IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN JOE CODDINGTON,
Appellant,
vs.
WILLIAM GITTERE, WARDEN,
Respondent.

No. 86527

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

A jury determined that appellant Ryan Joe Coddington committed first-degree murder with the use of a deadly weapon by striking Alea Clark in the head with a hatchet. Evidence introduced at trial indicated that Coddington burned Clark's body in a firepit on a public beach but later relocated the remains beneath a dog kennel on property where Coddington resided part-time. Coddington was sentenced to life in prison without the possibility of parole. This court affirmed the judgment of conviction on direct appeal. *Coddington v. State*, No. 71835, 2018 WL 1129659 (Nev. Feb. 26, 2018) (Order of Affirmance). Coddington filed a timely postconviction habeas petition, which the district court denied after conducting an evidentiary hearing. We affirm.

Coddington argues that the district court erred in rejecting several claims of ineffective assistance by trial and appellate counsel. To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness (deficient performance), and that the deficient performance creates a reasonable probability that there would have been a different outcome

absent counsel's errors (prejudice). *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (applying the *Strickland* test to claims of ineffective assistance of appellate counsel). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. "With respect to the prejudice prong, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (quoting *Strickland*, 466 U.S. at 694). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the facts underlying the claims by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We defer to the district court's factual findings that are supported by substantial evidence and not clearly wrong but review its application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Conflict of interest

Coddington first argues that attorney Brad Johnston provided ineffective assistance by failing to disclose a conflict of interest. Coddington alleges that Johnston maintained a business relationship with trial judge John Schlegelmilch, which adversely affected Johnston's performance at trial and on appeal.

Counsel has an obligation to avoid conflicts of interest. *Strickland*, 466 U.S. at 692. "[W]hether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists

when an attorney is placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). Under the Nevada Rules of Professional Conduct, a concurrent conflict arises when "[t]here is a significant risk that the representation of one or more clients will be materially limited" by a lawyer's personal interests or responsibilities to another person. RPC 1.7(a)(2). It is also a conflict for a lawyer to maintain financial interests adverse to a client. RPC 1.8(a).

Johnston testified that he associated with the Law Offices of John P. Schlegelmilch, Ltd. in an of-counsel capacity beginning in 2011. Johnston agreed to pay a small portion of his client fees to the law office, primarily in exchange for malpractice insurance. Johnston testified that he opened his own practice in late 2014, ceasing all association with and payments to the Schlegelmilch law office. Coddington was arrested for Clark's death on February 5, 2015, and retained Jesse Kalter as counsel. Johnston was later appointed to represent Coddington in two ancillary criminal cases and thereafter agreed to assist Kalter as second-chair in the instant case. Given this timeline, we discern no evidence of *any* business relationship between Johnston and Schlegelmilch during the period that Johnston represented Coddington, much less a relationship that might have divided Johnston's loyalties. We also do not consider Schlegelmilch's decision to recuse himself from the postconviction proceedings to be evidence of a conflict. It is appropriate for a judge to decline to decide his own involvement in an alleged conflict of interest, regardless of whether such a conflict in fact existed. *See* NCJC Rule 2.11(A) (requiring judicial disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned"). Nor has Coddington identified any way in

which Johnston's performance was affected by his previous association with Schlegelmilch's law practice. Coddington has therefore failed to demonstrate deficient performance or prejudice. Accordingly, the district court did not err in denying this ineffective-assistance claim.

Recording bench conferences

Coddington next argues that trial counsel should have objected to unrecorded bench conferences. Due process requires that bench conferences be memorialized, either through contemporaneous recording or by making a later record. *Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014). Here, the trial transcript reflects numerous instances in which the parties summarized matters when they returned to the record. But even assuming some conferences were not memorialized, Coddington has not demonstrated that he was hindered in raising on direct appeal any issues discussed during an unrecorded conference. *See id.* (stating that failure to record a bench conference warrants relief only if it "precludes this court from conducting a meaningful review of the alleged errors . . . identified [on appeal] and the prejudicial effect of any error"); *see also Archanian v. State*, 122 Nev. 1019, 1033, 145 P.3d 1008, 1019 (2006) (requiring petitioner to "show that the subject matter of [an] omitted portion[ ] of the record was so significant that this court cannot meaningly review his claims of error"). Coddington has thus failed to demonstrate a reasonable probability of a different outcome had trial counsel objected to the unrecorded bench conferences. We therefore conclude that the district court did not err in denying this ineffective-assistance claim.

Stipulation to admission of Clark's death certificate

Coddington next argues that trial counsel should not have stipulated to admission of Clark's death certificate because it contained

inadmissible hearsay. Kalter testified that he chose not to object to the death certificate after weighing the likelihood that it would be admitted under a hearsay exception against the potential that an unsuccessful objection would undermine credibility with the jury. The contents of Clark's death certificate, including the place and manner of death, represented the statutorily required conclusions of the medical examiner following Clark's autopsy. *See* NRS 440.430. The certificate therefore fell within multiple hearsay exceptions. These include a record of the activities of a public official or agency, a report of a public official or agency documenting matters observed pursuant to a duty imposed by law, and a record of death made pursuant to requirements of law. *See* NRS 51.155(1), (2); NRS 51.165. The death certificate did not contain inadmissible double hearsay as it did not introduce the content of any out-of-court statements. *See* NRS 51.035 (defining hearsay); NRS 51.067 (hearsay within hearsay). We therefore conclude that counsel's strategic decision to stipulate was not objectively unreasonable. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Additionally, the medical examiner testified to the bases for the determinations as to cause and manner of death. Thus, Coddington has not demonstrated the outcome of the trial would have differed had the death certificate been excluded. We therefore conclude that the district court did not err in denying this ineffective-assistance claim.

Admission of Coddington's power of attorney

Coddington next argues that trial counsel should not have stipulated to admission of a power of attorney (POA) granting Coddington's mother authority to dispose of his property. According to Coddington, the

admission of the POA provided an evidentiary basis for the district court to instruct the jury on flight.

The record indicates that trial counsel inadvertently stipulated to the POA as part of a packet containing other, non-objectionable documents. While trial counsel was deficient in agreeing to a blanket stipulation without sufficiently careful review of the affected exhibits, Coddington has not demonstrated prejudice. Counsel immediately objected once the error was identified, and the district court allowed argument on admission of the POA. Counsel's mistake was thus ultimately irrelevant to the document coming into evidence. Furthermore, Coddington has not demonstrated that the district court's decision to give a flight instruction turned on the POA. Neither the district court nor this court cited the POA in deciding that there was evidence that Coddington was planning to flee with consciousness of guilt or to evade arrest. *See Coddington*, 2018 WL 1129659, at *4. Rather, both courts relied on evidence provided by Toni Hardin, who testified at trial that Coddington was planning on "running." Additionally, both courts noted observations by police that Coddington's truck was packed with the bulk of his personal belongings and tools when he was arrested. Because Coddington failed to demonstrate a reasonable probability of a different outcome absent counsel's mistaken stipulation, the district court did not err in denying this ineffective-assistance claim.

Investigation and testing of crime scene acoustics

Coddington next contends that trial counsel should have performed audio testing at the crime scene. Coddington suggests that test results could have been used to challenge Hardin's trial testimony that, while sitting in Coddington's living room, she heard Clark being murdered in a back bedroom. Kalter testified that he visited Coddington's home, a

single-wide trailer, and spent more than three hours viewing and photographing the scene. Kalter observed that it was a "fairly short distance" from the living room to the bedroom and determined that testing was unnecessary to understand the acoustics of the residence. We conclude that Coddington has failed to demonstrate deficient performance as there is no evidence suggesting that Kalter's assessment was unreasonable. Nor has Coddington identified how the results of any testing would have undermined Hardin's account. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (discerning no prejudice under *Strickland* where appellant failed to show what evidence a more thorough investigation would have yielded); *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (providing that a claim must be supported by specific factual allegations that would entitle the petitioner to relief if true). Additionally, the record shows that counsel cross-examined Hardin at length about various factors that could have impeded her ability to accurately perceive the sounds she described. Coddington has not demonstrated deficient performance or prejudice and therefore the district court did not err in denying this ineffective-assistance claim.

Testing and disassembly of the alleged murder weapon

During their investigation, police discovered a hatchet on property shared by Coddington and his then-girlfriend. The hatchet was seized and forensically tested by the Washoe County Crime Laboratory, which found no blood present on the tool. The hatchet was then transferred to a lab in Sacramento, where the blade was disconnected from the handle, allowing additional surfaces to be swabbed. Coddington contends that trial counsel should have viewed the hatchet before it was taken apart to determine its weight and strength. Additionally, Coddington argues that

counsel should have objected to the disassembly of the hatchet and moved to suppress after it was altered.

Kalter testified that he could not recall if he knew of the State's testing plans before the hatchet was shipped to Sacramento. Even if counsel was notified, however, there is no evidence that removing the blade from the handle prevented the defense from later assessing the weapon's physical properties. Nor has Coddington shown what facts the intact hatchet would have proven that its component pieces did not. Thus, Coddington has not demonstrated that counsel was deficient for failing to investigate or object to disassembly of the hatchet, or that there was any resulting prejudice.

Furthermore, Kalter testified that the absence of blood and Clark's DNA on the hatchet, particularly after the testing of additional surfaces, was beneficial to the defense case as it weakened the State's claim that the hatchet had been used to murder Clark. Counsel read the Sacramento testing report into evidence and was able to argue in closing that, even after disassembling the hatchet, the State "came back with . . . nothing." We conclude that it was not an objectively unreasonable strategy for trial counsel to embrace this result rather than seek to suppress the hatchet. Accordingly, the district court did not err in denying this ineffective-assistance claim.

Development of a self-defense theory

Coddington next argues that trial counsel should have more thoroughly investigated and presented the theory that Coddington killed Clark in self-defense. Coddington specifically points to counsel's failure to call several witnesses who told police that Clark had a propensity for violence and was rumored to have solicited an acquaintance to kill Coddington.

The killing of another person is justified in self-defense "when the person who does the killing actually and reasonably believes . . . [t]hat there is imminent danger that the assailant will either kill him or cause him great bodily injury." *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000); *see also* NRS 200.120(1) (defining justifiable homicide). Additionally, the killer must actually and reasonably believe that use of force is "absolutely necessary under the circumstances" to avoid death or injury. *Runion,* 116 Nev. at 1051, 13 P.3d at 59. The State presented evidence that Coddington killed Clark after reading a text message implying Clark had arranged a "hit" on Coddington. Even assuming Clark legitimately wanted Coddington killed, there was no evidence that Clark herself, who was asleep and wearing only underwear before her death, posed an imminent threat. We conclude that it was a reasonable strategic decision for counsel to focus on the State's inability to establish what happened in the back bedroom, rather than pursuing a self-defense theory with little evidentiary support. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (noting that counsel's strategic decisions "will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)). Similarly, Coddington has not shown that a different outcome would have resulted if more witnesses testified about the purported hit or Clark's propensity for violence. Such testimony would be no more effective than the text message already in evidence to prove self-defense. We therefore conclude that the district court did not err in denying this ineffective-assistance claim.

Expert testimony regarding bone markings

Coddington next contends that trial counsel should have retained an expert in forensic anthropology to prove that marks on Clark's

bones were not inflicted with a hatchet. At the evidentiary hearing, Coddington called Dr. Marin Pilloud, who opined that injuries to Clark's vertebra, pelvis, and arm and leg bones were not consistent with a hatchet blade. Coddington contends that similar expert testimony could have been used to undermine Hardin's testimony that Coddington entered the back bedroom carrying a hatchet before Clark was killed.

Coddington has not demonstrated deficient performance or prejudice. Kalter testified that he determined an expert on bone markings was unnecessary because the State could not conclusively differentiate injuries inflicted before Clark's death from trauma occurring during disposal of her remains. Indeed, the State's expert, Dr. Katherine Taylor, testified that marks on Clark's bones occurred perimortem, meaning that they could have been inflicted shortly before or after Clark's death. Taylor further testified that the injuries could have come from any heavy object with a sharp edge. Counsel thus argued in closing that the marks could have been made by the pry-bar used during the burning of Clark's body. We cannot conclude that this strategy was objectively unreasonable, as it was consistent with the defense's central theme that the State could not prove what occurred when Clark was killed. Furthermore, we are not convinced there is a reasonable probability that additional expert testimony would have altered the trial outcome. The State alleged that Coddington struck Clark in the head with a hatchet, and Dr. Pilloud was unable to draw any conclusions about the cause of crushing injuries to Clark's skull. Accordingly, we conclude that the district court did not err in denying this ineffective-assistance claim.

Concession of manslaughter

Coddington next argues that trial counsel improperly conceded Coddington's guilt to manslaughter during closing argument without first obtaining Coddington's consent. The district court found that trial counsel's manslaughter argument did not equate to a concession of guilt. We agree. During closing argument, counsel repeatedly reminded the jury of the State's burden, attacked the credibility of the State's witnesses, and argued that the prosecution failed to prove what occurred in the back bedroom before Clark's death. Only then did counsel briefly hedge that manslaughter was the "only crime that could have potentially been proven." We conclude that this was not a clear admission of guilt constituting concession. *See Hovey v. Ayers*, 458 F.3d 892, 906 (9th Cir. 2006) (holding counsel did not concede first-degree murder by stating that "there could be findings" of the required mens rea); *State v. Greene*, 422 S.E.2d 730, 733 (N.C. 1992) (determining that counsel did not concede guilt by indicating that the jury could find defendant committed, at most, involuntary manslaughter).

Furthermore, Coddington has not demonstrated that counsel's manslaughter argument was made over Coddington's "intransigent objection." *McCoy v. Louisiana*, 584 U.S. 414, 426 (2018). Thus, even if the argument implied concession, the structural error analysis set forth in *McCoy* is inapposite. *See id.*; *see also Florida v. Nixon*, 543 U.S. 175, 192 (2004) (observing there is no "blanket rule demanding the defendant's explicit consent" where a defendant is informed of and unresponsive to counsel's concession strategy). We therefore apply the general ineffective-assistance standard to this claim. *See Armenta-Carpio v. State,* 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (holding that the remedy for a defendant dissatisfied with counsel's concession strategy is to "challenge the

reasonableness of counsel's performance"). Kalter testified that the defense team, including Coddington, met and discussed trial strategy many times. During these meetings, the team acknowledged that a full acquittal was unlikely given the overwhelming evidence connecting Coddington to Clark's death and the disposal of Clark's body. Kalter perceived that Coddington agreed that a manslaughter conviction would be a positive outcome. Given the evidence against Coddington, we conclude that counsel's closing argument was not unreasonable. Furthermore, Coddington has not shown how the outcome at trial would have differed had counsel employed a different approach during closing. Therefore, we conclude that the district court did not err by denying this ineffective-assistance claim.

Presentation of mitigation evidence

Coddington next argues that trial counsel should have developed additional mitigating evidence to support a lesser sentence. During the penalty phase, counsel called Coddington's mother, who testified to traumatic experiences in Coddington's childhood. Coddington asserts that counsel should have also presented testimony that Clark had a propensity for violence and arranged a hit on Coddington. Coddington also argues that counsel should have obtained a substance abuse evaluation to highlight his extensive history of drug use.

Coddington has demonstrated neither deficient performance nor prejudice. The jury received evidence about both the purported hit and Coddington's methamphetamine use during the guilt phase. It is unclear how additional evidence on the same subjects would have been anything more than cumulative. Furthermore, the details of Clark's death and the handling of her remains were notably brutal. Objectively reasonable counsel could have determined that arguments disparaging Clark's

character and highlighting Coddington's drug use could have alienated jurors rather than softening them to Coddington. Accordingly, the district court did not err by denying this ineffective-assistance claim.

Cumulative error

Finally, Coddington argues that cumulative error warrants reversal. Even assuming that multiple instances of deficient performance can be considered cumulatively to prove the prejudice prong, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (assuming without deciding that multiple deficiencies may be cumulated for a showing of prejudice under *Strickland*), there is no cumulative error here. As discussed above, Coddington demonstrated a single instance of deficient performance in counsel's mistaken stipulation to admit the POA. Thus, the district court did not err in denying this claim. *See United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("If there are no errors or a single error, there can be no cumulative error.").

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

_____, C.J.
Herndon

_____, J.
Bell

_____, J.
Stiglich

cc: Hon. Leon Aberasturi, District Judge
Oldenburg Law Office
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk