

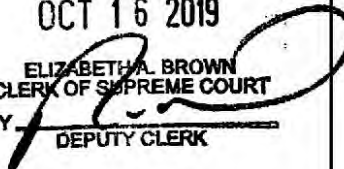
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLIFFORD MILLER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 76651-COA

**FILED**

OCT 16 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Clifford Miller appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 12, 2010, and a supplemental petition for a writ of habeas corpus filed on April 18, 2013. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

*Ineffective assistance of trial counsel*

Miller claims the district court erred by denying his petition because his trial counsel was ineffective. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Trial counsel's performance is prejudicial if a "reasonable probability [exists] that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice, *id.* at 697, and he must prove the facts underlying his ineffective-assistance claims by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103

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P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly wrong 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, Miller claims trial counsel was ineffective for failing to object at critical instances during the trial. He argues that trial counsel's failure to object was prejudicial because these instances were reviewed for plain error on direct appeal instead of a more favorable standard of review. The district court found that the instances alleged on direct appeal were determined not to be errors and therefore Miller failed to demonstrate trial counsel's performance was deficient and prejudicial. We conclude the district court's findings are supported by the record, Miller failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim because trial counsel cannot be deemed ineffective for failing to make futile objections. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Second, Miller claims trial counsel was ineffective for failing to investigate and present a theory of defense based on his mental health problems and the medications he was taking to treat these problems. The district court found trial counsel's decision not to pursue a defense based on Miller's mental health problems and medications was a sound trial strategy because it precluded the State from introducing harmful evidence of his previous suicidal and homicidal thoughts and a prior bad act of domestic violence. The district court also found Miller specifically asked trial counsel to pursue a defense based on involuntary manslaughter and there was evidence that would support a defense based on involuntary manslaughter. We conclude the district court's findings are supported by the record, Miller

failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim because trial counsel's strategic decision was unchallengeable under the circumstances of this case. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (“[T]rial counsel’s strategic or tactical decisions [are] virtually unchallengeable absent extraordinary circumstances.” (internal quotation marks omitted)).

Third, Miller claims trial counsel was ineffective for failing to introduce evidence of his mental health problems and the medications he was taking to treat these problems as mitigating evidence at sentencing. The district court found trial counsel’s decision not to introduce evidence of Miller’s mental health problems and family history of suicide and depression during the penalty phase of the trial was a sound trial strategy because it precluded the State from introducing harmful evidence of his previous suicidal and homicidal thoughts and a prior bad act of domestic violence. The district court further found that Miller failed to demonstrate a reasonable likelihood that the results of the penalty phase would have been different if this evidence had been presented. We conclude the district court’s findings are supported by the record, Miller failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim because trial counsel’s strategic decision was unchallengeable under the circumstances of this case. *See McNelton v. State*, 115 Nev. 396, 410, 990 P.2d 1263, 1273 (1999) (“The decision as to what mitigating evidence to present [is] a tactical [decision].”).

Fourth, Miller claims trial counsel was ineffective for failing to request an instruction during the penalty phase of his trial to inform the jury of his continued right to remain silent and not express remorse. The district court found Miller did express remorse during the penalty phase of

the trial, the jury was not instructed it could make inferences from Miller's decision to remain silent, and none of the authority Miller relied upon supported his contention that the district court was required to instruct the jury that a defendant can stand by his belief that he is innocent. We conclude the district court's findings are supported by the record, Miller failed to demonstrate trial counsel was ineffective for failing to request a "no adverse inference" instruction, and the district court did not err by rejecting this claim.

Fifth, Miller claims trial counsel was ineffective for "failing to spend sufficient material time with [him] and for being insufficiently prepared for trial." The district court found that trial counsel had spent an adequate amount of time with Miller in preparing for the trial and Miller failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness. We conclude the district court's findings are supported by the record, Miller failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim because it was a bare claim and would not have entitled Miller to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Sixth, Miller claims trial counsel was ineffective for failing to introduce evidence of his medical history because without this evidence he was not entitled to a jury instruction on the defense of insanity. We decline to address this claim because it was not raised in Miller's petition or considered by the district court in the first instance. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

*Ineffective assistance of appellate counsel*

Miller claims the district court erred by denying his petition because his appellate counsel was ineffective. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient and resulted in prejudice. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Appellate counsel's performance is prejudicial if an "omitted issue would have a reasonable probability of success on appeal." *Id.* at 998, 923 P.2d at 1114. The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697.

Miller claims appellate counsel was ineffective for failing to "federalize" the issues raised in his direct appeal. Appellant failed to demonstrate prejudice because he failed to show that he would have received a more favorable standard of review on appeal had counsel "federalized" his claims. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Accordingly, we conclude the district court did not err by denying this claim.

*Doctrine of the law of the case*

Miller claims the district court erred by denying his petition because it misconstrued the arguments he made in grounds 4 through 16 of his original petition. He argues that the district court should have construed those grounds as an extension of ground 3, in which he claimed appellate counsel was ineffective for failing to "federalize" the issues raised on direct appeal. However, the record demonstrates that Miller's petition stated, "The following are issues previously raised on direct appeal. These issues are now being presented as violations of this petitioner's constitutional rights in order to preserve them for federal review," and then


listed grounds 4 through 16. Based on this record, we conclude grounds 4 through 16 were not an extension of ground 3 and the district court did not err by concluding grounds 4 through 16 were barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); *Miller v. State*, Docket No. 48590 (Order of Affirmance, February 26, 2009).

Miller also claims the district court abused its discretion when it failed to appoint alternate counsel due to a breakdown in the attorney-client relationship. To the extent Miller raised this claim in his postconviction habeas petition, we conclude it is substantially the same claim he raised on direct appeal and is therefore barred by the doctrine of the law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99; *Miller*, Docket No. 48590 (Order of Affirmance, February 26, 2009).

For the foregoing reasons, we conclude Miller is not entitled to relief, and we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michael Montero, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk