

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN DOUGLAS MCNAIR, JR.,
Appellant,
vs.
ISIDRO BACA, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 72886

FILED

APR 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

John Douglas McNair, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 10, 2014, and supplemental petition filed on February 13, 2015. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

McNair contends the district court erred by denying several of his claims that trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 that are supported by substantial evidence and not clearly wrong 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, McNair argues counsel should have objected to the joinder of McNair's two cases and should have objected at trial to the admission of prior-bad-act evidence pursuant to NRS 48.045(2). McNair fails to demonstrate he was prejudiced. He alleges only that, had trial counsel objected, counsel could have explained to the district court why joinder was improper and the Nevada Supreme Court would have reviewed his bad-act-evidence claim under a different standard. Importantly, McNair does not allege there would have been a different result at trial had counsel raised either or both objections, nor does he allege a different result on appeal had different standards of review been applied. We therefore conclude the district court did not err by denying these claims.

Second, McNair argues counsel should have objected to the admission of uncorroborated accomplice testimony regarding his convictions for possession of stolen property and burglary. Both offenses involved a rifle McNair pawned on behalf of a juvenile, and his convictions for both offenses were based on the testimony of the juvenile, who had stolen the rifle. A conviction may stand on the testimony of an accomplice only if "the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." NRS 175.291; see *Evans v. State*, 113 Nev. 885, 891-92, 944 P.2d 253, 257 (1997).

Here, McNair's statements to police that he pawned the gun on behalf of the juvenile tended to connect McNair with the commission of the offenses. Further, McNair told police he "considered it probably was stolen" and he "was worried" about the rifle being stolen, which tended to establish McNair took possession of the rifle "[u]nder such circumstances as should have caused a reasonable person to know that it is stolen property." NRS 205.275(1)(b) (setting forth a means of liability for the crime of possession of stolen property). Because any objection by counsel would have been

futile, counsel cannot be objectively unreasonable for not making the objection. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Moreover, McNair has not alleged a reasonable probability of a different outcome at trial had counsel objected to the testimony. We therefore conclude the district court did not err by denying this claim.

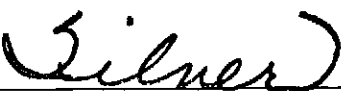
Third, McNair argues counsel should have requested an accomplice-testimony jury instruction. McNair failed to demonstrate prejudice because he did not allege a reasonable probability of a different outcome at trial had an instruction been given. We therefore conclude the district court did not err by denying this claim.


Fourth, McNair argues counsel should have objected to jury instruction 24, which purportedly instructed the jury¹ that, if they found McNair made false or deliberately misleading statements to law enforcement about the charges he was being tried for, the jury could consider the statements as circumstances tending to prove consciousness of guilt but were not by themselves sufficient to prove guilt. Specifically, McNair argues his statements to law enforcement were true and counsel's failure to object to the instruction implied to the jury that McNair's statements were false. McNair has not demonstrated counsel was deficient or he was prejudiced. Jury instructions were settled outside the presence of the jury, so the jury could not have known whether counsel objected and, thus, could not have inferred anything from counsel's lack of objection. Further, McNair does not contend the instruction was an inaccurate

¹Our review of this claim is hampered by McNair's failure to provide this court with the jury instructions. *See Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997) (analyzing jury instructions as a whole); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). However, we can resolve the claim because McNair read the instruction into the record at the evidentiary hearing on the instant petition.

statement of the law, and he fails to allege a reasonable probability of a different outcome at trial had the instruction not been given. We therefore conclude the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

, C.J.
Silver

, J.
Tao

, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Second Judicial District, Dept. 7
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk