

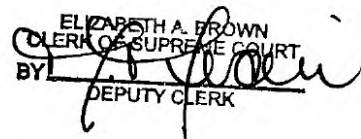
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IVAN DWIGHT COTTON, II, A/K/A
IVAN DWIGHT COTTON, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84179-COA

FILED

DEC 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Ivan Dwight Cotton, II, appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 2, 2021, and a supplemental petition filed on July 6, 2021. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Cotton argues the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. 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. 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).

Cotton claimed his trial counsel was ineffective for failing to investigate. Cotton argued that counsel should have sought testing of the victim's hands for gunshot residue and of the DNA swabs taken from the murder weapon because it could have uncovered evidence supporting his defense theory that the victim shot herself.

The district court made several findings relative to this claim. The victim was shot while inside her car with all but one window closed, and that window was only cracked. The jury heard testimony that gunshot residue would have been everywhere inside the car, including the victim's hands. Also, the gun used to shoot the victim belonged to Cotton, and both the victim and Cotton had fired the weapon in the past such that the presence of DNA evidence would not have been probative of who fired the fatal shots. Finally, the victim's wounds were not consistent with suicide while sitting in her car. The shots entered the right side of her body, were fired from close range but not up against her skin, hit multiple parts of her body, and travelled through her body parallel to the ground. These findings are supported by substantial evidence in the record. Based on this, Cotton failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel sought the testing alleged by Cotton. Therefore, we conclude the

district court did not err by denying this claim without conducting an evidentiary hearing.

Cotton also claimed his trial counsel was ineffective for conceding his guilt to second-degree murder during closing argument. The district court found that counsel did not concede Cotton's guilt. This finding is supported by substantial evidence in the record. Further, in light of the evidence against Cotton, counsel's alternative closing argument—if the jury thought Cotton did kill the victim, the evidence supported a finding only of second-degree murder—was not unreasonable under the circumstances. *Cf. Armenta-Carpio v. State*, 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013) (recognizing that “[a] concession of guilt is simply a trial strategy—no different than any other strategy the defense might employ at trial” and counsel's decision should be reviewed for reasonableness). Accordingly, Cotton failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel argued differently during closing. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

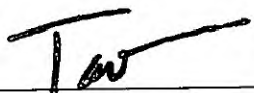
Cotton also argues the district court abused its discretion by adopting the entirety of the State's response in its findings of fact without first explicitly instructing the State to file an order consistent with the State's response. The district court did not err by directing the State to prepare an order. *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) (“[T]he district court may request a party to submit proposed findings of facts and conclusions of law . . .”). And Cotton cites no authority to

support his suggestion that the district court may not adopt the State's proposed order as its findings of fact and conclusions of law. We therefore conclude Cotton is not entitled to relief on this claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Nevada Defense Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk