

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LORENZO RICHIE, A/K/A RICHIE
SHADEL LORENZO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71514

FILED

JUL 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Lorenzo Richie appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and supplemental petition. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Richie argues the district court erred in denying his claims of ineffective assistance of trial counsel raised in his May 1, 2015, petition and his December 4, 2015, supplemental petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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 697, 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).

First, Richie argued his trial counsel was ineffective for failing to object to a jury instruction guiding the transition from consideration of the primary offense to consideration of a lesser-included offense, known as a transition instruction. Richie asserted the transition instruction should have informed the jury it had the option of acquitting Richie of the lesser-included offense. Richie failed to demonstrate his counsel's performance was deficient or resulting prejudice. The district court concluded the transition instruction given in this matter appropriately explained to the jury how to transition to consideration of a lesser-included offense if they could not find Richie guilty of the primary offense and Richie's trial counsel did not act in an objectively unreasonable manner in failing to object to the instruction. *See Green v. State*, 119 Nev. 542, 548, 80 P.3d 93, 97 (2003). Substantial evidence supports the district court's conclusion in this regard.

Moreover, Richie cannot demonstrate a reasonable probability of a different outcome at trial had counsel objected to the transition instruction because the jury found him guilty of the primary offense of battery with the intent to commit a crime, and therefore, the jury did not have to transition to consideration of the lesser-included offense of misdemeanor battery. Therefore, we conclude the district court did not err in denying this claim.

Second, Richie argued his trial counsel was ineffective for advising him to testify at trial. Richie failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he explained to Richie the risks of testifying, including that the jury would learn of Richie's criminal history. Counsel further stated he advised Richie to testify because that was the only way to present the jury with Richie's self-defense theory. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which the district court concluded Richie did not demonstrate. Substantial evidence supports the district court's conclusion in this regard.


Richie also fails to meet his burden to demonstrate the district court erred in concluding he was not prejudiced by counsel's actions. The record before this court only contains a small portion of the trial transcript and does not contain the entirety of Richie's testimony. As the appellant, it is Richie's obligation to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009); *see also* NRAP 30(b)(1) (stating the appendix filed on appeal shall include "[c]opies of all transcripts that are necessary" to permit review of the issues raised on appeal). Because Richie did not provide this court with a sufficient record to adequately evaluate his prejudice claim, Richie fails to demonstrate the district court erred in concluding he did not show a reasonable probability of a different outcome at trial had counsel advised him not to testify. Therefore, we affirm the denial of this claim.


Third, Richie argued his trial counsel was ineffective for failing to investigate his mental health issues or seek a competency evaluation. Richie failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. The district court concluded Richie was not entitled to relief for this claim because Richie did not provide any evidence supporting this claim or demonstrate counsel would have uncovered evidence to support this claim had counsel investigated Richie's mental health.¹ See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). In addition, Richie did not provide evidence to support an assertion he was incompetent during the trial-level proceedings because he failed to show he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him when he entered his guilty plea. See *Melchor-Gloria v. State*, 99 Nev. 174,

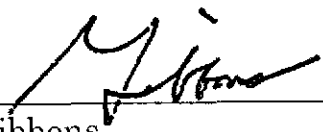
¹Richie also argues it is improper to require a petitioner to investigate and discover evidence to support a postconviction claim regarding trial counsel's failure to investigate mental health issues because such evidence is unavailable due to trial counsel's failure to conduct an investigation. However, a petitioner has the burden to prove facts sufficient to support a postconviction claim. *Means*, 120 Nev. at 1012, 103 P.3d at 33. Therefore, a petitioner asserting his trial counsel could have discovered favorable evidence through a reasonably diligent investigation has the burden to demonstrate what evidence would have been discovered by such an investigation. *Molina*, 120 Nev. at 192, 87 P.3d at 538. Accordingly, Richie is not entitled to relief for this claim.

179-80, 660 P.2d 109, 113 (1983). Because Richie did not provide support for his claim, Richie failed to demonstrate his counsel acted in an objectively unreasonable manner regarding this issue or a reasonable probability of a different outcome had counsel investigated his mental health or sought a competency evaluation. Therefore, we conclude the district court did not err in denying this claim

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Attorney General/Carson City
Christopher R. Arabia
Clark County District Attorney
Eighth District Court Clerk