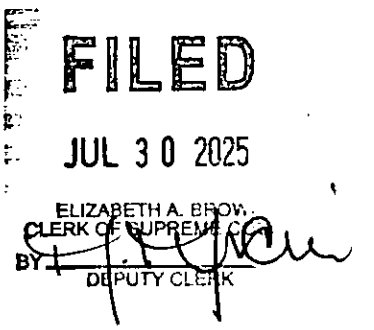
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NORMAN RENORD SMITH,
Appellant,
vs.
TIM GARRETT, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 89084-COA



ORDER OF AFFIRMANCE

Norman Renord Smith appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 10, 2022, and a supplement filed on September 12, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Smith argues the district court erred by denying his claims of ineffective assistance of trial and appellate 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*). To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of

success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Smith claimed trial counsel was ineffective for failing to file a motion for a new trial based on two separate outbursts (one during voir dire and one during closing arguments) where the victim's parents made statements about Smith shooting their daughter. Smith alleged the outbursts impacted the jury's ability to conduct a reasoned evaluation of the evidence and resulted in an unfair and unreliable verdict. A trial court may grant a new trial "if required as a matter of law or on the ground of newly discovered evidence." NRS 176.515(1).

Smith did not allege counsel should have moved for a new trial based on newly discovered evidence. Instead, Smith's claim implied counsel should have moved for a new trial because it was required by law. We conclude Smith failed to demonstrate deficiency or prejudice.

Counsel moved for a mistrial after each of the outbursts and the trial court denied the motions. Smith challenged those decisions on direct appeal, and the Nevada Supreme Court determined that, although the trial

court "erred in not taking steps to minimize the potential prejudice immediately after the outbursts," the outbursts did not prejudice Smith because he conceded shooting the victim by asserting self-defense. *Smith v. State*, No. 78604, 2021 WL 1964041, *1 (Nev. May 14, 2021) (Order of Affirmance). Specifically, the supreme court decided the outbursts "did not prevent [Smith] from receiving a fair trial." *Id.* Because the supreme court concluded Smith was not denied his right to a fair trial due to the outbursts, Smith failed to demonstrate trial counsel was deficient or a reasonable probability of a different outcome but for counsel's failure to move for a new trial based on the argument that a new trial was required by law. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Smith claimed trial counsel was ineffective for failing to attempt to elicit testimony from Officer Lee regarding statements Smith made to Lee that he shot the victim accidentally. Smith alleged the statements were admissible as excited utterances because he had been pepper sprayed prior to the shooting and was still under the effect of the exciting events when he spoke with Lee. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." NRS 51.095. The elapsed time between the event and the statement is an important factor to consider when "determining whether the declarant was under the stress of the startling event when he or she made the statement," but it alone is not determinative of the issue. *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006). Rather, the "district

court[ ] must examine all of the facts and circumstances surrounding a statement in addition to the time elapsed from the startling event." *Id.*

During trial, the State made an uncontested offer of proof that Smith made the statements to Lee approximately 30 minutes after the shooting had occurred. The record reflects that Smith made the statements only after Lee had detained Smith, placed him in handcuffs, and read him his *Miranda*[1] rights. Lee testified at trial that Smith was "agitated" during their encounter and that Lee told Smith to "calm down." On cross-examination, Lee explained that he asked Smith if Smith needed medical attention because he told Lee he had been pepper sprayed. However, the fact that Smith's statements regarding the shooting being an accident were made 30 minutes after the shooting and only after Smith had been detained by police and handcuffed weighs against a finding that the statements were made in relation to the startling events and not for a self-exculpatory purpose after a motive to fabricate the story had arisen. *See Williamson v. United States*, 512 U.S. 594, 600 (1994) (observing that "[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false"); *see also United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988) (providing that the defendant "was not prevented from introducing" his post-arrest statement because "he could have testified to the statement himself," but that admitting the statement "without subjecting [the defendant] to cross-examination [is] precisely what the hearsay rule forbids"). Because Smith did not demonstrate his statements

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

were made while under the stress of excitement from being pepper sprayed or from the shooting, Smith failed to demonstrate trial counsel was deficient or a reasonable probability of a different outcome but for counsel's inaction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Smith claimed appellate counsel was ineffective for failing to challenge the trial court's rejection of Smith's proposed jury instruction regarding "misfortune or accident." Smith fails to cogently argue and present relevant authority in support of his argument that the trial court erred in rejecting his proposed instruction. Thus, we decline to address this issue. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that it is appellant's responsibility to provide relevant authority and cogent argument).

Even if we were to address this issue, Smith's bare claim failed to explain how the trial evidence supported his proposed instruction. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) (holding that a defendant is entitled to an instruction if there is some evidence to support it). And Smith fails to include in his appendix a copy of his proposed instruction. Thus, we presume the proposed instruction supports the district court's decision to deny this claim. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting the court will presume that missing portions of the appellate record support the district court's decision); *see also* NRAP 30(b)(2)(D) (stating the appendix must contain "[r]elevant jury instructions given to which exceptions were taken, and excluded when offered"); *Greene v. State*, 96 Nev. 555, 558, 612

P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *Turpen v. State*, 94 Nev. 576, 577-78, 583 P.2d 1083, 1084 (1978) (concluding that the appellant's failure to include a proposed instruction in the record on appeal precluded appellate review). For these reasons, we conclude Smith is not entitled to relief based on this claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge
Law Office of Amanda Pellizzari, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk