

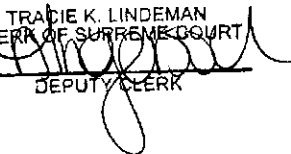
IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT COTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61518

FILED

JAN 30 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Senior Judge.

Appellant argues that the district court erred in denying the claims of ineffective assistance of counsel raised in his April 22, 2009, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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

application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel were ineffective for failing to subpoena appellant's financial records and failing to call a forensic accountant or real estate expert to testify. Appellant fails to demonstrate either deficiency or prejudice for this claim. During opening statements, counsel stated that a defense forensic accountant would show that the defendant did not marry the victim to gain access to her financial assets, yet the defense did not actually present expert testimony of this nature during trial. At the evidentiary hearing, counsel testified that he hired a forensic accountant to examine appellant's finances and that he concluded that it would not be beneficial to appellant to have that expert testify at trial. While it is unclear when counsel made the decision not to present the expert's testimony, 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 appellant does not demonstrate, particularly in light of appellant's own damaging testimony concerning improper tax documents. Appellant did not present any additional financial documents that counsel could have discovered and appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel presented additional financial information to the jury. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his counsel were ineffective for failing to seek immunity for Kelleen Cota to allow her to testify for appellant's defense. Appellant fails to demonstrate either deficiency or prejudice for this claim. Counsel testified that he did not pursue immunity for Kelleen Cota because he did not believe her to be helpful to

the defense and did not want her to testify. Tactical decisions such as this one “are virtually unchallengeable absent extraordinary circumstances,” *Ford*, 105 Nev. at 853; 784 P.2d at 953, which appellant does not demonstrate. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought immunity for Kelleen Cota as he fails to demonstrate that his counsel could have compelled a grant of immunity to Kelleen Cota or that the State improperly refused to seek immunity for her. See NRS 178.572-74; *State v. Tricas*, 128 Nev. ___, ___, 290 P.3d 255, 258-59 (2012) (discussing Nevada’s immunity statutes); see also *Williams v. Woodford*, 384 F.3d 567, 600 (9th Cir. 2004) (stating that the State’s refusal to grant “immunity to a defense witness denies the defendant a fair trial only when (1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process”). Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel were ineffective for failing to seek testing of apparent blood on plastic wrap and gloves. Appellant fails to demonstrate either deficiency or prejudice for this claim. Both of appellant’s trial counsel testified that they did not pursue testing of the apparent blood out of concern that the result would not be helpful and would limit their ability to present different arguments about what could have occurred. Tactical decisions such as this one “are virtually unchallengeable absent extraordinary circumstances,” *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. Appellant did not conduct testing of the blood sample for the post-conviction proceedings and fails to demonstrate a reasonable probability of a different outcome at trial as he does not demonstrate the test result would

have been favorable. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel were ineffective for failing to file motions to prohibit hearsay or to obtain discovery from the State. Appellant fails to demonstrate either deficiency or prejudice for this claim. Appellant does not discuss what type of hearsay testimony counsel should have sought to prohibit and does not discuss any discovery that counsel failed to obtain from the State. Bare claims, such as this are insufficient to demonstrate that a petitioner is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that his trial counsel were ineffective for failing to limit the State's use of prior-bad-act evidence related to appellant's financial information. Appellant fails to demonstrate either deficiency or prejudice for this claim. Counsel did oppose introduction of this evidence, but the district court concluded it was admissible. Appellant fails to demonstrate prejudice related to this claim because on direct appeal this court concluded that this evidence was properly admitted. *Cota v. State*, Docket No. 48317 (Order of Affirmance, July 24, 2008). Therefore, the district court did not err in denying this claim.

Sixth, appellant argues that his trial counsel were ineffective for failing to object or seek a limiting instruction when a police officer testified that appellant would not talk to the police. Appellant also argues counsel should have sought a mistrial due to the officer's statement. Appellant fails to demonstrate either deficiency or prejudice for this claim. In a hearing outside of the presence of the jury, the parties discussed the officer's comment, and counsel stated he did not want an instruction

because he did not want to highlight the officer's comment to the jury. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected or sought a mistrial due to the officer's comment as this court concluded on direct appeal that the comment was not prejudicial. *Cota v. State*, Docket No. 48317 (Order of Affirmance, July 24, 2008). Therefore, the district court did not err in denying this claim.

Seventh, appellant argues that his counsel were ineffective for making a poor closing argument, conceding his guilt in closing, and challenging the jury to find appellant guilty in closing. Appellant fails to demonstrate either deficiency or prejudice for this claim. A review of the record reveals that counsel did not concede appellant's guilt or challenge the jury to find appellant guilty. Rather, when counsel's closing argument is viewed as a whole, it is clear that he argued that the State failed to meet its burden to prove that appellant intended to kill the victim. In addition, counsel testified at the evidentiary hearing that he believes that jurors generally want to believe the State, so he had to craft his argument to gain the trust of the jurors by conceding certain facts where appropriate. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. Appellant fails to demonstrate a reasonable probability of a different outcome had counsel made a different type of closing argument. Therefore, the district court did not err in denying this claim.

Eighth, appellant argues that his counsel were ineffective by failing to be prepared to question one of the defense witnesses, the physician who conducted the autopsy on the victim. Appellant fails to demonstrate that he was prejudiced. At the evidentiary hearing, counsel admitted that he was surprised when the physician — a defense witness — arrived at the trial earlier than expected and that counsel had actually decided not to present that witness' testimony because the pertinent information, that the victim's death could have been caused by an accident, had been presented by the State's medical expert. As the information counsel had intended to elicit from this witness was presented by a different witness, appellant fails to demonstrate that he was prejudiced by counsel's actions with respect to the challenged witness. Therefore, the district court did not err in denying this claim.

Ninth, appellant argues that his trial counsel were ineffective for allowing the jury to hear that Kelleen Cota invoked her right against self-incrimination. Appellant argues that police officers' statements that Kelleen Cota would not talk to the police allowed an adverse inference from her testimonial privilege. Appellant fails to demonstrate either deficiency or prejudice for this claim. The challenged comments did not inform the jury that Ms. Cota had invoked her Fifth Amendment right against self-incrimination; rather, the officers merely stated that she had declined to talk with them during the investigation of this matter. Appellant fails to demonstrate that the passing comments regarding the investigation amounted to an improper adverse inference: either that the government made a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" or that "inferences from a witness' refusal to answer added critical weight to the prosecution's

case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.” *Namet v. United States*, 373 U.S. 179, 186-87 (1963). Therefore, the district court did not err in denying this claim.

Tenth, appellant argues that his trial counsel were ineffective for failing to object to prosecutorial misconduct for improper vouching for witnesses, disparaging of the defense, injecting the prosecutor’s personal opinion, and hinting at additional evidence that was not presented to the jury. Appellant fails to demonstrate either deficiency or prejudice for this claim. At the evidentiary hearing, counsel testified that he did not believe the State vouched for witnesses or disparaged the defense and that is why he did not object. Tactical decisions such as this one “are virtually unchallengeable absent extraordinary circumstances,” *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. In addition, the State’s comments, when reviewed in context, reflected reasonable inferences based on the evidence. *Greene v. State*, 113 Nev. 157, 177, 931 P.2d 54, 66-67 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Therefore, the district court did not err in denying this claim.¹

Eleventh, appellant argues that his trial counsel were ineffective for failing to object to improper opinion testimony by police officers indicating their belief in his guilt. Appellant fails to demonstrate

¹Appellant also argues that his appellate counsel should have raised these as issues of error on appeal. Appellant fails to demonstrate a reasonable likelihood of success had counsel raised the underlying claims on appeal as the comments reflected reasonable inferences based on the evidence. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

deficiency or prejudice because the challenged testimony was rationally based upon the perception of the officers. *See* NRS 50.265; NRS 50.295. Therefore, the district court did not err in denying this claim.

Twelfth, appellant argues that his trial counsel were ineffective for failing to argue that the second-degree murder instruction was improper as the theory espoused in the instruction was not noticed. Appellant also claimed that the State diluted the burden of proof for murder by making a confusing closing argument. Appellant fails to demonstrate either deficiency or prejudice. Appellant fails to demonstrate that he did not receive notice of the State's theory of second-degree murder as the information provided a plain and concise statement of the essential facts as well as a citation to the statutes discussing the crime of murder with the use of a deadly weapon. *See* NRS 173.075; NRS 193.165; NRS 200.010; NRS 200.030. In addition, appellant fails to demonstrate the State's closing argument improperly confused the jurors as the challenged statements properly discussed the law regarding malice. *See* NRS 200.020; *McCurdy v. State*, 107 Nev. 275, 278, 809 P.2d 1265, 1266 (1991). Therefore, the district court did not err in denying this claim.

Thirteenth, appellant argues that his trial counsel were ineffective for failing to argue that testimony from a medical examiner who did not conduct the autopsy violated his confrontation right under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Polk v. State*, 126 Nev. ___, 233 P.3d 357 (2010). Appellant fails to demonstrate deficiency or prejudice. Those cases were not issued until after completion of appellant's trial. Therefore, appellant's counsel were not ineffective for failing to argue testimony that was based on findings from a different medical examiner violated appellant's confrontation rights because

counsel cannot be faulted for failing to anticipate a court's later decision. *See Nika v. State*, 124 Nev. 1272, 1293-94, 198 P.3d 839, 854 (2008). In addition, the medical examiner who actually conducted the autopsy did testify, and appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel asserted that appellant's confrontation rights were violated. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant argues that his trial counsel were ineffective for introducing evidence of past domestic violence and failing to request a limiting instruction regarding that evidence. Appellant declined to pursue this claim at the evidentiary hearing and accordingly fails to meet his burden to demonstrate counsel was deficient for this claim. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). In addition, there was substantial evidence of appellant's guilt produced at trial and appellant fails to demonstrate a reasonable probability of a different outcome had counsel refrained from questioning about domestic violence allegations or had requested a specific limiting instruction for such evidence. Therefore, the district court did not err in denying this claim.

Next, appellant argues that he received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate

counsel will be most effective when every conceivable issue is not raised on appeal. *Ford*, 105 Nev. at 853, 784 P.2d at 953.

First, appellant argues that his appellate counsel was ineffective for failing to assert error regarding hearsay testimony. Appellant fails to demonstrate either deficiency or prejudice related to this claim as he only makes general references to supposed hearsay testimony. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued error on this basis. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his appellate counsel was ineffective for failing to assert error due to the lack of a limiting instruction regarding previous prior-bad act evidence of domestic violence. Appellant fails to demonstrate either deficiency or prejudice for this claim because the district court properly instructed the jury regarding the use of prior-bad-act evidence. *See* NRS 48.045. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his appellate counsel should have argued that the district court erred in permitting opinion testimony by police officers indicating their belief in his guilt. Appellant fails to demonstrate deficiency or prejudice because the challenged testimony was rationally based upon the perception of the officers. *See* NRS 50.265; NRS 50.295. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his appellate counsel was ineffective for failing argue that the second-degree murder instruction was improper as the theory espoused in the instruction was not noticed and that the State diluted the burden of proof for murder by making a

confusing closing argument. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel testified at the evidentiary hearing that he did not raise claims regarding these issues because he did not believe they would have been successful. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. Moreover, as discussed previously, the information provided a plain and concise statement of the essential facts as well as a citation to the statutes discussing the crime of murder with the use of a deadly weapon. See NRS 173.075; NRS 193.165; NRS 200.010; NRS 200.030. Appellant also fails to demonstrate that the State's closing argument improperly confused the jurors as the challenged statements properly discussed the law regarding malice. See NRS 200.020; *McCurdy*, 107 Nev. at 278, 809 P.2d at 1266. Therefore, the district court did not err in denying this claim.

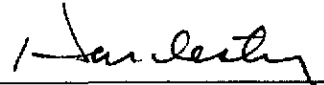
Fifth, appellant argues that his appellate counsel was ineffective for failing to assert that cumulative error warranted a new trial. Appellant fails to demonstrate either deficiency or prejudice for this claim because he does not demonstrate that any errors required a new trial even if considered cumulatively.

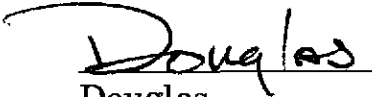
Next, appellant claimed that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Appellant fails to demonstrate that any errors, even if considered cumulatively, amount to ineffective assistance of counsel in light of the substantial evidence of his guilt.

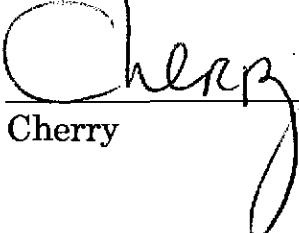
Finally, appellant argues that the counsel who represented appellant during the proceedings below was ineffective for failing to

subpoena documents, meet with appellant, and conduct investigation. These claims were not raised in the petition before the district court, and therefore, we decline to consider these claims in the first instance on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.2d 25, 33 (2004).

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

²The opening brief improperly attempts to incorporate facts contained in the opening brief for appellant's direct appeal and in the petition filed before the district court. NRAP 28(e)(2). In addition, the answering brief submitted by the State does not comply with NRAP 32(a)(4) because the text is not double spaced. Counsel for the parties are cautioned that the failure to comply with the briefing requirements in the future may result in the imposition of sanctions. *See* NRAP 28.2(b).

cc: Chief Judge, Eighth Judicial District Court
Lee A. Gates, Senior Judge
Hitzke & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk