

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROSEMARY VANDECAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78057-COA

FILED

MAR 05 2021

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

ORDER OF AFFIRMANCE

Rosemary Vandecar appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 3, 2015, and later-filed supplements. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Vandecar contends the district court erred by denying her claims of ineffective assistance of trial counsel. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 687, 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, Vandecar argued trial counsel was ineffective for failing to move to suppress Vandecar's statement to police based upon her invocation of her right to counsel. Trial counsel filed a pretrial motion requesting suppression of Vandecar's statement on the ground that the statement was involuntary. Vandecar contended counsel should have argued that her statement to police should have been suppressed because she asked for an attorney, she called an attorney with her cell phone, and the officer took the phone away from her during that call. During the evidentiary hearing on the pretrial motion, the detective who interviewed Vandecar testified that Vandecar did not ask to speak to an attorney and he did not take her phone from her while she was using it. The trial court found the detective's testimony credible. Because these issues were addressed prior to trial, Vandecar did not demonstrate her trial counsel's performance fell below an objective standard of reasonableness, *see Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (stating appellate courts defer to the district court's credibility findings "absent a clear showing that the court reached the wrong conclusion"), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000), or a reasonable probability of a different outcome had counsel made additional efforts to suppress her statements. Therefore, we conclude the district court did not err by denying this claim.¹

¹Vandecar argues the district court erred by denying this claim without conducting an evidentiary hearing on it. For the reasons just discussed, we conclude she was not entitled to an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding

Second, Vandecar argued trial counsel was ineffective for failing to present expert testimony to rebut the State's expert witness regarding the cause and manner of the victim's death. Tactical decisions, such as which witnesses to call, rest with counsel. *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). These decisions are virtually unchallengeable absent extraordinary circumstances. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). The district court conducted an evidentiary hearing on this claim. At that hearing, trial counsel testified that he retained an expert witness regarding the victim's cause of death but decided not to present that witness's testimony at trial because it would have merely confirmed the opinion of the State's expert witness. Vandecar failed to demonstrate this tactical decision fell below an objective standard of reasonableness. Vandecar presented expert testimony at the evidentiary hearing regarding the victim's cause of death, but the district court found that testimony was inconclusive. This finding is supported by the record before this court. Because the postconviction expert witness's potential testimony was not favorable to the defense, Vandecar failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented that testimony at trial. Therefore, we conclude the district court did not err by denying this claim.

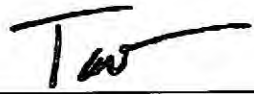
Finally, Vandecar argued the cumulative effect of trial counsel's errors in this case warrants reversal. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, see *McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17

that, to warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle her to relief).

(2009), Vandecar did not demonstrate instances of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court Dept. 9
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Vandecar also raises new argument in her reply brief, contending her statement to the police was coerced. This new argument is improper, and we decline to consider it. *See* NRAP 28(c).