

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIO ALEJANDRO LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74596-COA

FILED

FEB 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Mario Alejandro Lopez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Lopez argues the district court erred by denying the claims of ineffective assistance of trial counsel he raised in his February 2, 2015, 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations not belied by the record, that if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Lopez claimed his trial counsel was ineffective for failing to move to suppress his statements to police detectives. Lopez asserted the detectives failed to advise him of his *Miranda*¹ rights and coerced him into speaking by using physical force against him. The district court concluded this claim was belied by the record and denied it without considering it at the evidentiary hearing. The district court found Lopez testified during trial that the detectives advised him of his *Miranda* rights and he agreed to discuss the incident with them. The record supports the district court's findings. *See Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made."). Accordingly, Lopez failed to demonstrate his counsel's performance was deficient or a reasonable probability of a different outcome had counsel moved to suppress his statements. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Lopez claimed his trial counsel was ineffective for failing to object when the State made improper statements during closing and rebuttal arguments. Lopez contended the State implied personal knowledge of the events, discussed facts not in evidence, demeaned the defense, inflamed the jury, and commented on prohibited matters. Lopez failed to demonstrate resulting prejudice. The challenged comments were

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

reviewed on direct appeal under a plain error standard and the Nevada Supreme Court found none of the challenged comments rose to plain error, and further concluded the issue of “guilt was not close.” *Lopez v. State*, Docket No. 65048 (Order of Affirmance, October 16, 2014). Given the Nevada Supreme Court’s conclusions and the substantial evidence of Lopez’ guilt produced at trial, which included his incriminating statements, Lopez failed to demonstrate a reasonable probability of a different outcome had counsel raised objections to the challenged comments. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.


Third, Lopez claimed his trial counsel was ineffective for failing to present expert testimony to support his voluntary-intoxication defense. Lopez failed to demonstrate his counsel’s performance was deficient or resulting prejudice. At the evidentiary hearing, Lopez’ counsel testified the defense retained an expert concerning the effects of methamphetamine, alcohol, and prescription medication to interview Lopez in an effort to bolster a voluntary-intoxication defense. The expert testified at the evidentiary hearing that he interviewed Lopez prior to the trial. The expert testified he concluded he could not state that Lopez was unable to form a specific intent to commit the crimes and informed Lopez’ counsel he would not testify in a manner that was helpful to the defense. Counsel testified that she decided not to call the expert to testify for that reason. “Tactical decisions are virtually unchallengeable absent extraordinary circumstances,” *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Lopez did not demonstrate. As Lopez did not demonstrate counsel’s tactical decision amounted to an extraordinary circumstance, he failed to

meet his burden to show his counsel's performance fell below an objective standard of reasonableness.

In addition, Lopez asserted counsel should have attempted to find additional experts and speculates such experts could have provided testimony to support a voluntary-intoxication defense. However, Lopez did not demonstrate reasonably diligent counsel could have uncovered expert testimony that would have supported a voluntary-intoxication defense and unsupported claims, such as this one, fail to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Given the record, Lopez failed to demonstrate a reasonable probability of a different outcome had counsel presented expert testimony to support a voluntary-intoxication defense. Therefore, we conclude the district court did not err by denying this claim.

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


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk