

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM EDWARD WORKMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68727

FILED

FEB 23 2017

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

ORDER OF AFFIRMANCE

Appellant William Edward Workman appeals from an order of the district court denying his July 21, 2011, postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Workman argues the district court erred in denying his claims of ineffective assistance of trial counsel. 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, Workman argued his trial counsel was ineffective for failing to investigate Workman's living conditions and lack of shelter options. Workman asserted counsel could have discovered and presented evidence and testimony at trial to support his defense that he entered the home merely to find shelter, and not with the intent to commit larceny. Workman failed to demonstrate his 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." *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). At the evidentiary hearing, Workman's trial counsel testified she had an investigator who worked on this case and she obtained what she believed to be the necessary photographs from the State. Counsel testified her investigator attempted to locate one of the witnesses Workman asserts would have provided favorable testimony, but her recollection was that her investigator was unable to find that witness. Counsel further testified she believed she had obtained sufficient evidence to present Workman's defense, Workman's own version of events was plausible, and the facts of this case spoke for themselves. 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 Workman fails to demonstrate counsel's investigative decisions amounted to objectively unreasonable decisions.

Moreover, the majority of the information Workman asserted counsel should have attempted to discover was duplicative of information he provided the jury during his own trial testimony. Under these circumstances, Workman failed to demonstrate a reasonable probability of a different outcome at trial had counsel attempted to discover additional similar information and then presented it at trial. Therefore, we conclude the district court did not err in denying this claim.

Second, Workman argued his trial counsel was ineffective for failing to properly explain the State's plea offers or the potential penalties he faced. Workman failed to demonstrate counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified she explained the plea offers to Workman and stressed he faced a lengthy sentence under the habitual criminal enhancement, yet Workman rejected the plea offers. Workman also testified counsel presented the State's plea offers and he understood he faced the habitual criminal enhancement, but he rejected the plea offers because he was innocent. Under these circumstances, Workman failed to demonstrate his counsel's actions regarding the plea offers or potential penalties were performed in an objectively unreasonable manner. Workman also failed to demonstrate a reasonable probability of a different outcome had counsel further explained these issues to him. Therefore, we conclude the district court did not err in denying this claim.

Third, Workman argued his trial counsel was ineffective for failing to object when a police officer testified concerning another officer's out-of-court statements. During trial, Officer Mandagaran testified he walked towards the home, noticed someone look out of a window and quickly backed away, and that his service vehicle was parked directly in

front of the window. Officer Reed later testified he heard Officer Mandagaran relay over the radio that someone had peered out of the window and look directly at him. Workman asserted trial counsel should have objected to Officer Reed's testimony regarding the statement he heard over the radio as impermissible hearsay. Workman failed to demonstrate his counsel's performance was deficient or resulting prejudice.

At the evidentiary hearing, counsel testified she did not object to Officer Reed's testimony because she believed there was a hearsay exception that permitted the testimony. She also stated she did not object because she believed this was actually favorable testimony because it demonstrated Workman did not attempt to flee after seeing a police officer and supported his story that he was merely using the home as a shelter from the weather. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *id.*, which Workman did not demonstrate. Given the nature of the testimony, Workman failed to demonstrate a reasonable probability of a different outcome had counsel raised an objection. Therefore, we conclude the district court did not err in denying this claim.¹

¹Workman also appeared to argue his trial counsel was ineffective for failing to assert admission of Officer Reed's testimony regarding Officer Mandagaran's statement violated the Confrontation Clause. However, the "Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial." *Medina v. State*, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). The challenged testimony did not violate Workman's confrontation rights because Officer Mandagaran testified at trial, and therefore, counsel did not provide

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Fourth, Workman argues his trial counsel was ineffective for failing to object when witnesses and the State during the trial referred to his actions as a burglary. Workman asserted it is for the jury to decide the ultimate issue and the premature labeling of his actions as a burglary prejudiced him. Workman failed to demonstrate his counsel's performance was deficient or resulting prejudice. Workman fails to meet his burden to provide authority supporting the proposition that reasonably diligent counsel will object when the State or witnesses reference a defendant's actions in relation to the charged crime during trial. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining it is the appellant's responsibility to present relevant authority and cogent argument). Additionally, Workman failed to demonstrate the references to burglary in this case created an inference of guilt. The jury was instructed on the presumption of innocence, and, when viewed in context, the statements at issue referred to the report of a possible burglary by the homeowner or related to burglary investigations generally. Under these circumstances, Workman failed to demonstrate a reasonable probability of a different outcome had counsel asserted the challenged statements were improper. Therefore, we conclude the district court did not err in denying this claim.

Fifth, Workman argues counsel should have presented evidence to demonstrate Workman needed to find shelter due to an illness, prepared him to testify at trial, and properly question the State's expert


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ineffective assistance of counsel for failing to raise this issue during the trial.

regarding burglary. Workman also asserts cumulative errors of counsel amount to ineffective assistance of counsel. Workman did not raise these issues in his petition and the district court did not allow Workman to raise new claims at the evidentiary hearing. See *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). Therefore, these claims are not properly raised on appeal and we decline to consider them in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Scott N. Freeman, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk