IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID LENWARD BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72279

ORDER OF AFFIRMANCE

David Lenward Brown appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Brown argues the district court erred in denying a claim of ineffective assistance of trial counsel he raised in his March 28, 2016, petition. 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,

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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).

Brown argued his trial counsel was ineffective for not seeking to admit into evidence text messages between Brown and the victim. Brown failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, Brown's counsel testified he and his investigator obtained and reviewed the text messages. Counsel testified the messages contained sexual references and statements that could be construed to be threats toward the victim's young son. For those reasons, counsel concluded the messages were likely to be harmful to Brown's defense and decided not to introduce the messages during the trial. Tactical decisions such as these "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which the district court concluded Brown did not demonstrate. Substantial evidence supports the district court's conclusion in this regard. In light of the nature of the text messages, Brown failed to demonstrate a reasonable probability of a different outcome had counsel introduced the text messages during the trial. Therefore, we conclude the district court did not err in denying this claim.[2]

---

[2]To the extent Brown asserts the district court should have considered information from an unrelated investigation regarding the police

Next, Brown appears to argue the district court erred in denying his claim of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

Brown appeared to assert his counsel improperly failed to raise meritorious issues on direct appeal in order to protect his reputation. Brown did not identify any claim counsel should have raised on direct appeal. Bare claims, such as this one, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err in denying this claim.

Finally, Brown appears to argue the district court erred by denying the petition without appointing postconviction counsel. The appointment of postconviction counsel was discretionary in this matter. *See* NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently

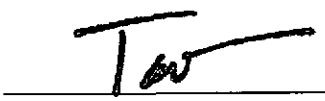
---

department's vice unit when it evaluated Brown's postconviction claims, Brown did not present such information before the district court and we decline to consider any new information in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

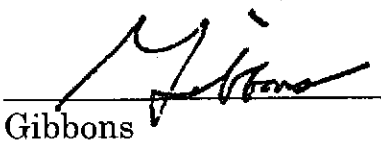
complex so as to warrant the appointment of postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

Having concluded Brown is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
David Lenward Brown
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[3]We have reviewed all documents Brown has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Brown has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.