IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT E. TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45009

FILED

JAN 30 2009

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

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

On April 24, 1995, appellant Vincent Turner was convicted, pursuant to a jury verdict, of conspiracy to commit robbery, robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, burglary, and murder with the use of a deadly weapon. Turner appealed, and this court reversed and remanded for a new trial. Turner v. State, 114 Nev. 682, 962 P.2d 1223 (1998).

On March 3, 1999, Turner was convicted, pursuant to a jury verdict, of conspiracy to commit robbery, robbery with the use of a deadly weapon, burglary, and first-degree murder with the use of a deadly weapon. For the murder, Turner was sentenced to serve a term of life in the Nevada State Prison with parole eligibility after 20 years, plus an equal and consecutive term for the deadly weapon enhancement. Turner also received sentences of four years for conspiracy, seven years for burglary, and ten years for robbery with an equal and consecutive term for the deadly weapon enhancement, all concurrent to the murder count. This court dismissed Turner's appeal. Turner v. State, Docket No. 33967

(Order Dismissing Appeal, August 11, 2000). The remittitur issued on September 19, 2000.

On May 29, 2001, Turner filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750, the district court elected to appoint counsel to represent appellant. Counsel filed a supplemental petition on April 20, 2004. The district court heard argument but declined to hold an evidentiary hearing, and on March 6, 2008, the district court denied appellant's petition. This appeal followed.

Facts

The evidence presented at trial shows that Edward Earl Walker, a cocaine dealer, stored drugs at the home of his girlfriend, Marnie Hickman. Hickman had a relationship with Turner. On February 2, 1992, Turner, Darryl Fuller, and Armand Brown formed a plan to rob Walker of cocaine. Turner was to gain entry to the apartment and then leave the door unlocked. The other two were to enter and execute the robbery. Turner was not to play any further role in the robbery.

Turner, Fuller, and Brown went to Hickman's apartment that evening. Hickman allowed Turner inside the apartment, and Turner left the door unlocked behind him. Fuller and Brown then entered the apartment and searched for cocaine. They ordered Turner to lie down on the ground, which he did. Brown aimed a handgun at Hickman and demanded to know where Walker kept his cocaine. Fuller discovered a large amount of cocaine. Fuller and Brown then decided to kill Hickman because she had seen them and could identify them. Brown ordered Hickman to lie on the floor. He pulled the trigger but his gun jammed. Fuller handed Brown his handgun. Hickman begged for her life and promised to tell Brown where Walker kept his remaining supply of

narcotics. Brown then shot and killed Hickman. Turner, Fuller, and Brown then left together; they took Walker's cocaine to a hotel room and divided it amongst themselves.

On April 21, 1992, Turner contacted the North Las Vegas Police Department and confessed his involvement in the murder.

On appeal, Turner argues that his murder conviction should be reversed because the trial court erroneously instructed the jury regarding the finding of intent required to convict him of first-degree murder and that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel.

First-degree murder instructions

We first turn to Turner's claim that his conviction for first-degree murder should be reversed because the jury was not properly instructed regarding the requisite intent for first-degree murder under the theories of aiding and abetting and vicarious coconspirator liability, pursuant to Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), and Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled on other grounds by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008), respectively. Turner was charged with first-degree murder under theories of felony murder, aiding and abetting, and vicarious coconspirator liability. Instruction No. 13 on aiding and abetting read:

> Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each person did every act constituting the offense charged.
>
> All persons concerned in the commission of a crime who either directly or actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the

> law as principals in the crime thus committed and are equally guilty thereof.
>
> To aid and abet is to assist or support the efforts of another in the commission of a crime.
>
> A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime.
>
> The state is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Jury instruction No. 10 on vicarious coconspirator liability read:

> Where two or more individuals join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all. Every conspirator is legally responsible for an act of a conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy.

The latter instruction was highlighted for the jury and identified by the prosecutor during closing argument as "the most important instruction you are going to receive in this case." Turner claims that he is entitled to relief because these instructions allowed him to be convicted of first-degree murder without proof that he had the specific intent to commit murder.

In Sharma, we disapproved of an instruction on the "natural and probable consequences" doctrine and held that for a person to be held accountable for a specific intent crime under a theory of aiding or abetting, the aid must have been given with the specific intent to commit the charged crime. Sharma, 118 Nev. at 655, 56 P.3d at 872. Similarly, in Bolden we reaffirmed our disapproval of the "natural and probable

consequences" doctrine and held that to convict a defendant as a coconspirator for a specific intent offense, the State must prove that the defendant had the specific intent to commit the act constituting the offense. Bolden, 121 Nev. at 922-23, 124 P.3d at 200-01.

Turner's conviction was final before Sharma and Bolden were decided, but he argues that pursuant to our decision in Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006), they should be applied retroactively. Turner has misconstrued our decision in Mitchell. In that case we did not hold that Sharma announced a new rule that applied retroactively. Rather, Sharma was a clarification of existing law and was therefore applicable to convictions that were final before it was decided. Id. at 1276-77, 149 P.3d at 38. We have not had the opportunity to decide whether Bolden announced a new rule or was a clarification of existing law. However, for the reason stated below, that determination is not required here.

Turner's claims based on Sharma and Bolden were not raised in his petition before the district court. Generally, this court will not consider claims that were not raised in the district court. Zampanti v. Sheriff, 86 Nev. 651, 653, 473 P.2d 386, 387 (1970); McGill v. Chief of Police, 85 Nev. 307, 309, 454 P.2d 28, 29 (1969). However, we have indicated that such claims may be considered in limited circumstances when the petitioner demonstrates both good cause and prejudice, and the claim involves questions of law that do not require factual determinations outside the record. Bejarano v. State, 122 Nev. 1066, 1071, 146 P.3d 265, 269-70 (2006); Rippo v. State, 122 Nev. 1086, 1091, 146 P.3d 279, 282-83 (2006). Turner's claims are also procedurally barred under NRS 34.810(1)(b) to the extent that the underlying arguments could have been raised at trial or on direct appeal. This procedural default may be

overcome by a showing of good cause and actual prejudice provided by NRS 34.810(3). A petitioner can also overcome this procedural bar by showing that failure to consider his claims would result in a fundamental miscarriage of justice, which requires a colorable showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 36 (2006) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

Turner claims that he has shown good cause sufficient to overcome the procedural bars because the legal grounds for his claims were not reasonably available. We conclude that Turner has failed to demonstrate good cause. Recently, we held that good cause existed when the legal basis for a claim had not previously been available. Rippo, 122 Nev. at 1091, 146 P.3d at 283; Bejarano, 122 Nev. at 1071, 146 P.3d 269. However, we have also held that "proper respect for the finality of convictions demands that this ground for good cause be limited to previously unavailable constitutional claims." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003).

As stated above, Sharma clarified existing law. Mitchell, 122 Nev. at 1276-77, 149 P.3d at 38. Therefore, the legal grounds for Turner's claim were previously available and could have been raised at trial or in his direct appeal. In addition, Sharma was decided approximately 18 months before Turner filed his supplemental petition in the district court. Thus, Turner could have raised his Sharma claim in the district court and he has not demonstrated good cause for failing to do so. Therefore, Turner's Sharma claim is procedurally barred.

Bolden was not decided until after Turner's conviction became final. However, Bolden was decided as a matter of state law. Bolden v. State, 121 Nev. 908, 920-23, 124 P.3d 191, 199-201 (2005), overruled on

other grounds by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008). Thus, even if we were to decide that Bolden announced a new rule and introduced legal grounds that were previously unavailable, that case would not provide good cause to overcome the procedural bars because Turner's claim does not implicate federal constitutional concerns. Nika v. State, 124 Nev. ___, ___ P.3d ___ (Adv. Op. No. 103, December 31, 2008); Clem, 119 Nev. at 621, 81 P.3d at 525-26. Alternatively, if we treat Bolden as a clarification similar to Sharma, the legal grounds for Turner's claim were previously available and his claim should have been raised at trial, on direct appeal, or in Turner's petition in the district court.

We conclude that Turner has not demonstrated good cause for failing to raise his claims on direct appeal or in the district court. Nor has he made a colorable showing of factual innocence sufficient to demonstrate manifest injustice, particularly given the overwhelming evidence supporting the first-degree murder conviction based on the felony-murder rule. Accordingly, his claims are procedurally barred, and we decline to consider them.

Ineffective assistance of counsel

In this appeal, Turner raises several claims of ineffective assistance of counsel.[1] To state a claim of ineffective assistance of counsel

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[1]Turner raised additional claims in his proper person petition before the district court that were not raised on appeal. Specifically, he claimed that (1) his statement to police was inadmissible under the 5th Amendment because he was in "continuous custody" after receiving counsel for a probation violation, (2) the district court failed to suspend the trial in order to determine competency, (3) he was wrongly convicted of the deadly weapon enhancement because there was no evidence that he had actual or constructive possession of the weapon, (4) appellate counsel was ineffective for failing to allow him to accept the State's plea bargain, (5)

continued on next page . . .

sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694. The court may dispose of a claim if the petitioner makes an insufficient showing on either prong. Id. at 697.

Additionally, Turner claims that the district court erred when it failed to hold an evidentiary hearing with regard to a number of his claims. "[A]n evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true." Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007). However, an evidentiary hearing is not required when the factual allegations are belied by the record or when there is no factual dispute and the petitioner has raised a purely legal issue. See Johnson v. State, 117 Nev. 153, 161, 17 P.3d 1008, 1013 (2001).

First, Turner claims that his trial counsel was ineffective for failing to inform him of a favorable pretrial plea bargain. Appellant failed

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. . . continued

appellate counsel was ineffective for failing to raise colorable claims or file a petition for rehearing, (6) he was wrongly convicted based on the mere fact that he was present during the crime, (7) the district court erred in instructing the jury on aiding and abetting because he was not charged as a principal, (8) trial counsel was ineffective for failing to object to the instructions on aiding and abetting, and (9) the amended information was defective for failing to charge him as a principal. We conclude that Turner abandoned these claims and we do not consider them here.

to demonstrate that trial counsel's performance was deficient. The only evidence offered in support of this claim was Turner's affidavit stating his belief that such an offer was available. Such a "bare" allegation is insufficient to support a claim for post-conviction relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in summarily denying this claim.

Second, Turner claims that his trial counsel was ineffective for failing to call psychologist Dr. Harrie F. Hess to testify regarding Turner's diminished mental capacity. Turner failed to demonstrate that trial counsel's performance was deficient. Dr. Hess conducted a psychological evaluation of Turner prior to Turner's first trial and concluded that he was competent to stand trial. However, Dr. Hess found that he had an IQ of 69, placing him at the top of the intellectual range of mild mental retardation. Dr. Hess testified at Turner's first trial that this mild mental retardation made Turner more susceptible to influence from others and should be considered a mitigating factor affecting his culpability.

Prior to Turner's second trial, he was examined by psychiatrist Dr. Thomas Bittker, who was prepared to rebut Dr. Hess's testimony that a defense of diminished capacity was warranted. Dr. Bittker's report gave several reasons for his conclusions, including that Turner did not meet the full criteria for mild mental retardation and his intellectual deficits were not unlike that of many other convicted felons. Thus, Bittker concluded that Turner's intellectual deficits were not sufficient to warrant holding him less accountable than other individuals for participation in a crime.

Turner's counsel decided not to call Dr. Hess at the second trial. Counsel "has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167

(2002). In the context of claims of ineffective assistance of counsel, "'a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances.'" Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (internal quotation marks omitted) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)). Here, not only did Dr. Hess testify at Turner's first trial, which resulted in conviction, but Dr. Bittker was prepared to rebut all of Dr. Hess's assertions at the second trial. And there is nothing in the record demonstrating extraordinary circumstances justifying a challenge of defense counsel's tactical decision not to call Dr. Hess as a witness at Turner's second trial. Therefore, the district court did not err in summarily denying this claim.

Third, in a related claim, Turner asserts that his trial counsel was ineffective for failing to develop a defense of diminished capacity. Appellant failed to demonstrate that trial counsel's performance was deficient. "[T]he technical defense of diminished capacity is not available in Nevada." Crawford v. State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005). Therefore, the district court did not err in summarily denying this claim.

Fourth, Turner claims that trial counsel was ineffective for failing to move for a mistrial after the prosecutor referred to a prior bad act. Turner failed to demonstrate prejudice. During a police interview, Turner told police that he was "scared at the thought of going back to prison." Turner's statement was ruled admissible at trial, but the word "back" was redacted from the statement in order to avoid reference to the fact that Turner had been previously convicted. During closing argument, the prosecutor stated that Turner told police he was "afraid to go back to prison." Defense counsel objected on the ground that the prosecutor had mischaracterized Turner's statement. The district court sustained the

objection and asked the jury to disregard it. The prosecutor then stated, "I am going to quote it so I get it right, 'I was still scared at the thought of going to prison.'"

Here, the jury was instructed to disregard the prosecutor's improper statement, and "this court generally presumes that juries follow district court orders and instructions." Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Moreover, there is nothing to indicate that the jury considered the use of the word "back" as anything other than a mistake. Defense counsel referred to the statement as a mischaracterization and the prosecutor's statement that he would "quote it, so I get it right" implied that he had misspoken. Accordingly, Turner failed to demonstrate a reasonable probability that a motion for mistrial would have been granted by the district court. Therefore, the district court did not err in summarily denying this claim.

Fifth, Turner claims that trial counsel was ineffective for failing to move for a mistrial after the prosecutor argued "victim impact" during opening statements. Turner failed to demonstrate that trial counsel's performance was deficient. The prosecutor stated that the victim, Marnie Hickman, "was somebody's daughter, she was a mother." Defense counsel objected, and the district court overruled the objection. Later in the opening statement, the prosecutor described the victim's brother's failure to reach her on the phone by stating that "[h]e has no idea that his sister, a woman that he loved, lies dead in her own apartment." Turner argues that these two statements constitute highly prejudicial victim impact testimony. We conclude that these descriptions of the victim and the circumstances of her death do not constitute victim impact statements. Therefore, the district court did not err in summarily denying this claim.

Sixth, Turner claims that his trial counsel was ineffective for failing to object to testimony that Turner had not called Secret Witness to report Hickman's murder. Turner failed to demonstrate that trial counsel's performance was deficient. During opening statements, defense counsel argued that Turner "called the Secret Witness Program, he voluntarily called them because it was 'eating him up.'" During the State's case-in-chief, Las Vegas Metropolitan Police Department Detective James Jackson testified that no one had contacted Secret Witness with regard to the case, effectively rebutting defense counsel's statement. Turner claims that the testimony was an improper comment on his right to remain silent. We disagree. Detective Jackson's statement that no one had called Secret Witness about the case did not implicate Turner's right to remain silent because a prosecutor is only prohibited from commenting on a defendant's post-arrest silence. See, e.g., Doyle v. Ohio, 426 U.S. 610, 616-20 (1976) (use of defendant's silence for impeachment purposes, after defendant received Miranda warnings, violated due process clause); Washington v. State, 112 Nev. 1054, 1059-60, 921 P.2d 1253, 1256-57 (1996) (Constitution prohibits comment about defendant's post-arrest silence). Moreover, Turner opened the door for the evidence when he claimed during opening statements that he had called Secret Witness to report Hickman's murder. The State was entitled to rebut defense counsel's claims of what the evidence would show. Cf. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982) (permitting normally impermissible comment on failure to present a defense witness where defendant had previously claimed the witness could provide an alibi). Therefore, the district court did not err in summarily denying this claim.

Seventh, Turner claims that trial counsel was ineffective for conducting improper questioning of Detective Jackson. He further claims

that his counsel's actions resulted in frequent judicial correction in the presence of the jury and thus diminished trial counsel's credibility.[2] Turner failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Our review of the record does not reveal misconduct. Turner cites to several instances of purportedly improper questioning. The cited portion of the record reveals twelve objections made by the State during a particularly intense cross-examination regarding the progress of Jackson's investigation. Nine of the objections were sustained, two were overruled, and one was resolved in an unrecorded bench conference. None of the sustained objections were the result of egregious behavior by defense counsel.[3] Moreover, the cited portion of the record reveals only one instance in which the district court sua sponte interrupted defense counsel.[4] Turner failed to demonstrate a reasonable probability that but for counsel's cross-examination of Detective Jackson the result of trial would have been different. Therefore, the district court did not err in summarily denying this claim.

Finally, Turner claims that his trial counsel was ineffective for failing to prepare his coconspirator, Darryl Fuller, to testify. Turner failed

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[2]Inasmuch as Turner alleges misconduct on the part of the district court, that claim should have been raised on direct appeal and is procedurally barred. NRS 34.810(1)(b)(2).

[3]Of the nine questions to which the district court sustained objections, two were argumentative, one asked for hearsay, one was vague, one had been asked and answered, and four called for speculation.

[4]The record reflects that the district court interrupted defense counsel after counsel incorrectly recited the court's ruling. The district court stated, "Counsel, that's a mischaracterization of the court's ruling, would you please keep your editorial comments to yourself."

to demonstrate that counsel's performance was deficient or that he was prejudiced. As stated above, in the context of claims of ineffective assistance of counsel, "a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances." Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (internal quotation marks omitted) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)). Fuller had previously pleaded guilty to first-degree murder and robbery in relation to the events for which Turner was on trial. The record indicates that Turner's trial counsel met with Fuller and determined that it was not in Turner's best interest that Fuller testify. Specifically, trial counsel stated, "When our investigator went out to Jean last week in order to talk to him, Mr. Fuller was more cooperative, today when I went over there he just wanted something from me and I couldn't give him anything, he basically wanted to take the stand and litigate his appeal." Counsel also stated, "We decided that it would not be in Mr. Turner's best interest, so we made a tactical decision not to call Darryl Fuller today." Other than speculating as to Fuller's possible testimony, Turner has not demonstrated "extraordinary circumstances" that would justify a challenge of trial counsel's tactical decision.

Turner further argues that if Fuller was not allowed to testify then he should have been allowed to testify on his own behalf. The record reflects that Turner was thoroughly canvassed regarding his right to testify, and he chose not to exercise that right. Therefore, the district court did not err in summarily denying this claim.

Ineffective assistance of appellate counsel

Turner also raises claims that his appellate counsel was ineffective. Such claims are reviewed under the Strickland test. Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004). "To establish

prejudice based on the deficient assistance of appellate counsel, the defendant must show 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).

Turner claims that appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct on direct appeal. Specifically, he argues that appellate counsel was ineffective for failing to raise the issue of the prosecutor's argument of "victim impact" during his opening statement. Turner failed to demonstrate prejudice. As explained above, even if appellate counsel had raised the matter on appeal, a different result was not reasonably probable. Turner also claims that appellate counsel was ineffective for failing to raise the issue of the prosecutor's reference to Turner's fear of returning to prison. Again, as explained above, we conclude that even if appellate counsel had raised the matter on appeal, a different result was not reasonably probable. Therefore, the district court did not err in summarily denying these claims.

Next, Turner claims that appellate counsel was ineffective for failing to raise a direct appeal claim challenging the Kazalyn instruction given at trial. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). While Turner's appeal was pending, this court decided Byford v. State, which disapproved of the Kazalyn instruction on the mens rea required for a first-degree murder conviction based on willful, deliberate, and premeditated murder, and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. Byford was decided on February 28, 2000. Turner's direct appeal was decided on August 11, 2000. Turner v. State, Docket No. 33967 (Order Dismissing Appeal, August 11, 2000). Therefore, Turner's

conviction was clearly not yet final when Byford was decided. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (stating that "[a] conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired"); Sup. Ct. R. 13 (stating that petition for writ of certiorari to United States Supreme Court must be filed within 90 days after entry of judgment or order sought to be reviewed). This court recently held that Byford applies to cases that were pending on appeal at the time Byford was decided. Nika v. State, 124 Nev. ___, ___ P.3d ___ (Adv. Op. No. 103, December 31, 2008). Accordingly, as a matter of due process, the new rule announced in Byford applies to Turner. Id. at 22-23. Therefore, Turner's appellate counsel was deficient for failing to challenge the erroneous Kazalyn instruction.

However, Turner fails to demonstrate that he was prejudiced. Instructional error is subject to harmless error review. Cortinas v. State, 124 Nev. __, ___, 195 P.3d 315, 324 (2008). In this case, there was overwhelming evidence that Turner was guilty of felony murder. Turner confessed to the police that he conspired to commit the crimes that resulted in Marnie Hickman's death. Moreover, the jury found Turner guilty of the underlying crimes of conspiracy to commit robbery, robbery with the use of a deadly weapon, and burglary. By definition, the conspiracy conviction required the jury to find beyond a reasonable doubt that Turner had the specific intent to commit robbery. See Nelson v. State, 123 Nev. ___, ___ n.37, 170 P.3d 517, 527 n.37 (2007). Because the jury found that Turner intended to commit robbery, the fact that the robbery resulted in Hickman's death was all that was required for a conviction of first-degree murder. See Payne v. State, 81 Nev. 503, 505-06,

406 P.2d 922, 924 (1965); NRS 200.030. Accordingly, we are convinced "that the error complained of did not contribute to the verdict obtained." Cortinas, 124 Nev. at ___, 195 P.3d at 324. Thus, Turner failed to demonstrate that a Byford claim had a reasonable probability of success on appeal; therefore, the district court did not err in denying this claim.

Third, Turner claims that his appellate counsel was ineffective for failing to raise a claim that the district court erred in denying his motion in limine to exclude a photograph of the victim with her one-year-old child. Turner argues that "there was no explanation for the reason the child was included in the identification of the deceased victim" and that the picture unduly influenced the jury. Appellant failed to demonstrate prejudice. The record reflects that it was the only picture, with the exception of autopsy and crime scene photos, available to the prosecution. In ruling on appellant's motion, the district court stated, "I don't find the fact that it shows the victim with her child, who happens to be in the picture, unduly prejudicial, in fact, I don't find it prejudicial at all." We concur that the mere presence of the deceased victim's child in the photo was not unduly prejudicial. Accordingly, appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in summarily denying this claim.[5]

Finally, Turner claims that appellate counsel was ineffective for failing to raise a claim under Batson v. Kentucky, 476 U.S. 79 (1986), on direct appeal. Turner failed to demonstrate deficient performance or prejudice. There were four African-Americans on the prospective jury, one

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[5]Inasmuch as Turner raises a claim of cumulative trial error, that claim should have been raised on direct appeal and is procedurally barred. NRS 34.810(1)(b)(2).

male and three females. The prosecutor exercised peremptory challenges against the African-American female jurors (jurors 2, 7, and 10). The defense objected to the State's use of its peremptory challenges and raised a claim pursuant to Batson. Id. at 96 (holding that government's exercise of peremptory challenges in racially discriminatory manner violates equal protection). The district court concluded that jurors 2 and 7 had been properly challenged, but rejected a peremptory challenge of juror 10.

This court has previously adopted the three-step analysis set forth by the United States Supreme Court in Purkett v. Elem, 514 U.S. 765, 767 (1995), for consideration of a Batson claim. Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004). First, "the opponent of the peremptory challenge must make out a prima facie case of discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). Next, "the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge." Id. Finally, "the trial court must then decide whether the opponent of the challenge has proven purposeful discrimination." Id. Here, the district court concluded that because the only three peremptory challenges exercised by the prosecution were directed at African-American women, the defense made a prima facie case of discrimination. Next, the district court concluded that the State had asserted a sufficient neutral explanation for each challenge. Finally, the district court found that the challenges of jurors 2 and 7 were appropriate but declined to permit the prosecution to exercise a peremptory challenge with respect to juror 10.

In particular, juror number 2's son had recently been arrested and she felt that he was treated unfairly by law enforcement. Further, the district court noted that when she was excused "not only did she exhibit her enthusiasm for being excused, but she indicated her enthusiasm to the

members of the remaining jury panel . . . which caused some laughter by the remaining jury panel members." In the district court's view, it was "quite possible . . . that she was looking for a reason to be excused from the jury."

Juror number 7 stated that she had been the victim of previous crimes and that law enforcement had failed to provide her with sufficient protection. She further stated that she was reluctant to judge anyone because she was not perfect herself. The district court also noted that she displayed hostility toward the prosecution and that her body language raised legitimate concerns about her willingness to be fair to both sides.

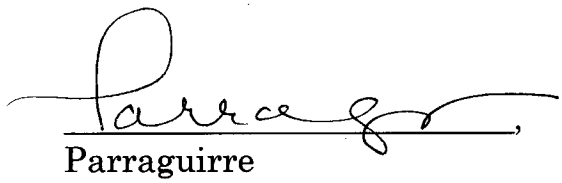
Finally, during voir dire juror number 10 stated, "My morals, what I consider right or wrong or I believe to be right or wrong takes precedence over what Nevada State says is law." However, after further questioning, she stated that even if she disagreed with the law, if she was sworn in as a juror she would follow the law and adopt it as it applies in the case. The district court stated that while there was justifiable concern after her first comments, "upon further inquiry . . . she indicated in this case she did not feel that there was any basis for . . . concern regarding her moral convictions and that she, upon taking her oath in this case, would follow her oath." The district court determined that while there was "some racially neutral context upon which the State could base its peremptory challenge," it was not satisfied that the challenge should be upheld and declined to permit the State to use a peremptory challenge against juror number 10.

After review of the record, we conclude that Turner failed to demonstrate a reasonable probability that a Batson claim would have had

success on appeal. Therefore, the district court did not err in summarily denying this claim.

Having considered all of Turner's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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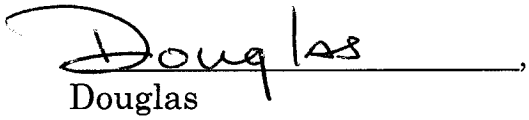

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cc: Hon. Lee A. Gates, District Judge
Gary Gowen
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk