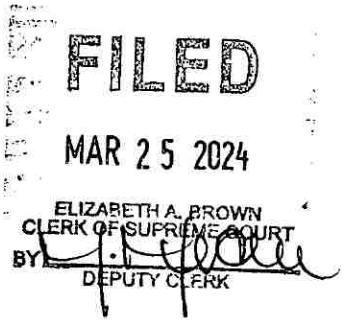
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY EDWARD RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86407-COA



ORDER OF AFFIRMANCE

Jeffrey Edward Rodriguez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 2, 2017, and supplemental pleadings. Second Judicial District Court, Washoe County; Tammy Riggs, Judge.

Rodriguez filed his petition more than one year after issuance of the remittitur on direct appeal on January 12, 2016. Thus, Rodriguez's petition was untimely filed. *See* NRS 34.726(1). Rodriguez's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* The district court found that official interference by prison officials constituted cause for the delay, and we conclude this finding is supported by the record before this court. The district court then addressed Rodriguez's claims and concluded they lacked merit.[1]

[1]If Rodriguez's claims lacked merit, he necessarily failed to demonstrate undue prejudice. *See Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) ("A showing of undue prejudice necessarily implicates the merits of the . . . claim."). Accordingly, we conclude the district court erred when it first determined that Rodriguez demonstrated undue prejudice and then determined whether his claims had merit. We

Rodriguez argues the district court erred by denying his claims of ineffective assistance of counsel.[2] 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).

Rodriguez claimed that counsel should have called Dr. Mahaffey to testify in support of a heat-of-passion defense. Dr. Mahaffey conducted a psychological evaluation of Rodriguez before trial. Rodriguez claimed that based on the conclusions Dr. Mahaffey reached in her report, her testimony would have supported his contention that his actions constituted manslaughter and not first-degree murder.

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nevertheless affirm because, for the reasons discussed in this order, the district court reached the correct result. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

[2]Jennifer Lunt, Esq., represented Rodriguez after his arraignment in district court, but Rodriguez successfully moved to have her relieved less than two months before trial. John Ohlson, Esq., was then appointed and represented Rodriguez through sentencing.

After conducting an evidentiary hearing regarding this claim wherein Rodriguez, Ms. Lunt, and Mr. Ohlson testified, the district court found that Mr. Ohlson did not believe Dr. Mahaffey would be helpful as a testifying witness and that neither counsel believed a heat-of-passion defense was a viable strategy based on the facts of the case. These findings are supported by the record. Mr. Ohlson testified that he did not recall reviewing Dr. Mahaffey's report but speculated that he would have been disinclined to call her to testify because he was "never impressed" with her testimony. He also testified that he thought that the State's ability to prove premeditation "was pretty difficult to get over." Ms. Lunt testified that while she would have called Dr. Mahaffey to testify, she did not believe Dr. Mahaffey's testimony would result in a manslaughter conviction because the State had a really strong case and the facts supported a first-degree murder conviction. Dr. Mahaffey was not called to testify at the evidentiary hearing.[3] In light of these circumstances, Rodriguez failed to demonstrate that counsel's actions were objectively unreasonable or a reasonable probability of a different outcome at trial had counsel called Dr. Mahaffey to testify. Therefore, we conclude the district court did not err by denying this claim.

Rodriguez also claimed that counsel failed to properly advise him regarding his right to testify at trial. Rodriguez alleged that Mr. Ohlson did not at any time discuss with him testifying or prepare him to

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[3]Rodriguez did not provide this court with a copy of Dr. Mahaffey's report for our review on appeal. Accordingly, we presume the report supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d, 131, 135 (2007); *see also Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *accord* NRAP 30(b)(3).

testify. Rodriguez believed that Mr. Ohlson would address any issues with the State's evidence during closing arguments, and he claimed the outcome of his trial would have been different had he been able to "tell his story."

The district court conducted an evidentiary hearing regarding this claim and found that Rodriguez would have testified as follows: Rodriguez found out about the victim's extramarital affairs in the days leading up to her killing but had opted to work things out with her. Rodriguez and the victim worked for the same employer, would each take their own vehicles to work, and would speak to each other via phone. On the day of the killing, the victim did not answer her phone, which caused Rodriguez to believe she was speaking to a man she was having an affair with. Angered by this, Rodriguez intentionally crashed his vehicle into the victim's vehicle. Thereafter, Rodriguez and the victim engaged in an argument, during which time the victim threatened to call 9-1-1. Rodriguez then pulled out a firearm and shot the victim to death before shooting at bystanders who had stopped to help. Rodriguez testified he was in a "dream-like" state and experienced blackouts during the incident.

The district court's findings are supported by the record. The district court further found that Rodriguez's testimony about his lack of memory of the incident was not credible, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Rodriguez's proffered testimony did not support a manslaughter verdict because it did not demonstrate that he shot the victim based on an "irresistible impulse of passion . . . caused by a serious and highly provoking injury, or attempted injury, sufficient to excite such passion in a reasonable person," *Allen v. State*, 98 Nev. 354, 356, 647 P.2d 389, 390-91 (1982), and

that there lacked an interval of time between the provocation and the killing, *see* NRS 200.060. Accordingly, Rodriguez failed to demonstrate a reasonable probability of a different outcome at trial but for counsel's alleged errors. Therefore, we conclude that the district court did not err by denying this claim.

Because Rodriguez failed to demonstrate undue prejudice to overcome the procedural time bar, we conclude the district court did not err by denying his petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Tammy Riggs, District Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk