

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVARISTO NAVARRO RODRIGUEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79048-COA

FILED

NOV 09 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Evaristo Navarro Rodriguez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 20, 2016. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Rodriguez claims the district court erred by denying his claims of ineffective assistance of counsel. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 687, 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).

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First, Rodriguez claimed counsel was ineffective for failing to object to a detective's testimony identifying Rodriguez on a video surveillance tape. Rodriguez claimed it was the jury's duty to determine who was in the video and the detective's testimony improperly invaded that duty of the jury. Even assuming, without deciding, that counsel should have objected, and the objection was sustained, *see Burnside v. State*, 131 Nev. 371, 388, 352 P.3d 627, 639 (2015), Rodriguez failed to demonstrate a reasonable probability of a different outcome at trial given all of the evidence presented. One of the victims identified Rodriguez as the shooter at trial, all of the victims testified it was the male dressed in black that retrieved the gun, and several of the victims testified it was the man in black that shot at them. Further, Rodriguez was pulled over after he was seen driving away from the crime scene, a black shirt was found in the car, and the gun used in the shooting was found under the passenger seat of his car. Therefore, we conclude the district court did not err by denying this claim.

Next, Rodriguez claimed counsel was ineffective for failing to secure a material defense witness for trial. Rodriguez was convicted of false imprisonment with the use of a deadly weapon, discharging a weapon at or into a vehicle, assault with the use of a deadly weapon, and felon in possession of a firearm. He claimed the witness was material because she told the police she was the person who shot the gun. The district court held an evidentiary hearing on this claim, but Rodriguez did not produce the witness to testify at the hearing. An investigator testified that he tried to get her to cooperate but ultimately she stopped communicating with him. In addition, the Nevada Supreme Court previously noted that the witness gave inconsistent accounts of the night in question and the witness had been

previously found to be incredible by the district court at a different hearing. Therefore, Rodriguez failed to demonstrate this witness would have testified consistent with her statement to the police or that the jury would have found her credible. Accordingly, Rodriguez failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel secured this witness's presence at trial. Thus, we conclude the district court did not err by denying this claim.

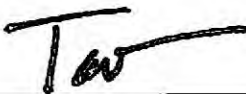
Next, Rodriguez claimed counsel was ineffective for failing to retain a ballistics expert to refute the State's expert. At the evidentiary hearing, counsel testified he spoke with a ballistics expert but decided not to use him. Rodriguez failed to demonstrate extraordinary circumstances that would warrant challenging counsel's strategic decision. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (holding counsel's strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (quotation marks omitted)). Therefore, Rodriguez failed to demonstrate counsel was deficient. Further, Rodriguez failed to produce a ballistics expert to testify at the evidentiary hearing. Therefore, Rodriguez failed to demonstrate a reasonable probability of a different outcome at trial had counsel retained a ballistics expert. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (holding a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable). Accordingly, we conclude the district court did not err by denying this claim.

Rodriguez also claims in his opening brief on appeal that the cumulative errors of counsel entitle him to relief. Because this claim was not raised in Rodriguez's petition below, we decline to consider it for the

first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

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

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

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

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

cc: Hon. Kathleen M. Drakulich, District Judge  
Law Office of Thomas L. Qualls, Ltd.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk