

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CODIE MICHAEL SCOTT WALKER,  
Appellant,  
vs.  
WARDEN, E.S.P.; AND THE STATE OF  
NEVADA,  
Respondents.

No. 72957

**FILED**

MAR 14 2018

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

*ORDER OF AFFIRMANCE*

Codie Michael Scott Walker appeals from an order of the district court dismissing in part and denying in part, the postconviction petition he filed on April 1, 2015, and the supplement he filed on March 3, 2016. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Walker claims the district court erred by denying two of his claims of ineffective assistance of counsel. 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*); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (adopting the *Strickland* test for claims of ineffective assistance of appellate counsel). 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, Walker claimed counsel was ineffective for failing to renew the motion to sever when it became clear his codefendant was not going to testify. Walker failed to demonstrate counsel was deficient or resulting prejudice. Walker knew at the time his motion to sever was litigated his codefendant was not going to testify at a joint trial. That was the crux of the motion to sever. Therefore, a renewal of that motion would not have been successful. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (explaining counsel cannot be deemed ineffective for failing to submit futile motions). Accordingly, the district court did not err by denying this claim.

Second, Walker claimed the district court erred by denying his claim trial counsel was ineffective for failing to object to prosecutorial misconduct during closing argument. Walker claims he believes the State told the jury Walker was not remorseful and improperly instructed the jury on the legal definition of the word room as it applies to burglary. Further, he claimed trial and appellate counsel were ineffective for failing to order the closing arguments by the State to be transcribed. Walker argues this failure to object and failure to provide the transcripts on appeal deprived appellate counsel of the ability to raise prosecutorial misconduct on appeal.

The district court held an evidentiary hearing on this claim. Trial counsel testified he did not object and have the State's closing argument transcribed because he did not believe the State committed prosecutorial misconduct during closing argument or that there was

anything constitutionally objectionable presented in the closing argument.<sup>1</sup> Walker failed to challenge counsel with specific alleged incidences of prosecutorial misconduct at closing argument or present the district court or this court with a copy of the transcript of closing argument. Therefore, Walker failed to demonstrate the underlying facts of his claim by a preponderance of the evidence. Accordingly, the district court did not err by denying this claim.

Next, Walker claims the district court erred by denying his claims raised in grounds 1, 2, 3, and 5 of his petition. Specifically, he claims the district court erred by denying these claims as barred by the doctrine of law of the case. Walker claims he expressly renewed each of these claims as claims of ineffective assistance of counsel in his supplemental petition and the district court should have evaluated them as such.

The claims raised grounds 1, 2, 3, and 5 of Walker's petition were claims he raised on direct appeal. The Nevada Supreme Court determined they lacked merit. *See Walker v. State*, Docket No. 62271 (Order of Affirmance, April 10, 2014). Therefore, the district court did not err by applying the doctrine of law of the case to these claims.<sup>2</sup> *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Walker may have renewed these claims as ineffective assistance of counsel claims in his supplemental petition, however, the district court resolved all claims raised

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<sup>1</sup>Trial counsel also initially represented Walker on appeal and filed an opening brief. Thereafter, new appellate counsel was appointed and filed a supplemental opening brief. Appellate counsel did not testify at the evidentiary hearing.

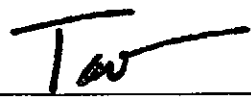
<sup>2</sup>We decline Walker's invitation to expand the exceptions to the doctrine of the law of the case.

in the supplemental petition on their merits. Further, Walker does not demonstrate the district court improperly denied any claims raised in the supplemental petition based on the doctrine of law of the case.

Finally, Walker claims the district court abused its discretion by denying the majority of his claims without holding an evidentiary hearing. Walker fails to demonstrate the district court abused its discretion because he failed to allege specific facts in his claims that, if true, would entitle him to relief. *See Berry v. State*, 131 Nev. \_\_\_, \_\_\_, 363 P.3d 1148, 1156 (2015) (reviewing a district court's determination that a petitioner is not entitled to an evidentiary hearing for an abuse of discretion); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we conclude the district court did not err by denying Walker's petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Jerome M. Polaha, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk