

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID ROBERT THOMSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70354

FILED

JUL 12 2017

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

ORDER OF AFFIRMANCE

David Robert Thomson appeals from the district court order denying the postconviction petition for a writ of habeas corpus he filed on June 9, 2014. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Thomson claims the district court erred by denying his petition because he received ineffective assistance of trial and appellate counsel. To establish ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 (1984). Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted issue had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice.

Strickland, 466 U.S. at 697. 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, Thomson claimed trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of second-degree murder and appellate counsel was ineffective for failing to adequately challenge the district court's failure to give such an instruction. Because the jury found Thomson guilty of the greater offense beyond a reasonable doubt, Thomson failed to demonstrate he was prejudiced by counsels' representation and the district court did not err in denying these claims.

Second, Thomson claimed trial counsel was ineffective for failing to object when the prosecutor improperly vouched for the credibility of a State witness during closing argument and appellate counsel was ineffective for failing to raise this issue on appeal. The district court made the following findings: The prosecutor's statement, "she wasn't there a year earlier before the storage shed thing. So she's telling you the truth. She's being truthful, and she's doing it in a way that makes sense," did not constitute impermissible witness vouching. The prosecutor was commenting on the credibility of the witness through inferences drawn from the witness's testimony and did not place the prestige of the government behind the witness or discuss unadmitted evidence. And any objection to this statement would have been futile. The record supports the district court's findings, and we conclude it did not err in denying Thomson's claims. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004);

see also Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (observing counsel's decision if and when to object is a tactical decision).

Third, Thomson claimed trial counsel was ineffective for failing to investigate and present expert testimony to refute the State's ballistic expert's testimony that Thomson's firearm was in fact the murder weapon. The district court conducted an evidentiary hearing on this claim and made the following findings: Trial counsel had retained a ballistics expert. The expert reviewed the State's ballistic expert's report and found no irregularities. And counsel made a reasonable tactical decision not to present the expert's testimony to the jury. The record supports the district court's findings, and we conclude it did not err in denying Thomson's claim. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Fourth, Thomson claimed trial counsel was ineffective for failing to present expert testimony to refute a detective's testimony regarding text messages found on the victim's cellphone and information collected from the cellphone providers. The district court conducted an evidentiary hearing on this claim and found trial counsel made a reasonable tactical decision not to secure a cellphone expert based on previous counsel's assertion that she had a cellphone expert look into the matter and found that an expert would not be helpful. The record supports the district court's findings, and we conclude it did not err in denying Thomson's claim. *See id.*

Fifth, Thomson claimed trial counsel was ineffective for failing to object to testimony given in violation of the Confrontation Clause. The district court made the following findings: The expert witness' statement that "A lot of my case work has been reexamined by other examiners and have come back with the same conclusions" was not testimonial hearsay.

The statement was offered to explain that ballistic evidence could be retested and it went through a validation process. And counsel's performance was not deficient because any objection or motion to strike would have been futile. The record supports the district court's findings, and we conclude it did not err in denying Thomson's claim. *See Williams v. Illinois*, 567 U.S. 50, ___, 132 S. Ct. 2221, 2242-44 (2012); *Vega v. State*, 126 Nev. 332, 339, 236 P.3d 632, 637 (2010); *Ennis*, 122 Nev. at 706, 137 P.3d at 1103.

Sixth, Thomson claimed trial counsel was ineffective due to the existence of a conflict of interest and irreconcilable differences. The district court made the following findings: Thomson's lack of contact with his counsel and their differing trial strategies did not constitute a conflict of interest. Counsel was aware of his previous representation of one of the State's witnesses, counsel took proactive measures to prevent any conflict, and Thomson ultimately waived the alleged conflict. And Thomson failed to demonstrate an actual conflict of interest because his case did not involve multiple-representation and counsel did not have a personal stake in the outcome of the trial. The record supports the district court's findings, and we conclude it did not err in denying Thomson's claim. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

Seventh, Thomson claimed trial counsel was ineffective for failing to object to the district court's decision not to record the bench conferences and appellate counsel was ineffective for not raising this issue on appeal. The district court found these claims were bare allegations because they failed to identify any issues that required a bench conference

record for meaningful appellate review. The record supports the district court's finding, and we conclude it did not err in denying Thomson's claims. See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); see also *Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014).


Eighth, Thomson claimed trial counsel was ineffective for failing to object to the district court's implied malice, premeditation and deliberation, reasonable doubt, and equal and exact justice instructions and appellate counsel was ineffective for failing to challenge these instructions on appeal. The district court found the implied malice, premeditation and deliberation, reasonable doubt, and equal and exact justice instructions that were conveyed to the jury correctly stated the law and any objection or appeal would have been futile. The record supports the district court's finding, and we conclude it did not err in denying Thomson's claims. See NRS 175.211; NRS 200.020; *Ennis*, 122 Nev. at 706, 137 P.3d at 1103; *Garcia v. State*, 121 Nev. 327, 339-40, 113 P.3d 836, 844 (2005); *Leonard v. State*, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001); *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000); *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).


Next, Thomson claims the district court erred by denying the issues he raised in his pro se petition. Thomson's appellate brief merely lists the issues and asserts he adopts the arguments presented in his petition; it does not present any argument as to why the district court's rulings are erroneous. We conclude the claim is inadequately briefed, and we decline to consider it on appeal. See NRAP 28(e)(2); *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), *overruled on other grounds by Lisle*


v. State, 131 Nev. ___, ___ n.5, 351 P.3d 725, 732 n.5 (2015); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Finally, Thomson claims the cumulative effect of counsels' errors warrant relief. However, even assuming multiple deficiencies in counsels' performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), the district court did not find any such deficiencies, so there was nothing to cumulate.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk