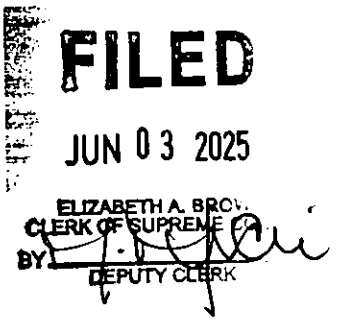
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON JEROME BOLEN,
Appellant,
vs.
NEVADA DEPARTMENT OF CORRECTIONS; ELY STATE PRISON; WILLIAM GITTERE, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 88832-COA



ORDER OF AFFIRMANCE

Jason Jerome Bolen appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 4, 2021, and supplemental pleadings. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.[1]

Bolen argues the district court erred by denying his claim that counsel was ineffective for failing to properly explain a plea offer to him. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice. *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*). To demonstrate prejudice where the purported deficiency led to the rejection of

[1]The Honorable Deborah L. Westbrook did not participate in the decision in this matter.

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a plea offer, a petitioner must show that, but for the deficiency, there is a reasonable probability that the petitioner "would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances[ ], that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe" than the conviction and sentence imposed on the petitioner. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). 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).

In his petition and at the evidentiary hearing, Bolen claimed he was presented with two different plea offers in this case: (1) plead to one count of attempted murder and stipulate to a prison sentence of 8 to 20 years; and (2) plead to one count of battery causing substantial bodily harm and receive a five-year probation term with a suspended prison sentence of 4 to 10 years. He argued counsel failed to explain to him the strengths and weaknesses of the State's case and inform him of the possible penalties he faced if he went to trial.

The district court held an evidentiary hearing and found that counsel explained the strengths and weaknesses of the case to Bolen. Counsel testified he recalled offer one, noted above, and explained that offer to Bolen. He also explained that he specifically remembered informing Bolen that he was not likely to get probation from the particular district

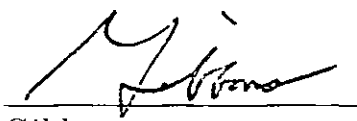
court judge that was overseeing the case. The district court found counsel more credible than Bolen and that the offer the State presented to counsel was likely offer one to attempted murder. The district court also found that Bolen never testified he would have accepted the plea to attempted murder. The district court's findings are supported by substantial evidence and are not clearly erroneous. Given the district court's credibility determinations, we conclude that Bolen failed to demonstrate that offer two, noted above, was presented to counsel, or that Bolen stated he was willing to accept offer one had it been fully explained to him. Further, while counsel did not specifically testify he discussed the "strengths and weaknesses" of the case with Bolen, he did testify that he discussed the case several times with Bolen but that it was difficult because Bolen "had opinions on the case and how it was going to go." Further, counsel testified he discussed the possible penalties of going to trial. Thus, we conclude Bolen failed to demonstrate counsel's performance was deficient.

Further, as to offer two above, Bolen failed to demonstrate prejudice in that he did not show the district court would have accepted the terms of the plea negotiation. As presented by Bolen, the plea offer terms would have constituted an illegal sentence. The maximum sentence for battery causing substantial bodily harm is one to five years in prison. *See* NRS 193.130(2)(c); NRS 200.481(2)(b). Thus, the district court would have been unable to impose and suspend a sentence of four to ten years in prison because such a sentence would have been outside the permissible range for

the offense. Therefore, Bolen failed to demonstrate prejudice as to the second offer.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla



_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]Bolen appears to concede the terms for the potential sentence in the second plea offer, as stated by Bolen at the evidentiary hearing, were not correct. Bolen argues that he was not required to prove the exact terms of the plea negotiation and that he could prove the terms on remand if this court were inclined to reverse the district court's order denying his petition. However, the burden was on Bolen to prove his allegations by a preponderance of the evidence at the evidentiary hearing, and the prejudice prong for his ineffective assistance of counsel claim required a showing that the district court would have accepted the terms of the plea negotiations. *See Cooper*, 566 U.S. at 164.