 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, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Similarly, to establish ineffective assistance of appellate 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 the omitted issue would have had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). We give deference to the district

court's factual findings if supported by substantial evidence and not clearly erroneous but 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).

First, Aubert claimed trial counsel was ineffective for not renewing an objection to an alleged NRS 171.178(3) violation. The district court found the justice court had already ruled on this issue and any further objection would have been futile. The district court's finding is supported by the record and we conclude the district court did not err in denying this claim. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Second, Aubert claimed trial counsel was ineffective for failing to impeach witnesses Stephanie Staehr and Kenny Cooper. The district court found this claim was belied by the record because trial counsel attempted to impeach Staehr and thoroughly cross-examined both Staehr and Cooper. Moreover, trial counsel made a strategic decision as to how to best examine these witnesses and Aubert failed to demonstrate a different examination approach would have changed the result of the trial. The district court's findings are supported by the record and we conclude the district court did not err in denying this claim. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *see generally Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996).

Third, Aubert claimed trial counsel was ineffective for failing to challenge the introduction of testimony he gave at a previous trial about his prior felony convictions. The district court found this claim was belied by the record because trial counsel did raise an objection and was

successful in limiting the questioning on this issue, and any further objection would have been futile. The district court's finding is supported by the record and we conclude the district court did not err in denying this claim. *See Hargrove*, 100 Nev. at 503, 686 P.2d at 225; *Ennis*, 122 Nev. at 706, 137 P.3d at 1103.

Fourth, Aubert claimed trial counsel was ineffective for failing to object to jury instructions 5 and 10.¹ The district court found both of these instructions had been affirmed by the Nevada Supreme Court in various cases and trial counsel could not be deemed ineffective for failing to make futile objections. The district court's finding is supported by the record and we conclude the district court did not err in denying this claim. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103; *Parker v. State*, 109 Nev. 383, 389-90, 849 P.2d 1062, 1066 (1993); *Nevius*, 101 Nev. at 250 & n.5, 699 P.2d at 1060-61 & n.5.

Fifth, Aubert claimed trial counsel was ineffective for failing to investigate the three men who were in the car with him, a mysterious motorcycle man, and the 7-Eleven clerk and custodian. The district court found Aubert failed to show how investigating these people would have changed the outcome of the trial. The district court's finding is supported by the record and we conclude the district court did not err in denying this

¹Instruction no. 5 defines "reasonable doubt" as required by NRS 175.211 and instruction no. 10 discusses the jury's consideration of the evidence in this case and is nearly identical to an instruction approved of by the Nevada Supreme Court in *Nevius v. State*, 101 Nev. 238, 250 & n.5, 699 P.2d 1053, 1060-61 & n.5 (1985).

claim. *See United States v. Porter*, 924 F.2d 395, 397 (1st Cir. 1991); *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Sixth, Aubert claimed trial counsel was ineffective for failing to communicate a plea offer. The district court found no formal offer was ever extended and, therefore, Aubert could not meet his burden to show a reasonable probability he would have accepted the more favorable plea offer but for trial counsel's deficient performance. The district court's finding is supported by the record and we conclude the district court did not err in denying this claim. *See Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1407-10 (2012).

Seventh, Aubert claimed trial counsel was ineffective for failing to adequately question prospective jurors during voir dire. The district court found Aubert's claim was belied by the record, defense counsel's focus on determining whether the prospective jurors could get past the fact Aubert had four prior felony convictions was a reasonable strategy, and Aubert failed to demonstrate prejudice. The district court's findings are supported by the record and we conclude the district court did not err in denying this claim. *See Aubert v. State*, Docket No. 58550 (Order of Affirmance, November 15, 2012); *see generally Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

Eighth, Aubert claimed trial counsel was ineffective for failing to present mitigation evidence at sentencing. The district court found trial counsel made a reasonable strategic decision to focus on Aubert's prior felony convictions because Aubert was facing mandatory sentencing under the habitual felon statute and Aubert failed to prove prejudice as the sentencing statute provides the district court with very little discretion.

The district court's findings are supported by the record and we conclude the district court did not err in denying this claim. See NRS 207.012(1).

Ninth, Aubert claims appellate counsel was ineffective for failing to challenge the State's notice of intent to seek habitual criminal adjudication. The district court found this claim was belied by the record because appellate counsel argued on direct appeal that the notice was not filed until after Aubert was convicted and the Nevada Supreme Court determined appellate counsel's argument was meritless. The district court's finding is supported by the record and we conclude the district court did not err in denying this claim. See *Hargrove*, 100 Nev. at 503, 686 P.2d at 225; *Aubert*, Docket No. 58550 (Order of Affirmance, November 15, 2012).

Aubert also claims the district court erred by denying the claims (1) he was vindictively prosecuted by deputy district attorneys Marc Schifalacqua and Michelle Fleck because they had prosecuted a previous case against him in which he was acquitted, (2) the State committed prosecutorial misconduct by presenting false testimony regarding the amount of money at issue and the victim's interactions with the mysterious motorcycle man, and (3) juror misconduct and a compromised verdict deprived him of a fair trial.² However, the district court found these claims were not cognizable because they should have

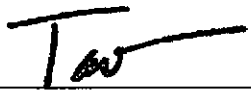
²To the extent Aubert also claims the district court erroneously denied his claim that trial counsel was ineffective "for allowing Deputy District Attorney Fleck to read from prior testimony . . ." on grounds it was raised in the wrong venue, we conclude his claim is belied by the record.

been raised on direct appeal, and we conclude the district court did not err in this regard. *See* NRS 34.810(1)(b)(2).

Aubert further claims the district court erred in denying his cumulative error claim. However, the record demonstrates the district court did not find any errors and therefore there were no errors to cumulate.

Having concluded Aubert is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk