

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BYFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50074

FILED

SEP 22 2010

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

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

Byford's codefendant, Christopher Williams, shot Monica Wilkins multiple times in the desert outside of Las Vegas, Nevada. Byford then took the weapon from him, shot Wilkins twice in the head, and set her remains on fire. A jury convicted Byford of first-degree murder with the use of a deadly weapon and sentenced him to death. On appeal from the denial of his post-conviction petition for a writ of habeas corpus, Byford argues that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. He also asserts that the district court erred in denying his motion to supplement his petition. Lastly, he claims that the district court erred in concluding that relief was not warranted based on cumulative error.

Ineffective assistance of trial and appellate counsel

Byford argues that the district court erred by denying numerous claims of ineffective assistance of trial and appellate counsel.

“A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review,” Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court’s purely factual findings are entitled to deference. Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). Under the two-part test established by the United States Supreme Court in Strickland v. Washington, a defendant carries the burden to show that counsels’ performance fell below an objective standard of reasonableness and prejudice. 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996); see also Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). A court need not consider both prongs of the Strickland test if a defendant makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

Jury selection

Byford argues that the district court erred in denying four claims that trial and appellate counsel were ineffective for failing to challenge trial error during voir dire. We conclude that the district court did not err in denying the claim for the reasons discussed below.

First, Byford argues that trial and appellate counsel were ineffective for failing to adequately oppose the State’s challenge for cause to prospective jurors who did not favor the death penalty. As the jurors stated that they could not consider the death penalty in this case, Byford failed to demonstrate that counsel would have been successful in opposing the challenges for cause. See Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997). Further, Byford failed to demonstrate prejudice as he did not show that a seated juror was not fair and impartial. See Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005).

Second, Byford argues that trial and appellate counsel were ineffective for failing to challenge the district court's inquiry of jurors who favored death. The district court did not engage in more extensive voir dire examinations based solely on a prospective juror's views on the death penalty. Instead, it engaged in further discussion when prompted by an equivocal answer concerning that juror's feelings about the death penalty, the juror's ability to be impartial, or when the juror's stated answers conflicted with the answers provided on the jury questionnaire. Further, the jurors seated on the jury indicated that they were impartial and could consider all the sentencing options. See id. Because Byford failed to demonstrate that his counsel were deficient or prejudice, the district court did not err by denying this claim.

Third, Byford argues that trial and appellate counsel were ineffective for failing to challenge the district court's inquiry as to whether the jurors could equally consider all possible punishments. We conclude that Byford failed to demonstrate that his counsel's performances were deficient or prejudice for two reasons. First, this court did not consider the equal consideration inquiry improper until our decision in Leonard v. State, 117 Nev. 53, 65-66, 17 P.3d 397, 405 (2001), which was decided after Byford's trial. Second, the record indicated that Byford's counsel had a tactical reason for not raising an objection. See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

Fourth, Byford argues that trial and appellate counsel were ineffective for failing to challenge jurors Andrus and Ellis based on implied bias, and thus squandering a peremptory challenge that should have been used to remove juror Kersey, who favored the death penalty.

We conclude that Byford failed to demonstrate that his counsel were deficient because the record reveals no valid basis to support a for-cause challenge as both jurors indicated that they could be impartial despite the fact that both had a female relative who had been murdered. Further, Byford did not demonstrate that any seated juror was not impartial. See Weber, 121 Nev. at 581, 119 P.3d at 125.

Recording of proceedings

Byford argues that trial and appellate counsel were ineffective for failing to challenge numerous bench and chambers conferences that were not recorded or held in Byford's presence. We conclude that this claim lacks merit. While "[o]nly rarely should a proceeding in a capital case go unrecorded," Archanian v. State, 122 Nev. 1019, 1032, 145 P.3d 1008, 1018 (2006) (quoting Daniel v. State, 119 Nev. 498, 507, 78 P.3d 890, 897 (2003)), "a capital defendant's right to have trial proceedings recorded and transcribed is not absolute" and therefore "[t]he mere failure to make a record of a portion of the proceedings . . . is not grounds for reversal." Id. at 1033, 145 P.3d at 1018-19 (quoting Daniel, 119 Nev. at 508, 78 P.3d at 897) (alterations in original); cf. SCR 250(5)(d). As Byford has not identified any issue that this court was unable to meaningfully review due to the failure to record a portion of the proceeding, he failed to show that trial and appellate counsel were ineffective in this regard. See Archanian, 122 Nev. at 1033, 145 P.3d at 1019.

As to Byford's claim that he was not present at certain proceedings, we have "explained that a defendant does not have an unlimited right to be present at every proceeding." Gallego v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001). Byford has not explained the nature or importance of the proceedings he missed or prejudice from his

absence. See id. at 368, 23 P.3d at 240. Therefore, the district court did not err by denying this claim.

Preparation of Byford's testimony

Byford argues that trial counsel were ineffective because counsel should have performed a mock examination to prepare him for cross-examination and explained to him the importance of his demeanor while testifying. We conclude that this claim lacks merit. Byford fails to adequately explain how the mock examination would have assisted him. And he did not testify at his second trial; instead, his prior testimony was read into the record. Thus, the jury did not observe any aspects of his demeanor and none of his answers appeared any more unemotional than the rest of his testimony. See Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) ("The cold record is a poor substitute for demeanor observation.").

Failing to adequately address Byford's testimony

Byford argues that trial counsel's failure to introduce his original trial testimony as a prior "statement" from a previous proceeding suggested to the jury that there had been a prior trial. We conclude that Byford failed to demonstrate that counsel were deficient. Byford's counsel objected to the introduction of his prior testimony arguing that the manner in which the testimony was referred to, as "prior sworn testimony . . . from a previous proceeding," violated Byford's constitutional rights. To the extent that his counsel may have been deficient for failing to insist that it be referred to as a "statement," we conclude that Byford failed to demonstrate prejudice. Considering the similarity between the prior testimony and the days of testimony that the jury had already heard, along with the overwhelming evidence of his guilt, Byford failed to

demonstrate that referring to the testimony only as a prior “statement” would have significantly affected the jury’s perception of the prior testimony or the outcome of the proceeding. Therefore, the district court did not err by denying this claim.¹

Failing to challenge testimony

Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for failing to challenge the testimony from eight witnesses. We conclude that the district court did not err in denying these claims for the reasons discussed below.

First, Byford argues that trial and appellate counsel were ineffective for failing to challenge the testimony of Marian Wilkins, the victim’s mother, and Jojo Findley, the victim’s sister, because they had no direct knowledge of facts relevant to the guilt determination and their testimony amounted to victim impact evidence, which is improper in the guilt phase of trial. We conclude that Byford failed to demonstrate that his counsel were deficient, as the testimony was relevant to the events surrounding Wilkins’s death and did not amount to victim impact testimony. See NRS 48.015; NRS 176.015(3)(b).

Second, Byford asserts that trial and appellate counsel were ineffective for failing to challenge Todd Smith’s testimony that Byford and

¹Byford also contends that he was prejudiced by the introduction of his original trial testimony because it allowed the prosecutor to comment on his failure to testify at retrial. However, we concluded in his direct appeal that “the State never referred to the prior testimony as a way of commenting on Byford’s silence at the second trial.” Id. at 225, 994 P.2d at 707-08.

Williams contemplated killing Wilkins before the shooting as unreliable. We conclude that Byford failed to demonstrate that any challenge to Smith's testimony on these grounds would have been successful as Smith's inability to remember some information concerning the statements, while affecting his credibility, would not affect the admissibility of the testimony. Lisle v. State, 113 Nev. 540, 555, 937 P.2d 473, 482 (1997).

Byford also argued that trial and appellate counsel were ineffective for failing to challenge Smith's testimony that he was threatened. We conclude that Byford failed to demonstrate that his counsel were deficient. Smith testified that he heard Byford and Williams tell other inmates in the cell that Smith was a snitch, see NRS 50.025(1)(a), thus Byford did not demonstrate a sufficient basis upon which counsel could have challenged Smith's testimony.

Third, Byford argues that trial counsel were ineffective for failing to challenge Billy Simpson's competency to testify. We conclude that Byford fails to demonstrate that counsel were deficient as there is no indication from the record that Simpson was not competent to testify. He appeared able to understand the oath and testified to matters he personally observed. See NRS 50.025(1)(a); Wilson v. State, 96 Nev. 422, 427, 610 P.2d 184, 187 (1980). While inconsistencies were exposed on cross-examination and Simpson acknowledged head injuries that hindered his ability to recall certain facts, such factors affect the weight given to his testimony, not his competence to testify. See Wilson, 96 Nev. at 427, 610 P.2d at 187. Moreover, Byford failed to demonstrate prejudice as the critical aspects of Simpson's testimony—that Byford admitted to killing Wilkins and reenacted the murder—were corroborated by other witnesses.

Fourth, Byford argues that trial counsel were ineffective for failing to examine Tammy Byford about threats against her by Simpson. While the evidence of threats came out on cross-examination and redirect, Byford contends that it would have been more persuasive and fully explained if it had been elicited on direct examination. Because he failed to show deficient performance or prejudice, the district court properly denied this claim.

Fifth, Byford argues that counsel were ineffective for failing to file a motion in limine to limit Wayne Porretti's testimony, during which he offered irrelevant and objectionable testimony. While Byford's counsel were deficient for failing to address the irrelevant testimony, Byford failed to demonstrate prejudice. Considering Byford's admissions and attempts to mislead the police, he failed to demonstrate that the jury would not have believed Porretti's testimony about Byford's admission or that the outcome of the trial would have been different if he had succeeded in precluding any irrelevant testimony.

Sixth, Byford argues that trial and appellate counsel were ineffective for not challenging Detective Scholl's testimony that he believed Smith and thought that Byford and Williams should be prosecuted. While counsel were deficient for failing to address improper vouching, see Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 410 n.14, considering the overwhelming evidence of Byford's guilt, he failed to demonstrate that the result of the trial would have been different had this testimony been precluded or that he would have enjoyed success on appeal had this issue been raised.

Seventh, Byford argues that trial counsel were ineffective for failing to file points and authorities to prohibit Chief Deputy District

Attorney David Schwartz's testimony. While Schwartz did not directly vouch for Smith, Schwartz's testimony that Smith was offered a plea to a lesser charge and that Smith cried during his preliminary hearing testimony implied that the prosecutor believed Smith's account. See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). However, considering the overwhelming evidence of Byford's guilt, he failed to demonstrate prejudice.

Failing to call witnesses during the guilt phase

Byford argues that the district court erred in denying claims that counsel were ineffective for failing to call eight witnesses and introduce several prior statements. "An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary." State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)). A petitioner asserting claims that his counsel did not conduct 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). We conclude that the district court did not err in denying these claims for the reasons discussed below.

First, Byford argues that his trial counsel were ineffective for failing to call Deputy District Attorney Kephart as a witness or seek his disqualification from the trial because Kephart had discovered physical evidence that was introduced at trial. He further claims that counsel should have objected to the introduction of evidence Kephart discovered. We conclude that Byford fails to demonstrate that his counsel were deficient. Generally, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." RPC 3.7(a).

However, even though Kephart was involved in the discovery of evidence at the crime scene, the evidence was collected by crime scene technicians whose testimony was sufficient to establish the chain of custody.

Second, Byford argues that trial counsel were ineffective for failing to call Lorelee Silvey as a witness because she would have testified that Billy Simpson told her that Smith had killed Wilkins but that she did not believe him because he had a reputation for lying. As the record indicated that Simpson was not generally credible, counsel were not deficient for failing to introduce evidence of a statement that, while exculpatory to Byford, was made by a reputed liar and bore no indicia of credibility. Further, in light of the overwhelming evidence of Byford's guilt, Byford failed to demonstrate prejudice.

Third, Byford argues that trial counsel were ineffective for failing to call Brenda Gayle Wright to rebut the State's allegation that Tammy Byford lied about being threatened by Billy Simpson. Because Byford did not produce evidence that Wright heard any threat despite the opportunity to do so, we conclude that he failed to show that counsel were ineffective.

Fourth, Byford argues that counsel were ineffective for failing to introduce Williams's prior testimony that Smith killed Wilkins. As one of Byford's counsel testified in an evidentiary hearing that he believed that Williams's testimony was more damaging to Byford, an assessment supported by the record, Byford failed to demonstrate that counsel were deficient. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Further, even if counsel had presented Williams's testimony, Byford failed to demonstrate that there was a reasonable probability of a different result at trial considering the overwhelming evidence of his guilt.

Fifth, Byford argues that trial counsel were ineffective for failing to retain a firearms expert. He asserts that an expert would have testified that it was possible for one person to reload a pistol clip while holding the weapon and clip, which would refute the State's closing comments on Byford's testimony. Further, the expert would testify that the weapon was underpowered, thus suggesting that Wilkins was shot numerous times because of the ineptness of the weapon rather than with the intent to torture her. Regarding Byford's first contention, we conclude that he failed to demonstrate that his counsel were deficient for failing to proffer evidence to rebut an argument prior to the introduction of the testimony that incited the argument itself. As to Byford's second contention, he failed to demonstrate prejudice as the State's expert had testified that the murder weapon was underpowered.

Sixth, Byford argues that trial counsel were ineffective for (1) failing to retain a medical expert to testify that there was "a reasonable probability" that a cause-of-death determination was impossible due to the damage to Wilkins's body and (2) failing to impeach the State's expert with his own preliminary hearing testimony that the body's condition made it impossible to determine if the gunshot wounds to the chest were immediately fatal and that he could not rule out that Wilkins was dead prior to being shot in the head, thus exculpating Byford. As the medical examiner's testimony at trial appeared more conclusive than that given at the preliminary hearing, Byford demonstrated that his counsel were deficient for failing to more strenuously test the medical examiner's testimony. However, considering the overwhelming evidence of Byford's guilt and the medical examiner's admission at trial that the victim could have been dead before being shot in the head, we conclude that he failed to

demonstrate prejudice based on counsel's failure to more strenuously cross-examine the medical examiner or introduce testimony from another medical expert.

Seventh, Byford argues that trial counsel were ineffective for failing to retain a psychologist to counter the State's theory that he was the leader of the group, Smith would not have killed the victim absent Byford's permission, and members of the group might act of their own accord to establish respect within the group. Further, Byford contended that counsel should have introduced Smith's criminal record to show that Smith committed crimes without Byford's influence. We conclude that this claim lacks merit. Byford did not call an expert at the evidentiary hearing to develop the testimony he proffers here. Further, even if counsel were deficient, Byford failed to demonstrate prejudice for two reasons. First, Byford's trial counsel cross-examined Smith about his criminal record. Second, in light of Byford's admissions and attempt to fabricate an alibi, he failed to demonstrate that there was a reasonable probability of a different outcome at trial if this testimony had been introduced.

Eighth, Byford argues that trial counsel were ineffective for failing to retain a crime-scene reconstructionist, call the defense investigator whose report detailed inconsistencies between Smith's testimony and the evidence at the crime scene, and request that the jury view the crime scene. We conclude that Byford failed to demonstrate prejudice. While this evidence may have exposed some inconsistencies between Smith's testimony and the physical evidence taken from the scene, Byford failed to demonstrate it would have altered the outcome of the trial considering the other evidence establishing his guilt.

Ninth, Byford argues that counsel were ineffective for failing to introduce prior inconsistent statements of Billy Simpson, Chad Simpson, and Todd Smith as substantive evidence. See NRS 51.035(2)(a). As the statements did not directly implicate Byford in the murder, they were favorable to Byford and counsel were deficient for failing to introduce them as substantive evidence. However, we conclude that Byford fails to demonstrate prejudice considering the overwhelming evidence of his guilt.

Failing to request or object to guilt phase instructions

Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for failing to request or challenge several instructions. We conclude that his claims lack merit for the reasons discussed below.

First, Byford argues that trial counsel were ineffective for failing to request a jury instruction on voluntary intoxication because evidence adduced at trial revealed that he had ingested alcohol and drugs on the night of the murder. He also contends that appellate counsel was ineffective for failing to raise this issue on appeal. We conclude that Byford failed to demonstrate that counsel were deficient or prejudice. While there was some evidence that Byford had ingested beer and marijuana on the evening of the shooting and had even mentioned in passing that he “was pretty messed up,” the evidence did not demonstrate the intoxicating effect of the alcohol and marijuana or the “resultant effect on [his] mental state.” Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985). And other evidence at trial contradicted any suggestion that intoxicants affected his mental state: Byford admitted that he had the presence of mind to seize the firearm after Smith set it down, suggest that they burn the body, and fabricate an alibi. Given the evidence presented

at trial, Byford was not entitled to an instruction on voluntary intoxication. Id. Accordingly, Byford failed to demonstrate that trial or appellate counsel were ineffective in this regard. Therefore, the district court did not err in denying this claim.

Second, Byford argues that his trial and appellate counsel were ineffective for failing to challenge the reasonable doubt instruction. We disagree. The district court gave the reasonable doubt instruction mandated by NRS 175.211, and we have repeatedly upheld the constitutionality of that instruction. See, eg., 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), limited on other grounds by Summers v. State, 122 Nev. 1326, 1331, 148 P.3d 778, 782 (2006). Given these decisions, counsel were not deficient in failing to raise the issue and Byford cannot demonstrate prejudice.

Third, Byford argues that trial and appellate counsel were ineffective for failing to challenge the “equal and exact justice” instruction, which he contends improperly minimized the burden of proof and created a reasonable likelihood that the jury would not apply the presumption of innocence. This court has rejected this claim where, as here, the jury was also properly instructed on the presumption of innocence and the State’s burden of proof. See Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Byford therefore failed to show deficient performance or prejudice, and the district court did not err by denying this claim.

Fourth, Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for failing to challenge an instruction directing the jury that it was to consider the guilt

or innocence of the defendants and not of any other person. We have rejected challenges to this instruction as “patently meritless.” Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001). Byford therefore failed to demonstrate deficient performance or prejudice, and the district court properly denied this claim.

Fifth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the accomplice instruction because it did not advise the jury of Smith’s status as an accomplice as a matter of law. As Smith testified to his involvement in the murder and acknowledged that he had pleaded guilty to charges related to the murder, Byford’s counsel were deficient for failing to challenge the instruction. See Rowland v. State, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002) (“[A] district court should instruct the jury as a matter of law regarding a witness’s accomplice status when the witness’s own testimony leaves no doubt that the witness was an accomplice.”). Nevertheless, Byford failed to demonstrate prejudice for two reasons. First, Smith admitted involvement in the murder and his subsequent conviction and incarceration. Second, while Smith was the only eyewitness to the murder, Byford admitted his involvement in the murder to numerous witnesses, attempted to fabricate an alibi, and threatened Smith.

Sixth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the instructions on the essential elements of aiding and abetting murder. See Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). As the instructions failed to clearly indicate that the jury had to find that Byford aided Williams with the specific intent

that Williams murder the victim, see id. at 655, 56 P.3d at 872, counsel were deficient for failing to challenge the instructions.² Nevertheless, Byford fails to establish prejudice. The evidence showed that Byford handed Williams the weapon immediately before the shooting and said that “he couldn’t do it.” Williams then repeatedly shot the victim, reloaded, and shot her again. Byford thereafter took the weapon from Williams and shot the victim twice in the head while she was on the ground. Considering this evidence, he did not demonstrate that the result of the trial would have been different had the jury been instructed on aiding and abetting pursuant to Sharma or that his claim had a reasonable likelihood of success on appeal.

Guilt phase prosecutorial misconduct

Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for not challenging numerous instances of prosecutorial misconduct that occurred during the guilt phase of trial. We conclude that the claims lack merit for the reasons discussed below.

Prosecutorial misconduct warrants relief on direct appeal when “a prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due process,” and therefore this court has explained that “a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.”

²While Sharma was not decided until after Byford’s trial and direct appeal, we have held that it was a clarification of the law as it existed at the time of Byford’s trial. See Mitchell v. State, 122 Nev. 1269, 1276, 149 P.3d 33, 38 (2006).

Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)). Prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt. King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

First, Byford contends that trial and appellate counsel were ineffective for failing to challenge the prosecutor's statement that it was impossible for one person to reload a firearm clip while still holding the gun. Byford argues that the statement was unsupported by the evidence. As no evidence was introduced on this matter, nor does it appear to be a reasonable inference from the evidence, the statement was improper, see Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002), and abrogated on other grounds by Rosas v. State, 122 Nev. 1258, 1265 n.10, 147 P.3d 1101, 1106 n.10 (2006); Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997), overruled on other grounds by Byford, 116 Nev. 215, 994 P.2d 700, and Byford's counsel should have challenged the argument. However, Byford fails to demonstrate prejudice as there was overwhelming evidence of his guilt.

Second, Byford contends that trial and appellate counsel were ineffective for failing to challenge a comment that he contends suggested that he had lied during his testimony and commented on his failure to testify. The prosecutor's argument—that for the jurors to believe Byford's testimony, they would have to find that several other witnesses were "liars"—was not improper. See Honeycutt v. State, 118 Nev. 660, 674, 56 P.3d 362, 371 (2002) ("[A] prosecutor may demonstrate to a jury through inferences from the record that a defense witness's testimony is untrue."), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592

(2005); Williams, 113 Nev. at 1020, 945 P.2d at 445. Further, as the prosecutor referenced Byford's prior testimony, which was admitted as evidence, he did not comment on Byford's failure to testify. See Byford, 116 Nev. at 225, 994 P.2d at 707-08 ("Our review of the record indicates that the State never referred to the prior testimony as a way of commenting on Byford's silence at the second trial."). Thus, Byford failed to demonstrate that counsel were deficient.

Third, Byford contends that trial and appellate counsel were ineffective for failing to more strenuously challenge an allegedly disparaging comment made during the rebuttal argument. We conclude that Byford failed to demonstrate that his counsel were deficient or prejudice. Byford's counsel objected, and, while the district court did not make an explicit ruling, it endorsed as accurate defense counsel's explanation that he never insinuated that the State was involved in any wrongdoing. Therefore, the district court did not err in denying this claim.

Fourth, Byford contends that counsel should have addressed instances of taunting by the prosecution at his first trial and attempts to dissuade Tammy Wright from testifying at his second trial. We conclude that Byford failed to substantiate these claims. While Byford and Wright described the events giving rise to the claim in affidavits, they did not testify to facts concerning these matters. In light of the respective single averments and the lack of development of further evidence at the evidentiary hearing despite the opportunity to do so, we cannot conclude that the district court erred in finding that Byford failed to show prejudice from counsel's failure to address the purported misconduct.

Penalty phase misconduct

Byford argues that the district court erred in denying his claims that trial and appellate counsels' performances were ineffective for failing to challenge numerous instances of prosecutorial misconduct during the penalty phase of his trial. We conclude that these claims lack merit for the reasons discussed below.

First, Byford argues that trial and appellate counsel were ineffective for failing to challenge comments made during the State's closing argument as exceeding the bounds of proper advocacy and inflaming the passions of the jury. We conclude that this claim lacks merit. Many of the comments of which Byford complains did not exceed the bounds of proper advocacy. See Williams, 113 Nev. at 1020, 945 P.2d at 445 (inviting jury to consider victim's final moments was not improper). Therefore, counsel did not perform deficiently by failing to address the comments. To the extent that some of the comments exceeded the bounds of proper advocacy, see Berry v. State, 882 So. 2d 157, 164 (Miss. 2004) (concluding that comparison of victim's rights to defendant's rights was egregious and "possibly rose to the level of prosecutorial misconduct"), Byford failed to demonstrate prejudice because the decision between life or death was not close and therefore there was not a reasonable probability of a different outcome at trial or on appeal. See Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (providing that the focus of the prejudice inquiry should be on the penalty proceedings and whether the misconduct "so infected the proceedings with unfairness as to make the results a denial of due process"); Schoels v. State, 114 Nev. 981, 989, 966 P.2d 735, 740 (1998) (providing that in evaluating prosecutorial misconduct during the penalty phase, this court "will reverse the conviction or death penalty

where the decision between life or death is a close one or the prosecution's case is weak"), on rehearing, 115 Nev. 33, 975 P.2d 1275 (1999). Here, the aggravators found were compelling—the murder was committed by Byford while he was under a sentence of imprisonment and the murder involved torture or mutilation—and the sole mitigator found—that he may have been under the influence of drugs or alcohol at the time of the crime—was not particularly persuasive. Therefore, the district court did not err in denying this claim.

Second, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's comment that the death penalty has a deterrent effect as improper and unsupported by the evidence. We conclude that Byford failed to demonstrate that counsel were deficient because the prosecutor's statements merely noted general policy considerations for the death penalty. Evans v. State, 117 Nev. 609, 632, 28 P.3d 498, 514 (2001). To the extent that the comments referenced facts not proven at trial, Byford failed to demonstrate prejudice because, given the strength of the State's case, there was not a reasonable probability of a different outcome at trial or on appeal as to the penalty.

Third, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument respecting the function of aggravators. We conclude that this claim lacks merit. As the prosecutor accurately described Nevada law, see NRS 200.033; NRS 175.554, Byford's counsel was not deficient for failing to challenge the comment, see Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims.").

Fourth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument minimizing the gravity of the jury's decision and injecting the prosecutor's personal beliefs about the propriety of the death penalty. The challenged comments, which suggested that experts in the prosecutor's office had already determined that the death penalty was appropriate, improperly conveyed the personal opinion of members of the prosecutor's office, referred to facts that were not introduced at trial, and diminished the gravity of the jury's decision. See Valdez v. State, 124 Nev. 1172, 1193, 196 P.3d 465, 479 (2008) (“[A] prosecutor should not inject his or her own personal beliefs and opinions.”); Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (stating that “[i]t is improper for [prosecutor] to refer to facts not in evidence”); Geary v. State, 112 Nev. 1434, 1451, 930 P.2d 719, 730 (1996) (considering jury minimizing importance of its role in sentencing to be an “intolerable danger’ in the capital sentencing process” (quoting Caldwell v. Mississippi, 472 U.S. 320, 333 (1985))). While counsel were deficient for failing to challenge the comments, we conclude that Byford failed to demonstrate prejudice because the evidence supporting the death sentence was overwhelming.

Fifth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's interjection of his personal opinion about Byford's family during rebuttal argument. Counsel were deficient for failing to address the comment. See Valdez, 124 Nev. at 1193, 196 P.3d at 479. However, we conclude that Byford failed to demonstrate prejudice given the evidence supporting the death sentence.

Sixth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's disparagement of his

family related to mitigation evidence Byford's family presented. We conclude that Byford failed to demonstrate that his counsel were deficient because the remarks, while phrased as personal opinion, were a fair inference from the evidence adduced. See Evans, 117 Nev. at 632-33, 28 P.3d at 514. Therefore, the district court did not err in denying this claim.

Seventh, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's comments that Byford was a threat to individual jurors. The challenged comment addressed a general policy consideration for the death penalty and did not warn the jurors that Byford posed a danger to them. Because Byford failed to show deficient performance, the district court did not err in denying this claim.

Eighth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument that any time multiple gunshots are used in a murder it is torture. The challenged comment was a permissible response to Byford's argument that the murder weapon was underpowered and thus multiple shots were required to kill the victim and were not indicative of torture. Because Byford failed to demonstrate that his counsel were deficient, the district court did not err in denying this claim.

Ninth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument "urg[ing] the jury to send a message to the community to cure societal ills" as inflammatory and exceeding the bounds of proper advocacy. We disagree. As the challenged comment was proper in the context in which it was made, Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) ("[A] prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or make a statement to the

community.”), overruled on other grounds by Byford, 116 Nev. 215, 946 P.2d 438, counsel were not deficient for failing to challenge it. Therefore, the district court did not err in denying this claim.

Tenth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor’s argument regarding the quality of life in prison because the argument referred to facts that were not in evidence and distracted the jury from its weighing task. Even if counsel were deficient in this regard, Byford failed to demonstrate prejudice considering the evidence supporting the death sentence.

Eleventh, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor’s comments blaming the justice system for Byford’s crimes and asserting that Byford’s family had improperly manipulated the justice system. Further, Byford submits that there was no evidence concerning how he would behave on parole later in life. The prosecutor’s implication that the criminal justice system was to blame for the crime was improper. However, the comment did not “so infect[] the proceedings with unfairness as to result in a denial of due process.” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Further, Byford’s counsel objected to the comment implying that Byford’s family had manipulated the justice system, and the district court instructed the jury to only consider the evidence presented; therefore, Byford cannot demonstrate that trial counsel were ineffective. As the prosecutor’s statements about Byford’s risk of reoffending were proper inferences from the presentation of evidence concerning his past offenses, counsel’s performance was not deficient for failing to challenge the comments. Therefore, the district court did not err in denying this claim.

Twelfth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's comment mingling Byford's and Williams's acts to suggest that Byford was a larger risk based on Williams's conduct. The comment Byford asserts his counsel should have challenged does not impermissibly mingle Williams's and Byford's actions. Rather, the argument clearly indicates which acts are attributed to each defendant and did not operate to confuse the jury. Because Byford failed to demonstrate that his counsel were deficient, the district court did not err in denying this claim.

Thirteenth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument that Byford posed a danger to others even if he were incarcerated and thus death was the only way to guarantee that he would not murder again. As the evidence presented during the penalty hearing supported the argument, see Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005) ("Prosecutors may argue that a defendant poses a future danger where the evidence supports such an argument."), Byford failed to demonstrate that his counsel were deficient for failing to object or challenge the comment on appeal.

Fourteenth, Byford argues that trial and appellate counsel were ineffective for failing to challenge the prosecutor's argument that the statutorily enumerated mitigating circumstances were not applicable to the instant case and otherwise unsupported by the evidence. We disagree. Even if counsel had challenged the argument as improper, Byford failed to demonstrate prejudice because, given the strength of the State's case, there was not a reasonable probability of a different outcome at trial or on appeal as to the penalty.

Penalty phase instructions

Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for failing to challenge penalty phase instructions. We conclude that the district court did not err in denying these claims for the reasons discussed below.

First, Byford argues that counsel should have challenged the torture aggravator instruction on two grounds: (1) the instruction does not narrow the class of murderers eligible for the death penalty and the evidence did not show that he intended to cause pain beyond the killing itself and (2) the torture instruction did not incorporate the specific intent required for the aggravating circumstance under a theory of aiding and abetting as required by Sharma.

As to his argument that the torture aggravator was overly broad and unsupported by the evidence, we conclude that the claim lacks merit. Because the instruction failed to include language that “the murderer must have intended to inflict pain beyond the killing itself,” Domingues v. State, 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996), Byford’s counsel were deficient for failing to object to it. However, Byford fails to demonstrate prejudice. In analyzing the facts under Domingues, this court held in Byford’s direct appeal that the jury could have reasonably concluded that acts constituting Wilkins’s murder “had a vengeful, sadistic purpose and [were] intended to inflict pain beyond the killing itself and therefore constituted torture.” Byford, 116 Nev. at 240, 994 P.2d at 717. In addition, Byford admitted the facts supporting the mutilation aspect of the aggravator. Accordingly, the district court did not err by denying this claim.

As to Byford's challenge to the aggravator under Sharma, we conclude that Byford failed to demonstrate that his counsel were deficient. We have not considered whether Sharma applies to this aggravating circumstance. However, even assuming it does, Byford failed to demonstrate prejudice. The evidence at trial, particularly Byford's admission that he set the victim's body on fire, was sufficient to support the finding of this aggravator based solely on mutilation. Byford, 116 Nev. at 240, 994 P.2d at 716 ("Establishing either torture or mutilation is sufficient to support the jury's finding of this aggravating circumstance."). Therefore, the district court did not err in denying this claim.

Second, Byford argues that trial and appellate counsel were ineffective for failing to fully challenge the mutilation instruction because it failed to instruct the jury that they were not to consider the damage done by wildlife as evidence of mutilation.³ As Byford admitted that he set the victim's remains on fire, even with a more specific instruction, he failed to show that but for counsel's error there was a reasonable probability of a different result at trial or on appeal. Therefore, the district court did not err by denying this claim.

Third, Byford argues that trial and appellate counsel were ineffective for failing to fully challenge the commutation instruction because it failed to inform the jury that the possibility of commutation was remote and the jury may have speculated that Byford may only serve a short sentence if not sentenced to death. As the given instruction was a

³Byford also argues that counsel should have challenged the instruction based on its failure to specify a mens rea element. This claim is discussed below.

correct statement of the law as it applied to Byford's case, see Leonard v. State, 117 Nev. 53, 79-80, 17 P.3d 397, 414 (2001), Byford failed to demonstrate that any challenge by counsel would have been successful.

Torture and mutilation aggravator

Byford argues that the district court erred in denying his claims that trial and appellate counsel were ineffective for failing to challenge the torture and mutilation aggravator based on (1) the inconsistent application of the aggravating circumstance, (2) the lack of a mens rea element in the aggravating circumstance, and (3) the lack of a unanimity requirement. We conclude that the district court did not err for the reasons discussed below.

First, Byford argues that his trial and appellate counsel were ineffective for failing to seek dismissal of the mutilation and torture aggravator because the inconsistent application of that aggravator violates equal protection. We disagree. Byford failed to demonstrate that the decision to pursue the aggravator was "based on 'an unjustifiable standard such as race, religion, or other arbitrary classification,'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)); see also Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 736 (2006) (providing that matters of prosecutorial discretion are "within the entire control of the district attorney,' absent any unconstitutional discrimination" (quoting Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973))), or that the aggravator was unconstitutional, see Byford, 116 Nev. at 240, 994 P.2d at 716 ("Byford has failed to show that the aggravator was found unconstitutionally in this case."). Therefore, trial counsel were not deficient, and the district court did not err by denying this claim.

Second, Byford argues that trial and appellate counsel were ineffective for failing to challenge the mutilation aggravator and instruction because the jury was not required to find that the acts were committed with the intent to mutilate rather than to avoid discovery of the crime. We disagree. Although the mutilation must be for some purpose other than causing the victim's death, we have never required that the mutilation be solely for the purpose of mutilating the victim's body as opposed to destroying evidence. See Byford, 116 Nev. at 241, 994 P.2d at 717 (“[T]he legislative intent in making mutilation an aggravating circumstance ‘was to discourage the desecration of a fellow human being’s body.’”). And contrary to Byford’s assertions, the mutilation aggravator, as explained in the jury instructions, could not fairly be applied to every defendant who is eligible for the death penalty (all defendants convicted of first-degree murder). Arave v. Creech, 507 U.S. 463, 474 (1993) (explaining that an aggravator is constitutionally infirm “[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty”). Therefore, Byford failed to demonstrate that his counsel were deficient for failing to raise such a challenge, and the district court did not err by denying this claim.

Third, Byford argues that trial and appellate counsel were ineffective for failing to challenge the torture or mutilation verdict form because it did not indicate that the jury’s verdict was unanimous regarding whether torture existed or mutilation existed. Byford failed to demonstrate that counsel were deficient. Under NRS 200.033(8), “torture” and “mutilation” are “closely related components of a single aggravating circumstance.” Jimenez v. State, 106 Nev. 769, 774, 801 P.2d 1366, 1369 (1990). Because the torture and mutilation components are stated in the

disjunctive, the aggravator may be returned based on a finding of either or both components. Id.; Byford, 116 Nev. at 240, 994 P.2d at 716. Further, as Byford admitted to the facts supporting a finding of mutilation, he failed to demonstrate prejudice. Accordingly, the district court properly denied this claim.

Lack of instructions on mitigators

Byford argues that trial counsel were ineffective for failing to preserve the record regarding the district court's failure to give a proposed instruction regarding the alleged mitigating circumstances. On appeal from his judgment of conviction, we concluded that even if the district court erred in refusing to give the instruction, that error did not rise to the level of constitutional error requiring reversal. Byford, 116 Nev. at 238, 994 P.2d at 715. Accordingly, even if counsel were deficient, Byford cannot demonstrate prejudice. Therefore, the district court properly denied this claim.

Failure to find clearly applicable mitigators

Byford argues that trial counsel was ineffective for failing to move for a new penalty hearing based on the jury's failure to find clearly established mitigating factors. As jurors are not required to find proffered mitigating circumstances simply because there is un rebutted evidence to support them, Gallego v. State, 117 Nev. 348, 366-67, 23 P.3d 227, 240 (2001), we conclude that Byford failed to demonstrate that counsel were deficient, and the district court did not err by denying this claim.

Failure to move to dismiss aggravators

Byford argues that trial and appellate counsel were ineffective for failing to seek dismissal of the aggravators because they were not established by probable cause at the preliminary hearing or pleaded in the

information. Because a finding of probable cause is not necessary to charge the aggravators, nor do they need to be charged in the information or indictment, Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249, 256 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008), counsel were not deficient in this regard, and the district court properly denied this claim.

Failure to challenge imprisonment aggravator

Byford argues that the district court erred by denying his claim that trial and appellate counsel were ineffective for failing to challenge the “under sentence of imprisonment” aggravator because it does not sufficiently narrow the class of individuals eligible for the death penalty. In this, Byford asks this court to overrule Parker v. State, 109 Nev. 383, 849 P.2d 1062 (1993), in which this court held that “[a] person who is on probation for a felony offense at the time of the murder is deemed to be under a sentence of imprisonment.” Id. at 393, 849 P.2d at 1068. Because Byford failed to articulate a novel argument for this court to depart from its prior holding, counsel were not ineffective in this regard, and the district court properly denied this claim.

Failing to make constitutional challenges to the death penalty

Byford argues that the district court erred in denying his claims that his counsel were ineffective for failing to make the following constitutional challenges to the imposition of the death penalty in his case: (1) NRS 177.055(3) is unconstitutional because it provides this court with “unfettered discretion” to impose a sentence of less than death upon the finding of a constitutional violation; (2) the lethal injection protocol is unconstitutional; (3) the unavailability of clemency renders the death penalty unconstitutional; (4) Nevada’s death penalty scheme fails to

narrow the persons eligible for the death penalty; (5) the death penalty is cruel and unusual; and (6) the death penalty violates international law.

We conclude that Byford failed to demonstrate that counsel were deficient for the following reasons: (1) NRS 177.055(3) does not provide this court with unbridled discretion but merely allows the court to remand for application of the normal procedures in a death penalty case, see Johnson v. State, 118 Nev. 787, 803-04, 59 P.3d 450, 461 (2002); (2) a challenge to the lethal injection protocol involves a factual dispute that would not have been addressed at trial and could not have been addressed in the first instance on direct appeal, see McConnell v. State, 120 Nev. 1043, 1055, 102 P.3d 606, 615-16 (2004); (3) the statutory procedures for administering a grant of clemency do not implicate a constitutionally protected interest, see Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989), see generally Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998) (noting that clemency is a matter of grace); (4) this court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty, see Thomas v. State, 122 Nev. at 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Gallego, 117 Nev. at 370, 23 P.3d at 242; Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998); (5) this court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution, see Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979); and (6) this court has rejected challenges to the constitutionality of the death penalty based on international law, see, eg., Servin v. State, 117 Nev. 775,

787-88, 32 P.3d 1277, 1285-86 (2001); accord Roper v. Simmons, 543 U.S. 551, 575 (2005). Therefore, the district court did not err in denying this claim.

Failure to call expert during penalty phase

Byford argues that the district court erred in denying his claim that trial counsel were ineffective for failing to call an expert on adolescent brain maturation to testify in both the guilt and penalty phases of trial. Byford's submission of several articles published after his trial and an unsworn affidavit did not sufficiently substantiate this claim. See Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (burden of proving ineffective assistance is on defendant). Therefore, district court did not err by denying this claim.

Failure to federalize issues on appeal

Byford argues that the district court erred by denying his claim that appellate counsel was ineffective for failing to present his claims on direct appeal challenging the admission of photographs and prior bad acts as issues of federal constitutional law to preserve them for federal review. Although Byford cited to general federal authority to support these claims, he failed to adequately explain how federal constitutional principles would have garnered relief. Because Byford failed to demonstrate that his counsel was deficient or prejudice, the district court properly denied this claim.

Failure to move to strike unsupported factual allegations

Byford argues that the district court erred in denying his claim that appellate counsel was ineffective for failing to move to strike an argument by the State on appeal because it was not supported by the record. As this court did not rely on the challenged argument to resolve

any matter on appeal, see Byford, 116 Nev. at 225, 228-29, 994 P.2d at 708, 710, Byford failed to demonstrate prejudice. Therefore, the district court did not err in denying this claim.

First-degree murder jury instructions

Citing Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), Byford argues that the jury instructions defining the elements of first-degree murder violated his state and federal constitutional rights to due process and equal protection. Byford raised this claim in his supplemental petition for a writ of habeas corpus, although he did not rely on Polk. On appeal from the initial denial of that petition, this court affirmed the denial of this claim and remanded the matter only as to Byford's claims of ineffective assistance of trial and appellate counsel. Byford v. State, Docket No. 44215 (Order Affirming in Part, Vacating in Part, and Remanding, November 16, 2005). As this claim falls outside the scope of this court's remand, it is not properly before this court.⁴

Motion to supplement his petition

Byford argues that the district court erred in denying his motion to file a supplemental petition alleging that the State failed to disclose information that Porretti was given an inducement to testify against Byford. We discern no abuse of discretion, see Miles v. State, 120

⁴We note that on direct appeal, this court summarized the evidence of deliberation and premeditation and concluded that it "was sufficient for the jurors to reasonably find that before acting to kill the victim Byford weighed the reasons for and against this action, considered its consequences, distinctively formed a design to kill, and did not act simply from a rash, unconsidered impulse." Byford v. State, 116 Nev. 215, 233-34, 994 P.2d 700, 712-13 (2000).

Nev. 383, 387 n.16, 91 P.3d 588, 590 n.16 (2004), because regardless of whether Byford could show good cause for his failure to raise this claim sooner, he failed to demonstrate prejudice. See State v. Powell, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006). As discussed above, there was overwhelming evidence of guilt based on Smith's testimony and Byford's repeated admissions, threats against Smith, and attempt to fabricate an alibi. As Porretti was only one of several witnesses to whom Byford admitted his culpability in the murder, he did not demonstrate that, but for the State's failure to provide him with evidence impeaching Porretti's testimony, there was a reasonable probability of a different result at trial.

Cumulative error

Byford argues that the aforementioned errors of trial and appellate counsel, coupled with the erroneous first-degree murder instructions, considered cumulatively, warrant reversal of his judgment of conviction and death sentence. We disagree. Even assuming that counsel's deficiencies may be cumulated for purposes of the prejudice prong of Strickland, see Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies); State v. Thiel, 665 N.W.2d 305, 322 (Wis. 2003) (concluding that multiple incidents of deficient performance may be aggregated in determining prejudice under Strickland), we conclude that any deficiencies in counsel's performance

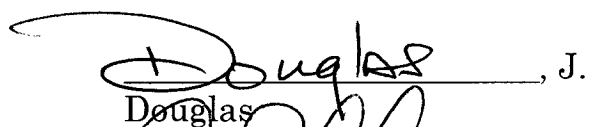
had no cumulative impact warranting reversal of Byford's convictions or sentence. Therefore, the district court did not err by denying this claim.⁵

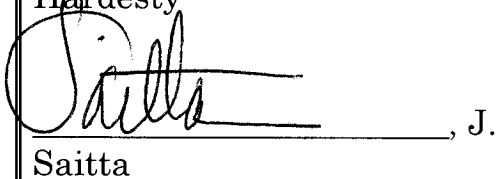
Having considered Byford's contentions, and concluding that no relief is warranted, we

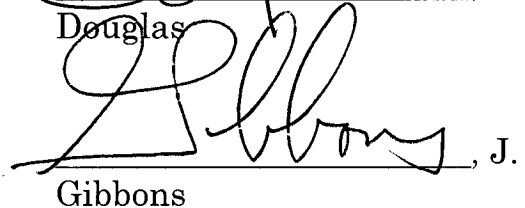
ORDER the judgment of the district court AFFIRMED.⁶

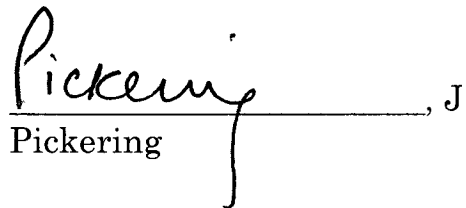

Parraguirre, C.J.


Hardesty, J.


Douglas, J.


Saitta, J.


Gibbons, J.


Pickering, J.

cc: Hon. Valorie Vega, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵To the extent that Byford argues the cumulative effect of any error respecting the first-degree murder instructions, this claim is not properly before this court.

⁶The Honorable Michael Cherry, Justice, voluntarily recused himself from participation in the decision of this matter.