

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARVIN DEANDRE RICHARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71288

FILED

AUG 16 2017

ELIZABETH BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Richard argues the district court erred in denying his claims of ineffective assistance of counsel he raised in his February 21, 2012, petition and March 13, 2013, supplement. To prove ineffective assistance of counsel, a petitioner must demonstrate 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, 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

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application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Richard argued his trial counsel was ineffective for failing to present a defense based upon battered spouse syndrome and for failing to present witnesses who could have supported such a defense. Richard failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources" in order to properly represent a defendant. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). At the evidentiary hearing, trial counsel testified Richard informed him of the victim's aggressive actions and he examined battered spouse syndrome as a possible defense, but concluded there were problems with such a defense in this matter and focused on self-defense for the trial. Trial counsel also testified he interviewed witnesses who could have testified regarding the relationship between Richard and the victim, as well as Richard's reaction to confrontation, but chose not to present their testimony at trial out of a concern they would contradict Richard's testimony. Tactical decisions such as these "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which the district court concluded Richard did not demonstrate. Substantial evidence supports the district court's conclusion in this regard.

In addition, the expert-witness report Richard presented during the postconviction proceedings did not diagnose Richard with battered spouse syndrome, but rather concluded he had different conditions stemming from his difficult upbringing and substance abuse. Under these

circumstances, Richard failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented a defense based upon battered spouse syndrome or presented witnesses in an effort to support such a defense. Therefore, we conclude the district court did not err in denying this claim.

Second, Richard argued his trial counsel was ineffective for failing to present evidence to support Richard's theory of self-defense. Richard failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. As stated previously, trial counsel testified at the evidentiary hearing he interviewed witnesses in preparation for trial, but chose not to present their testimony at trial out of a concern they would contradict Richard's testimony. Tactical decisions such as these "are virtually unchallengeable absent extraordinary circumstances," *id.*, which the district court concluded Richard did not demonstrate. Substantial evidence supports the district court's conclusion in this regard. In addition, during trial Richard testified regarding his belief in his need to act in self-defense and counsel questioned him at length regarding his thoughts and actions during the incident. As Richard testified regarding the incident and the witnesses Richard identified did not actually witness the incident that caused the victim's death, Richard failed to demonstrate a reasonable probability of a different outcome had trial counsel presented these potential witnesses at trial in support of Richard's assertion of self-defense. Therefore, we conclude the district court did not err in denying this claim.

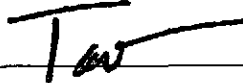
Third, Richard argued his trial counsel was ineffective for failing to present mitigation evidence or expert witness testimony at the sentencing hearing regarding Richard's mental health issues and history of suffering abuse. Richard failed to demonstrate his trial counsel's


performance was deficient or resulting prejudice. Trial counsel filed a sentencing memorandum that included a report prepared by a psychologist who interviewed Richard at length. The report noted Richard's abusive upbringing and psychological difficulties. During the sentencing hearing, Richard's counsel referenced the sentencing memorandum and the sentencing court stated it had read the report. Richard failed to demonstrate these were the actions of an objectively unreasonable defense attorney. As trial counsel filed a sentencing memorandum containing information regarding Richard's mental health issues and history of suffering abuse, Richard failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel presented further information of this nature. Therefore, we conclude the district court did not err in denying this claim.

Next, Richard argues the district court erred in declining to conduct a second evidentiary hearing after Richard supplemented the postconviction record with a report regarding a new psychological examination. Following the first evidentiary hearing, the district court permitted Richard to retain an expert to further investigate whether a defense based upon battered spouse syndrome would have been appropriate. As noted previously, the resulting report did not indicate Richard suffered from battered spouse syndrome. Given the nature of the report, the district court concluded a new evidentiary hearing was not necessary and denied the petition. Because a claim based upon battered spouse syndrome would not have entitled Richard to relief, we conclude the district court properly denied the petition without conducting a second evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Having concluded Richard 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
McLetchie Shell LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk