

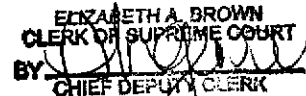
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD WAYNE OSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71223

FILED

SEP 13 2017

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

ORDER OF AFFIRMANCE

Gerald Wayne Osby appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on June 5, 2014, and the supplemental petition he filed on May 8, 2015. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Osby claims the district court erred by denying his claims of ineffective assistance of counsel. 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, 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).

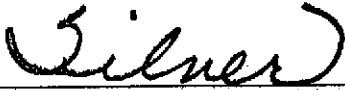
First, Osby claimed counsel was ineffective for failing to present testimony from an expert on the reliability of eyewitness identifications. Osby failed to demonstrate counsel was deficient or resulting prejudice. The district court found counsel made a tactical decision not to present an expert based on the amount of eyewitness testimony and his prior experience using an eyewitness expert in a different case. Further, the district court found Osby's claim was bare and naked because he failed to explain how an expert would have attacked the witnesses' testimony. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim. *See Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

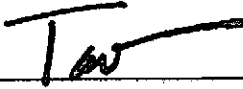
Second, Osby claimed counsel was ineffective for failing to investigate the identifications made by several witnesses. Osby failed to demonstrate counsel was deficient or resulting prejudice because he failed to demonstrate what a more thorough investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Counsel attempted to contact and interview the witnesses but many of them refused to speak to counsel's investigator. Further, Osby failed to identify any evidence that could have been discovered. Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel conducted a more thorough investigation. Accordingly, the district court did not err by denying this claim.


Finally, Osby claimed counsel was ineffective for failing to investigate a witness, Max Nettles, whom Osby claimed might have been

the actual shooter. Osby failed to demonstrate counsel was deficient or resulting prejudice. The district court found counsel's investigator attempted to contact Nettles, but Nettles refused to speak with counsel's investigator. Further, the district court found Osby failed to show how a better investigation would have rendered a more favorable outcome at trial. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim. *See id* Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Oronoz, Ericsson & Gaffney, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk