

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

UBALDO SALDANA-GARCIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74376-COA

FILED

DEC 04 2018

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

ORDER OF AFFIRMANCE

Ubaldo Saldana-Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 3, 2015, and a supplemental petition filed on May 6, 2016. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Saldana-Garcia claims the district court erred by denying his ineffective-assistance-of-counsel claims. 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, Saldana-Garcia claimed counsel was ineffective for failing to investigate and prepare for trial because counsel failed to consult with or present an expert to respond to the State's presentation of expert testimony. Saldana-Garcia failed to demonstrate counsel was deficient or resulting prejudice. Other than speculation, Saldana-Garcia failed to demonstrate what an expert would have testified to or how an expert would have helped with responding to the State's presentation of expert testimony. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err by denying this claim.

Second, Saldana-Garcia claimed counsel was ineffective for failing to file a pretrial motion for sequestered individual voir dire. The district court concluded Saldana-Garcia failed to demonstrate counsel was deficient or resulting prejudice. The district court found Saldana-Garcia supported his claim with nothing more than speculation and failed to demonstrate he was prejudiced. Saldana-Garcia failed to provide this court with the transcript of jury selection. The burden is on Saldana-Garcia to provide pertinent portions of the record for this court's review. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). Based on the record before this court and the findings of the district court, we conclude the district court did not err by denying this claim.

Third, Saldana-Garcia claimed counsel was ineffective for failing to adequately protect the appellate record by allowing numerous unrecorded bench conferences. The district court found Saldana-Garcia

failed to demonstrate counsel was deficient or resulting prejudice. The district court found the trial court made records of any unrecorded bench conferences held and, therefore, counsel was not deficient for further ensuring the conferences were recorded. We conclude the district court did not err by finding counsel was not deficient. Further, Saldana-Garcia cannot demonstrate the district court erred by finding no prejudice because he failed to provide this court with the transcripts of trial. *See Greene*, 96 Nev. at 558, 612 P.2d at 688. Therefore, the district court did not err by denying this claim.


Fourth, Saldana-Garcia claimed counsel was ineffective for failing to object to the admission of polygraph evidence. The district court found Saldana-Garcia failed to demonstrate counsel was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he did not object to the testimony regarding the victim's mother requesting the victim be polygraphed because he believed it reinforced the mother's strong doubt as to one of the victims' veracity. The district court determined this was a tactical decision and was virtually unchallengeable absent extraordinary circumstances, *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Saldana-Garcia failed to demonstrate. We conclude the district court did not err by finding counsel was not deficient. Further, Saldana-Garcia cannot demonstrate the district court erred by finding no prejudice because he failed to provide this court with the transcripts of trial. *See Greene*, 96 Nev. at 558, 612 P.2d at 688. Therefore, the district court did not err by denying this claim.

Finally, Saldana-Garcia claimed the cumulative errors of counsel entitled him to relief. Because Saldana-Garcia failed to

demonstrate any error, he necessarily failed to demonstrate there was cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Kenneth C. Cory, District Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk