


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATRICK COLE BRAND,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 76706-COA

**FILED**

MAR 19 2020

ELIZABETH L. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Patrick Cole Brand appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 13, 2017, and a supplemental petition filed on January 9, 2018. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Brand argues the district court erred by denying his claims that counsel was ineffective. The State argues Brand did not raise these claims in his petition below and improperly raised them for the first time at the evidentiary hearing. The State argues this was error, and this court should not consider these claims on appeal. After reviewing the petition, supplemental petition, and the evidentiary hearing transcript, we conclude the district court should have explicitly stated on the record Brand demonstrated good cause to raise new claims at the evidentiary hearing. *See Barnhart v. State*, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006). However, we conclude the district court did not abuse its discretion by considering the new claims raised at the evidentiary hearing. *See id.* at 303,

130 P.3d at 651-52. Therefore, we will consider these claims on the merits on appeal.<sup>1</sup>

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

First, Brand claims the district court erred by denying his claim that counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the grand jury proceedings. Specifically, he claimed that since the charges were dismissed at the preliminary hearing

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<sup>1</sup>Brand claims the district court erred by denying his claim that counsel was ineffective for admitting the text messages between him and the victim's mother. This claim was raised for the first time at the evidentiary hearing. The district court did not consider this claim on the record at the evidentiary hearing, and it did not address this claim in the order denying Brand's petition and supplement. We conclude the district court did not abuse its discretion by not considering this claim, *see id.*, therefore, this claim is not properly before this court and we decline to consider it.


based on insufficient evidence, counsel should have challenged the grand jury proceedings based on insufficient evidence. Brand failed to support this claim with specific facts that, if true, would entitle him to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). He failed to allege how the evidence presented at the grand jury proceedings was insufficient. Further, Brand failed to provide this court with transcripts of the preliminary hearing or grand jury proceedings. The burden was on Brand to provide this court with relevant transcripts. See NRAP 30(b)(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on the appellant.”). Accordingly, we conclude the district court did not err by denying this claim.

Second, Brand claims the district court erred by denying his claim that counsel was ineffective for failing to hire an investigator and for failing to interview witnesses. At the evidentiary hearing, counsel testified he did hire an investigator. Further, counsel testified he attempted to interview witnesses in this case and the witnesses refused to speak with him. Therefore, Brand failed to demonstrate that counsel was deficient. Brand also failed to demonstrate he was prejudiced because he failed to demonstrate what a more thorough investigation would have uncovered. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Accordingly, we conclude the district court did not err by denying this claim.

Finally, Brand claims the district court erred by denying his claim that counsel was ineffective for failing to hire an expert witness to refute the expert witnesses presented by the State at trial. Brand failed to specify what a defense expert would have testified to or how that testimony would have undermined the testimony of the State’s experts. Therefore, he failed to demonstrate counsel was deficient for failing to hire an expert or a

reasonable probability of a different outcome at trial had counsel hired an expert. Accordingly, we conclude the district court did not err by denying this claim.

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

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Mueller & Associates  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk