

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVIER BENITO-VICTORIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70747

FILED

AUG 16 2017

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

ORDER OF AFFIRMANCE

Javier Benito-Victoria appeals from an order of the district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Benito-Victoria has failed to provide this court with an adequate appendix, hampering this court's review on appeal. *See Thomas v. State*, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (appellant is ultimately responsible for providing appellate court with portions of the record necessary to resolve claims on appeal); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Cross-references to appendices in other cases are not sufficient. *See* NRAP 30(b)(3).

Benito-Victoria contends the district court erred by denying his claim that trial counsel was ineffective for failing to obtain the services of a forensic psychology memory expert.¹ To prove ineffective assistance of

¹The State contends this claim is broader than that raised in Benito-Victoria's petition. However, neither Benito-Victoria nor the State has provided this court with a copy of that petition. *See* NRAP 30(b)(4). We
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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).

Benito-Victoria fails to demonstrate counsel was deficient in failing to obtain the memory expert. The district court conducted an evidentiary hearing on this claim. Benito-Victoria does not contest the district court's finding that trial counsel sought the assistance of a psychological expert and that the trial court consequently ordered Dr. Mortillaro to conduct an examination of the victim at the defense's expense. Further, Benito-Victoria concedes that Dr. Mortillaro is a forensic psychologist with expertise in memory reliability and that he was unable to afford Dr. Mortillaro's fees. Finally, substantial evidence in the record supports the district court's finding that counsel then consulted with a different psychologist whose non-memory-related opinion was not

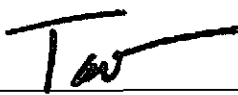
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presume, without deciding, that Benito-Victoria's claim on appeal is within the scope of that raised before the district court.

favorable to the defense and was thus not presented at trial. Benito-Victoria has not demonstrated counsel could have obtained another memory expert whose fees he could afford. Accordingly, he has failed to demonstrate counsel's actions were objectively unreasonable, and we therefore conclude the district court did not err in denying this claim.²

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Turco & Draskovich
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Even had we concluded that counsel was deficient, we could not have reached the issue of prejudice—i.e., whether there was a reasonable probability of a different outcome at trial—because Benito-Victoria failed to provide this court with complete trial transcripts.