

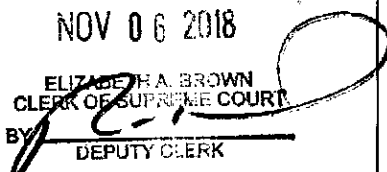
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAN BARCHENGER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74035-COA

FILED

NOV 06 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Dan Barchenger appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Barchenger argues the district court erred by denying his September 24, 2014, petition and later filed supplement. 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, Barchenger argued his trial counsel was ineffective for failing to properly explain a plea offer made by the State. Barchenger asserted he may have accepted a plea offer had counsel properly explained the potential sentences he faced had he accepted the offer. Barchenger failed to demonstrate resulting prejudice. The district court conducted an evidentiary hearing concerning this issue and Barchenger testified at that hearing. The district court found Barchenger testified that he would have only accepted a plea offer had such an offer been accompanied by the promise of a specific sentence and no such offer had been made in this case. Based on the testimony provided at the evidentiary hearing, the district court found Barchenger did not demonstrate a reasonable probability there was a plea offer from the State he would have accepted absent ineffective assistance of counsel, the State would not have withdrawn it in light of intervening circumstances, and the district court would have accepted such an offer. *See Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012) (“To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”). Substantial evidence supports the district court’s findings. Therefore, we conclude the district court did not err by denying this claim.

Second, Barchenger argued his trial counsel was ineffective for failing to object when the district court did not instruct the jury the State must prove the kidnapping was not incidental to the battery in order for the jury to convict Barchenger of both crimes. Barchenger failed to demonstrate his counsel’s performance was deficient or resulting prejudice. The Nevada Supreme Court examined this issue under a plain error standard on direct

appeal. *Barchenger v. State*, Docket No. 63850 (Order of Affirmance, June 11, 2014). The court concluded Barchenger was not entitled to relief because the evidence produced at trial demonstrated “Barchenger’s actions in removing Walters from his residence at gunpoint and forcing him to walk some distance down a road were not incidental to the battery but distinct conduct that supports a separate second-degree kidnapping conviction.” *Id.* As the evidence demonstrated the kidnapping and battery charges were separate and distinct, Barchenger failed to demonstrate it was objectively unreasonable not to request a jury instruction concerning incidental charges or a reasonable probability of a different outcome at trial had counsel requested such an instruction. Therefore, we conclude the district court did not err by denying this claim.

Third, Barchenger argued his trial counsel was ineffective for failing to object when the State projected the word “vigilante” on an overhead projector. Barchenger also argued his trial counsel was ineffective for failing to object when the State blocked his view of witnesses and the presentation of evidence with a television monitor. Barchenger failed to demonstrate his counsel’s performance was deficient or resulting prejudice. Barchenger raised only bare and unsupported allegations for these issues and did not explain how there was a reasonable probability of a different outcome at trial had counsel raised objections to these issues. Barchenger’s bare claims are insufficient to demonstrate he 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 by denying this claim.

Fourth, Barchenger argued his trial counsel was ineffective during closing arguments by stating he was not happy Barchenger was absent during that portion of the trial. Barchenger asserted this statement


improperly emphasized his absence. Barchenger failed to demonstrate his counsel's performance was deficient or resulting prejudice. Barchenger failed to appear for the final day of his trial and the trial court instructed the jury members not to take his absence into account during their participation in the trial. During the defense closing argument, Barchenger's counsel acknowledged he was not happy Barchenger was absent, but stated it was a privilege for him to be in a courtroom to defend a person accused of a crime and asked the jury members not to speculate as to why Barchenger was not in attendance. Given the circumstances counsel faced by Barchenger's absence from the trial, Barchenger did not demonstrate counsel acted in an unreasonable manner by acknowledging that absence. Moreover, we presume the jury followed the trial court's instruction to not take Barchenger's absence into account, *see Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), and, therefore, we conclude Barchenger failed to demonstrate a reasonable probability of a different outcome at trial had counsel made a different closing argument. Accordingly, we conclude the district court did not err by denying this claim.


Fifth, Barchenger argued the cumulative errors of counsel warrant vacating the judgment of conviction. The record before this court demonstrates overwhelming evidence of Barchenger's guilt was presented at trial. This evidence includes the testimony of three victims, the evidence demonstrating their injuries, the testimony of Barchenger's friend who accompanied him to the victim's residence, and Barchenger's incriminating statements to a detective and his friend's father. Given the overwhelming evidence of Barchenger's guilt, we conclude Barchenger failed to demonstrate his counsel's errors, even if considered cumulatively, warrant

vacating the judgment of conviction. Therefore, we conclude the district court did not err by denying this claim.

Next, Barchenger argues the district court erred by only conducting an evidentiary hearing regarding his claims concerning his counsel's explanation of the plea offer. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations not belied by the record, and if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The district court concluded the majority of Barchenger's claims failed to meet that standard and the record before this court reveals the district court's conclusions in this regard were proper. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Lynne K. Simons, District Judge  
Oldenburg Law Office  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk