IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD LEE JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47771

FILED

DEC 31 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Edward Lee Jones stands convicted of first-degree murder with the use of a deadly weapon in the 1991 stabbing death of his girlfriend, Pamela Williams. A jury sentenced him to death. This court affirmed the conviction and sentence on appeal.[1] Jones then sought relief from the judgment in district court based on ineffective assistance of trial and appellate counsel. The district court denied relief. This appeal followed.

In this appeal, we consider whether the district court erred by rejecting Jones's claims that trial and appellate counsel provided

[1]Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997).

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ineffective assistance in violation of the Sixth Amendment. With respect to the ineffective-assistance claims related to the guilt phase of the trial, we conclude that Jones failed to establish at least one prong of the test articulated in Strickland v. Washington[2] as to each claim. Because we conclude that Jones failed to demonstrate that he received constitutionally inadequate representation with respect to the guilt phase, we affirm the district court's order to the extent that it denied those claims. With respect to the ineffective-assistance claims related to the penalty phase of the trial, we conclude that counsel provided constitutionally inadequate representation. Therefore, we reverse the district court's order to the extent that it denied those claims, and we remand for a new penalty hearing.

Turning to the factual and procedural background of this case, on August 22, 1991, during an argument, Jones attempted to choke Williams and then stabbed her with a kitchen knife approximately 36 times. Jones was arrested shortly after Williams's death, and he admitted to choking and stabbing her.

At trial, Jones was represented by Arnold Weinstock and Paul Wommer, who also represented Jones on direct appeal.[3] Jones's theory of

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[2]466 U.S. 668 (1984).

[3]Jones had been convicted of first-degree murder and sentenced to death in a prior trial. That conviction was reversed on appeal based on ineffective assistance of counsel because trial counsel, without securing Jones's consent, conceded that Jones killed Williams and argued for second-degree murder. Jones v. State, 110 Nev. 730, 877 P.2d 1052

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defense was that the State did not prove beyond a reasonable doubt that Jones killed Williams. Rather, according to the defense, the State had only proved that Jones argued with Williams and that a stabbing occurred. The jury disagreed and found Jones guilty of first-degree murder with the use of a deadly weapon.

In seeking the death penalty, the State alleged two aggravating circumstances—Jones was previously convicted of a felony involving the use or threat of violence to the person of another and the murder involved the mutilation of the victim. To support these aggravating circumstances, the State introduced evidence of Jones's prior conviction for robbery with the use of a deadly weapon and relied on the evidence introduced at the guilt phase respecting the nature and extent of the stab wounds on Williams's body. To support its argument that death was the appropriate punishment, the State presented evidence of Jones's juvenile record, which consisted primarily of burglaries, and that Jones had once pointed a rifle at his mother. In addition, Williams's brother testified that Jones had once shot someone, although Jones was not charged with any crime related to the shooting. And corrections officers testified that Jones had started a fire in his cell, attempted to strike corrections officers, and possessed a shank fashioned out of a sharpened

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(1994). On remand, Jones was tried and convicted a second time, and this court affirmed the judgment on appeal. Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997).

toothbrush. Jones called no witnesses but gave a statement in allocution expressing his sorrow about Williams's death.

The jury found both aggravating circumstances and three mitigating circumstances—Jones committed the murder while he was under the influence of extreme mental or emotional disturbance, he acted under duress or under the domination of another person, and "any other mitigating circumstances."[4] Determining that the aggravators outweighed the mitigators, the jury imposed death. This court affirmed the judgment of conviction on appeal.[5]

Jones filed a proper person post-conviction petition for a writ of habeas corpus in the district court, after which the district court appointed counsel, who filed a supplemental petition. The district court conducted an evidentiary hearing, in which trial counsel Weinstock and Wommer provided the sole testimony. Weinstock testified at length respecting numerous claims raised in the petition. Wommer's testimony was brief, primarily consisting of an acknowledgment that he had nothing to add to Weinstock's testimony and a statement that he had prepared the argument on direct appeal challenging the mutilation aggravator. Subsequently, the district court entered findings of fact and conclusions of

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[4]The jurors rejected four other mitigators—no significant prior criminal history, the victim consented or participated in Jones's criminal act, Jones was an accomplice in a murder committed by someone else, and Jones's youth.

[5]Jones, 113 Nev. 454, 937 P.2d 55.

law denying all of Jones's claims. Jones now appeals the district court's denial of his post-conviction petition.

Jones contends that the district court erred by denying numerous claims of ineffective assistance of trial and appellate counsel. He contends that these errors warrant reversal of the district court's order and a remand for a new trial. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review."[6] However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court.[7] A claim that counsel provided constitutionally inadequate representation is subject to the two-part test established by the Supreme Court in Strickland v. Washington.[8] To prevail on a claim of ineffective assistance of trial or appellate counsel, a defendant must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[9] The defendant bears the burden to "prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[10] To establish prejudice resulting from trial counsel's inaction or omission, a

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[6]Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

[7]Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

[8]466 U.S. 668 (1984).

[9]Id. at 687.

[10]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

defendant must demonstrate a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance.[11] To establish prejudice resulting from appellate counsel's deficiency, a defendant must establish that the omitted issue had a reasonable probability of success on appeal.[12] "The defendant carries the affirmative burden of establishing prejudice."[13] A court need not consider both prongs of the Strickland test if a defendant makes an insufficient showing on either prong.[14]

Guilt phase ineffective-assistance claims

Jones argues that the district court erred by denying his claims of ineffective assistance of trial and appellate counsel related to the guilt phase of his trial. For the reasons set forth below, we conclude that Jones failed to demonstrate that trial and appellate counsel were ineffective for any of the reasons asserted. Therefore, the district court did not err by denying these claims.

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[11]Strickland, 466 U.S. at 694; Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[12]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[13]Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994).

[14]Strickland, 466 U.S. at 697.

Claims of ineffective assistance of trial counsel

Trial counsel's qualifications, competence, and conflicts of interest

Jones argues that the district court erred by rejecting his claim that he was not appointed qualified, competent, and conflict-free counsel as procedurally barred because he did not raise these concerns on direct appeal. We agree that this claim was not subject to a procedural bar. Because the underpinnings of Jones's claim are grounded in a challenge to trial counsel's performance, this claim was properly raised for the first time in a post-conviction habeas petition.[15] Nonetheless, we conclude that the district court did not err by denying the claim because Jones failed to demonstrate that counsel provided constitutionally inadequate representation on the grounds asserted.

Jones challenges trial counsel's qualifications and competence on three grounds: (1) he was left unrepresented during critical pretrial stages of his case, (2) the district court failed to ascertain whether Weinstock and Wommer were qualified under SCR 250, and (3) Weinstock had a conflict of interest. For the reasons explained below, we conclude that Jones failed to establish that counsel were ineffective on any of those grounds. Therefore, the district court did not err by denying these claims.

First, Jones contends that he was left unrepresented during critical pretrial stages of his case. In particular, Jones asserts that at the

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[15]Pellegrini v. State, 117 Nev. 860, 882, 34 P.3d 519, 534 (2001) (stating that "[i]neffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition").

time Weinstock was appointed as counsel, he had pleaded guilty to a disciplinary infraction and was under a 30-day suspension and that at some point after being appointed as counsel, Weinstock's law firm was sanctioned by this court and removed from the list of attorneys eligible for appointment to represent indigent defendants in district court for a period of one year.[16] As to Weinstock's 30-day suspension, the record indicates that Jones was represented not only by Weinstock but by Weinstock's law firm, which included at least one other practicing lawyer in addition to Weinstock. It therefore appears that Jones was represented by counsel during Weinstock's 30-day suspension. As to the law firm's suspension from indigent-defense appointments, the district court concluded that the sanction against the firm only affected prospective appointments. Thus, Jones was not left without counsel as a result of the sanction imposed against the law firm. And when Weinstock's partner withdrew from the case, the district court appointed Paul Wommer as co-counsel. Therefore, Jones's claim that he was unrepresented lacks merit.

Second, Jones argues that the district court failed to ascertain whether Weinstock was qualified under SCR 250. At the time of Jones's trial, SCR 250 provided that "unless the court determines that an attorney otherwise has the competence and ability to represent a defendant in a capital case," trial counsel must meet three minimum requirements—(1) "acted as counsel in no less than seven felony trials, at least two of which

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[16]See Burke v. State, 110 Nev. 1366, 887 P.2d 267 (1994).

involved violent crimes, including one murder case," (2) "previously acted as co-counsel in at least one death penalty trial," and (3) "licensed to practice law for at least three years." Jones alleged no specific factual allegations to support his claim that Weinstock was unqualified to represent him, other than general assertions that Weinstock's "repeated errors, mistakes and omissions" showed his lack of qualifications, resulting in prejudice. Jones also makes a perfunctory allegation that the district court made no inquiries into Wommer's "experience, education, resources or other qualifications to serve as counsel in a capital case." Jones raised nothing more than a bare allegation in this regard.[17]

Finally, Jones contends that Weinstock had a conflict of interest and, as a result of that conflict, he declined to call Dr. Louis Mortillaro, a psychologist, to testify at trial. In particular, Jones asserts that counsel declined to call Dr. Mortillaro because Dr. Mortillaro had been identified as a witness against Weinstock in a malpractice suit. While "[e]very defendant has a constitutional right to the assistance of counsel unhindered by conflicting interests,"[18] "a defendant . . . must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[19] Jones failed to make the required demonstration. Weinstock testified at the post-conviction evidentiary hearing that he

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[17]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[18]Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

[19]Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

decided not to call Dr. Mortillaro because he did not believe Dr. Mortillaro was helpful to the case. Instead, the defense called another psychologist to testify on Jones's behalf. Jones fails to adequately explain how Dr. Mortillaro's testimony at trial would have been more helpful than the expert testimony presented. And "[a] strategy decision, such as who should be called as a witness, is a tactical decision that is 'virtually unchallengeable absent extraordinary circumstances.'"[20] Weinstock articulated a tactical reason for not calling Dr. Mortillaro, and nothing in Weinstock's decision suggests that it was grounded in an actual conflict of interest rather than a trial strategy. Under the circumstances, Jones failed to allege sufficient facts demonstrating that an actual conflict of interest affected Weinstock's performance.[21]

Although we conclude that the district court erred by denying these claims as procedurally barred,[22] Jones failed to establish that trial

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[20]Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

[21]See Cuyler, 446 U.S. at 348.

[22]See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (stating that "[i]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal").

counsel were ineffective on the grounds he asserted. Consequently, we conclude that relief is not warranted in this regard.[23]

Pretrial motions

Jones contends that the district court erred by denying his claim that trial counsel were ineffective for failing to adequately prepare for trial by reading the transcripts from his first trial, which would have alerted counsel to file several pretrial motions in limine to exclude certain testimony. Specifically, Jones argues that counsel should have sought to exclude testimony that Williams was planning to leave Nevada and was afraid of Jones, that Williams's mother and sister were afraid for Williams because of Jones, and that Jones had attempted to commit suicide. In addition to prejudice resulting from counsel's failures to file these motions in limine, Jones argues that counsel's failure to file these motions caused numerous delays during trial while evidentiary issues were decided, resulting in counsel's election to forgo calling several witnesses.

Even assuming counsel should have filed Jones's desired pretrial motions, Jones must still demonstrate prejudice by establishing a reasonable probability that but for counsel's failure in this respect, the results of his trial would have been different. We conclude that he failed

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[23]Jones argues that trial counsel failed to adequately communicate with him, but he makes no specific arguments showing prejudice, instead only claiming that more consultation with him would have made counsel better prepared for trial. We conclude that Jones failed to establish that trial counsel were ineffective on this basis and that the district court did not err by denying this claim. See Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

to demonstrate prejudice in light of the evidence establishing his guilt, particularly his admissions that he choked and stabbed Williams. Moreover, Jones fails to adequately explain the relevance of the witnesses counsel decided not to call or how their testimony would have changed the outcome of his trial. Accordingly, we conclude that the district court did not err by denying this claim.

Jury selection

Jones complains that the district court erred by denying his claim that trial counsel were ineffective for failing to object to the district court's and the State's qualifying the jurors by asking if they could "equally consider" all three potential penalties. We disagree. As this court recognized in Leonard v. State, a juror's ability to "equally consider" all punishments is not required and references to "equal" consideration in the voir dire and jury questionnaire may result in prejudice if a "prospective juror was erroneously excused for cause because of his or her views on the death penalty."[24] Here, Jones did not argue that any particular juror was erroneously excluded based on the "equal" consideration inquiry or on his or her view of the death penalty.

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[24]117 Nev. 53, 65-66, 17 P.3d 397, 405 (2001). This court also recognized that trial counsel's failure to object to the references to "equal" consideration could have reflected a tactical decision if, for example, trial counsel concluded that the challenged juror was biased and properly excluded or was undesirable on some other ground. Id. at 67, 17 P.3d at 406.

Considering the law at the time of Jones's trial[25] and his failure to identify any juror erroneously removed for cause based on the "equal" consideration inquiry, we conclude that Jones's failed to demonstrate that trial counsel were ineffective in this regard. Consequently, we conclude that the district court did not err by denying this claim.[26] Further, we decline Jones's invitation to overrule Leonard in this respect.

Counsel's absences during trial

Jones asserts that the district court erred by denying his claim that trial counsel were ineffective for not ensuring that both counsel were present at all critical stages of the proceedings. In particular, he notes that Wommer appeared in federal court during the testimony of a criminalist and a serologist and that Weinstock missed a day of the proceedings due to illness and missed the testimony of a police officer and two criminalists. Jones concedes that he consented to these absences but

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[25]We note that although in Leonard we declined to find plain error, we included a prospective direction to district courts to cease using "equal" consideration inquiries in either voir dire or jury questionnaires. 117 Nev. at 67-68, 17 P.3d at 406. Leonard was decided several years after Jones's trial, however, and therefore that prospective direction was not in force during Jones's trial.

[26]To the extent Jones argues that the district court erred by inquiring whether the jurors could equally consider the death penalty and other lesser sentences, this claim is procedurally barred absent a showing of good cause and prejudice because it could have been raised on direct appeal. See NRS 34.810(1)(b)(2), (2). We conclude that Jones failed to demonstrate good cause and prejudice. Therefore, the district court did not err by denying this claim.

claims he was not fully advised as to his right to have both attorneys present at all critical stages. He further claims that he need not demonstrate prejudice as a result of counsel's absences because the denial of counsel is a structural error.

We reject Jones's contention that trial counsel's absences violated his right to counsel or constituted structural error. The Sixth Amendment guarantees "every criminal defendant . . . the right to have representation during each 'critical stage' of adversarial proceedings."[27] A denial of the right to counsel is of such significance that the United States Supreme Court has concluded that a total deprivation of the right to counsel constitutes structural error, which is per se reversible.[28] Jones, however, was not faced with a total deprivation of counsel.[29] Rather, he was represented by counsel at all critical stages of the criminal proceedings, albeit in one or two instances by only one counsel. And Jones cited no authority suggesting that the absence of one counsel constitutes an unconstitutional denial of his right to representation. Consequently,

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[27]Dzul v. State, 118 Nev. 681, 685, 56 P.3d 875, 878 (2002); see Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (securing right of criminal defendant to be represented by counsel in state prosecutions).

[28]Johnson v. United States, 520 U.S. 461, 468-69 (1997); see Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (explaining structural error as "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself").

[29]See Gideon, 372 U.S. 335.

we conclude that under these circumstances, Jones was not denied his right to counsel.

Further, Jones did not demonstrate that the single counsel present in the instances he cites provided deficient representation as a result of co-counsel's absence. He suggests that the absences left counsel unprepared, but he failed to support this contention with anything other than speculation. Nor does the record support Jones's speculative claim that the jury drew a negative inference from counsel's absences. Because Jones failed to demonstrate deficient representation or prejudice based on counsel's absences, we conclude that the district court properly denied this claim.

Expert witnesses

Jones contends that the district court erred by denying his claims that trial counsel were ineffective in five instances related to expert testimony. We disagree.

First, Jones argues that trial counsel provided constitutionally ineffective assistance by failing to adequately prepare the defense's expert psychologist, Dr. Hess, for his interview with Jones by informing Dr. Hess of Jones's prior suicide attempt. This claim lacks merit because Jones failed to demonstrate prejudice. The crux of Dr. Hess's testimony concerned his conclusion that Jones suffered from cocaine intoxication at the time of Williams's murder. In an effort to undermine Dr. Hess's credibility, the State elicited on cross-examination that Dr. Hess was unaware of certain facts about Jones, including Jones's suicide attempt. Dr. Hess agreed with the State that Jones's attempt may have been an effort to manipulate Williams because Williams and her young daughter

were apparently nearby when Jones made the attempt. But Dr. Hess testified as a general matter that the circumstances the State presented to him about Jones of which Dr. Hess was unaware at the time of his evaluation did not "change the basic facts" upon which he based his conclusion that Jones suffered from cocaine intoxication at the time of Williams's murder. Because Dr. Hess's testimony indicates that his opinion respecting Jones's cocaine intoxication was unaffected by Jones's suicide attempt, Jones failed to demonstrate prejudice as he suggests. Therefore, we conclude that the district court did not err by denying this claim.

Second, Jones argues that trial counsel should have had Jones's blood sample independently tested for alcohol content in light of Jones's statement to police that he had been drinking the night before the killing. We conclude, however, that even assuming trial counsel should have had the sample independently tested, Jones failed to establish that such testing would have resulted in a different outcome. Because Jones failed to demonstrate deficient representation or prejudice based on counsel's failure to secure blood alcohol testing, we conclude that the district court did not err by denying this claim.

Third, Jones contends that trial counsel should have called a toxicology expert to testify about the cocaine metabolite found in his system and the effects of cocaine. Jones speculates that had counsel called a toxicology expert, the evidence would have shown that he was unable to act with premeditation and deliberation. However, he failed to provide any evidence establishing that a toxicology expert would have testified that the amount of cocaine metabolite found in his system suggested a

level of impairment at the time of the offense that would have rendered him incapable of forming the requisite intent for first-degree murder. Because Jones failed to demonstrate prejudice, we conclude that the district court did not err by denying this claim.

Fourth, Jones argues that trial counsel should have called an expert to show that the police incompetently processed the crime scene by neglecting to collect hair, fiber, and fingerprint evidence and failing to investigate whether Williams's body had been moved. Jones contends that such an expert would have uncovered "serious errors and violations in protocol." Jones further claims that counsel should have called an expert to address the coroner's failure to establish a time of death. These claims are speculative, however, as they do not suggest that exculpatory evidence would have been uncovered or that any evidence resulting from the omissions would have affected the outcome of the trial, particularly in light of Jones's admissions that he choked and stabbed Williams. Because Jones failed to demonstrate prejudice, we conclude that the district court did not err by denying these claims.

Fifth, Jones contends that the most glaring example of trial counsel's ineffectiveness is their stipulation to the State's DNA analysis of blood found at the crime scene and on Jones. Jones argues that competent counsel should not "stipulate" to share an expert with the State. Rather, according to Jones, counsel should have retained a defense expert to examine the blood and DNA evidence. However, Jones does not argue and has not demonstrated that had a DNA expert of his choosing tested the blood evidence, the tests would have yielded different results. Further, to the extent Jones challenges his counsel's alleged failure to investigate the

qualifications of the State's expert or the integrity of the DNA testing process, he failed to provide any evidence impeaching the expert's qualifications or the testing procedures. Because Jones failed to demonstrate prejudice, we conclude that the district court did not err by denying this claim.

Rebuttal evidence and defense witnesses

Jones contends that the district court erred by denying his claim that trial counsel were ineffective for failing to rebut two theories presented by the State. First, Jones argues that counsel should have rebutted the State's argument that Jones killed Williams because she intended to leave him. He asserts that had counsel discussed this matter with him or his mother, counsel would have learned that he and Williams planned to marry and take the children on a cruise. Second, Jones contends that counsel should have rebutted the State's contention that Jones manipulated Williams into staying with him by attempting suicide. He argues that counsel should have presented evidence of his suicide attempts after Williams's death to show a series of suicide attempts that continued after Williams's death rather than a single incident designed to manipulate her. However, even assuming counsel had rebutted the State's evidence on these matters, Jones failed to demonstrate prejudice in light of his admissions that during an argument with Williams, he choked her, retrieved a knife from the kitchen, and stabbed her. Therefore, we conclude that the district court did not err by denying these claims.

Jones also argues that counsel, in a rush to complete the trial, failed to call five witnesses on his behalf, including an expert in police procedures, psychologist Dr. Mortillaro, a bank records custodian, and two

witnesses who apparently could verify that Jones and Williams purchased a mobile home and leased a space in a mobile home park. However, Jones did not adequately explain the significance of these witnesses or present testimony or offers of proof from these witnesses at the evidentiary hearing. Because Jones failed to demonstrate that had the testimony of these witnesses been introduced a reasonable probability existed that the outcome of the trial would have been different, we conclude that the district court did not err by denying this claim.

First-degree murder instruction

Jones contends that the district court erred by denying his claims that trial and appellate counsel were ineffective for failing to challenge the propriety of the first-degree murder instruction because it did not include the terms willfulness and deliberation. We disagree.

The general instruction on first-degree murder used in this case advised the jury that "[m]urder in the First Degree is the premeditated unlawful killing of a human being, with malice aforethought, whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." Jones correctly observes that the instruction omitted the words willfulness and deliberation.[30] While counsel should have challenged the instruction at trial and on appeal, we conclude that Jones was not prejudiced by this omission. Adding the missing words to the general instruction would not have changed the outcome at trial or had success on appeal because, in

[30]See NRS 200.030(1)(a).

addition to the defective instruction, the jury was also given what is commonly known as the Kazalyn[31] instruction. That instruction, which was the law at the time of Jones's second trial,[32] effectively advised the jury that if it found premeditation, then the killing was willful, deliberate, and premeditated murder. Given the Kazalyn instruction, adding the omitted terms to the first-degree murder instruction would not have had the effect of requiring the jury to find "willfulness" and "deliberation" apart from finding "premeditation." Therefore, Jones failed to demonstrate that there is a reasonable probability that a correct general instruction would have led to a different outcome at trial or entitled Jones to relief on appeal. Because Jones failed to show that counsel's omissions

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[31]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). In accordance with Kazalyn, the jury was instructed as follows:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
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> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

[32]See Nika v. State, 124 Nev. ___, ___ P.3d ___ (Adv. Op. No. ___, December ___, 2008).

prejudiced him, we conclude that the district court did not err by denying this claim.[33]

Preservation of record and right to public trial

Jones contends that the district court erred by denying his claim that trial counsel were ineffective for failing to ensure that several bench conferences and chambers meetings were recorded. We disagree.

As this court has recognized, "[o]nly rarely should a proceeding in a capital case go unrecorded."[34] But we have also recognized that a capital defendant's right to have trial proceedings recorded and transcribed is not absolute[35] and that the "[t]he mere failure to make a record of a portion of the proceedings . . . is not grounds for reversal."[36] Rather, a defendant must show that the subject matter of the omitted portions of the record was so significant that meaningful appellate review is handicapped.[37]

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[33]To the extent Jones argues that the district court erroneously instructed the jury on first-degree murder, this claim is procedurally barred absent a showing of good cause and prejudice because it could have been raised on direct appeal. NRS 34.810(1)(b)(2), (2). We conclude that Jones failed to demonstrate good cause and prejudice. Therefore, the district court did not err by denying this claim.

[34]Daniel v. State, 119 Nev. 498, 507, 78 P.3d 890, 897 (2003).

[35]Archanian v. State, 122 Nev. 1019, 1033, 145 P.3d 1008, 1018-19 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 3005 (2007).

[36]Daniel, 119 Nev. at 508, 78 P.3d at 897.

[37]Id.

In this case, Jones has not demonstrated prejudice as a result of trial counsel's failure to ensure that all bench conferences and chambers meetings were recorded. Specifically, he has not demonstrated that the failure to record those proceedings undermined the reliability of the outcome of the trial or impeded this court's appellate review. Therefore, we conclude that the district court did not err by denying this claim.

Jones also argues that trial counsel's failure to ensure that the challenged off-the-record conferences and chambers hearings were held within public hearing and view denied his right to a public trial. However, he failed to adequately explain how conducting several bench conferences and chambers hearings out of the public view denied him his right to a public trial. Jones also complained that trial counsel failed to ensure his presence at the challenged off-the-record proceedings and therefore denied his right to be present during critical stages of the proceeding. However, "a [capital] defendant does not have an unlimited right to be present at every trial proceeding."[38] Here, Jones failed to adequately explain how he was prejudiced by his absence from any pretrial hearing. Accordingly, because Jones failed to demonstrate prejudice, we conclude that the district court did not err by denying these claims.[39]

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[38]Gallegos v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001).

[39]To the extent Jones argues that the district court failed to ensure that all off-the-record conferences were recorded, open to the public, and conducted in his presence, these claims are procedurally barred absent a showing of good cause and prejudice because they could have been raised on direct appeal. NRS 34.810(1)(b)(2), (2). We conclude that Jones failed

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Closing argument

Jones argues that the district court erred by denying his claim that trial counsel were ineffective for not objecting to numerous improper comments the prosecutor made during closing argument. We have considered each alleged instance of prosecutorial misconduct and conclude that even if counsel should have objected, there is no reasonable probability of a different outcome during the guilt phase because, as this court held on direct appeal,[40] there was overwhelming evidence of Jones's guilt.[41] Therefore, we conclude that the district court did not err by denying these claims.[42]

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to demonstrate good cause and prejudice. Therefore, the district court did not err by denying these claims.

[40]Jones v. State, 113 Nev. 454, 467-68, 937 P.2d 55, 64 (1997).

[41]King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (stating that in instances where there is overwhelming evidence of guilt, "even aggravated prosecutorial misconduct may constitute harmless error").

[42]To the extent Jones argues that the district court erred by denying his claim that prosecutorial misconduct warrants reversal of his conviction, this claim is procedurally barred absent a showing of good cause and prejudice because it could have been raised on direct appeal. NRS 34.810(1)(b)(2), (2). We conclude that Jones failed to demonstrate good cause and prejudice. Therefore, the district court did not err by denying this claim.

Claims of ineffective assistance of appellate counsel

Jones contends that the district court erroneously denied several claims respecting ineffective assistance of appellate counsel. To the extent that Jones's appellate counsel claims are based on the same grounds underlying his trial counsel claims addressed in this decision, we conclude that Jones failed to demonstrate that any omitted issue had a reasonable probability of success on appeal based on our reasoning related to the trial counsel claims.[43] Jones also contends that appellate counsel failed to frame his claims in the context of federal constitutional concerns to preserve them for federal review. We conclude, however, that Jones failed to show that had appellate counsel invoked the federal constitution Jones would have enjoyed any resulting success on appeal. Therefore, we conclude that the district court did not err by denying these claims.[44]

Penalty phase claims

Jones argues that the district court erred by denying his claims of ineffective assistance of counsel related to the penalty hearing. Jones contends that counsel were ineffective on several grounds; however, we consider two grounds sufficient to justify a new penalty hearing—trial

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[43]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[44]We also reject Jones's claim that the district court erred by denying his claim that the impact of cumulative errors committed in the guilt phase mandate reversal of his conviction. We conclude that Jones failed to demonstrate that any error, considered individually or cumulatively, resulted in prejudice. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

and appellate counsel's failure to challenge numerous instances of prosecutorial misconduct and trial counsel's failure to investigate and prepare a case in mitigation. For the reasons explained below, we conclude that the district court erred by denying these claims and that counsel's ineffective representation in these areas warrants a new penalty hearing. We further conclude that trial counsel were deficient for failing to object to an erroneous mutilation instruction but that Jones did not show a reasonable probability of a different result absent trial counsel's deficiency.

Prosecutorial misconduct

Jones contends that the district court erred by denying his claims that trial and appellate counsel were ineffective for failing to challenge instances of prosecutorial misconduct. Although Jones points to numerous comments by the prosecutor that should have been challenged by counsel, we address the most problematic instances of misconduct.

Jones first argues that the prosecutor committed misconduct when she referred to his "animal lust" and "thirst for blood." We have disapproved of such arguments as improperly "toying with the jurors' imagination," and we do so again here.[45] The prosecutor also disparaged Jones by referring to him as "self-centered, selfish, a small package" and "a shallow, gruesome, deranged, and brutal killer who needs the death penalty" and describing him as "evil from the beginning." While it was

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[45]Pacheco v. State, 82 Nev. 172, 179-80, 414 P.2d 100, 103-104 (1966); see Collier v. State, 103 Nev. 563, 566, 747 P.2d 225, 227 (1987).

certainly proper for the prosecutor to argue that Jones deserved death based on the heinous nature of the crime,[46] her rhetoric was unduly inflammatory and unnecessary.

Jones also points to instances in which the prosecutor invoked her authority and experience as a prosecutor. In particular, she argued,

> [W]e expect as prosecutors, as defense, anyone in the system expects that unfortunately there are going to be killings and there are going to be murders. But what we don't expect is someone to be mutilated and stabbed thirty-five to thirty-six times with a . . . butcher knife. That we don't expect. And that's why he needs and that's why he deserves the death penalty.

She also argued that "we know [the death penalty] deters." As this court has explained, it is improper for a prosecutor to "invoke[e] the authority of his supposedly greater experience and knowledge" because doing so "invites undue jury reliance upon the conclusions he personally endorses."[47] Here, the prosecutor's arguments improperly invoked her authority and experience.

Jones further points to multiple instances in which the prosecutor argued facts not in evidence. For example, the prosecutor suggested to the jury that Williams repeatedly "cried out and begged for

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[46]Jones v. State, 113 Nev. 454, 467-69, 937 P.2d 55, 64 (1997).

[47]Guy v. State, 108 Nev. 770, 786, 839 P.2d 578, 588 (1992); Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985).

her life, and she begged to stay alive on behalf of those children of hers."[48] Later in her argument, the prosecutor again commented that Williams "cried out not to be stabbed" and that Williams "begged for mercy and for her life." The prosecutor also argued that Williams's young son probably saw her body, "and he hid. And maybe that's why to this day that child can be found in the morning when they wake up and he's hidden, hiding, sleeping under tables, under lamps."[49] Nothing in the evidence adduced at trial suggested that Williams cried out or begged for mercy during the stabbing or that her son saw her body.[50] As we have held on numerous occasions, it is improper for a prosecutor to argue facts not in evidence.[51] Here, the prosecutor not only stated facts not supported by the evidence but repeated the errors throughout her closing argument.

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[48]We recognize that trial counsel objected to the prosecutor's first reference to Williams having cried out and begged for mercy during the stabbing. However, the prosecutor engaged in this argument repeatedly in her presentation with no further objection from trial counsel.

[49]Williams's sister testified during the penalty hearing that her nephew slept under a lamp because he did not like to sleep in the dark.

[50]Trial counsel objected to the prosecutor's statements respecting Williams's son. However, appellate counsel did not raise this matter on appeal.

[51]Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 418 (2007), cert. denied ___ U.S. ___, 129 S. Ct. 95 (2008); Butler v. State, 120 Nev. 879, 897, 102 P.3d 71, 84 (2004); Rippo v. State, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997).

Finally, Jones points to instances in which the prosecutor attempted to inflame the jurors' passions. Specifically, the prosecutor argued, "We know from [Williams's brother] that holidays aren't the same anymore." "Holiday" arguments are clearly improper because "they have no purpose other than to arouse the jurors' emotions."[52] And another prosecutor exhorted the jurors to have "vigilance, courage, strength, and resolve in making the decision that has to be made by you today." We have held similar comments to be improper because they are "designed to stir the jury's passion and appeal to partiality."[53]

These egregious instances of prosecutorial misconduct occurred throughout the penalty phase closing argument. Trial counsel should have objected and appellate counsel should have challenged these comments on appeal.

Having determined that trial and appellate counsel provided deficient representation by failing to challenge these numerous and egregious instances of prosecutorial misconduct, we must next consider whether counsel's errors prejudiced the defense at the penalty phase. We recognize that on Jones's direct appeal, this court concluded that other instances of prosecutorial misconduct during the penalty phase that had been raised on direct appeal—the prosecutor's argument that a shank found in Jones's possessions in prison could have been meant for inflicting

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[52]Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702 (1987); Hollaway v. State, 116 Nev. 732, 742-43, 6 P.3d 987, 994 (2000).

[53]Evans v. State, 117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001).

harm on the jurors and comparison of Jones to a "rabid animal"—did not prejudice Jones.[54] But in reaching that conclusion, this court applied an incorrect standard to determine whether the prosecutorial misconduct was harmless. In particular, this court concluded that the errors were harmless because there was overwhelming evidence of Jones' guilt.[55] Rather than focusing on the evidence of guilt, when reviewing prosecutorial misconduct committed during a penalty hearing, the focus of the prejudice inquiry should be on the penalty proceedings and whether the misconduct "so infected the proceedings with unfairness as to make the results a denial of due process."[56] Considering the extent of the prosecutorial misconduct at the penalty phase and the nature of the aggravating and mitigating circumstances found by the jury and the other evidence presented at the penalty hearing, we conclude that Jones demonstrated prejudice resulting from counsel's failure to challenge the prosecutorial misconduct at trial and on appeal. Therefore, we conclude that the district court erred by denying this claim.

Mitigation case

Contributing to our conclusion that a new penalty hearing is warranted is Jones's claim that the district court erred by denying his claim that trial counsel were ineffective for failing to adequately

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[54]Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997).

[55]Id. at 468, 937 P.2d at 64.

[56]Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

investigate and prepare a case in mitigation. Counsel presented no mitigation evidence other than Jones's statement in allocution in which he apologized to Williams's family and stated that he was sorry Williams was dead and that he "wasn't able to protect her." Jones further expressed his love for Williams and his appreciation to counsel.

We recognize that Jones waived his right to present mitigation evidence, which he had the right to do.[57] However, the scope of the waiver is unclear. At the post-conviction evidentiary hearing, Weinstock testified that Jones was ambivalent about returning to death row and that Jones stated that he did not want to present "any Defense." In response to the an inquiry about whether Jones wanted family members to testify on his behalf, Weinstock testified that he did recall the "actual specific conversation" about that subject but that Jones stated that he did not want his mother present at the penalty hearing or called as a witness. Weinstock's broad testimony that Jones desired no case in mitigation, however, conflicts with the trial record. At trial, Wommer informed the district court that, contrary to counsel's wishes, Jones did not want his mother or sister to testify on his behalf. Weinstock also advised the district court that they discussed with Jones the relevance of introducing medical records that revealed "prior mental problems that he may have been suffering from, prior suicide attempts, those types of things." Weinstock stated that Jones "[did] not want any of that presented." Jones

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[57]Kirksey v. State, 112 Nev. 980, 995, 923 P.2d 1102, 1112 (1996).

informed the district court that counsel's representations were correct. Although Jones waived his right to present mitigation, the scope of that waiver as articulated by trial counsel in the post-conviction proceedings is at odds with that expressed at trial.

Regardless of the scope of Jones's waiver respecting mitigation evidence, counsel's attitude and approach to the penalty hearing gives us additional concern as to whether counsel were sufficiently prepared to adequately advise Jones respecting his decision not to present mitigation evidence. In particular, Weinstock expressed at the post-conviction evidentiary hearing that he had little faith that mitigation evidence even mattered and that the penalty hearing required little thought. In particular, Weinstock testified that "you don't go into a capital case, or any case, preparing for what I'm going to do when I lose." He further expressed that "there is not a penalty phase until the defendant is convicted, and the penalty phase followed immediately after the guilt phase. So preparation, basically, is immediately after the jury returns with the guilty verdict." Weinstock reiterated this philosophy by stating, "I mean, you have that whole night after the jury verdict comes in to prepare for the penalty phase and to do whatever you can to honor the penalty phase." And most distressing, Weinstock testified,

> I am not going to spend [an] inordinate amount of time on issues that may possibly deal with mitigation presupposing that we're going to lose at trial, and the jury is going to be in any way interested or concerned in possible mitigating circumstances after they've determined that he has committed what in the jury's mind is a heinous murder.

Weinstock's testimony evinces an almost complete lack of investigative effort into possible mitigation evidence. Counsel were clearly deficient in preparing a mitigation case prior to trial. And Jones presented several affidavits in the post-conviction proceeding representing what legitimate mitigation evidence would have been found had counsel conducted any investigation. Given the additional mitigation evidence and the mitigation found at trial, counsel's deficiencies respecting penalty hearing investigation and preparation prejudiced Jones, contributing to our overall concern with the reliability of the penalty determination. Therefore, we conclude that Jones is entitled to a new penalty hearing and the district court erred by denying this claim.

Mutilation instruction

Jones contends that the district court erred by denying his claims that trial counsel were ineffective for failing to challenge an erroneous mutilation instruction. In particular, he argues that counsel should have objected to the mutilation instruction because that instruction did not advise the jury that mutilation requires something beyond the act of killing. In Browne v. State, this court expressly stated that "[m]utilation requires an act beyond the act of killing itself."[58] We recognize that Browne was decided after Jones's direct appeal. However, our conclusion in Browne is consistent with prior case law respecting the scope of the mutilation aggravator, where we stated, in explaining the

[58]113 Nev. 305, 316, 933 P.2d 187, 193 (1997).

former depravity of mind aggravator,[59] that mutilation sufficient to support "depravity of mind" must be "beyond the act of killing itself."[60] Here, although the relevant instruction correctly advised the jury respecting the definition of mutilation—"to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect"[61]—it failed to advise the jury that mutilation of the victim must be beyond the act of killing itself. We conclude that trial counsel were deficient for failing to challenge the instruction.

Although trial counsel should have objected to the erroneous mutilation instruction, we conclude that Jones failed to demonstrate prejudice. In particular, the forensic pathologist testified that Williams died as a result of "internal hemorrhage due to stab wounds of the chest." However, other than the three or four stab wounds that caused Williams's death, Jones inflicted more than 30 additional stab wounds. Some of those additional stab wounds damaged Williams's liver and nearly severed her windpipe. Other injuries to Williams's arms and hands were characterized as defensive wounds. And although the forensic pathologist

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[59]The 1995 legislature amended NRS 200.033(8) by removing the term "depravity of mind." 1995 Nev. Stat., ch. 467, § 1, at 1491.

[60]Smith v. State, 110 Nev. 1094, 1104, 881 P.2d 649, 655 (1994); Libby v. State, 109 Nev. 905, 917, 859 P.2d 1050, 1058 (1993), vacated on other grounds, 516 U.S 1037 (1996).

[61]Smith v. State, 114 Nev. 33, 39, 953 P.2d 264, 267 (1998); Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 412-13 (1979), vacated on other grounds, 500 U.S. 901 (1991).

did not describe each nonlethal injury Williams suffered, he did note stab wounds to her neck, right shoulder area, and breasts. Considering the injuries Jones inflicted on Williams in addition to those that caused her death, we conclude that Jones failed to demonstrate a reasonable probability that the jury would not have found the mutilation aggravator beyond a reasonable doubt had the jury been properly instructed. Therefore, we conclude that the district court did not err by denying this claim.[62]

We conclude that the district court erred by denying Jones's claims that trial and appellate counsel were ineffective for not challenging several instances of prosecutorial misconduct and trial counsel were ineffective for failing to investigate and prepare a case in mitigation. Because Jones was prejudiced by counsel's omissions, we conclude that he is entitled to a new penalty hearing. Accordingly, we

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[62]To the extent Jones contends that the district court erred by denying his claim that appellate counsel were ineffective for failing to challenge the mutilation instruction on appeal, we conclude that Jones failed to demonstrate that his challenge had a reasonable probability of success. We further reject Jones's claims that trial and appellate counsel were ineffective for failing to challenge the mutilation aggravator as unconstitutionally vague and overbroad because the instruction failed to advise that the aggravator requires proof of specific intent to mutilate and define terms such as "essential part of the body" and "cut off or alter radically so as to make imperfect." This court has never included an element of specific intent respecting the mutilation aggravator, and we have rejected constitutional challenges to the definition of mutilation. See Smith v. State, 114 Nev. 33, 39, 953 P.2d 264, 267 (1998). Therefore, we conclude that the district court did not err by denying these claims.

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter for a new penalty hearing.[63]

_____, C.J.
Maupin

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Donald M. Mosley, District Judge
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[63]Jones raises a number of other claims in this appeal respecting alleged errors committed by the district court and trial and appellate counsel related to the penalty hearing. However, in light of our decision remanding for a new penalty hearing, we need not consider these claims.