

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT L. WHITESELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49286

FILED

NOV 03 2009

FRACIE K. LINDEMAN
CLERK OF SUPREME COURT
Fracie K. Lindeman
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court granting in part and denying in part appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On April 25, 2002, the district court convicted appellant, pursuant to a jury verdict, of one count each of burglary; robbery with the use of a deadly weapon, victim 65 years of age or older; murder with the use of a deadly weapon, victim 65 years of age or older; and possession of stolen property. The district court sentenced appellant to multiple concurrent and consecutive terms in the Nevada State Prison totaling life without the possibility of parole. This court affirmed appellant's judgment of conviction and sentence on direct appeal. Whitesell v. State, Docket No. 39650 (Order of Affirmance, February 11, 2004). The remittitur issued on March 9, 2004.

On December 17, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to assist appellant, and counsel filed a supplement to the petition. Following an

evidentiary hearing, as well as supplemental briefing by both parties, the district court granted the petition in part and denied the petition in part on April 12, 2007.¹ This appeal follows.

On appeal, appellant argues that the district court erred in denying his claim that the district court violated his Sixth Amendment rights pursuant to Crawford v. Washington, 541 U.S. 36 (2004) when it admitted the preliminary hearing testimony of an unavailable witness. Appellant further argues that the district court erred in denying ten claims of ineffective assistance of trial counsel and three claims of ineffective assistance of appellate counsel. Finally, appellant claims that cumulative error warrants reversal of his conviction. For the reasons stated below, we conclude that these claims lack merit, and affirm the decision of the district court.

Standard of Review

A court must dismiss claims in a habeas petition if those claims either were or could have been presented in an earlier proceeding, unless the court finds both good cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner. NRS 34.810(1)(b). Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus and are not subject to the requirements of NRS 34.810(1)(b). Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001). Such claims

¹In granting the petition in part, the district court concluded that possession of stolen property was a lesser included offense of robbery with the use of a deadly weapon, and vacated appellant's sentence on the possession of stolen property charge.

present a mixed question of law and fact, subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

To state a claim of ineffective assistance of trial 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 jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Similarly, to support a claim of ineffective assistance of appellate counsel, a petitioner must show that his counsel's performance both fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal. Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14. The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Admission of preliminary hearing testimony

Appellant first argues that the district court erred in admitting the preliminary hearing testimony of Stephen Patzig at trial, in violation of his Sixth Amendment rights pursuant to Crawford v. Washington, 541 U.S. 36 (2004). Appellant argues that he had good cause

to raise this claim because Crawford was decided shortly before his conviction was final. Even assuming that appellant had good cause, we conclude appellant failed to demonstrate prejudice because the district court did not err in admitting Patzig's preliminary hearing testimony.

In Crawford, the United States Supreme Court determined that the Confrontation Clause bars the use of a testimonial statement by a witness not testifying at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.² 541 U.S. 36, 53-54 (2004); see also Medina v. State, 122 Nev. 346, 354, 143 P.3d 471, 476 (2006). Recently, in Chavez v. State, this court concluded that the preliminary hearing testimony of an unavailable witness may be admitted under Crawford, so long as the defendant received an opportunity for effective cross-examination at the preliminary hearing. 125 Nev. ___, ___, 213 P.3d 476, 486 (2009). This court determines whether the opportunity for cross-examination was adequate on a case-by-case basis and considers factors such as the extent of discovery available to the defendant at the time of the cross-examination, and whether the magistrate judge allowed the defendant an opportunity to thoroughly cross-examine the witness.

²Similarly, NRS 171.198(6) and NRS 51.325(1) allow for the admission of preliminary hearing testimony at trial, so long as the party offering the testimony establishes that (1) the defendant was represented by counsel at the preliminary hearing, (2) counsel actually cross-examined the witness and (3) the witness is actually unavailable for trial. See also Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997).

In this case, Patzig was unavailable to testify at trial.³ At the preliminary hearing, counsel for appellant and counsel for his co-defendant both thoroughly cross-examined Patzig. Appellant's counsel had access to the transcript of Patzig's previous interview with police detectives and cross-examined Patzig specifically regarding his motivations for testifying and statements he made to detectives regarding his parole status. The justice court placed no limitations on the scope of defense counsel's cross-examination. Based on these factors, we conclude that appellant received an adequate opportunity to cross-examine Patzig at the preliminary hearing. Accordingly, because Patzig was unavailable at trial, the district court did not err in admitting Patzig's preliminary hearing testimony. Therefore, because appellant failed to demonstrate actual prejudice, this claim was barred by NRS 34.810(1)(b).

To the extent appellant also argues that trial and appellate counsel were ineffective for failing to argue that admission of Patzig's preliminary hearing testimony violated appellant's confrontation rights, appellant fails to demonstrate that he was prejudiced by counsel's actions. Given this court's conclusion that Patzig's testimony was properly admitted, appellant cannot demonstrate any reasonable probability of a different result had trial counsel objected to Patzig's testimony, or had

³In his opening brief, appellant concedes that Patzig "disappeared" prior to trial and does not dispute his unavailability. Appellant's new argument in the reply brief that the State did not make a good faith effort to produce Patzig at trial is improperly raised for the first time in appellant's reply brief. Because it is improperly raised, we decline to consider this claim.

appellate counsel raised the issue on direct appeal. Therefore, the district court did not err in denying this claim.

Specific intent requirement

Appellant next argues that trial and appellate counsel were ineffective for failing to object to the information and jury instructions at trial, and for failing to argue on appeal that the jury instructions and information were defective. Specifically, appellant argues that that the State's information and the jury instructions at trial failed to allege the specific intent necessary to convict him of first-degree murder, in violation of Sharma v. State, 118 Nev. 648, 652-58, 56 P.3d 868, 870-74 (2002) (concluding that to convict a defendant of a specific intent crime pursuant to an aiding and abetting theory, the jury must be instructed that the defendant aided and abetted with the intent to commit the underlying crime), and Bolden v. State, 121 Nev. 908, 921, 124 P.3d 191, 200 (2005) (concluding that that a defendant cannot be found guilty of specific intent crimes on the basis that commission of those offenses was a natural and probable consequence of a conspiracy, but rather it must be proven that the defendant participated in the conspiracy with the intent to commit those crimes). Appellant fails to demonstrate that he was prejudiced.

The jury instructions read to the jury in this case included three separate alternative theories of liability for first degree murder: (1) premeditation; (2) felony murder; and (3) vicarious liability by either aiding and abetting or that the act was the natural and probable consequence of a conspiracy. The jury instructions related to aider/abettor and conspiracy liability did not require the jury to find that appellant had aided and abetted or participated in the conspiracy with the intent to commit murder. Therefore, the jury instructions did not comply with the

dictates of Sharma or Bolden. However, in addition to first-degree murder, the jury also found appellant guilty beyond a reasonable doubt of burglary and robbery. As provided by NRS 200.030(1)(b), murder in the first-degree includes any murder “[c]ommitted in the perpetration or attempted perpetration of . . . robbery [or] burglary.” Thus, as the victim died in the perpetration of the burglary and robbery, appellant was clearly guilty of felony murder pursuant to NRS 200.030(1)(b). Accordingly, any errors in the jury instructions related to vicarious liability were harmless beyond a reasonable doubt pursuant to Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 324 (2008) (noting that if a jury does not receive the appropriate instruction regarding specific intent, a defendant’s conviction must be reversed unless the district court’s failure to instruct the jury was harmless beyond a reasonable doubt).⁴

Because the failure to include a specific intent instruction with respect to vicarious liability was harmless, appellant cannot demonstrate a reasonable probability the result of trial would have been different had the jury been correctly instructed on vicarious liability and specific intent. Similarly, appellant cannot demonstrate that this issue had any reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Massiah and Brady violations

Next, appellant argues that trial counsel was ineffective for failing to investigate a “possible” violation of Brady v. Maryland, 373 U.S.

⁴Notably, the evidence presented at trial also indicated that the defendant cut the victim’s throat, indicating that the jury did not convict him pursuant to any vicarious liability theory.

83 (1963) and for failing to present a “complete” motion regarding a potential violation of Massiah v. United States, 377 U.S. 201 (1964). Appellant further argues that appellate counsel was ineffective for failing to present a “comprehensive” argument regarding the Massiah violation on appeal. Each of these claims center around appellant’s allegations that witness Stephen Patzig was working as a police informant, and that he intentionally elicited incriminating statements from appellant in his capacity as a police informant. For the reasons discussed below, we conclude that each of these claims lack merit.

Brady violation

Appellant first claims that trial counsel was ineffective for failing to file a motion alleging that the State violated his rights pursuant to Brady when it failed to disclose certain impeachment evidence related to Patzig. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Pursuant to Brady v. Maryland, the State has a duty to disclose evidence favorable to the accused where that evidence is material to either guilt or punishment. 373 U.S. at 87. When a witness has received “substantial benefits” after approaching the police with information about a crime, or in exchange for testifying at trial, these benefits must be disclosed pursuant to Brady. Singh v. Prunty, 142 F.3d 1157, 1162-63 (9th Cir. 1998).

Here, appellant argues that the State withheld evidence that Patzig had received psychiatric treatment while in prison, that Patzig had previously sought benefits in exchange for cooperating with police investigators in an unrelated case, and that the felony charges Patzig faced while he was a cellmate with the appellant at the Clark County Detention Center were subsequently reduced to misdemeanors.

Despite appellant's allegations, appellant cannot demonstrate that the State withheld any material information related to Patzig. The district court, not the State, denied appellant's motion for inspection of Patzig's criminal records. Trial counsel was involved in the previous case in which Patzig acted as an informant and indicated at the preliminary hearing in this case that he was aware that Patzig had previously requested benefits in exchange for testimony, stating "I know [Patzig] asks for benefits every time he gets a chance." Contrary to appellant's assertions, appellant has presented no evidence indicating that Patzig's pending felony charges were reduced to misdemeanors pursuant to any kind of agreement with the State. Accordingly, appellant fails to demonstrate that the State withheld any evidence, indicating that a motion alleging a Brady violation would have been futile. Counsel cannot be deemed ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.⁵

Massiah violation

Appellant next claims that trial counsel was ineffective for failing to file a "complete" motion to dismiss for prosecutorial misconduct pursuant to Massiah v. United States, 377 U.S. 201 (1964). Appellant also argues that appellate counsel did not adequately brief the Massiah issue

⁵Appellant does not appear to argue that appellate counsel was ineffective for failing to argue a Brady violation on direct appeal. To the extent appellant may have raised this claim, we conclude that appellate counsel was not deficient, as any claim pursuant to Brady would not have had a reasonable probability of success on appeal.

on direct appeal. We conclude that appellant fails to demonstrate that trial or appellate counsel were deficient, or that he was prejudiced.

In Massiah, the United States Supreme Court concluded that it was a violation of a defendant's Sixth Amendment right to admit at trial a defendant's statements to his co-defendant after the defendant had been indicted, and his co-defendant had agreed to work covertly as a government agent. Id. at 203-204. Thus, a Massiah violation has two separate components: (1) that a defendant's statements are deliberately elicited (2) by a government agent. Id. at 206.

Appellant argues that the State violated the dictates of Massiah when it elicited testimony from Patzig at the preliminary hearing regarding appellant's statements to him. Trial counsel filed a motion to dismiss pursuant to Massiah and appellate counsel briefed the issue on direct appeal. Nonetheless, appellant argues that trial and appellate counsel failed to discuss the issue with sufficient detail. Specifically, appellant argues that while Patzig may not have acted as a government agent prior to his February 28, 2001 interview with the police, following that interview, Patzig believed himself to be a police agent. Accordingly, appellant argues that any statements the defendant made to Patzig after February 28, 2001 were obtained in violation of Massiah and wrongfully admitted at the preliminary hearing.

Despite appellant's allegations, appellant fails to present any additional evidence to suggest that Patzig was working as a government agent. Beyond suggestions that Patzig himself believed that he might have a relationship with the police, no evidence presented suggests that the police or the State had any type of agreement with Patzig. Patzig's own unsupported belief that he might gain some kind of benefit by

cooperating with the police is insufficient to establish that he acted as a government agent. See United States v. Taylor, 800 F.2d 1012, 1016 (10th Cir. 1986) (concluding that in the absence of any express or implied “quid pro quo” agreement between an informant and the State, or any instructions or directions by the State, the informant was not a government agent, even if he had deliberately elicited statements from the defendant in hopes of getting preferential treatment in his own case). In addition, this court has already concluded on direct appeal that Patzig was not a government agent. This conclusion is law of the case and may not be revisited by way of a more detailed or more precisely focused argument. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, as Patzig was not acting as a government agent, appellant cannot demonstrate a reasonable probability of a different result had trial or appellant counsel presented a more extensive argument regarding any potential Massiah violation. Therefore, the district court did not err in denying this claim.

Cross-examination of Patzig

Appellant next argues that trial counsel was ineffective for failing to cross-examine Patzig about his motives for testifying against appellant. Specifically, appellant argues that trial counsel should have cross-examined Patzig regarding a letter he wrote to the clerk of the court in a previous case allegedly seeking benefits after he testified against a jailhouse acquaintance. Appellant also argues that trial counsel should have cross-examined Patzig regarding discrepancies in a February 28, 2001, interview with the police and his preliminary hearing testimony. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced.

At the preliminary hearing, counsel for appellant's co-defendant cross-examined Patzig first and established Patzig had previously testified against another jailhouse acquaintance. Accordingly, because Patzig's testimony was read to the jury, the jury was aware that Patzig had a history of "turning informant." Even so, it was also established that in this case, Patzig had not received any benefit in exchange for his testimony, and did not expect to receive a benefit. With respect to the discrepancies between Patzig's interview with the police and Patzig's preliminary hearing testimony, trial counsel asked about at least some of these discrepancies during cross-examination, and Patzig indicated that after his interview with the police, he continued to be cellmates with appellant and was able to obtain some additional information. Given the other overwhelming evidence presented against appellant, including his girlfriend's testimony about the day of the murder, evidence that appellant possessed the fake bomb and handgun taken from the victim's home, evidence that appellant had recently begun carrying a box cutter consistent with the murder weapon, and a neighbor's eyewitness identification that she had seen appellant and two other men walking away from the victim's home on the day of the murder, appellant cannot demonstrate a reasonable probability of a different result had trial counsel cross-examined Patzig about the letter he wrote in the previous case. Therefore, the district court did not err in denying this claim.

Investigation of alibi witness

Next, appellant argues that trial counsel was ineffective for failing to investigate appellant's claims that he had alibi witnesses. Appellant specifically argues that counsel was ineffective for failing to locate a friend of his, Lauri Strum, with whom he was doing laundry on

the day of the murder, and the bartender at the New Montana Bar, who would have testified that appellant was also in the bar on the day of the murder. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). At the evidentiary hearing, trial counsel testified that he attempted to locate the bartender, but the bar had been torn down. He further testified that he visited the trailer park where Strum had lived, but was unable to locate her. While appellant argues that counsel was ineffective for failing to also search jail and prison records for Lauri Strum, he fails to demonstrate that such an effort would have actually succeeded in locating her. Appellant does not suggest how trial counsel should have attempted to locate the unnamed bartender. Notably, post-conviction counsel did not present testimony from either potential witness at the evidentiary hearing. Given the other overwhelming evidence presented against appellant, including his own confession to Patzig, appellant fails to demonstrate a reasonable probability that the result of the trial would have been different had trial counsel located Strum or the bartender. Therefore, the district court did not err in denying this claim.

Contemporaneous photograph of appellant

Next, appellant argues that trial counsel was ineffective for failing to present contemporaneous photographs of appellant at trial. Appellant argues this photograph was necessary to impeach an eyewitness who saw appellant leaving the crime scene, who originally told the police that appellant was short, Hispanic, and husky. Appellant fails to

demonstrate that counsel was deficient or that he was prejudiced. At the evidentiary hearing, trial counsel testified that he did not obtain a contemporaneous photograph because it was obvious from appellant's appearance that he was not Hispanic. Generally, the "[t]actical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances." See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). Appellant fails to demonstrate any extraordinary circumstances here. In addition, given the other overwhelming evidence presented against appellant, appellant has failed to demonstrate a reasonable probability that the result of trial would have been different had trial counsel introduced a contemporaneous photograph. Therefore, the district court did not err in denying this claim.

In-court identification of appellant

Next, appellant argues that trial counsel was ineffective for failing to object to eyewitness Karyn Hopkins' identification of the defendant. Appellant further argues that trial counsel was ineffective for failing to obtain an expert witness to testify about the reliability of eyewitness identifications. Appellant failed to demonstrate that he was prejudiced.

The applicable standard for pretrial identifications is whether, considering the totality of the circumstances, "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law." Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (alteration in original) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

Here, Hopkins identified appellant at the preliminary hearing,

where appellant was wearing a jail jumpsuit, shackles, and was seated with his two co-defendants. Hopkins later identified appellant at trial. Based on the circumstances of the preliminary hearing, appellant argues that Hopkins' first identification of appellant was so unnecessarily suggestive that it rendered any later identifications by Hopkins to be unreliable. Appellant also argues that an expert witness was necessary to explain that Hopkins' identification was unreliable. Nonetheless, even if trial counsel had succeeded in challenging Hopkins' identification of appellant, or presented expert witness testimony regarding the reliability of the identification, given the other overwhelming evidence presented against appellant, including his own confession to Patzig, appellant fails to demonstrate a reasonable probability that the result of trial would have been different. Therefore, the district court did not err in denying this claim.

Hearsay testimony

Next, appellant argues that trial counsel was ineffective for failing to object to testimony by a police detective that he had been informed by county jail inmate David Delmult that he overheard a conversation between appellant and another inmate in which appellant indicated that he had hidden a gun in a Budget Crest Motel room. Appellant failed to demonstrate that he was prejudiced. The police detective's testimony regarding the out-of-court statement of Demult was likely inadmissible hearsay. See NRS 51.035. Even so, the gun, and the fact that it had been discovered hidden in a motel room recently vacated by appellant, were properly admitted to the jury. Therefore, given the other overwhelming evidence presented against appellant, appellant has failed to demonstrate reasonable probability of a different outcome had

this statement been excluded. Therefore, the district court did not err in denying this claim.

Redacted statement

Next, appellant argues that trial counsel was ineffective for failing to review appellant's redacted statement to the police before it was presented to the jury. According to appellant, when police asked appellant what he planned to do with the stolen gun he claimed he obtained from his co-defendant, appellant replied "self-defense." However, the redacted and transcribed copy of the statement presented to the jury read "sell it." Appellant failed to demonstrate that trial counsel was deficient or that prejudiced. Trial counsel admitted at the evidentiary hearing that he had only reviewed appellant's complete statement, not the redacted version. However, counsel pointed out the error in the transcript to the jury during closing arguments. Thus, as the jury was aware of the error in the transcripts, appellant has failed to demonstrate a reasonable probability of a different outcome had trial counsel reviewed the redacted statement earlier. Therefore, the district court did not err in denying this claim.

DNA expert

Next, appellant argues that trial counsel was ineffective for failing to cross-examine a DNA expert regarding strands of hair recovered from the victim's hands. Appellant failed to demonstrate the counsel was deficient or that he was prejudiced. As appellant admits in his briefing, the LVMPD never tested the DNA from those samples. Accordingly, any questioning regarding the strands of hair would have had very little probative value to either the State or the defense, and appellant has failed to demonstrate reasonable probability of a different result had trial

counsel pursued this line of questioning. Therefore, the district court did not err in denying this claim.

Sentencing phase

Next, appellant argues that trial counsel failed to adequately prepare for and represent appellant at sentencing. Specifically, appellant claims that counsel was ineffective for: (1) failing to investigate and present mitigating evidence at the penalty hearing; (2) failing to meet with appellant before the initially scheduled sentencing hearing; and (3) failing to object to the introduction of evidence related to appellant's criminal history at the penalty hearing. For the reasons stated below, we conclude that each of these claims lack merit.

Failure to present mitigating evidence

Appellant first claims that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty hearing. Appellant argues that he was "kidnapped" by his mother at the age of seven, abandoned by his mother at the age of nine, and spent his youth in a children's home. Appellant asserts that counsel should have performed additional investigation into this aspect of his childhood, including obtaining DCFS records and interviewing family members, and presented this information to the jury. We conclude that appellant failed to demonstrate that he was prejudiced. At the sentencing hearing, trial counsel elicited testimony from appellant regarding his childhood, and appellant testified regarding his abandonment by his mother, and his time in the children's home. Accordingly, as the jury was aware of appellant's troubled childhood and appellant's family's good opinion of him, appellant fails to demonstrate a reasonable probability that the result of the penalty hearing would have been different had counsel performed additional

investigation or presented additional evidence related to appellant's childhood. Therefore, the district court did not err in denying this claim.⁶

Failure to meet with appellant before the initially scheduled sentencing hearing

Next, appellant claims that trial counsel was ineffective for failing to meet with him prior to the initially scheduled sentencing hearing. Appellant fails to demonstrate that he was prejudiced. At the initial hearing, trial counsel explained that he had been unable to meet with appellant face to face, and the trial court continued the hearing to allow trial counsel the opportunity to do so. Therefore, appellant fails to demonstrate a reasonable probability of a different result had counsel met with him earlier. Accordingly, the district court did not err in denying this claim.

Failure to object to evidence of appellant's criminal history

Next, appellant argues that counsel was ineffective for failing to object to the presentation of certain evidence related to appellant's criminal history during the penalty phase. During the penalty hearing, an investigator for the State relied on a report from the National Crime Information Center (NCIC) to testify that appellant had numerous felony arrests and both felony and misdemeanor convictions. The presentence

⁶To the extent appellant also claims that trial counsel was ineffective for failing to present certain family members as witnesses at the sentencing hearing, we note that the sentencing court received and read letters from these family members. Therefore, appellant is unable to demonstrate a reasonable probability of a different outcome had trial counsel presented these witnesses at the sentencing hearing. Accordingly, the district court did not err in denying this claim.

investigation report (PSI) compiled by the Department of Parole and Probation listed fewer actual arrests, charges, and convictions. Thus, appellant argues that because the PSI contained fewer arrests and charges, counsel should have objected to the presentation of information contained in the NCIC report as inaccurate. In addition, appellant argues that trial counsel should have objected to the presentation of appellant's entire criminal history through the NCIC report on the grounds that the report was more prejudicial than probative. See Herman v. State, 122 Nev. 199, 209, 128 P.3d 469, 475 (2006).

Appellant fails to demonstrate that he was prejudiced. Given the violent nature of the crime of which he was convicted, appellant has failed to demonstrate a reasonable probability that had the jury been presented with slightly fewer previous criminal charges, the jury would have agreed upon a lesser sentence than the sentence of life without the possibility of parole ultimately imposed by the district court. Therefore, the district court did not err in denying this claim.⁷

Cumulative error

Finally, appellant argues that the cumulative effect of trial and appellate counsel's alleged errors indicates that he received ineffective assistance of counsel. Given the overwhelming evidence presented against appellant, including his own confession to Patzig that he murdered the victim, the jury's verdict was not rendered unreliable by the cumulative

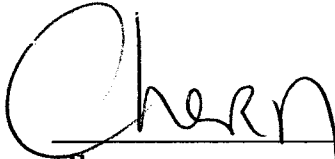
⁷To the extent appellant also argued that the statements contained in the NCIC report were hearsay admitted in violation of Crawford v. Washington, 541 U.S. 36 (2004), we note that this court has declined to extend Crawford to criminal penalty hearings. Summers v. State, 122 Nev. 1326, 1332, 148 P.3d 778, 782 (2006).

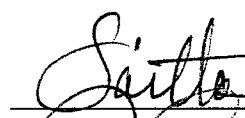
nature of any of trial or appellate counsel's alleged errors. Therefore, the district court did not err in denying this claim.

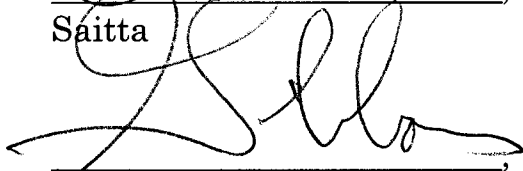
Conclusion

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that oral argument is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 15, District Judge
Joel M. Mann, Chtd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk