

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHI XIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72675

**FILED**

DEC 28 2017

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

*ORDER OF AFFIRMANCE*

Chi Xia appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on October 26, 2016<sup>1</sup>. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

In his petition, Chi Xia claimed 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 because it fell below an objective standard of reasonableness, and resulting prejudice in 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 because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

issue had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697. 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, Chi Xia claimed trial counsel was ineffective for failing to object to the district court’s decision to not use a third-party translator to verify a police officer’s testimony about her translation of a police interview. Chi Xia argued this decision violated NRS 50.054(1) because it allowed a biased police officer with an interest in the outcome of the trial to present an unverified translation to the jury. The district court found such an objection would have been futile because the police officer was merely recounting the translation she provided during the police interview, NRS 50.054 only applies to translations made during an in-court proceeding, and the Nevada Supreme Court has previously held NRS 50.054 does not apply to police interviews. We conclude the district court’s factual finding is supported by substantial evidence and is not clearly wrong and the district court did not err in rejecting this claim. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); *Baltazar-Monterrosa v. State*, 122 Nev. 606, 613, 137 P.3d 1137, 1142 (2006) (“[Holding] police interviews need not

be conducted by an independent interpreter and no presumption of police bias should apply absent a showing in the record.”).<sup>2</sup>

Second, Chi Xia claimed trial counsel was ineffective for failing to effectively argue he was prejudiced by the State’s last-minute decision to amend the information. The district court found trial counsel objected to the State’s amendment and made a strategic decision as to the argument he presented to support the objection. The district court further found Chi Xia could not demonstrate prejudice because the Nevada Supreme Court had ruled on direct appeal he was not prejudiced by the amendment. We conclude the district court’s factual findings are supported by substantial evidence and are not clearly wrong and the district court did not err in rejecting this claim. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (observing that strategic decisions are virtually unchallengeable under most circumstances); *Chi Xia v. State*, Docket No. 64593 (Order of Affirmance, November 13, 2015).

Third, Chi Xia claims trial counsel was ineffective for failing to explain the State’s plea offer to him and allow him to decide whether to accept or reject the offer. Chi Xia failed to demonstrate counsel was ineffective. The record reveals the prosecutor placed the plea offer on the record, defense counsel stated the plea offer was rejected, and Chi Xia was present with a Chinese interpreter and did not dispute defense counsel’s statement. Accordingly, we conclude the district court did not err in rejecting this claim. *See Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d

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<sup>2</sup>To the extent Chi Xia seeks a “reinterpretation of NRS 50.054 and the overturning of *Baltazar-Monterrosa*,” we decline to consider this issue because Nevada Supreme Court decisions are binding on this court.

25, 33 (2004) (petitioner bears the burden of proving ineffective assistance of counsel).

Fourth, Chi Xia claimed appellate counsel was ineffective for failing to include a transcript or an audio recording of his police interview in the appellate record. Chi Xia argued the transcript or audio recording was necessary to support his *Miranda*<sup>3</sup> claim that he did not consent to speak with one of the detectives during the police interview. And Chi Xia asserted he was prejudiced because the Nevada Supreme Court determined he failed to make a proper appellate record and denied his claim. The district court found that Chi Xia failed to allege or demonstrate his *Miranda* claim would have had a reasonable probability of success on appeal. We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong and the district court did not err in rejecting this claim. *See Means*, 120 Nev. at 1012-13, 103 P.3d at 33.<sup>4</sup>

Fifth, Chi Xia claimed appellate counsel was ineffective for failing to present the claim that his constitutional right to a trial by jury was violated when Mandarin speakers were struck from the jury venire. The district court found this claim would have been futile because it was not preserved for appeal, the parties agreed they did not want Mandarin-speaking jurors "to have their own views on the translations" presented during the trial, and the parties stipulated to striking Mandarin-speaking persons from the jury venire. We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong

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<sup>3</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).


<sup>4</sup>To the extent Chi Xia also claimed trial counsel was ineffective for failing to procure a transcript of the police interview, we conclude he failed to meet his burden to prove counsel was ineffective for the same reason.


and the district court did not err in rejecting this claim. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103; *see generally Hernandez v. New York*, 500 U.S. 352 (1991) (a prosecutor's belief that a bilingual juror will not accept the official translation of non-English evidence is a race-neutral reason for a strike).

Chi Xia also sought to reserve grounds six through ten in his petition so he could raise additional claims when they were revealed in the files and the transcripts he had requested. To this end, he now claims the district court erred by denying his motion for transcripts prepared at public expense. The record reveals the district court denied his motion because it lacked "specificity to justify providing transcripts as to misconduct" and he "was provided discovery previously that included [the] interview." We conclude Chi Xia failed to demonstrate he was entitled to transcripts prepared at public expense and the district court did not err in this regard. *See Peterson v. Warden*, 87 Nev. 134, 483 P.2d 204 (1971) (a postconviction habeas petitioner must make a threshold showing of how the transcripts "would serve any useful purpose and how he would be prejudiced without them" (internal quotation marks omitted)).

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

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Douglas W. Herndon, District Judge  
Chi Xia  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk