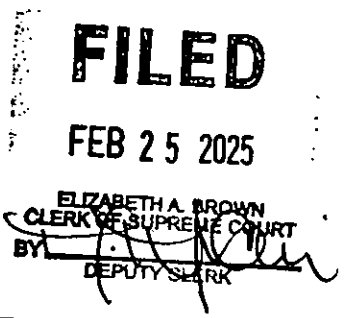
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN SCOTT CLAUSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87762-COA



ORDER OF AFFIRMANCE

Kevin Scott Clausen appeals from district court orders dismissing in part and denying in part a postconviction petition for a writ of habeas corpus filed on August 1, 2018, and a supplemental petition filed on December 18, 2020. Second Judicial District Court, Washoe County; Lynne K. Jones, Chief Judge.

Clausen argues the district court erred by denying his claim of ineffective assistance of trial 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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Clausen claimed trial counsel was ineffective for failing to investigate. Specifically, Clausen claimed in his petition and supplemental petition that trial counsel should have had gunshot residue testing performed on the clothing Clausen was wearing when he was arrested or should have engaged an expert to testify about the significance of gunshot residue. The district court conducted an evidentiary hearing where Clausen and trial counsel provided testimony regarding this claim. The district court found that trial counsel made a strategic decision not to have Clausen's clothing tested for gunshot residue based on "the substantial possibility residue would be present" and because the presence of residue on Clausen's clothing "would have enhanced the State's evidence and eclipsed the trial strategy" in light of the "wealth" of other evidence against Clausen. The record supports the decision of the district court. Therefore, Clausen failed to demonstrate counsel's performance was deficient. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("[C]ounsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances." (internal quotation marks omitted)).

Clausen is also unable to demonstrate prejudice. A petitioner alleging counsel should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Clausen offered no evidence regarding the results of any testing of his clothing, despite acknowledging his clothing had been collected and preserved by law enforcement, nor did he present evidence to demonstrate what an expert would have testified about gunshot residue. Therefore, Clausen failed to demonstrate a reasonable probability of a different outcome at trial but for counsel's alleged errors. Accordingly, we conclude the district court did not err by denying this claim.

Clausen also argues the district court erred by denying his claims of ineffective assistance of appellate counsel. 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, 1114 (1996).

First, Clausen claimed appellate counsel was ineffective for failing to challenge the trial court's denial of Clausen's motion to suppress the victim's identification of him. Clausen's motion alleged that his due process rights were violated because the procedure by which he was identified was impermissibly suggestive. The trial court denied the motion after conducting a pretrial hearing. The trial court concluded the victim's out-of-court identification of Clausen lacked the required state action to implicate due process concerns, *cf. Perry v. New Hampshire*, 565 U.S. 228, 241-48 (2012) (noting that, if a pretrial identification is alleged to have been suggestive based on conduct other than that of the police or the State, the identification will not be suppressed but rather will be subject to trial safeguards such as cross-examination and effective assistance of counsel), and the identification was reliable because the victim consistently described her assailant to law enforcement, *see id.* at 241 (providing that the "due process check for reliability" of a witness's identification of a defendant "comes into play only after the defendant establishes improper police conduct").

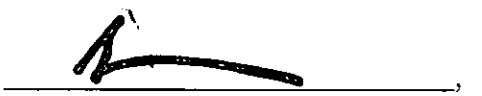
The victim first identified Clausen "on her own accord" after her daughter showed her a picture of Clausen on social media in connection with a local news story, and only after that initial identification did law enforcement confirm the victim's identification of Clausen. The bare claim contained in Clausen's petition did not allege what arguments counsel

should have made on appeal. In his supplemental petition, Clausen noted that the victim identified Clausen from an internet photo after being told he had been arrested as her assailant and that law enforcement conducted no further lineups because the victim had already seen a photo of Clausen. These facts are consistent with the facts relied on by the trial court in denying Clausen's motion. And Clausen did not specifically allege what arguments or authority counsel should have provided on direct appeal to demonstrate the trial court erred in its determination that there was no state action and that the victim's identification of Clausen was reliable. Therefore, Clausen failed to allege specific facts indicating counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success on appeal had counsel challenged the trial court's order. *See Chappell v. State*, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (providing that "a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently" but must instead "specifically explain how his attorney's performance was objectively unreasonable" (quotation marks and emphasis omitted)). Accordingly, we conclude the district court did not err by denying this claim.

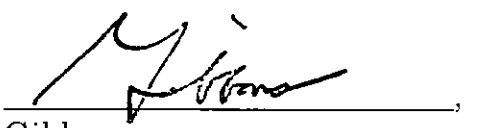
Finally, Clausen claimed appellate counsel was ineffective for failing to challenge the trial court's rejection of Clausen's proposed jury instructions related to eyewitness identification testimony. Clausen fails to include in his appendix a copy of his proposed instructions. We presume the proposed instructions support the district court's decision to deny this claim. *See Cuzze v. Univ. & Cmty. Coll Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting the court will presume that missing portions of the appellate record support the district court's decision); *see also* NRAP 30(b)(2)(D) (stating the appendix must contain "[r]elevant jury instructions given to which exceptions were taken, and excluded when offered"); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a

proper appellate record rests on appellant."); *Turpen v. State*, 94 Nev. 576, 577-78, 583 P.2d 1083, 1084 (1978) (concluding that the appellant's failure to include a proposed instruction in the record on appeal precluded appellate review).[1] For these reasons, we

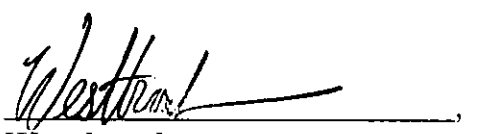
ORDER the judgment of the district court AFFIRMED.[2]



_____, C.J.
Bulla



_____, J.
Gibbons



_____, J.
Westbrook

cc: Hon. Lynne K. Jones, Chief Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[1]To the extent Clausen contends the district court failed to make the proposed instructions a part of the record, Clausen had available to him the procedure outlined in NRAP 10(c) for correcting the record but failed to utilize it.

[2]To the extent Clausen attempts to support the claims raised in his petition and supplemental petition by adding facts or argument on appeal, we decline to consider these facts or argument for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).