

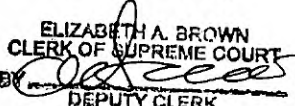
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CAMERON THOMAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83137-COA

FILED

SEP 09 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Cameron Thomas appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 2, 2020, and an amended petition filed on October 6, 2020. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Chief Judge.

Thomas argues the district court erred by denying his claims of ineffective assistance of trial counsel and by denying his request for an evidentiary hearing as to all but one of his claims. 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). 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 him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Thomas claimed counsel was ineffective for failing to challenge the trial judge's implied bias on the ground that the judge "altered the facts of the trial so the State could present" a victim's allegations of sexual abuse as spontaneous. Specifically, Thomas contended that a victim implicated him to deflect from her mother's physical abuse and that counsel should have attempted to disqualify the judge because the judge precluded evidence of this physical abuse due to implied bias. Recusal is required when, "considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 905, 907 (2017).

The district court conducted an evidentiary hearing as to this claim. Although counsel testified at that hearing that he believed he should have filed a motion to disqualify the trial judge, the district court also reviewed video and transcripts from the relevant trial court hearings and concluded that the trial judge was "impartial, fair, thoughtful, and reasonable" and there was no evidence of actual or implied bias. Thomas failed to provide this court with video recordings or transcripts from these trial court hearings, and thus, we presume that this material supports the district court's determination. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record."); *see also Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (stating "the missing portions of the record are presumed to

support the district court's decision"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992). In light of these circumstances, Thomas failed to demonstrate a constitutionally intolerable risk of bias. Therefore, Thomas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's failure to seek disqualification on this ground. Accordingly, we conclude the district court did not err by denying this claim.

Second, Thomas claimed counsel was ineffective for failing to challenge the judge's implied bias on the ground that the judge was married to an attorney who was responsible for the prosecution of child sex abuse cases. Thomas claimed this meant the judge had a vested interest in the successful prosecution of these types of cases, including his own. Thomas did not allege that the judge's husband worked on his case in any capacity, and he failed to explain how the judge's husband's occupation created a vested interest in his case. Thomas thus failed to demonstrate a constitutionally intolerable risk of bias. *See Rippo*, 580 U.S. at \_\_\_, 137 S. Ct. at 907. Therefore, Thomas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's failure to seek disqualification on this ground. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Thomas claimed counsel was ineffective for failing to challenge the judge's implied bias on the ground that the judge overwhelmingly favored the State when considering objections during trial and that the judge objected on the State's behalf. Thomas has not

demonstrated that either the number of objections that were decided in favor of the State or the three incidents during the three-week trial wherein the judge allegedly objected on the State's behalf presented a constitutionally intolerable risk of bias. *See id.*; *see also In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) (stating the "rulings and actions of a judge during the course of official judicial proceedings do not establish" that a trial court judge was biased against a party). Therefore, Thomas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's failure to seek disqualification on these grounds. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Thomas claimed counsel was ineffective for failing to file a pretrial motion to preclude evidence of a settlement reached in a related civil action and for failing to object to the State's references to this settlement during trial. Thomas claimed evidence of the settlement led to an improper inference that he was guilty. Prior to opening statements and outside the presence of the jury, the judge entertained argument as to the introduction of the civil settlement. At that time, counsel indicated that he "[kept] going back and forth" on whether to introduce the order of dismissal from the civil case because it "cut[ ] both ways." Counsel also stated that he planned to ask witnesses about the settlement. The pretrial discussion indicated that counsel's decision not to file a pretrial motion to preclude the settlement was strategic in nature. Therefore, Thomas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530



(2004) (stating “trial counsel’s strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances” (internal quotation marks omitted)).

Moreover, the State did not imply that Thomas had previously been found guilty of the conduct alleged; rather, the State referenced the settlement to rebut the anticipated implication that the victims had a financial motivation to fabricate their claims of abuse. Thomas thus failed to demonstrate a reasonable probability of a different outcome but for counsel’s failure to file a pretrial motion to preclude evidence of the settlement or to object to any references to the settlement. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Thomas claimed counsel was ineffective for failing to object to testimony that was improperly suggestive of prior bad acts. Thomas also contended that the probative value of this testimony was substantially outweighed by the danger of unfair prejudice. Thomas first points to testimony from a victim’s mother that the victim knew the word “humping” because the word was “used around the house to identify with good touch and bad touch with other children,” which was of concern because Thomas’ “son was doing that.” Thomas also points to testimony of the same witness that there were several signs of Thomas’ abuse that the witness failed to appreciate until after she became aware of the abuse: “There [were] a lot [of] things that I sat back and remembered and there [were] some things that haven’t been mentioned since I’ve been sitting here that I’m not sure that if you guys are aware of, and there are still things that come up.”

This testimony does not indicate Thomas committed a prior crime, wrong, or act. Moreover, this testimony was brief, it did not go into any details regarding Thomas' son's behavior or the other signs of abuse, and it did not suggest that any actions of Thomas' son could be imputed to Thomas. Thomas failed to demonstrate that the probative value of this testimony was substantially outweighed by the danger of unfair prejudice. *See* NRS 48.035(1). Therefore, Thomas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's failure to object to this testimony. Accordingly, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Sixth, Thomas claimed counsel was ineffective for failing to object to hearsay statements admitted pursuant to NRS 51.385. The statute allows for the admission into evidence of a young child's out-of-court statement regarding an act of sexual abuse where the trial court has found, in relevant part, "that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness." NRS 51.385(1)(a). In determining whether a statement is sufficiently trustworthy, the trial court must consider whether (1) the statement was spontaneous, (2) the child was subjected to repetitive questioning, (3) the child had a motive to fabricate, (4) the child used terminology unexpected of a child of similar age, and (5) the child was in a stable mental state. NRS 51.385(2).

Thomas contended that two forensic interviewers improperly testified as to hearsay statements that "were of a repetitive and cumulative nature" and were not spontaneous but were made for the purpose of a criminal investigation. He also contended this violated his right to confront

the declarants. Whether the statements were repetitive or cumulative of other evidence is not a factor in determining their admissibility under NRS 51.385. And the Nevada Supreme Court previously concluded that “the [trial] court appropriately weighed the factors provided in NRS 51.385(2) in determining the trustworthiness of the statements.” *Thomas v. State*, No. 71044, 2019 WL 118403, at \*3 (Nev. Jan. 4, 2019) (Order Affirming in Part, Reversing in Part, and Remanding). This holding is the law of the case, see *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798-99 (1975) (“The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.” (quotation marks omitted)), and Thomas failed to demonstrate he fell into an exception to the application of this doctrine, see *Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 630-32, 173 P.3d 724, 729-30 (2007). Moreover, we note the declarants testified at trial and were subject to cross-examination. Therefore, Thomas failed to demonstrate that his counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel’s failure to object to these statements. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

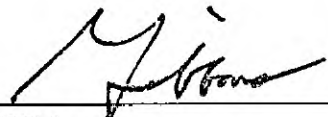
Seventh, Thomas claimed counsel was ineffective for failing to object to the trial court’s reasonable doubt and “equal and exact justice” jury instructions. The instructions given were consistent with controlling authority. See NRS 175.211(2) (stating no other definition of reasonable doubt may be given than the statutory one); see also *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (holding the “equal and exact justice” instruction did not undermine the presumption of innocence or lessen the State’s burden of proof). Therefore, Thomas failed to

demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's failure to object to these jury instructions. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Lastly, Thomas claimed that his conviction should be reversed due to the cumulative effect of counsel's errors. Even assuming that any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Thomas failed to demonstrate multiple errors to cumulate. Accordingly, we conclude the district court did not err by denying this claim. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate").

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

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

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

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



cc: Hon. Jerry A. Wiese, Chief Judge  
Law Office of Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk