

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE J. SMITH, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48445

FILED

SEP 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person 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; Michelle Leavitt, Judge.

On August 16, 2004, the district court convicted appellant, pursuant to a jury verdict, of trafficking in a controlled substance. The district court sentenced appellant to serve a term of 72 to 180 months in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.¹

¹Smith v. State, Docket No. 43751 (Order of Affirmance, May 2, 2006).

On August 23, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 7, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the district court lacked jurisdiction to convict him because the apartment complex at which he was arrested was under the control of the federal government.² A district court in Nevada "has jurisdiction over crimes committed in the county except for crimes committed where the United States has exclusive jurisdiction."³ Although we recognized in Smith's direct appeal that the record suggested there was "some nexus" between the apartment complex and the Department of Housing and Urban Development, Smith failed to demonstrate that the apartment complex was under the exclusive

²Because a challenge to the jurisdiction of a district court to try a defendant is not waivable, we have reviewed the merits of Smith's claim. See Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

³Pendleton v. State, 103 Nev. 95, 98, 734 P.2d 693, 695 (1987); see NRS 171.010.

jurisdiction of the federal government.⁴ Therefore, the district court did not err in denying this claim.⁵

Appellant also claimed that (1) the district court erred in denying his motion to suppress evidence seized during a search after appellant was detained by security guards; (2) the State violated Brady v. Maryland⁶ in withholding a surveillance videotape of appellant's arrest; and (3) the State violated Batson v. Kentucky⁷ when it exercised a peremptory challenge to strike an African-American juror. This court rejected these claims on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a

⁴See State v. Buckaroo Jack, 30 Nev. 325, 336, 96 P.497, 498 (1908) (holding that defendant bore the burden of showing that the crime occurred within the confines of an Indian reservation and in the exclusive jurisdiction of the federal government).

⁵To the extent that appellant claimed that his trial and appellate counsel were ineffective for failing to raise the aforementioned claim, we conclude that appellant failed to demonstrate that his counsel was ineffective for the reasons discussed above. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶373 U.S. 83 (1963).

⁷476 U.S. 79 (1986).

more detailed and focused argument.⁸ Therefore, the district court did not err in denying these claims.

Appellant also claimed that (1) there was insufficient evidence to sustain his conviction; (2) the district court erred in denying appellant's motion for a new trial; (3) the State coached a witness and suborned perjury; (4) the district court erred in admitting appellant's statements taken in violation of Miranda v. Arizona⁹; (5) the district court erred in admitting evidence where the chain of custody was defective; (6) the district court erred in refusing to admit testimony about the special police; (7) the State committed prosecutorial misconduct; (8) the district court permitted the loss of evidence; (9) the district court withheld legal documents; (10) the district court permitted the improper questioning of witnesses; (11) the district court improperly made indeterminate rulings on appellant's motions; (12) the district court erred in instructing the jury; (13) the judges were biased against appellant; (14) the records were incomplete and omitted instances of prosecutorial misconduct; (15) the district court erred in sentencing appellant; (16) the district attorney discouraged an investigator from testifying; (17) the district court erred in refusing to summon the jury commissioner in order to bring in "as many

⁸Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

⁹384 U.S. 436 (1966).

minorities as possible”; (18) the district court failed to inquire as to any conflict of interest between appellant and standby counsel; (19) the district court erred in admitting photographic evidence that had not been presented to appellant in a timely manner; (20) the special police detained Mamee Stewart and appellant because of their membership in a protected class; (21) the district court improperly limited the scope of appellant’s opening argument; (22) the State of Nevada and “unspecified private persons” related to the Eugene Berger Management Company (“EBMC”), the apartment complex security company, conspired to deprive appellant of his constitutional rights; (23) the presence of a Nevada Department of Corrections (“NDOC”) guard and bailiff at a sidebar undermined appellant’s presumption of innocence; (24) the district court improperly restricted appellant’s right to call and question witnesses; (25) the district court failed to strike the jury, which he asserted was biased against appellant; (26) appellant’s right to testify in his own behalf was compromised; (27) the district court improperly refused to permit appellant to use the trial transcript in arguing his motion for a new trial; (28) the district court erred in refusing to appoint substitute counsel to argue appellant’s presentence motion for a new trial; (29) photographs taken by security company employees were not admitted at trial; and (30) the district court did not permit appellant to recall a witness. These claims could have been raised on appellant’s direct appeal and appellant

failed to demonstrate good cause for his failure to do so.¹⁰ Therefore, the district court did not err in denying these claims.

Next, appellant claimed that he received ineffective assistance of standby counsel Robert Grasso.¹¹ Specifically, appellant claimed that his standby counsel was ineffective for (1) failing to secure videotape evidence and claiming the tape did not exist; (2) lying to the court concerning whether he was in possession of appellant's motions; (3) failing to provide an interview conducted by an investigator; (4) failing to provide proper attire for appellant; (5) failing to subpoena witnesses; (6) discouraging an investigator from testifying; (7) warning potential witnesses that appellant sought to subpoena them; (8) not knowing who appellant intended to call as witnesses; (9) failing to object to the instructions for trafficking in a controlled substance because the instruction was not supported by the evidence; (10) failing to object to the reasonable doubt instruction; (11) failing to request a low-level trafficking instruction; (12) failing to seek an entrapment instruction; and (13) failing to object to the district court's instruction that the jury did not need to concern itself with the wisdom of any rule of law stated in the instructions.

¹⁰NRS 34.810(1)(b)(1), (2).

¹¹Appellant invoked his right to self-representation over one year prior to trial on January 21, 2003. At that time, appointed counsel was then designated as standby counsel for appellant.

Further, appellant claimed that his lack of confidence in his standby counsel weighed heavily upon his decision not to testify in his own behalf. We conclude that the district court did not err in denying this claim. Appellant waived his right to counsel and chose to represent himself, and he did not have a constitutional right to standby counsel.¹² Because appellant had no constitutional right to standby counsel, he had no right to the effective assistance of standby counsel.¹³ Moreover, appellant failed to demonstrate that his right to self-representation was compromised by standby counsel's assistance during the trial.¹⁴ Further, appellant could have testified in his own behalf even though he was representing himself at trial.¹⁵ Therefore, the district court did not err in denying this claim.

¹²See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that a defendant does not have a right to advisory counsel).

¹³See generally McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) (holding that a post-conviction petitioner who has no constitutional or statutory right to the appointment of counsel has no right to the effective assistance of post-conviction counsel); see also Faretta v. California, 422 U.S. 806, 835 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.").

¹⁴See McKaskle v. Wiggins, 465 U.S. 168 (1984).

¹⁵See e.g., Harris v. State, 113 Nev. 799, 801, 942 P.2d 151, 153 (1997) (recognizing that a defendant representing himself testified in his

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Next, appellant claimed that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the result of the proceeding unreliable.¹⁶ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.¹⁷

First, appellant claimed that his trial counsel was ineffective for failing to investigate.¹⁸ Specifically, he asserted that counsel waited months to investigate the EBMC, which detained and searched appellant.

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own behalf at trial); Wayne v. State, 100 Nev. 582, 584, 691 P.2d 414, 415 (1984) (same).

¹⁶Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

¹⁷Strickland, 466 U.S. at 697.

¹⁸Although appellant represented himself at trial, he had been represented by counsel from the time of his initial arraignment on March 13, 2001, until he asserted his right to self-representation and the district court granted his motion on January 21, 2003. Thus, only those claims relating to this time period may be reviewed.

During that time, the company changed addresses and counsel was unable to obtain a copy of the surveillance tape prior to the suppression hearing. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In affirming appellant's judgment of conviction, we held that the security guards were not state actors, thus, even if the tape demonstrated that they did not have reasonable suspicion to detain appellant, it would not be material to the suppression hearing. Further, appellant did not put forth any evidence that a videotape of his conduct, detention, or search existed. Testimony prior to and at trial showed that, although there was a surveillance system at the apartment complex, it did not record the conduct that led to his detention, and could not have recorded the search of appellant by the security guards.¹⁹ Further, appellant did not allege what other specific evidence his counsel could have obtained had his counsel investigated the security company before it changed locations.²⁰ Therefore, the district court did not err in denying this claim.

¹⁹While there was one instance where a witness appeared to state that he watched the incident on videotape, the answer was to a compound question asked by appellant and it is unclear what part of the question he answered.

²⁰Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Second, appellant claimed that his trial counsel was ineffective for failing to investigate the nexus between the EMBC and the State of Nevada. He asserted that the Department of Parole and Probation had an office in the housing development and the State knew that the security guards left the property to assist the police if they were needed. Appellant failed to demonstrate that he was prejudiced. On direct appeal, this court recognized that the guards “worked closely” with the North Las Vegas Police Department. Nevertheless, this court held that the security guards were not state actors. Further, the mere fact that the State of Nevada Department of Parole and Probation leased space in the apartment complex did not make the complex guards state actors. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he was denied conflict-free appellate counsel. To show a Sixth Amendment violation of his right to counsel, appellant must demonstrate both an actual conflict and an adverse effect on his attorney’s performance.²¹ “In general, a conflict exists when an attorney is placed in a situation conducive to divided

²¹Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (providing that prejudice is presumed “only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance’”) (citation omitted) (emphasis added)).

loyalties.”²² Where a petitioner demonstrates an actual conflict of interest which adversely affects his counsel’s performance, this court presumes prejudice to the petitioner.²³ However, appellant failed to allege sufficient facts to show that his counsel’s loyalty was compromised. He merely asserted that he did not get along with his attorney and his attorney misinformed him concerning whether he would file a claim of ineffective assistance of trial counsel and failed to file the record in this court. As claims of ineffective assistance of counsel are not generally reviewable for the first time on direct appeal,²⁴ appellant did not demonstrate that he was prejudiced by the failure of his counsel to raise these claims on appeal. Therefore, the district court did not err in denying his claim.

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel’s performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability

²²Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

²³Id.

²⁴See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

of success on appeal.²⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁶ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²⁷

First, appellant claimed that his appellate counsel was ineffective for failing to argue that (1) the district court erred in denying his motion to suppress the evidence recovered from the search by the security guards; (2) the State violated Brady in withholding a surveillance videotape of appellant's arrest; and (3) the State violated Batson when it exercised a peremptory challenge to strike an African-American juror. Appellant's claim is belied by the record.²⁸ Appellate counsel argued these claims on direct appeal. Therefore, the district court did not err in denying these claims.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the employees of the EBMC discriminated against him and Stewart based on their membership in a protected class. He asserted that he believed the company also made

²⁵Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

²⁶Jones v. Barnes, 463 U.S. 745, 751 (1983).

²⁷Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

²⁸Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

significant campaign contributions. Appellant failed to demonstrate that he was prejudiced. Regardless of whether the EBMC employees discriminated against appellant and Stewart, this court held that the employees were not state actors, thus, the alleged violation did not amount to an error that could be addressed on appeal from his judgment of conviction.²⁹ Further, appellant's mere allegation that the company made political contributions did not undermine this court's conclusion that the guards were not state actors. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in failing to investigate how jurors were impaneled in Nevada as he asserted that the jurors did not represent a fair cross-section of the community. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. To demonstrate a prima facie violation of the fair cross-section requirement, a defendant must demonstrate that (1) the group he alleges

²⁹See Libby v. State, 113 Nev. 251, 254-55, 934 P.2d 220, 222 (1997) (recognizing that intentional discrimination by state actors violates the Equal Protection Clause) (quoting J.E.B. v. T.B., 511 U.S. 127, 130-31 (1994)); see also State v. Miller, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (recognizing that due process protections, such as the Fourth Amendment, protect against interference by state agents, not private citizens).

was “excluded is a distinctive group in the community;” (2) the group’s representation “in jury venires is not fair and reasonable in relation to the number of such persons in the community;” and (3) the under-representation is due to “systematic exclusion of the group in the jury-selection process.”³⁰ Appellant failed to carry the burden of establishing a prima facie violation of this doctrine.³¹ Although appellant sufficiently identified distinctive groups, he failed to carry his burden of establishing either under-representation or systematic exclusion. Appellant did not provide the statistical data necessary for determining relative under-representation as required by the second prong of this test.³² Second, appellant failed to demonstrate that the alleged under-representation was due to systematic exclusion of African-Americans or other distinctive groups in the jury selection process as required by the third prong.³³ Because appellant failed to establish a prima facie violation of the fair cross-section doctrine, we conclude that appellant’s counsel was not

³⁰Rippo v. State, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006) (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).

³¹See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (adopting the test set forth in Duren).

³²See Duren, 439 U.S. at 364.

³³See id.

ineffective for failing to argue this issue. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury pool was poisoned against appellant. Specifically, he claimed that the jury was tainted by a prospective juror's comment that his son died from using narcotics. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not demonstrate that the juror's single comment about his son's history with drugs was significant enough to overcome the presumption of impartiality enjoyed by the prospective jurors.³⁴ Once the juror made the statement, the district court immediately sequestered the prospective juror and questioned him out of the presence of the other jurors about whether his personal experiences would affect his impartiality. Further, the remaining prospective jurors indicated that they understood that appellant was presumed innocent and they would wait until hearing the evidence before forming an opinion as to guilt. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury pool was tainted by the court officers' act of standing beside appellant during a sidebar conference.

³⁴See Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005).

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not object to being accompanied by court officers during a sidebar conference,³⁵ thus, his appellate counsel would have had to demonstrate that the district court plainly erred in permitting the conference to continue in such a manner.³⁶ While this court has recognized that visible “physical restraints may have a significant effect on the jury by eroding the presumption of innocence,”³⁷ it has never stated that the act of accompanying a proper person criminal defendant to a sidebar conference erodes the presumption of innocence in the same manner. Appellant did not allege that he was forced to sit through trial in visible restraints or that any members of the jury ever saw him in visible restraints. Thus, appellant failed to demonstrate that this issue would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

³⁵In another matter, Smith even consented to the officers accompanying him out of the courtroom for another conference.

³⁶Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 71 (2008) (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

³⁷Hymon v. State, 121 Nev. 200, 207-08, 111 P.3d 1092, 1098 (2005) (citing Gonzalez v. Piler, 341 F.3d 897, 899-900 (9th Cir. 2003); U.S. v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002); Dickson v. State, 108 Nev. 1, 3, 822 P.2d 1122, 1124 (1992)).

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in losing appellant's pretrial "post-conviction" petition. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not allege what claims he was unable to raise because the district court lost the petition.³⁸ Further, the district court permitted appellant to refile a similar pleading. Thus, as the district court took steps to remedy the situation, appellant did not demonstrate that this issue would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying appellant's request for transcripts of pretrial hearings so that appellant could prepare for trial. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify what defenses he was unable to raise by the district court's denial of his request for transcripts.³⁹ Thus, he did not demonstrate that he was prejudiced by the lack of transcripts, and he failed to demonstrate that any error was

³⁸Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

³⁹Id.

not harmless.⁴⁰ Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence to sustain his conviction.⁴¹ Specifically, he claimed that his case was based entirely on the testimony of cooperating witnesses and State-suborned perjury. Appellant claimed that the State permitted a witness to falsely testify that he was a federal officer. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Evidence is sufficient to sustain a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution.⁴² A reviewing court will not disturb a verdict on appeal if it is supported by substantial

⁴⁰See Steese v. State, 114 Nev. 479, 496, 960 P.2d 321, 332 (1998) (providing that an error is harmless where “the verdict would have been the same in the absence of the error”) (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)).

⁴¹Appellant raised numerous claims regarding jury instructions on the elements of the crime that actually addressed whether there was sufficient evidence to sustain the conviction.

⁴²See Koza v. District Court, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

evidence.⁴³ Further, “[t]he jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given their testimonies.”⁴⁴ There was sufficient evidence upon which to conclude that appellant trafficked in a controlled substance. A person violates NRS 453.3385 when, among other things, he “is knowingly or intentionally in actual or constructive possession” of a schedule I controlled substance. Two security guards testified that their search of appellant revealed the presence of three individually packaged rocks that contained cocaine and weighed a total of 20.37 grams. Appellant presented no evidence that the witnesses testified for the prosecution in exchange for immunity from prosecution.⁴⁵ Further, appellant cross-examined one of the witnesses about his assertion that he was a federal officer and demonstrated that he testified inconsistently in that regard and the jury nevertheless found the testimony concerning the recovery of the cocaine credible. Therefore, the district court did not err in denying this claim.⁴⁶

⁴³See Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975).

⁴⁴Tabish v. State, 119 Nev. 293, 321, 72 P.3d 584, 602 (2003) (quoting Dorsey v. State, 96 Nev. 951, 954, 620 P.2d 1261, 1263 (1980)) (alteration in original).

⁴⁵Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁴⁶To the extent that appellant claimed that his appellate counsel was ineffective for failing to argue that the State proffered perjured
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Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State violated Brady. Specifically, appellant argued that the State failed to disclose (1) information related to the credibility of witnesses; (2) uniform patches worn by the security guards; (3) the contract between the security company and the city, state, or federal government; (4) information related to witness immunity from federal prosecution; and (5) photographs taken by the guards of the drugs seized. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. “Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material to either guilt or to punishment.”⁴⁷ Evidence is material if there is a reasonable probability that its disclosure would result in a different outcome.⁴⁸ “Exculpatory evidence is defined as evidence that will explain away the charge.”⁴⁹ Appellant put forth no evidence, only his bare

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testimony, appellant failed to demonstrate that his counsel was ineffective for the reasons discussed above.

⁴⁷Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)).

⁴⁸Id.

⁴⁹King v. State, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000) (citing Lay v. State, 110 Nev. 1189, 1197, 886 P.2d 448, 453 (1994))

allegation, that witnesses testified in exchange for immunity from federal prosecution.⁵⁰ Appellant did not specifically identify what information related to the credibility of witnesses and immunity deals that the State did not disclose.⁵¹ Appellant did not explain how the introduction of the uniform patches would have explained away the charges. Regarding the photographs, as appellant was accused of possessing drugs, evidence that bolstered the guard's claims that they found drugs on appellant is not favorable to the defense.⁵² Thus, appellant did not establish that the introduction of the photographs would have benefited the defense by explaining away the charges.⁵³ Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly interrupted appellant's opening arguments. Appellant failed to demonstrate that this issue would have had a reasonable probability of

⁵⁰Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁵¹Id.

⁵²Mazzan, 116 Nev. at 66, 993 P.2d at 36 (providing that Brady requires disclosure of material evidence that is favorable to the accused).

⁵³See King, 116 Nev. at 359, 998 P.2d at 1178 ("Exculpatory evidence is defined as evidence that will explain away the charge.") (citing Lay v. State, 110 Nev. 1189, 1197, 886 P.2d 448, 453 (1994)).

success on appeal. The district court only twice interrupted appellant's opening arguments. The first interruption was to advise appellant that he could circulate exhibits to the jury. The second interruption was to properly sustain the State's objection to appellant's argument that the jury should "put [themselves] in [appellant's] position" in relation to the suppression issue.⁵⁴ Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly interrupted appellant's questioning of a witness. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. During appellant's trial, appellant asked one of the security guards who detained him the status of the individuals who detained him, presumably, to explore whether they were state actors or worked for a private company. The district court interjected to clarify appellant's question, appellant then asked the question of the witness, and the witness answered. As appellant was permitted to ask the question and the witness was permitted to answer, appellant did not demonstrate that this

⁵⁴See Lioce v. Cohen, 124 Nev. ___, ___, 174 P.3d 970, 984 (2008) (citing Boyd v. Pernicano, 79 Nev. 356, 358-59, 385 P.2d 342, 343 (1963)) ("An attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties.").

issue would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in admitting an unauthenticated work order regarding repairs made to the entry gate at the apartment complex and photographs of the booth where appellant was arrested. Regarding the photographs, appellant claimed that he had requested the photographs four years prior to trial and had not been provided the photographs prior to their introduction at trial. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Even assuming that the district court erred in admitting the photographs and work order, such an error may constitute harmless error where other evidence establishes overwhelming evidence of guilt.⁵⁵ Here, there was overwhelming evidence, apart from the photographs and work order, that appellant trafficked in a controlled substance. Two security guards testified that they apprehended appellant and recovered three rocks of cocaine from appellant's pockets. Later testing revealed the substance seized from appellant contained cocaine

⁵⁵See Phillips v. State, 121 Nev. 591, 602, 119 P.3d 711, 719 (2005) (providing that errors in the admission of evidence are harmless where the remaining evidence of guilt is overwhelming).

and weighed 20.37 grams. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court failed to inquire as to whether an expert witness's testimony was based on speculation. He claimed that the court failed to certify the witness as an expert. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Prior to trial, the State moved to admit testimony of Carol Crossley, a chemist with Associated Medical Laboratories.⁵⁶ Crossley qualified as an expert because of her specialized training and knowledge.⁵⁷ Crossley testified that she had a bachelor of science degree in animal science with a minor in chemistry. Further, she had also testified as an expert witness in the Nevada courts in 2001 and 2002. Moreover, appellant did not object at

⁵⁶During the pendency of appellant's case in the district court, Associated Medical Laboratories changed names several times and was known as Quest Diagnostics at the time Crossley testified.

⁵⁷NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."); see also Freeman v. Davidson, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) ("An expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education.").

trial to the certification as an expert. There was significant evidence that Crossley possessed specialized knowledge and training relating to the testing of controlled substances. Thus, appellant failed to demonstrate that his appellate counsel could have demonstrated that the district court plainly erred in admitting this testimony if this issue had been raised on appeal. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that evidence in his case was tainted by defects in the chain of custody that resulted from an employee of the North Las Vegas Police Department selling cocaine from the evidence vault. He further claimed that the expert misled the court into believing that the seals on the evidence remained undisturbed. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. We previously have stated “[i]t is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand.”⁵⁸ Rather, a proper chain of custody is established where it is “reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence.”⁵⁹ Appellant failed to demonstrate any tampering with the

⁵⁸Sorce v. State, 88 Nev. 350, 352, 497 P.2d 902, 903 (1972).

⁵⁹Id. at 352-53, 497 P.2d at 903.

evidence in this case. At trial, the court received testimony concerning how the drugs were seized and taken into police custody. Further, witnesses testified concerning the procedures used by the custodian of evidence which included signing the seals on the bags of evidence, which had not been improperly disturbed. Appellant's mere allegation that an employee sold drugs from the NLVPD evidence vault and thus tainted all the evidence contained therein did not demonstrate, in light of the testimony of the evidence custodians, that the district court abused its discretion in admitting the evidence. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in admitting statements that were taken in violation of Miranda. Specifically, the State argued that appellant made numerous statements that were never substantiated or proven. Further, a North Las Vegas police officer testified that it was the policy of the North Las Vegas Police Department to refrain from providing Miranda⁶⁰ warnings. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The State did not seek to introduce any statements made by appellant while he was in the custody of the North Las Vegas Police Department. While the

⁶⁰Miranda v. Arizona, 384 U.S. 436 (1966).

security guards testified that appellant made statements while he was detained, this court has already held that they were not state actors. Thus, appellant did not demonstrate that this issue would have a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant was deprived of the opportunity to present a complete defense. Specifically, he claimed that the district court did not permit him to subpoena several witnesses from the Department of Housing and Urban Development and the EBMC or introduce testimony from his investigator. Appellant sought to introduce these witnesses to testify about the nature of the security guards employed by EBMC. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The witnesses were not relevant to the issues at trial as appellant's motion to suppress and the status of the security guards had already been resolved prior to trial. As appellant did not demonstrate that the witnesses' testimony would have been relevant at his trial, he failed to demonstrate that appellate counsel would have been able to demonstrate that this issue had a reasonable probability of

success on appeal.⁶¹ Therefore, the district court did not err in denying this claim.

Seventeenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly hindered appellant's right to testify by informing him of the consequences of testifying in his behalf. Specifically, appellant claimed that the court warned him that he could be cross-examined about other crimes. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. A party may properly cross-examine a witness with evidence that that witness has been convicted of a felony.⁶² Thus, the district court's warning was accurate and did not improperly hinder his ability to testify. Therefore, the district court did not err in denying this claim.

Eighteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecution was vindictive. Specifically, he asserted that the case had been passed from person to person within the prosecutor's office and the prosecutor showed up at the closing argument and told the jury to find appellant guilty. Appellant

⁶¹See NRS 48.025(1) (providing that "[a]ll relevant evidence is admissible").

⁶²NRS 50.095.

failed to demonstrate that he was prejudiced. The State did not file additional charges or amend the information to increase the severity of the charges filed in the instant case.⁶³ There is no evidence that this case rose out of the facts of any other case.⁶⁴ The mere fact that the case had been handled by several different members of the district attorney's office during the pendency of the trial proceedings does not give rise to an inference of vindictiveness. Therefore, the district court did not err in denying this claim.

Nineteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State of Nevada and "unspecified private persons" conspired to deprive appellant of his constitutional rights. He asserted that it was possible that numerous people involved in the case were close to people at the EBMC. Appellant failed to demonstrate that

⁶³See United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980) (citations omitted) ("The right to due process of law is violated where the government increases the severity of alleged charges in response to the exercise of constitutional or statutory rights.").

⁶⁴See id. ((providing that a prosecutorial decision does not appear to be the product of vindictiveness where it is "justified by independent reasons or intervening circumstances") (quoting United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980))); see also United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986) (providing that there is generally no appearance or likelihood of prosecutorial vindictiveness when the second criminal case arises out of a different set of facts).

counsel was deficient or that this issue had a reasonable probability of success on appeal. Appellant did not identify what individuals conspired with the State of Nevada to deprive appellant of his constitutional rights.⁶⁵ Therefore, the district court should deny this claim.

Twentieth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct. Specifically, appellant claimed that the State (1) vouched for the credibility of a witness by identifying the witness as a “housing authority officer” during the preliminary hearing; (2) told appellant that it had a picture of him destroying property, but did not produce it when requested; (3) enlisted an investigator to take prejudicial photographs and obtain statements that were introduced at trial; (4) endorsed evidence and misstated other evidence; (5) lied about whether cameras observed the search during opening arguments; (6) improperly stated that appellant became hostile after his detention by the security guards; (7) improperly commented on appellant’s explanation that the security guards planted the drugs; (8) misstated appellant’s argument; and (9) brought friends and family of the prosecution into court to exclaim before the jury that appellant was guilty. Appellant asserted the remarks shifted the burden of proof. Appellant failed to demonstrate that this claim had a reasonable

⁶⁵See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

probability of success on appeal. Even assuming that the challenged comments and conduct were improper, such prosecutorial misconduct may constitute harmless error where there is overwhelming evidence of guilt.⁶⁶ Here, as discussed above, there was overwhelming evidence of guilt. Therefore, the district court did not err in denying this claim.⁶⁷

Twenty-first, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court plainly erred in instructing the jury on the elements of trafficking in a controlled substance because the instruction was not supported by the evidence. He also claimed that the district court failed to define “trafficking” in response to a jury question. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. A jury may properly receive an

⁶⁶See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (providing that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt); Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (providing that to be reversible prosecutorial misconduct “must be prejudicial and not merely harmless”); see also NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

⁶⁷Appellant also claimed that his counsel was ineffective for failing to argue that portions of the record were incomplete with regards to statements made by the State that constituted prosecutorial misconduct. As we hold that any prosecutorial misconduct in the trial was harmless, appellant failed to demonstrate that his counsel was ineffective for failing to argue this claim.

instruction so long as it is supported by the evidence.⁶⁸ The district court instructed the jury that a “person who knowingly and intentionally sells, or is knowingly and intentionally in actual constructive possession of, a Schedule I controlled substance or any admixture which contains Cocaine . . . is guilty of Trafficking in a Controlled Substance.”⁶⁹ The instructions were correct under Nevada law.⁷⁰ Further, as discussed above, there was sufficient evidence upon which to instruct the jury on this charge. Regarding the jury question, as the instructions correctly defined the crime of trafficking in a controlled substance, the district court correctly referred the jury to its instructions in response to the jury’s question regarding the definition of trafficking. Therefore, the district court did not err in denying this claim.

Twenty-second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court plainly erred in giving the reasonable doubt instruction. Appellant failed to demonstrate that his counsel’s performance was deficient or that he was prejudiced.

⁶⁸See generally Weber v. State, 121 Nev. 554, 581-82, 119 P.3d 107, 126 (2005) (providing that a jury may properly receive an instruction if the instruction is supported by the evidence).

⁶⁹The district court provided instructions for both mid-level and low-level trafficking.

⁷⁰See NRS 453.3385(1), (2).

The district court gave Nevada's statutory reasonable doubt instruction as set forth in and mandated by NRS 175.211. This court has repeatedly held that the current statutory definition is constitutional.⁷¹ Therefore, the district court did not err in denying this claim.

Twenty-third, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court plainly erred in not giving a low-level instruction. This claim is belied by the record.⁷² The district court issued instructions for mid-level trafficking, low-level trafficking, and simple possession of a controlled substance. Therefore, the district court did not err in denying this claim.

Twenty-fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court plainly erred in failing to give an entrapment instruction. Specifically, he claimed that the State could not meet its burden of proving that appellant was predisposed to commit the crime of vandalizing the fence for which he was initially detained. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. "[E]ntrapment is an affirmative defense," and "[t]he defendant bears the burden of producing evidence of governmental

⁷¹See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Evans v. State, 112 Nev. 1172, 1191, 926 P.2d 265, 277 (1996); Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991).

⁷²Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

instigation.”⁷³ “Once the defendant puts forth evidence of governmental instigation, the State bears the burden of proving that the defendant was predisposed to commit the crime.”⁷⁴ Appellant was tried for trafficking in a controlled substance, not for vandalism. At trial, appellant did not put forth any evidence that the government induced him to possess cocaine. Therefore, the district court did not err in denying this claim.

Twenty-fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court plainly erred in instructing the jury that the judge’s duty is to instruct the jury on the law to apply to the case and that the jury need not concern itself with the wisdom of any rule of law stated in the instructions. Appellant failed to demonstrate that he was prejudiced. The challenged instruction was correct.⁷⁵ Therefore, the district court did not err in denying this claim.

Twenty-sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in making indeterminate rulings on motions. Specifically, appellant claimed that the district court granted a motion for trial transcripts only to later “ungrant” the motion. Appellant failed to

⁷³Foster v. State, 116 Nev. 1088, 1091, 13 P.3d 61, 63 (2000).

⁷⁴Id.

⁷⁵NRS 175.161.

demonstrate that his counsel was deficient or that he was prejudiced. Prior to the hearing on appellant's motion for a new trial, the district court granted appellant's motion for a complete trial transcript. At the hearing on the motion for a new trial, appellant indicated that he was not able to raise certain claims in his motion for a new trial because he had not been provided with the ordered transcripts. When asked by the court, appellant would not state the claims for which he needed the trial transcript in order to raise these claims. Therefore, the district court denied the motion for a trial transcript. As appellant could not state what purpose the transcripts would have served, he failed to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.⁷⁶

Twenty-seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying his motion for a new trial. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In his motion for a new trial, appellant claimed that (1) the court officer's act of accompanying him

⁷⁶Appellant also claimed that his appellate counsel was ineffective for failing to argue on appeal that the district court erred in losing appellant's motion for transcripts. As the district court entertained and ruled on appellant's motion for transcripts, appellant failed to demonstrate that this issue would have a reasonable probability of success on appeal.

to a sidebar conference eroded his presumption of innocence; (2) the prosecutor committed misconduct in referencing uncharged crimes and arguing that appellant's Fourth Amendment rights were not violated; (3) there was insufficient evidence to sustain his conviction; (4) the State violated Batson; (5) the search was illegal; (6) the State violated Brady; and (7) appellant was not provided with transcripts to argue his motion. In affirming appellant's judgment of conviction, this court held that the State did not violate Brady, Batson, or appellant's Fourth Amendment rights. Further, as discussed above, appellant failed to demonstrate that his remaining claims were meritorious. Thus, appellant did not demonstrate that his appellate counsel would have been able to demonstrate on appeal that the district court abused its discretion in denying appellant's motion.⁷⁷ Therefore, the district court did not err in denying this claim.

Twenty-eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly proceeded directly to the sentencing hearing after resolving the motion for a new trial. Appellant claimed that this action prevented him from being able to present mitigating evidence. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not

⁷⁷King v. State, 95 Nev. 497, 500, 596 P.2d 501, 503 (1979).

point to any errors in the PSI or any evidence he would have presented had he been given more time to prepare for the sentencing hearing.⁷⁸ Therefore, the district court did not err in denying this claim.

Twenty-ninth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court used discriminatory methods to impose sentence. Specifically, the district court failed to make findings of fact regarding appellant's arguments, including a specific drug quantity finding, at sentencing. Further, appellant's sentence was unreasonable. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. This court refrains from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."⁷⁹ Moreover, regardless of its severity, a sentence that is "within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"⁸⁰

⁷⁸Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷⁹Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); see also Lee v. State, 115 Nev. 207, 211, 985 P.2d 164, 167 (1999).

⁸⁰Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22

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NRS 453.3385 provides for a sentence of 2 to 15 years for anyone convicted of possessing between 14 grams and 28 grams of a schedule I substance.⁸¹ The jury found beyond a reasonable doubt that appellant was guilty of trafficking more than 14 grams, but less than 28 grams of a controlled substance. The district court sentenced appellant to 6 to 15 years in the Nevada State Prison. The drug quantity was sufficient to justify appellant's conviction and sentence. As appellant's sentence was within the statutory limits, it did not constitute cruel and unusual punishment. Further, it was not so disproportionate to the crime as to be unreasonable. Appellant did not allege what other evidence was impalpable or highly suspect.⁸² Therefore, the district court did not err in denying this claim.

Thirtieth, appellant claimed that his appellate counsel was ineffective for failing to pursue a claim of ineffective assistance of trial counsel. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the

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(1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

⁸¹NRS 453.3385(2).

⁸²Hargrove, 100 Nev. at 502, 686 P.2d at 225.

district court in the first instance and are generally not appropriate for review on direct appeal.⁸³ Appellant failed to demonstrate that any issues of ineffective assistance of counsel would have been appropriate for direct appeal in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Thirty-first, appellant claimed that his appellate counsel was ineffective for failing to argue that Chief Justice Mark Gibbons improperly sat on the panel that affirmed appellant's judgment of conviction. Appellant asserted that Chief Justice Gibbons' prior ruling at appellant's arraignment created an intolerable risk of the appearance of judicial bias. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that Chief Justice Gibbons harbored an actual or implied bias.⁸⁴ Knowledge acquired by a judge or justice in his or her official capacity are not grounds for disqualification.⁸⁵ Chief Justice Gibbons' role as judge during appellant's arraignment was limited, did not require any substantive rulings, and did not require disqualification. Thus, appellant failed to demonstrate that

⁸³Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

⁸⁴NRS 1.225(1), (2).

⁸⁵See Goldman v. Bryan, 104 Nev. 644, 653, 764 P.2d 1296, 1301 (1988), disagreed with on other grounds by Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007).

his appellate counsel was ineffective, and the district court did not err in denying this claim.⁸⁶

Thirty-second, appellant claimed that his appellate counsel was ineffective for failing to argue that Justice Michael Douglas, then Judge Douglas, was impermissibly biased against appellant after appellant moved to have Judge Douglas recused from the case. Appellant further asserted that Justice Douglas conspired with members of the prosecution in his case and was otherwise biased against appellant for appellant's prior pleadings. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. "A judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing factual grounds warranting disqualification."⁸⁷ Disqualification of a judge "must be based on facts, rather than mere speculation."⁸⁸ Appellant's assertion is based purely on speculation.

⁸⁶To the extent that appellant raised this claim independent of his ineffective assistance of appellate counsel claim, the claim could have been raised in his direct appeal, and he failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(1), (2).

⁸⁷Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (citing Hogan v. Warden, 112 Nev. 553, 559-60, 916 P.2d 805, 809 (1996)).

⁸⁸Id. (citing PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 437, 894 P.2d 337, 341 (1995), overruled on other grounds by Towbin Dodge, LLC v.

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Appellant put forth no evidence showing that Justice Douglas conspired with members of the prosecution. Appellant did not base his assertion on any particular facts but merely asserted that a reasonable person in the judge's position might have been too irate by appellant's prior allegations against his character to be able to impartially try the case. Therefore, the district court did not err in denying this claim.

Thirty-third, appellant claimed that his appellate counsel was ineffective for failing to argue that Judge Michelle Leavitt was biased against appellant. He claimed that the judge's comments, rulings, and refusal to make certain rulings evidenced her bias. Appellant failed to demonstrate that he was prejudiced. Appellant's claim of bias is not supported by facts showing that any purported bias stemmed from an extrajudicial source.⁸⁹ Therefore, the district court did not err in denying this claim.

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Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005)); United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993)).

⁸⁹See In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) ((providing that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification", but "personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his
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Thirty-fourth, appellant claimed that his appellate counsel's errors resulted in cumulative error. We conclude that because appellant's ineffective assistance of appellate counsel claims are without merit, he failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis. Therefore, the district court did not err in denying this claim.

Lastly, appellant claimed that the panels of this court should conduct hearings regarding each other to avoid the appearance of corruption. He alleged that this court improperly denied him relief on prior mandamus petitions. This claim does not address whether appellant's conviction was obtained "in violation of the Constitution of the United States or the Constitution or laws of this State," and was thus outside the scope of a post-conviction petition for a writ of habeas corpus.⁹⁰ Therefore, the district court did not err in denying this claim.

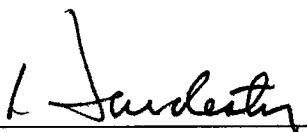
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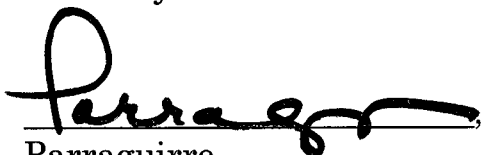
participation in the case") (quoting United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971))).

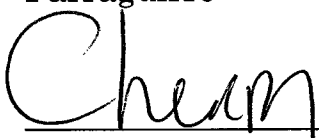
⁹⁰NRS 34.724(1).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹²


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry

⁹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Michelle Leavitt, District Judge
Willie J. Smith Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk