

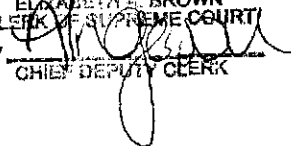
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEO HUNTER, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72413

**FILED**

FEB 14 2018

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

*ORDER OF AFFIRMANCE*

Leo Hunter, Jr., appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on September 7, 2012. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

In his petition, Hunter 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 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, Hunter claimed trial counsel was ineffective at sentencing for failing to investigate and bring forth in mitigation evidence that he suffered from post-traumatic stress disorder (PTSD). The district court conducted an evidentiary hearing and made the following findings. Trial counsel presented mitigating evidence at sentencing detailing Hunter's troubled upbringing, extensive military career, lack of criminal history, and willingness to take responsibility. Hunter was sentenced to a definite term of 25 years for second-degree murder despite the State's recommendation that he be sentenced to life with the possibility of parole. Hunter did not receive the maximum sentence for the deadly weapon enhancement. And Hunter failed to prove the outcome of the sentencing proceeding would have been different if trial counsel had presented evidence he suffered from PTSD. 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 v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance of counsel).

Second, Hunter claimed trial counsel was ineffective for failing to present evidence the handgun he retrieved to scare his daughter was always loaded because it was used for protection against the coyotes that were present on his ranch. The district court conducted an evidentiary hearing and made the following findings. The defense plan at the *beginning* of the trial was for Hunter to testify in his own defense. Evidence the

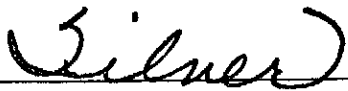
handgun was always loaded would have come in through Hunter's testimony. Hunter decided *during* the trial he did not wish to testify. And trial counsel cannot be said to have been ineffective for failing to present Hunter's testimony because Hunter decided during the trial he did not want to testify. 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 id.*


Third, Hunter claimed trial counsel was ineffective for failing to call the victim's boyfriend as a witness because the boyfriend would have testified the victim became violent when she used methamphetamine and she regularly used methamphetamine. The district court conducted an evidentiary hearing and made the following findings. The jury heard testimony the victim was under the influence of methamphetamine and acting very aggressively toward everyone prior to her death. And trial counsel made a tactical decision not to call the boyfriend to the witness stand because there was a risk his testimony would prove the premeditation element of the State's first-degree murder charge. 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 Rhyne v. State*, 118 Nev. 1, 8 & n.3, 38 P.3d 163, 167 & n.3 (2002) (decisions regarding whether to call a particular witness are tactical decisions); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances.").

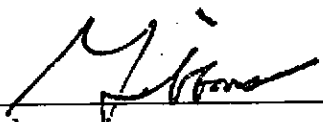
Fourth, Hunter claimed trial counsel was ineffective for failing to object to the admission of prior bad act evidence and appellate counsel was ineffective for failing to litigate the issue on appeal. The district court made the following findings. It was trial counsel who sought admission of

the interview transcript containing the prior bad act evidence. Trial counsel made a tactical decision to seek admission of the transcript because it supported the theory of defense that the shooting was either an accident or the victim pulled the trigger. And because trial counsel sought the admission of this evidence, neither the State nor the district court was required to request a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001). We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong, and any attempt to litigate this issue on appeal would have been futile. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); *Ford*, 105 Nev. at 853, 784 P.2d at 953. Accordingly, the district court did not err in rejecting this claim.

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

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

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

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

cc: Hon. Michael Montero, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk