

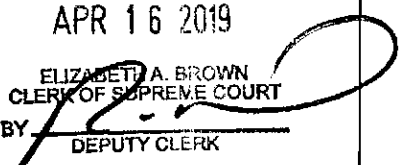
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDRUE LEE JEFFERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75344-COA

FILED

APR 16 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Andrue Lee Jefferson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Jefferson argues the district court erred by denying the claims of ineffective assistance of counsel raised in his March 4, 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

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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, Jefferson argued his trial counsel was ineffective for waiving the opportunity to present a closing argument. Jefferson failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he had prepared to present a closing argument, but believed the State's closing argument did no damage to Jefferson's defense. Counsel also testified he had previously observed the prosecutor's rebuttal arguments and was concerned that the prosecutor would make a persuasive rebuttal argument in this matter. Counsel further testified he felt confident with the case the defense had presented at that point. Counsel testified that for those reasons, he made the tactical decision to waive the defense closing argument in order to avoid a rebuttal argument from the State. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and the district court found Jefferson did not demonstrate his counsel's decision to waive closing argument amounted to an extraordinary circumstance. Substantial evidence supports the district court's decision. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002) (explaining that it was not objectively unreasonable for a defense counsel to make a tactical decision to waive closing argument out of concern that the prosecutor would make a persuasive rebuttal argument).

The district court also found Jefferson did not demonstrate a reasonable probability of a different outcome had counsel presented a closing argument. The district court found compelling evidence of

Jefferson's guilt had been presented at trial, including multiple witnesses that identified him as one of the persons who struck the victim. The record supports the district court's findings in this regard. Therefore, we conclude the district court did not err by denying this claim.

Second, Jefferson argued his trial counsel was ineffective for failing to investigate a potential witness, Emilio Powell, who had been present when the fight occurred. Jefferson contended he and Powell resembled one another, it was possible Powell actually committed the crime, and that witnesses had mistakenly identified Jefferson as a participant in the fight due to their resemblance. Jefferson failed to demonstrate his trial counsel's performance was deficient or resulting prejudice.

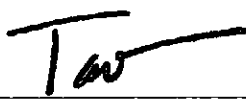
The record in this matter reveals that Jefferson was identified by multiple witnesses as a participant in the altercation that resulted in the victim's death. Jefferson speculates Powell could have been the person who actually committed the crime, but mere speculation is not sufficient to demonstrate reasonably diligent counsel could have undertaken an investigation that would have resulted in different identification testimony by the eyewitnesses to the crime. Accordingly, Jefferson failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. In addition, given the multiple witnesses who identified Jefferson as one of the persons that struck the victim, Jefferson failed to demonstrate a reasonable probability of a different outcome had counsel undertaken additional investigation. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (explaining that a petitioner is only entitled to have a claim


considered at an evidentiary hearing if the claim is supported by specific allegations not belied by the record, that if true, would entitle him to relief).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Elliott A. Sattler, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk