

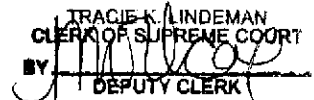
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONY ONTAI BROWN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68835

**FILED**

**MAY 17 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellant Tony Brown claims the district court erred by denying his claims of ineffective assistance of counsel raised in his June 26, 2012, petition and his September 28, 2012, and December 4, 2014, supplemental petitions. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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 that, 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, Brown claims counsel was ineffective for failing to do any pretrial investigation or locate alibi witnesses. Brown fails to demonstrate counsel's performance was deficient or resulting prejudice because he fails to allege what further investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered); *see also Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner must support his claims with specific facts that, if true, would entitle him to relief). Therefore, the district court did not err in denying this claim.

Second, Brown claims counsel was ineffective for failing to hire an expert on eyewitness identification. Brown fails to demonstrate counsel's performance was deficient or resulting prejudice. Brown failed to demonstrate an expert was necessary because he failed to allege there was anything wrong with the photographic lineups prepared in this case. Further, he failed to demonstrate a reasonable probability of a different outcome at trial had an expert been presented. Brown was identified by all three eyewitnesses, he was recorded on surveillance video at all three locations, he left his identification behind at the first location, and he was wearing the same clothes when he was arrested as he wore at the third location. Therefore, the district court did not err in denying this claim.

Third, Brown claims counsel was ineffective for failing to request a cautionary instruction regarding eyewitness identification. Brown fails to demonstrate counsel's performance was deficient or

resulting prejudice. Brown fails to demonstrate such an instruction would have been given, *Nevius v. State*, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985) (this court adheres “to the accepted view . . . that specific eyewitness identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt.”), and counsel is not deficient for failing to make futile requests, see *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to file futile motions). Further, Brown fails to demonstrate a reasonable probability of a different outcome at trial had the instruction been requested and presented to the jury. As stated above, overwhelming evidence that Brown was the person who committed the crimes was presented in this case. Therefore, the district court did not err in denying this claim.

Fourth, Brown claims counsel was ineffective for failing to challenge the jury panel as racially skewed. Specifically, he claims the African American population in Clark County is 11.5 percent but his venire was only 7.5 percent African American. Brown fails to demonstrate counsel’s performance was deficient because he fails to demonstrate that any underrepresentation was due to the systematic exclusion of African Americans in the jury selection process. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Evans v. State*, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996). The State represented the jury panel was selected from DMV records and Nevada Energy. See also *Buchanan v. State*, 130 Nev. \_\_\_, \_\_\_ n.5, 335 P.3d 207, 210 n.5 (2014) (noting the jury commissioner from the Eighth Judicial District Court testified jury selection “relies on random selections, without regard to race or gender, from a database created with information from the DMV and Nevada Energy.”). Brown fails to

demonstrate that use of the DMV and Nevada Energy records resulted in an underrepresentation in the jury selection in his case in particular and in other cases in general. The disparity between African Americans on the jury panel in this case and the population overall was approximately 4 percent. The Nevada Supreme Court has recognized the Sixth Amendment allows variations based on chance. *See Williams v. State*, 121 Nev. 934, 941, 125 P.3d 627, 632 (2005). Therefore, Brown fails to demonstrate a challenge to the venire would have been successful. Thus, the district court did not err in denying this claim.

Fifth, Brown claims counsel was ineffective for failing to adequately question the jurors for bias. Specifically, he claims counsel did not consult a jury expert, did not move for individual voir dire or for a written questionnaire, and did not ask proper questions to determine the jurors' potential biases. Brown fails to demonstrate counsel's performance was deficient or resulting prejudice. Brown fails to allege specific facts that, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Brown fails to show that "any of the selected jurors had preconceived notions that they were unable to set aside," *Brown v. State*, Docket No. 60082 (Order of Affirmance, September 26, 2013, at 2), what questions could have been asked of the jurors to determine any potential biases, or how an expert would have helped at jury selection. Therefore, the district court did not err in denying this claim.

Sixth, Brown claims counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, Brown claims counsel should have objected to this statement by the prosecutor regarding Brown's interaction with the police: "I am Anthony Jones [referring to Brown]. This is my information, and they run him and they look him up.


No, Anthony Jones is a—is a sex offender. Yeah, that's me. And I put down here consciousness of guilt . . .”

Brown fails to demonstrate counsel's performance was deficient or resulting prejudice for failing to object. Brown fails to demonstrate any objection would have been successful because the State was arguing Brown had consciousness of guilt by giving a false name and accepting the label of sex offender. We note the Nevada Supreme Court found it was proper to admit Brown's prior bad acts to show consciousness of guilt, *Brown v. State*, Docket No. 60082 (Order of Affirmance, September 26, 2013, at 7-8); therefore, it was proper for the State to argue it in closing arguments. Thus, counsel was not deficient for failing to make a futile objection. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Further, Brown fails to demonstrate there was a reasonable probability of a different outcome at trial had counsel objected. Accordingly, the district court did not err in denying this claim.

Finally, Brown claims he is entitled to relief based on the cumulative errors of counsel. Because Brown failed to demonstrate any error, he necessarily failed to demonstrate cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. William D. Kephart, District Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk