

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW DWAYNE MYERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84553-COA

FILED

NOV 08 2022

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

ORDER OF AFFIRMANCE

Matthew Dwayne Myers appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 22, 2021.¹ Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Myers contends 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

¹The district court correctly determined Myers' petition was timely, because it was received by the clerk of the district court on December 21, 2021, which was within the one-year timely filing deadline. See NRS 34.726(1); *Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 1372, 904 P.2d 1039, 1042 (1995) (providing it is the duty of the clerk of the district court to file documents).

(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. 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, Myers claimed that his trial counsel was ineffective for failing to obtain documents from the victim's financial advisor, M. Pequeen, or to call him as a witness for trial. Myers did not specify what the documents would have proven or what Pequeen's testimony would have been. Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel obtained documents from Pequeen or called him as a witness. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (indicating that a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). Therefore, we conclude the district court did not err by denying this claim.

Second, Myers claimed that his trial counsel was ineffective for failing to conduct a forensic audit. Myers failed to explain what the results of the audit would have been. Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel conducted a forensic audit. See *id.* Therefore, we conclude the district court did not err by denying this claim.

Third, Myers claimed that his trial counsel was ineffective for failing to challenge the victim's preliminary hearing testimony on the ground that she was incompetent to testify because she was older and had difficulty remembering things. Although the victim was not able to answer every question due to her lack of recollection, she had personal knowledge of the matter at issue because she testified that Myers had previously worked for her, was allowed to use her credit cards to purchase items for the apartment, and had made purchases for himself and his daughter without her permission. Myers thus failed to demonstrate the victim was incompetent to testify at the preliminary hearing. *See* NRS 50.015 ("Every person is competent to be a witness except as otherwise provided in this title."); NRS 50.025(1)(a) (providing that a witness may testify to a fact if there is evidence that she has personal knowledge of the matter). Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the victim's competency to testify at the preliminary hearing. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Myers claimed that his trial counsel was ineffective for failing to challenge the amended complaint on the ground that the language changed the context of the charges. As the district court concluded, the changes merely eliminated superfluous language, the counts remained the same, and thus the amended complaint did not change the context and meaning of the original complaint. Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of

reasonableness or a reasonable probability of a different outcome had counsel challenged the language changes in the amended complaint. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Myers claimed that his trial counsel was ineffective for failing to challenge before trial the amended information on the ground that charges for both theft and exploitation of an older/vulnerable person constituted double jeopardy. Myers had not yet been tried or punished for any of the offenses and thus double jeopardy was not at issue. *See Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) (setting out the scope of double jeopardy protections).

Moreover, because theft requires that the act be committed without lawful authority and does not require that the victim be older or vulnerable, any challenge alleging multiple punishments for the same offense would not be meritorious as the respective crimes each contain an element that the other does not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (providing that two offenses are separate if each offense requires proof of a fact that the other does not); NRS 200.5092 (defining the elements of exploitation of an older or vulnerable person); NRS 205.0832 (defining the elements of theft). Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the amended information on double jeopardy grounds. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Myers claimed that his trial counsel was ineffective for failing to challenge the State's motion to have the victim's testimony read

at trial on the ground that it would result in bias and confuse the jury. Specifically, Myers claimed that counsel should have argued for an age-appropriate actress to read the testimony and should have challenged the redactions made to the transcript omitting counsels' objections, argument regarding the objections, and the court's rulings. Myers has not presented, and the court is unaware of, any authority requiring the reader of such testimony to be an actress or of a particular age. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Moreover, the jury was instructed to determine Myers' guilt or innocence only from its consideration of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel. Thus any objections, the argument of counsel related thereto, and the resulting court rulings were not information the jury could consider when reaching its verdict. Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the State's motion to have the victim's testimony read at trial on these grounds. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Myers claimed that his trial counsel was ineffective for failing to challenge the reading of the victim's preliminary hearing testimony at trial on the grounds that the entirety of her testimony constituted hearsay and violated Myers' right to confrontation. The transcript of testimony given by a witness at a hearing where the witness

was under oath and subject to cross-examination is not hearsay. NRS 51.035(2)(d). The use of preliminary hearing testimony at a criminal trial does not run afoul of the Confrontation Clause when the defendant was represented by counsel at the preliminary hearing, counsel cross-examined the witness, and the witness is unavailable at trial. *State v. Eighth Judicial Dist. Court (Baker)*, 134 Nev. 104, 106-07, 412 P.3d 18, 21-22 (2018).

Myers' counsel cross-examined the victim during the preliminary hearing, and the victim subsequently died before trial. Accordingly, Myers failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the admission of the victim's preliminary hearing testimony on these grounds. Therefore, we conclude the district court did not err by denying this claim.²

Next, Myers claimed he was actually innocent. The Nevada Supreme Court has never held that a freestanding claim of actual innocence can be raised in a postconviction petition for a writ of habeas corpus. See *Berry v. State*, 131 Nev. 957, 967 n.3, 363 P.3d 1148, 1154 n.3 (2015) (noting the Nevada Supreme Court "has yet to address whether and, if so, when a free-standing actual innocence claim exists"). Because Myers has a remedy

²To the extent Myers claimed that his right to confrontation was "limited," he failed to explain how it was limited or what more counsel should have done. Therefore, we conclude Myers is not entitled to relief.

with which to raise his freestanding claim of actual innocence, see NRS 34.900-.990, we decline to consider it here.³

Myers next contends that he is entitled to relief because the district court clerk failed to file his requests for an evidentiary hearing and the appointment of counsel. For the reasons discussed above, Myers' claims did not warrant an evidentiary hearing. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a postconviction petitioner is only entitled to an evidentiary hearing on claims supported by specific factual allegations that, if true, would entitle petitioner to relief). And Myers neither has a right to postconviction counsel, see *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014), nor did he argue the contents of the request for counsel. Accordingly, we cannot conclude that Myers' substantial rights were affected, and we conclude Myers is not entitled to relief on these claims. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Finally, Myers contends that he is entitled to relief because the district court clerk failed to timely file his reply to the State's response and that the district court erred by failing to consider his reply before denying his petition. Because the State did not move to dismiss Myers' petition, he did not have the right to reply to the State. See NRS 34.750(4), (5).

³We express no opinion as to whether Myers could satisfy the requirements of a petition to establish factual innocence.

Therefore, we conclude Myers is not entitled to relief on these claims, and we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge
Matthew Dwayne Myers
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴Myers appears to raise claims on appeal that were not raised in his petition. We decline to consider these claims on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).