IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY ESQUIVEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70510

ORDER OF AFFIRMANCE

Johnny Esquivel appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on March 28, 2014. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Esquivel claims the district court erred by denying his petition because he received ineffective assistance of trial counsel. To establish 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 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). Both components of the ineffective-assistance inquiry—deficiency and prejudice—must be shown. *Id.* at 697. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the district court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Esquivel claimed trial counsel was ineffective for failing to investigate Henrique Freitas and present his testimony to the jury. The district court conducted an evidentiary hearing and made the following findings: (1) the failure-to-investigate claim was belied by the defense investigator's testimony, (2) trial counsel was either unable to procure Freitas or made a decision not to call him as a witness, and (3) Freitas' testimony was unnecessary because any facts he would have testified to were established by the testimony of other witnesses. The district court's factual findings are supported by the record and are not clearly wrong, and we conclude the district court did not err by rejecting this claim. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims are bare or belied by the record); *see also Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances.").

Second, Esquivel claimed trial counsel was ineffective for failing to investigate the absence of any written record memorializing his statement to Detective Todd Williams that "[i]t wasn't me, I wasn't there." The district court found the failure-to-investigate claim was belied by the record because trial counsel knew about the statement, knew it was not memorialized in a written record, and had asked Detective Williams about it before it was presented to the jury. The district court also found evidence the statement had not been memorialized would not have changed the trial result because other evidence of Esquivel's consciousness of guilt was presented to the jury, most notably, his flight and attempt to escape to Mexico. The district court's factual findings are supported by the record and are not clearly wrong, and we conclude the district court

did not err by rejecting this claim. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

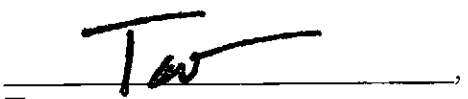
Third, Esquivel claimed trial counsel was ineffective for failing to move for suppression of his statement that "[i]t wasn't me, I wasn't there" because it was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court found there was no basis for excluding Esquivel's voluntary statement and any attempt to do so would have been futile. The district court's factual findings are supported by the record and are not clearly wrong. We conclude this claim was a bare allegation, it was not supported by any evidence adduced at the evidentiary hearing, and the district court did not err in rejecting it. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel cannot be deemed ineffective for failing to make futile objections); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner must prove the facts underlying his claims of ineffective-assistance by a preponderance of the evidence); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

Fourth, Esquivel claimed trial counsel was ineffective for failing to retain an expert to testify about "the physical and psychological responses a person experiences when facing a perceived threat." The district court found: (1) trial counsel made a strategic decision not to retain the services of an expert based on the facts and weaknesses of the case, (2) Dr. Norton Roitman's testimony at the evidentiary hearing was not based on the evidence presented at trial, and (3) the proposed testimony did not render the jury's verdict unreliable because it did not change the fact there were no reasonable grounds to justify the killing as self-defense. The district court's factual findings are supported by the

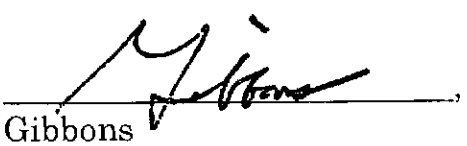
record and are not clearly wrong, and we conclude the district court did not err by rejecting this claim. *See Ford*, 105 Nev. at 853, 784 P.2d at 953.

Having concluded Esquivel 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
Oronoz, Ericsson & Gaffney, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk