

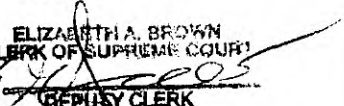
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WALTER KANEEKI CLARK,  
Appellant,  
vs.  
WILLIAM HUTCHINGS, WARDEN,  
Respondent.

No. 85547-COA

FILED

JUL 15 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Walter Kaneeki Clark appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 27, 2021, and a supplemental petition filed on May 16, 2022. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Clark argues the district court erred by denying his claims that trial counsel was ineffective without first conducting an evidentiary hearing. 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. 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual

allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Clark makes a general argument that the district court erred by denying 16 claims that counsel was ineffective without first conducting an evidentiary hearing. To the extent Clark attempts to incorporate these claims on appeal by referencing his petition filed below rather than providing specific argument or citation to authority, such incorporation is not allowed. See NRAP 28(e)(2). An appellant alleging the district court erred by denying their claims of ineffective assistance of counsel must specifically articulate counsel's alleged deficiency and prejudice for each claim in their appellate briefing. See *Chappell v. State*, 137 Nev. 780, 787-88, 501 P.3d 935, 949-50 (2021) (noting "a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just in a *pro forma*, perfunctory way or with a conclusory catchall statement that counsel provided ineffective assistance" (internal quotation marks and punctuation omitted)); see also *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Because Clark fails to articulate counsel's alleged deficiency or the resulting prejudice for each of these claims, we conclude that he failed to demonstrate the district court erred by denying these claims.

Second, Clark argues that the district court erred by denying his claim that counsel was ineffective for failing to investigate. He claims

counsel should have filed a *Brady*<sup>1</sup> motion to receive all exculpatory evidence in the possession of the State and should have found a custodian of records to authenticate a report that showed that one of the victims had a stolen firearm. Clark did not provide this court with transcripts of the jury trial. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on appellant.”); *see also* NRAP 30(b). Thus, this court is unable to evaluate whether there was a reasonable probability of a different outcome at trial had counsel filed a *Brady* motion or successfully moved to admit the report. Accordingly, we decline to consider this claim on appeal.

Next, Clark argues that the district court erred by denying his claim that appellate counsel was ineffective without first conducting an evidentiary hearing. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel’s performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Clark claimed that appellate counsel did not properly argue the claim that the district court erred by sustaining an objection by the State. At trial, Clark attempted to testify that one of the victims, Q, told Clark that Q just got out of prison and was selling illegal guns. The State objected, and the district court sustained the objection after an unrecorded bench

---

<sup>1</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

conference. On direct appeal, the Nevada Supreme Court found that Clark failed to argue that an exception to the hearsay rule existed to allow this information in. *Clark v. State*, No. 80018, 2021 WL 2760044 at \*3 n.3 (Nev. Jun. 30, 2021) (Order of Affirmance). Thus, he was not entitled to relief. *Id.* In his instant petition and supplement, Clark contended that counsel should have argued that an exception to the hearsay rule applied.

The district court found that there was no hearsay exception to allow the testimony and thus, Clark failed to demonstrate counsel was deficient or that the claim had a reasonable probability of success on appeal had counsel made different arguments. As stated above, Clark did not provide this court with transcripts of the jury trial, including the portion of trial where this objection occurred. Thus, we presume the trial transcript supports the decision of the district court. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 30(b)(3); *Greene*, 96 Nev. at 558, 612 P.2d at 688. Accordingly, we conclude that the district court did not err by denying this claim.

Finally, Clark argues that the postconviction judge should have recused herself pursuant to NCJC 2.11 because her brother was likely to be a material witness in the postconviction proceedings. In his petition, Clark claimed that trial counsel was ineffective for failing to call the postconviction judge's brother as a witness to support Clark's argument that he did not flee after the shooting and instead tried to turn himself in. Clark argues that, had he been granted an evidentiary hearing on this claim, the postconviction judge's brother was a potential witness.

NCJC 2.11(A)(2)(d) provides that a judge shall disqualify himself or herself if "[t]he judge knows that . . . a person within the third degree of relationship to [them] is . . . likely to be a material witness in the



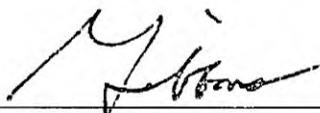
proceeding.” Here, the postconviction judge’s brother would be within the third degree of relationship to the judge. At a hearing on the instant petition, the postconviction judge brought the potential issue to the attention of Clark’s counsel, and counsel waived the disqualification. Clark argues this was not sufficient to waive the disqualification because he was not consulted. See NCJC 2.11(C) (stating the judge subject to disqualification “may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider . . . whether to waive disqualification”). We conclude Clark fails to demonstrate disqualification was necessary because he has not shown that the postconviction judge’s brother was likely to be a material witness.

In a prior postconviction petition, Clark alleged that counsel was ineffective for failing to call the judge’s brother as a witness at trial to rebut the evidence of flight. See *Clark v. State*, No. 76529, 2019 WL 4392640, at \*3 (Nev. Sep. 12, 2019) (Order Affirming in Part, Reversing in Part and Remanding). The Nevada Supreme Court concluded that Clark failed to demonstrate he was prejudiced. See *id.* That holding is the law of the case, see *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798-99 (1975) (“The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.” (quotation marks omitted)), and Clark fails to demonstrate an exception to the application of this doctrine, see *Tien Fu Hsu v. Cnty. of Clark*, 123 Nev. 625, 630-32, 173 P.3d 724, 729-30 (2007).

Clark argues on appeal that his claim was different than the claim he raised in his previous postconviction petition. He contends that, instead of arguing the postconviction judge’s brother would corroborate that he did not try to flee after the shooting, the brother would have testified

about what happened during the shooting and corroborate that Clark drove one of the victims to the hospital. However, the postconviction judge's brother was not a percipient witness to these actions, and Clark fails to allege how the postconviction judge's brother's testimony would have been admissible. Thus, Clark fails to demonstrate that there was a likelihood of an evidentiary hearing on this issue and that the postconviction judge's brother was likely to be a material witness. Therefore, we conclude that the postconviction judge did not err by not disqualifying herself. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Michelle Leavitt, District Judge  
The Law Office of Dan M. Winder, P.C.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk