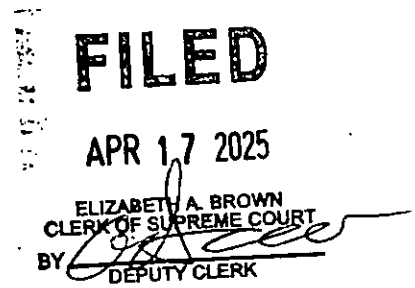
IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL MATA,
Appellant,
vs.
JEREMY BEAN, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 87747



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Appellant Manuel Mata argues that the district court erred in denying three claims of ineffective assistance of counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of counsel, a petitioner must show (1) counsel's performance fell below an objective standard of reasonableness (deficient performance) and (2) a reasonable probability of a different outcome but for counsel's deficient performance (prejudice). *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *see also Kirksey v. State*, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1113 (1996) (applying *Strickland* to appellate-counsel claims). Postconviction claims warrant an evidentiary hearing when the claims are supported by specific factual allegations that are not belied by the record and that would entitle the petitioner to relief if true. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The petitioner

bears the burden of proving the facts supporting the claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We defer to the district court's factual findings, *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005); *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004), and review the application of law to those facts de novo, *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

First, Mata argues that trial counsel should have more thoroughly investigated and presented witnesses at trial in support of the alternate suspect theory. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Mata fails to demonstrate deficient performance or prejudice. Tactical decisions made by counsel, such as which witnesses to interview or investigate, "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). And Mata's assertions as to what further investigation would have uncovered are vague, speculative, and lacking in factual support. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Mata does not allege with specificity what testimony "Maria," "Guerro," or other individuals connected to Villalpando might have provided. Accordingly, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Mata argues that trial counsel failed to present a heat of passion argument in relation to the death of the second victim. This claim

is belied by the record, which shows that counsel discussed the relationship between passion and deliberation in the closing argument. To the extent Mata argues that counsel should have done so in a different manner or in more depth, such an argument is unavailing. *See Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) ("Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation."). Thus, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Finally, Mata argues that trial and appellate counsel should have challenged the sufficiency of the evidence supporting the conviction for trafficking a controlled substance. Specifically, Mata argues that the State failed to prove he had knowledge of the cocaine found in his home. "Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry." NRS 193.017. Such knowledge "need not be proved by positive or direct evidence, but may be inferred from conduct and the facts and circumstances disclosed by the evidence." *State v. Rhodig*, 101 Nev. 608, 611, 707 P.2d 549, 551 (1985). Here, there was significant circumstantial evidence from which the jury could infer Mata had constructive knowledge of the cocaine. For example, numerous witnesses testified at trial that the garage where the cocaine was found was Mata's "mancave," a space Mata frequented; that Mata's family considered that space his; and that it was a space over which Mata had control. The cocaine itself was stored in a black bag, which was not hidden and was visible from inside the garage. Thus, a rational trier of fact could have found that the knowledge element was satisfied. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (concluding that sufficient evidence supports a conviction where "after viewing the evidence in the

light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) ("[C]ircumstantial evidence alone may sustain a conviction."). Consequently, Mata has not shown deficient performance or prejudice because any challenge would have been futile. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 ("[C]ounsel cannot be deemed ineffective for failure to submit to a classic exercise in futility." (internal quotation marks omitted)); *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114 ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."). Therefore, the district court did not err in rejecting these claims without conducting an evidentiary hearing.

Having considered Mata's arguments and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre

_____, J.
Bell

_____, J.
Stiglich

cc: Hon. Tierra Danielle Jones, District Judge
The Law Office of Kristina Wildeveld & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk