

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD RAYMOND TORREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84215-COA

FILED

SEP 14 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Raymond Torrez appeals from an order of the district court denying a postconviction petition for writ of habeas corpus filed on January 25, 2018, and a supplemental petition filed on August 6, 2020. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Torrez argues that the district court erred by denying his 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).

Torrez raised several claims of ineffective assistance of counsel below. Torres does not indicate which of these claims the district court incorrectly decided; rather, Torres maintains that a letter written by the victim after trial indicates he is innocent of robbery. As to each claim below, the district court made specific findings of fact to support its conclusions that Torres failed to demonstrate counsel's actions were objectively unreasonable and that Torres failed to demonstrate he was prejudiced by any alleged deficiency. On appeal, Torres does not challenge the district court's factual findings, nor does he explain how the district court erred in concluding that counsel's performance was not deficient. Accordingly, Torres fails to demonstrate the district court erred by denying these claims.

Torrez also argues that the district court erred by denying his claim of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

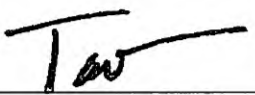
Torrez claimed counsel was ineffective for failing to challenge on appeal the transition jury instruction regarding lesser-included offenses because the instruction did not comply with *Green v. State*, 119 Nev. 542, 80 P.3d 93 (2003). At an evidentiary hearing, counsel testified that she picked the two "biggest" issues that might have success on appeal, that she generally has better success on appeal when she raises a few key issues, and that she received Torres's input in deciding which issues to raise on appeal.

The evidence presented at the hearing demonstrates counsel's decision not to raise this claim on appeal was a strategic decision, *see Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (holding that appellate counsel will be most effective when every conceivable issue is not raised on appeal), and strategic decisions of counsel are virtually unchallengeable absent extraordinary circumstances, *see Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Torrez has not shown extraordinary circumstances that warrant challenging counsel's strategic decision. As such, Torrez fails to demonstrate that his counsel's performance fell below an objective standard of reasonableness.

Moreover, the challenged jury instruction was drafted by defense counsel. Therefore, any error was invited, and Torrez fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("[A] party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." (quotation marks omitted)). Accordingly, Torrez fails to demonstrate the district court erred by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Leon Aberasturi, District Judge
Karla K. Butko
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk