

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT DEWAYNE SIOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69009

FILED

JUL 26 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Hendrich*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Robert Siow claims the district court erred by denying his claims of ineffective assistance of counsel raised in his petition filed on September 22, 2014, and in his supplemental petition filed on May 11, 2015.

To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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 697, 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

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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 allegations 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).

First, Siow claims trial counsel was ineffective for failing to call his mother and brother to testify and for failing to consider Siow's ideas for a defense strategy. Siow fails to demonstrate counsel was deficient or resulting prejudice because he fails to support these claims with specific facts that, if true, would entitle him to relief. *See id.* Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

Second, Siow claims trial counsel was ineffective for failing to do further testing with the DNA evidence found on the child victim's underwear. Siow fails to demonstrate trial counsel was deficient for failing to pursue further testing because the DNA evidence was exculpatory for Siow since both DNA samples from the underwear did not match his DNA. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Siow does not demonstrate. Further, he fails to demonstrate resulting prejudice because he fails to demonstrate further testing of the DNA would have resulted in a different outcome at trial. Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

Third, Siow claims trial counsel was ineffective for failing to obtain an independent psychological evaluation of the child victim. Siow fails to demonstrate counsel was deficient or resulting prejudice. Siow

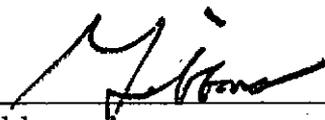
fails to demonstrate the motion would have been successful because the accusations were corroborated by his own statements, he failed to demonstrate the victim's mental or emotional state affected her ability to tell the truth, and the State did not call or obtain a benefit from an expert in psychology or psychiatry. See *Koerschner v. State*, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000); see also *Abbott v. State*, 122 Nev. 715, 727, 138 P.3d 462, 470 (2006) (reaffirming the test set forth in *Koerschner*). Siow fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought an independent psychological examination of the victim. Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

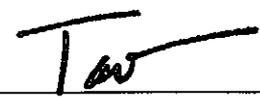
Fourth, Siow claims trial counsel was ineffective for failing to timely object to the admission of hearsay statements under NRS 51.385 prior to the introduction of those statements. He also claims trial counsel was ineffective for failing to object to the district court's lack of specific findings regarding the admissibility of the statements. Siow fails to demonstrate resulting prejudice because he fails to demonstrate a reasonable probability of a different outcome had trial counsel objected prior to the introduction of the statements. After the statements were offered, a hearing was held on their admissibility pursuant to NRS 51.385. While the district court did not make specific findings after the hearing, it listened to arguments by both trial counsel and the State and concluded the statements were admissible. Siow fails to demonstrate there was a reasonable probability of a different outcome had trial counsel objected to the lack of specific findings. Accordingly, the district court did not err in denying this claim without holding an evidentiary hearing.

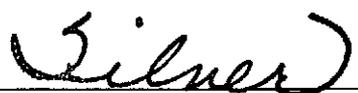
Next, Siow claims appellate counsel was ineffective for failing to raise three claims of ineffective assistance of counsel on direct appeal: trial counsel was ineffective for failing to request an independent psychological examination of the child victim, trial counsel was ineffective for failing to timely object to the admissibility of the hearsay statements; and trial counsel was ineffective for failing to object to the district court's failure to make specific findings regarding the hearsay statements. Siow fails to demonstrate appellate counsel was deficient or resulting prejudice because claims of ineffective assistance of counsel cannot generally be raised on direct appeal. *See Feazell v. State*, 111, Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Therefore, the district court did not err in denying these claims without holding an evidentiary hearing.

Finally, Siow claims he is entitled to relief based on the cumulative errors of counsel. Because Siow's ineffective-assistance-of-counsel claims lack merit, he fails to demonstrate cumulative error. Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

Having concluded Siow is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Gregory & Waldo
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk