

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY NOLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50241

FILED

MAR 24 2009

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE AMENDED JUDGMENT OF CONVICTION

This is a proper person appeal from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On March 12, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree kidnapping, one count of sexual assault, two counts of sexual assault with substantial bodily harm, one count of robbery, four counts of burglary, two counts of unauthorized signing of a credit or debit card transaction document, and two counts of attempted unauthorized signing of a credit or debit card transaction document. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after five years for the first-degree kidnapping conviction; concurrent terms of life without the possibility of parole for sexual assault causing substantial bodily harm, imposed consecutively to the kidnapping sentence; and a consecutive term of life with the possibility of parole after ten years for the

sexual assault conviction. The remaining terms were imposed concurrently.

On June 8, 2004, the district court convicted appellant, pursuant to a jury verdict in a separate trial, of one count of first-degree kidnapping, four counts of sexual assault, one count of attempted murder with the use of a deadly weapon, and one count of battery with the use of a deadly weapon causing substantial bodily harm. The district court sentenced appellant to serve a term of life with the possibility of parole after five years for the first-degree kidnapping conviction and four concurrent terms of life with the possibility of parole after ten years for the sexual assault convictions, imposed consecutively to the first-degree kidnapping sentence. The remaining sentences were imposed concurrently.

On appeal, this court affirmed the judgments of conviction in part, and vacated appellant's conviction for battery with the use of a deadly weapon with substantial bodily harm. Nolan v. State, 122 Nev. 363, 132 P.3d 564 (2006). The remittitur issued on May 16, 2006. On August 13, 2007, the district court entered amended judgments of conviction in which it struck appellant's conviction for battery with the use of a deadly weapon from the June 8, 2004, judgment of conviction.

Appellant filed three petitions for writs of habeas corpus. Appellant's first petition raised claims related to the March 12, 2006, judgment of conviction which concerned crimes committed against Lynda Weishaar. Appellant's second petition raised claims related to the June 8, 2006, judgment of conviction which concerned crimes against Cynthia Dyson and Lawrence Dyson. Appellant's third petition raised claims

related to the amended judgments of conviction that were filed after this court affirmed the judgments of conviction in part, and vacated appellant's conviction for battery with the use of a deadly weapon with substantial bodily harm. The district court denied all three petitions. We conclude that the district court did not err in denying these petitions for the reasons discussed below.

First Petition

On December 4, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court denied appellant's petition after conducting an evidentiary hearing. This appeal followed.

In his petition, appellant contended that there was insufficient evidence to sustain his conviction, the district court erred in admitting testimony that had been elicited under hypnosis, the State and district court erroneously introduced a prior statement of the victim, and a juror improperly questioned a witness. This court considered and rejected these claims on appeal. The doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and precisely focused argument." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying these claims.

Appellant also contended that the State committed prosecutorial misconduct, failed to investigate or pursue DNA testing on other suspects, failed to disclose some evidence until the last day of trial,

refused to identify the hypnotherapist that conducted hypnosis on Weishaar, improperly presented show-up and voice identifications that were the result of hypnosis, violated the exclusionary rule, violated Brady v. Maryland, 373 U.S. 83 (1963), violated Miranda v. Arizona, 384 U.S. 436 (1966), presented false evidence, tampered with a witness, and improperly argued false hypnosis testimony. He further claimed that the district court erred in failing to instruct the jury on lesser-included offenses, imposing multiple punishments in violation of the Double Jeopardy Clause, admitting unlawfully obtained statements, instructing the jury, precluding videotape evidence, interfering with the defense, tampering with evidence, destroying evidence, permitting evidence to be introduced on the last day of trial, redacting the Weishaar's hypnotized testimony, permitting the State to introduce written transcripts of appellant's statements to the police, limiting the testimony of a defense witness, interfering with defense counsel's cross-examination, committing judicial misconduct, permitting the jurors to tamper with evidence, permitting a nurse to testify as an expert in toxicology, and permitting the nurse to testify regarding Weishaar's medical records. He also claimed that the district court was biased and the makeup of the jury violated Batson v. Kentucky, 476 U.S. 79 (1986). These claims could have been raised on appellant's direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(1), (2). Therefore, the district court did not err in denying these claims.

Next, appellant claimed that this court erred in deciding his direct appeal using harmless error analysis. This claim is improperly raised in his petition for a writ of habeas corpus, and appellant failed to

demonstrate good cause for failing to raise the claim earlier. NRS 34.810(1)(b)(3); see NRAP 40(c)(2). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he was actually innocent. On direct appeal, this court determined that sufficient evidence supported the jury's verdict. Although appellant asserted his innocence, he failed to identify any new evidence that would undermine the jury's verdict. See Calderon v. Thompson, 523 U.S. 538, 559 (1998) (holding that to demonstrate actual innocence a petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence")(quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). Therefore, he failed to demonstrate that he was actually innocent, and we conclude that the district court did not err by denying this claim.

Next, appellant raised twenty-seven claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the 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). 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] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103

P.3d 25, 33 (2004). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that his appointed counsel, from the public defender's office, was ineffective for proceeding under a conflict of interest. Specifically, he claimed that his counsel represented him for eleven months despite the fact that the public defender's office had previously represented an individual known as "Hamburger," who appellant contended actually committed the crime. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. An attorney may not represent a client where "[t]he representation of one client will be directly adverse to another client." RPC 1.7(a)(1). Further, the attorneys associated in a firm are precluded from representing a client where the representation of one client will be directly adverse to another client of that firm. RPC 1.10(a). In the instant case, the public defender's office was prohibited from representing appellant because appellant's asserted defense theory implicated another client of the public defender's office in criminal activity. However, the public defender's office promptly withdrew from representing appellant when it discovered the identity of Hamburger and the district court appointed substitute counsel to represent appellant at trial. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate Hamburger. Specifically, appellant asserted that his trial counsel should have sought to show that

Hamburger was the man that Weishaar described as assaulting her and that biological evidence found on Weishaar matched Hamburger. Appellant failed to demonstrate that he would not have been convicted had his counsel investigated and introduced testimony related to Hamburger. At trial, witnesses testified that appellant followed Weishaar out of a bar several blocks from the apartment complex where the victim was later discovered injured. When questioned by the police, appellant admitted that he had consensual sex with Weishaar. He claimed that Weishaar's head injuries resulted from falling off of a three-foot wall where she was later discovered. Further, appellant used, and attempted to use, Weishaar's credit cards at several businesses after the assault. Moreover, the biological evidence recovered from Weishaar could not be matched to anyone, including Hamburger, because the amount recovered did not contain enough genetic material to develop a DNA profile. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to hire an expert to test the biological evidence recovered from Weishaar. He asserts that the fact that it had not been matched to anyone confused the jury. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. As noted above, the amount of biological evidence collected was too small for testing to develop a DNA profile. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to move to suppress appellant's statements to the police. Specifically, he claimed that he invoked his right to counsel prior to questioning and repeatedly asked for counsel during questioning.

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced.

When a suspect asserts the right to counsel in response to Miranda warnings, police must cease asking any further questions and can only question the suspect again without counsel if the suspect himself reinitiates further communication. See Dewey v. State, 123 Nev. ___, ___, 169 P.3d 1149, 1153 (2007). At the preliminary hearing, Detective Kisner testified that prior to appellant giving a recorded statement, he asked for an attorney. Detective Kisner stated that he did not ask appellant any questions, but did provide appellant with the charges he faced. When presented with the charges, appellant insisted on speaking with Detective Kisner. Detective Kisner then repeated the Miranda warnings and appellant adamantly denied that he wanted counsel. The record shows no further requests for counsel during the recorded statement. In addition, at the evidentiary hearing, appellant failed to introduce more evidence concerning the circumstances surrounding his statement despite the opportunity to do so. Thus, because the record indicates that the police ceased questioning upon appellant's initial invocation of his right to counsel, appellant reinitiated communication, and subsequent Miranda warnings were issued, appellant failed to demonstrate that a motion to suppress would have been successful. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (providing that a petitioner may demonstrate prejudice for a claim of ineffective assistance of counsel based on counsel's failure to seek suppression of illegally seized evidence where petitioner shows "that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have

changed the result of a trial"). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to file a request, under the Freedom of Information Act, for information concerning deals made with State witnesses. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify the State witnesses who he contended had been offered deals in exchange for their testimony. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective because he did not have adequate time to prepare the case for trial. Specifically, he asserted that counsel was not appointed until less than three months before the start of trial and was unable to adequately investigate and consult expert witnesses. Because appellant's aforementioned claims of ineffective assistance of counsel regarding his counsel's investigation and decision not to pursue certain expert witnesses are without merit, appellant failed to demonstrate counsel failed to adequately prepare for trial. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to challenge the introduction of hypnotically induced testimony, which included the posthypnotic show-up and voice identification; inform the jury of criteria for the admission of posthypnotic testimony pursuant to NRS 48.039; ask for a cautionary instruction concerning the testimony; hire an expert to testify about problems with

posthypnotic testimony; and subpoena the therapist that performed the hypnosis to examine what occurred during the sessions. Appellant failed to demonstrate that he was prejudiced. While this court recognized that the district court erred in admitting Weishaar's posthypnotic testimony, it ultimately concluded that the error was harmless beyond a reasonable doubt. Nolan v. State, 122 Nev. 363, 372-73, 132 P.3d 564, 570 (2006). Appellant failed to demonstrate that had his counsel challenged the posthypnotic testimony or sought a cautionary instruction, the outcome of the trial would have been different. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to object to the district court coaching Weishaar's testimony. Appellant failed to demonstrate that he was prejudiced. As discussed above, this court concluded that, while the district court erred in admitting Weishaar's testimony, it concluded that the error was harmless beyond a reasonable doubt. Id. Thus, because this court concluded that the jury would have convicted appellant even without Weishaar's testimony, appellant failed to show that his counsel's failure to object to the district court's conduct during Weishaar's testimony affected the outcome of the trial. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel was ineffective for failing to object to the district court's decision to decline to admit a videotape from the bar where appellant and Weishaar had been drinking. Specifically, he claimed that it would refute the allegation of kidnapping. Appellant failed to demonstrate that he was prejudiced. The State

proceeded under a theory that Weishaar was not forcefully abducted from the pub, but lured to an apartment where she was assaulted. Thus, even if the tape showed that Weishaar left the pub of her own free will, as other testimony confirmed, it still failed to undermine the State's theory. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his counsel was ineffective for failing to object to the introduction of Weishaar's medical records on the basis that they were incomplete. He further asserted that his counsel should have sought to introduce the victim's prior medical history and the testimony of her prior treating physicians. He claimed that it would demonstrate that Weishaar's injuries were the result of a pre-existing condition. Appellant failed to demonstrate that he was prejudiced. Considering the severe facial trauma; significant blood loss; substantial laceration in her vagina; bruising around her vagina and anus; and a large blood clot, which contained foreign matter that was removed from Weishaar's vagina, appellant did not demonstrate that he would not have been convicted had his counsel introduced evidence of Weishaar's prior medical history. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to object to the introduction of Weishaar's medical records because Nurse Linda Ebbert's testimony was not sufficient to authenticate the records. He claimed that Nurse Ebbert was contradicted by Dr. Derek Meeks who stated that the records were incomplete. Moreover, Nurse Ebbert was not a gynecologist and therefore could not have testified about the accuracy of the records. Appellant failed to

demonstrate that his counsel was deficient or that he was prejudiced. The district court admitted Weishaar's medical records based on the certificate of the custodian of records, not on the authentication of Nurse Ebbert. See NRS 52.325(2). Further, the custodian of records certified that the records submitted at trial were a "true and exact copy" of Weishaar's medical records. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to object to Nurse Ebbert's testimony about Weishaar's injuries because she was not a doctor. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Nurse Ebbert qualified as an expert witness because of her specialized training and knowledge. Nurse Ebbert testified that she had received a degree in nursing, had been a nurse for 40 years, and a sexual assault examiner for nine years. She had also received specialized training in gathering forensic evidence as part of a sexual assault investigation. Further, she had been qualified as an expert witness in Nevada courts approximately 40 times. There was significant evidence that Nurse Ebbert possessed specialized knowledge and training related to sexual assault examinations and evidence gathering. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his counsel was ineffective for failing to object to Dr. Meeks' testimony because he had no independent recollection of the events and had to consult his report. Appellant failed to demonstrate that his counsel was deficient. Dr. Meeks was properly permitted to refresh his recollection by reviewing his report.

See NRS 50.125. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his counsel was ineffective for failing to object to Dr. Meeks' testimony because he was permitted to testify about another doctor's diagnosis. Appellant failed to demonstrate that his counsel was deficient. At trial, Dr. Meeks was permitted to testify as both Weishaar's treating physician and a medical expert. He testified to injuries that he personally observed. Further, as a medical expert, he was permitted to explain the meaning of another diagnosis in the medical records that were admitted at trial. See NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."). Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his counsel was ineffective for stipulating to Dr. Meeks' qualifications. Specifically, he asserted that the stipulation permitted Dr. Meeks to testify about memory loss, despite not being qualified to discuss neurological issues, and about the likely cause of the victim's facial injuries. Appellant failed to demonstrate that Dr. Meeks was not qualified to testify as an expert witness. Thus, appellant failed to demonstrate that his counsel was ineffective. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant claimed that his counsel was ineffective for failing to object to the district court's comment that it would overrule every objection that he made. He claimed that this demonstrated judicial

bias. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. During trial, appellant objected to Dr. Meeks' testimony regarding the head trauma sustained by Weishaar. In response, the court stated "you stipulated to his qualification. So I'm going to overrule every objection you make so sit down." This comment did not indicate bias. The district court merely indicated that because defense counsel stipulated to Dr. Meeks' qualifications, it would not consider later objections asserting that there was a lack of foundation for his testimony. Further, appellant failed to prove bias at the evidentiary hearing and the district court's finding is supported by substantial evidence. Therefore, we affirm the denial of this claim.

Seventeenth, appellant claimed that his trial counsel was ineffective for failing to call a neurologist to rebut Dr. Meeks' testimony about memory loss and Weishaar's head injuries. Appellant failed to demonstrate that his counsel was ineffective. While appellant identified the specific testimony he had hoped to elicit, appellant failed demonstrate that there was an expert who would have been able to provide such testimony. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Although given an opportunity at the evidentiary hearing, appellant did not seek to introduce any evidence concerning what expert his counsel should have called or what that expert's testimony would have been. Therefore, the district court did not err in denying this claim.

Eighteenth, appellant claimed that his counsel was ineffective for failing to object to a juror's outburst and questioning of a State witness. Appellant failed to demonstrate that he was prejudiced. In deciding the direct appeal, this court acknowledged that the district court plainly erred

in failing to admonish the jury after the outburst, but ultimately concluded that the error “was not prejudicial and did not affect Nolan’s substantial rights.” Nolan v. State, 122 Nev. 363, 374, 132 P.3d 564, 571 (2006). Therefore, the district court did not err in denying this claim.

Nineteenth, appellant claimed that his counsel was ineffective for failing call Michelle Ross to testify on his behalf. He asserted that Ross would testify that (1) Weishaar told Ross that she did not remember much about the night of the attack or the hypnosis sessions; (2) Weishaar’s mother had told Ross about Weishaar’s prior medical history; and (3) Weishaar confided in Ross about her history of physical abuse. In addition, appellant asserted that Ross could testify about appellant’s character. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Considering the severity of the injuries Weishaar sustained, appellant did not demonstrate that he would not have been convicted had his counsel introduced evidence of Weishaar’s prior medical history and past physical abuse. Further, this court concluded that the jury would have found appellant guilty even if Weishaar’s testimony was not admitted at trial. Id. at 372-73, 132 P.3d at 570. Lastly, appellant did not allege what specific character evidence Ross would have offered. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Twentieth, appellant claimed that his counsel was ineffective for failing to object when the district court directed the jury to tamper with evidence. Specifically, he claimed that the district court improperly instructed the jury to “fill in the blank spots” regarding the transcription of appellant’s statement to the police. Appellant failed to demonstrate

that his counsel was deficient or that he was prejudiced. In explaining the blank spots in the transcript of appellant's videotaped statement, the district court stated,

“[F]requently people who transcribe these things can't hear something and there's a [sic] blanks in the transcript, so if you want and you hear what is in there where there's a blank space feel free in your own copy to write it down, although you don't get to keep these copies. I suppose if enough of us agree with what was said in the blank spots we could fill in the blank spots.”

The district court's comments were permissible. The district court did not direct the jury to tamper with evidence but merely instructed the jurors that they could use the transcript as a guide to understand the taped statement and could take notes on the transcript based on their understanding of the taped statement. Therefore, the district court did not err in denying this claim.

Twenty-first, appellant claimed that his counsel was ineffective for failing to object to the district court tampering with evidence. Specifically, he claimed that the district court redacted his statement to the police and omitted every reference that he had made to Hamburger, which demonstrated his innocence. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not testify at trial. While the district court properly admitted appellant's incriminating statements as non-hearsay because the statements were offered against appellant, see NRS 51.035(3)(a), appellant's exculpatory statements to police were inadmissible as out-of-court statements “offered in evidence to prove the truth of the matter

asserted.” NRS. 51.035; NRS 51.065(1). Therefore, the district court did not err in denying this claim.

Twenty-second, appellant claimed that his counsel was ineffective for failing to follow the requirements of NRS 48.069 and properly introduce evidence of Weishaar’s prior sexual conduct. He asserted that evidence existed that Weishaar had sex three weeks before the assault and this testimony would have impeached her testimony that she did not have sex and was not in the habit of engaging in sex and would have supported his claim that the sex was consensual. Appellant failed to demonstrate that he was prejudiced. As discussed above, this court concluded that there was sufficient evidence upon which to sustain appellant’s convictions even if Weishaar’s testimony was not admitted at trial. Nolan, 122 Nev. at 372-73, 132 P.3d at 570. Thus, impeachment of her testimony would not have altered the outcome of the trial. Further, considering the substantial nature of Weishaar’s injuries, appellant did not demonstrate that the evidence would have raised sufficient doubt concerning whether the sex was consensual. Therefore, the district court did not err in denying this claim.

Twenty-third, appellant claimed that his counsel was ineffective for failing to object to the district court’s decision to conduct the trial examination of appellant’s former counsel, Bill Gonzalez. Specifically, he asserted that the district court failed to ask Gonzalez more questions about Hamburger. He claimed that Gonzalez knew that Hamburger committed the crimes because he worked for the public defender’s office, which had represented Hamburger in the past for violent crimes. Appellant failed to demonstrate that his counsel was deficient or

that he was prejudiced. Gonzalez, as an attorney in the public defender's office, could not be called to testify about facts learned about Hamburger through the public defender's office's representation of Hamburger. See NRS 49.095; see also Federal Savings & Loan Insurance Corp. v. Fielding, 343 F. Supp. 537, 544 (D. Nev. 1972) (recognizing that the knowledge a partner in a law firm gains in representing a client is imputed to each other partner and those partners are "equally constrained by the evidentiary privilege and the ethical precept of non-disclosure"). Therefore, the district court did not err in denying this claim.

Twenty-fourth, appellant claimed that his counsel was ineffective for failing to object to the fact that the district court did not let Gonzalez testify to Hamburger's physical description. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. While Gonzalez worked for the public defender's office, which had represented Hamburger in the past, he never met Hamburger or personally observed him. See NRS 50.025(1)(a) ("A witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). The only knowledge he had of Hamburger's ethnicity came from what he was told by an investigator. Thus, he could not have testified to Hamburger's physical description. See NRS 51.065(1). Therefore, the district court did not err in denying this claim.

Twenty-fifth, appellant claimed that his counsel was ineffective for failing to object or otherwise preserve issues of prosecutorial misconduct for appeal. Specifically, appellant claimed that the State committed misconduct when it argued that (1) appellant struck the victim

three or four times despite a lack of evidence presented at trial of how many times he struck her; (2) appellant committed the crime despite the fact that the DNA evidence could not be matched to appellant; (3) appellant lured the victim from the bar where she was drinking despite the fact that no testimony supported this argument; (4) appellant was a “30 yr [sic] old kid” despite the fact that appellant was actually 36 years old at the time of trial; and (5) appellant used a car on the night of the assault despite the fact that he did not own a car. Appellant failed to demonstrate that he was prejudiced. Even assuming that the challenged comments and conduct were improper, such prosecutorial misconduct may constitute harmless error where there is overwhelming evidence of guilt. See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (providing that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt); Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (providing that to be reversible prosecutorial misconduct “must be prejudicial and not merely harmless”); see also NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). Here, there was overwhelming evidence of guilt. Witnesses testified that appellant followed Weishaar out of the bar where she had been drinking. Appellant admitted to the police that he had sex with Weishaar. He also admitted that he left her where she was later found injured. Further, witnesses identified appellant as using and attempting to use Weishaar’s credit card at several businesses. Therefore, the district court did not err in denying this claim.

Twenty-sixth, appellant claimed that his trial counsel was ineffective for failing file a motion to dismiss and a motion for judgment

notwithstanding the verdict based on insufficient evidence. Appellant failed to demonstrate that he was prejudiced. On direct appeal, this court held that there was sufficient evidence adduced at trial to support appellant's convictions. Nolan, 122 Nev. at 376-78, 132 P.3d at 573-74. Therefore, the district court did not err in denying this claim.

Twenty-seventh, appellant claimed that his counsel's errors resulted in reversible cumulative error. We conclude that because appellant's ineffective assistance of counsel claims are without merit, he failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in precluding the introduction of prior sexual conduct, failing to argue that the district court was biased, failing to argue that the district court erred in not letting a

witness testify to the physical description of Hamburger, failing to argue that the district court erred in permitting a nurse to testify to the accuracy of medical records, failing to argue that the medical records were incomplete and did not discuss Weishaar's prior medical history, failing to argue that the State committed prosecutorial misconduct, and failing to argue that the district court improperly redacted exculpatory information from appellant's statement to the police. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced for the reasons discussed above. Therefore, the district court did not err in denying these claims.

Appellant also claimed that his appellate counsel was ineffective for permitting his direct appeals to be consolidated despite the district court's order severing the trials. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Considering that this court may elect to consolidate related appeals on its own motion, NRAP 3(b), appellant did not demonstrate that his appeals would not have been consolidated had his counsel not pursued consolidated appeals. Further, he did not demonstrate that the outcome of his appeals would have been altered if the appeals were considered separately. Therefore, the district court did not err in denying this claim.

Second Petition

On March 5, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court

denied appellant's petition after conducting an evidentiary hearing. This appeal followed.

In his petition, appellant claimed that there was insufficient evidence to sustain his convictions, the State failed to preserve and gather the rock that was allegedly used in the attack, and the jury instruction for kidnapping was misleading. This court considered and rejected these claims on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying these claims.

Next, appellant contended that the State committed prosecutorial misconduct, falsely represented facts related to disciplinary actions against a police detective, suborned perjury, violated Brady v. Maryland, 373 U.S. 83 (1963), in failing to turn over prior statements of Cynthia Dyson, failed to gather exculpatory evidence, failed to investigate assaults on appellant, tampered with appellant's statements, improperly referred to the internal investigation in its closing, fabricated a story about a witness's availability, created prejudicial photographic evidence, failed to notify the defense of deals with three witnesses, moved to admit fabricated evidence, and tampered with a witness. He also claimed that the district court failed to give several jury instructions, improperly admitted medical reports, improperly permitted the State to create a false impression of the evidence, improperly permitted the State to introduce hearsay evidence, committed misconduct, was biased, made improper comments, gave improper and erroneous jury instructions, permitted a

violation of Batson v. Kentucky, 476 U.S. 79 (1986), improperly admitted medical reports through a detective's testimony, erred in admitting certain evidence, erred in permitting appellant's statements to be read into evidence, denied appellant the right to confront a witness, erred in striking appellant's evidence from the record, erred in refusing to grant appellant's motion for a mistrial, and improperly interfered with a defense cross-examination. These claims could have been raised in appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so and actual prejudice. NRS 34.810(1)(b)(1), (2). Therefore, the district court did not err in denying these claims.¹

Next, appellant claimed that he was actually innocent. On direct appeal, this court determined that sufficient evidence supported the jury's verdict. Although appellant asserted his innocence, he failed to identify any new evidence that would undermine the jury's verdict. See Calderon v. Thompson, 523 U.S. 538, 559 (1998). Therefore, he failed to demonstrate that he was actually innocent, and we conclude that the district court did not err by denying this claim.

¹To the extent that appellant raised the aforementioned claims as claims of ineffective assistance of counsel in his petition for a writ of habeas corpus, those claims are discussed below. However, to the extent that he raised the claims as claims of ineffective assistance of counsel for the first time in his reply brief to the district court, we decline to reach the merits as he was not permitted leave to file a reply brief. NRS 34.750(5).

Next, appellant raised fifteen claims of ineffective assistance of trial counsel. For the reasons discussed below, we conclude the district court did not err by denying these claims.

First, appellant claimed that his counsel failed to raise a Batson challenge during jury selection. See Batson, 476 U.S. 79. In deciding a Batson objection, the trial court must engage in a three-step analysis: (1) the opponent of a peremptory challenge must make a prima facie case of racial discrimination; (2) the burden of production then shifts to the proponent of the strike to give a race neutral explanation; and (3) the trial court must then decide whether the opponent of the challenge has proven purposeful discrimination. See Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 28-29 (2004) (following Purkett v. Elem, 514 U.S. 765, 767-68 (1995)). Appellant alleged that he was improperly tried by all white jurors after two African-American venirepersons were dismissed. Appellant did not identify the jurors that he alleged were improperly dismissed or seek to elicit facts at the evidentiary hearing concerning who dismissed the jurors and whether the jurors were dismissed using peremptory challenges or challenged for cause. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Thus, appellant failed to meet his burden to demonstrate that counsel was ineffective. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to challenge several jurors because they were victims of sexual abuse, knew victims of sexual abuse, sat on prior trials concerning sexual abuse, or were law enforcement officers or related to law enforcement officers. Appellant failed to demonstrate that counsel was deficient or that

he was prejudiced. During voir dire, no juror indicated that any relationship, past experience, or job would affect his or her ability to serve as a fair and impartial juror. Further, no juror expressed a prejudicial attitude that would have supported a challenge for cause. Thus, appellant failed to demonstrate that any objection to any juror would have been successful or have led to a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to file a motion to sever the crimes of sexual assault, kidnapping, and attempted murder because they were separate instances and could have confused the jury. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Two or more offenses may be charged in the same information if the offenses are “[b]ased on the same act or transaction” or “[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” NRS 173.115. Further, “[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed.” Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989). Here, the evidence at trial showed that the kidnapping of the victim was part of the same transaction that culminated with the sexual assault. Further, the attempted murder of Lawrence Dyson occurred after Cynthia Dyson told her son that appellant had raped her and she showed her son where appellant lived. Thus, the crimes were so “blended with one another” that full proof by testimony of one crime could not be given without showing the others. Allan v. State, 92 Nev. 318, 321, 549 P.2d 1402, 1404 (1976). Thus,

appellant failed to demonstrate that his counsel would have been able to demonstrate that the “joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court’s discretion to sever.” Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002) (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to the district court’s interference with the examination of a witness. Specifically, he claimed that the district court cross-examined Detective Art Chavez in front of the jury about when appellant consented to a search of his apartment. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The district court examined Detective Chavez outside the presence of the jury. It did not interfere and conduct an examination when Detective Chavez testified in front of the jury. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to object to the district court’s decision to restrict Detective Art Chavez from discussing appellant’s statements in which he denied that he raped Dyson and stated that he engaged in consensual intercourse with her. Appellant failed to demonstrate that his counsel was deficient. Appellant’s exculpatory statements to Detective Chavez could not be “offered in evidence to prove the truth of the matter asserted.” NRS.

51.035; NRS 51.065(1). Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to object to the introduction of photographs of Lawrence's injuries. He asserted that the photographs were not taken by a crime scene photographer and thus he had no way of knowing if they were altered. Appellant failed to demonstrate that his counsel was deficient. A photograph may be admitted through the testimony of a witness with "personal knowledge that a matter is what it is claimed to be." NRS 52.025. Lawrence's sister testified that she took the photographs of Lawrence's injuries and the photographs accurately depicted his injuries on the day she took the photographs. Further, the photographs were relevant as they depicted the extent of the injuries that the State contended appellant inflicted on Lawrence. See NRS 48.025(1) (providing that "[a]ll relevant evidence is admissible"). Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to hire a toxicologist to challenge the State's findings concerning Dyson's second drug test that indicated that Dyson did not have a significant amount of barbiturates and methamphetamine in her blood. Appellant failed to demonstrate that he was prejudiced. At trial, witnesses testified that Dyson initially tested positive for using barbiturates and methamphetamine in a presumptive test. A later conclusive test indicated that there was not a significant amount of barbiturates and methamphetamine in her blood. The test did show a borderline positive result for marijuana. Further, a police officer and

nurse testified that they did not observe Dyson behave in a fashion that suggested that she was under the influence of methamphetamine, marijuana, and barbiturates. In light of that testimony, appellant did not show that his counsel's failure to have a toxicologist testify affected the outcome of the trial. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to object to Dyson's testimony that Detective Conboy forced her to sign a do not prosecute card, and for failing to interview or subpoena Detective Conboy to testify. He asserted that Detective Conboy would have undermined the State's insinuation that Detective Conboy's misconduct caused Dyson to sign a no prosecute statement and state that she was not assaulted. He further claimed that his counsel failed to object to assertions that Detective Conboy had been disciplined or to the State's statements mischaracterizing the facts of that discipline. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. At trial, Dyson testified that Detective Conboy threatened to charge her with sexual assault if she did not sign a do not prosecute card. She did not offer her statements for the truth of those statements, but merely to demonstrate the effect his statements had on her. See Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay."). Further, at the evidentiary hearing, the State introduced documentation of the disciplinary action against Detective Conboy for the incident involving Dyson. Thus, if

Detective Conboy was called and testified truthfully, he would have confirmed the reports. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel was ineffective for failing to cross-examine Byron Rowsen. Specifically, he claimed that Rowsen's testimony was hearsay because his statement that there was blood on the wall of the apartment was contradicted by a forensic investigator. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Rowsen testified concerning the condition of the apartment as he observed it when he cleaned it after appellant moved. His testimony was not hearsay. It was not rendered hearsay merely because it was contradicted by another witness. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his counsel was ineffective for failing to object to the district court's reasonable doubt instruction. Appellant failed to demonstrate that his counsel's performance was deficient. The district court gave Nevada's statutory reasonable doubt instruction as set forth in and mandated by NRS 175.211. This court has repeatedly held that the current statutory definition is constitutional. 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). Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his counsel was ineffective for failing to object to the district court's instructions for attempted murder with the use of a deadly weapon. Specifically, appellant contended

that his attorney failed to oppose the district court's decision to remove language concerning direct and circumstantial evidence from the instruction. Appellant failed to demonstrate that he was prejudiced. Instruction 26 properly instructed the jury on the difference between direct and circumstantial evidence. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his counsel was ineffective for failing to object to the district court's instruction that if the jury cannot decide between two charges, it must return a guilty verdict on both charges. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify where in the record the district court instructed the jury that it must find him guilty of both charges or what charges the district court insisted that he be convicted of. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, a review of the jury instructions reveals no such instruction. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his counsel was ineffective for failing to request an instruction for the lesser-included offense of open and gross lewdness. Because there was sufficient evidence to find appellant guilty of sexual assault and sexual assault with substantial bodily harm, see Nolan v. State, 122 Nev. 363, 376-77, 132 P.3d 564, 573 (2006), appellant did not show that the outcome of the proceeding would have been different had a lesser-included offense instruction been given. See Strickland v. Washington, 466 U.S. 668, 694 (1984). Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his counsel was ineffective for failing to request an instruction concerning citizen's arrests. Appellant failed to demonstrate that he was prejudiced. In finding appellant guilty of attempted murder with the use of a deadly weapon, the jury had to have found that appellant used a deadly weapon in the performance of acts which tend, but failed, to kill Lawrence, when such acts were done with the intent to unlawfully kill Lawrence. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008); see also NRS 193.165. Appellant had no common law or statutory right to use deadly force in arresting Lawrence. State v. Weddell, 118 Nev. 206, 214, 43 P.3d 987, 992 (2002). Thus, the deadly force he used against Lawrence was unreasonable unless Lawrence threatened him with serious bodily harm or death. Because the jury was instructed on self-defense, and still convicted appellant of attempted murder, appellant failed to demonstrate that instructing the jury on citizen's arrests would have altered the outcome of the trial. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, appellant claimed that the State committed misconduct when it argued that (1) the sexual assault expert that testified at trial was incompetent; (2) there was an internal investigation of Detective Conboy forcing the victim to sign a do not prosecute card despite a lack of evidence of the investigation; and (3) the jury did not need to like Detective Conboy. Appellant failed to demonstrate that he was prejudiced. As discussed above, prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt. See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000);

Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990). Here, there was overwhelming evidence of guilt. Dyson testified that appellant induced her to follow him to his apartment. Once at the apartment, he forced her inside and then undressed. He then took her to a bedroom where, against her will, he performed oral sex on her, placed his penis into her vagina and anus, and forced her to place her fingers in his anus while he masturbated. Further, witnesses testified that when Lawrence confronted appellant, they engaged in a fight during which appellant struck Lawrence in the head with a rock multiple times and kicked him while he was on the ground. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly questioned Detective Chavez in front of the jury, the State committed prosecutorial misconduct, the district court erred in excluding Detective Chavez's testimony about appellant's statements, and the district court erred in permitting hearsay to be admitted at trial. For the reasons discussed above, appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Therefore, the district court did not err in denying these claims.

Second, appellant claimed that his appellate counsel was ineffective for permitting his direct appeals to be consolidated. He claimed that his counsel failed to follow the district court's order severing the trials. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Considering that this court may elect to

consolidate related appeals on its own motion, NRAP 3(b), appellant did not demonstrate that his appeals would not have been consolidated had his counsel not pursued consolidated appeals. Further, he did not demonstrate that the outcome of his appeals would have been altered if the appeals were considered separately. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to timely notify him of this court's disposition of his direct appeal. He asserted that his counsel failed to tell him of the disposition until two months after his case had been decided. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not explain how his counsel's failure to notify him of this court's decision affected the outcome of the appeal. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225; see also Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying appellant's motion for a mistrial that was based on mention of the Detective Conboy investigation. Appellant failed to demonstrate that he was prejudiced. During the trial, the State asked Detective Kisner whether there was an investigation concerning Detective Conboy. Detective Kisner answered that there was an investigation. Defense counsel objected and moved for a mistrial. Upon the conclusion of the sidebar, the district court instructed the jury that it was not to be concerned with the procedure that the police department used in assigning

cases. Considering the collateral nature of the statement and the immediate instruction to the jury to disregard it, appellant failed to demonstrate that the district court abused its discretion in denying the motion. Because appellant failed to demonstrate that this claim had a reasonable probability of success on appeal, the district court did not err in denying this claim.

Next, appellant claimed that this court erred in failing to send him a timely notification concerning its decision of his appeal. He asserted that he received notice 66 days after this court's decision and thus was deprived of 66 days during which he could have prepared his federal petition. This claim does not address whether appellant's conviction was obtained "in violation of the Constitution of the United States or the Constitution or laws of this State," and was thus outside the scope of a post-conviction petition for a writ of habeas corpus. NRS 34.724(1). Therefore, the district court did not err in denying this claim.

Third Petition

On August 22, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court in which he raised claims related to the amended judgments of conviction that were filed on August 13, 2007. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court denied appellant's petition. This appeal followed.

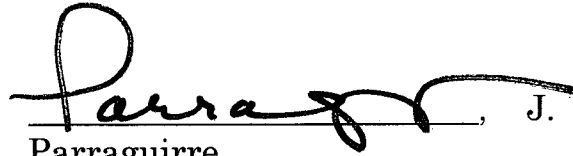
In his petition, appellant contended that the State improperly altered the count numbers and added convictions and additional punishments to appellant's judgments of conviction on remand from this

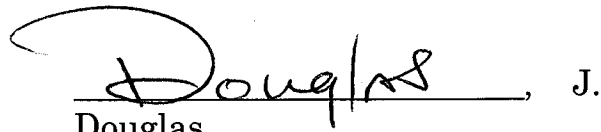
court's decision in Nolan v. State, 122 Nev. 363, 132 P.3d 564 (2006). Appellant failed to demonstrate that he was prejudiced. The district court complied with this court's decision and vacated appellant's conviction for battery with the use of a deadly weapon causing substantial bodily harm. The district court did not add any other counts or further punishment. Therefore, the district court did not err in denying these claims.

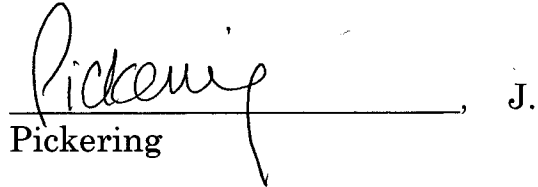
Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Our review of the amended judgment of conviction for district court case number C188025(2), however, reveals a clerical error. The amended judgment of conviction incorrectly states that appellant was convicted of four counts of sexual assault with substantial bodily harm. The record on appeal indicates that, in regard to the Dyson trial, there was no finding of substantial bodily harm. The State charged appellant with sexual assault and the jury found appellant guilty of sexual assault. Moreover, the sentencing transcript indicates that appellant was sentenced for sexual assault. Thus, the amended judgment of conviction should have stated that appellant was convicted of four counts of sexual assault. We therefore conclude that this matter should be remanded to the district court for the correction of the amended judgment of conviction. See NRS 176.565. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the amended judgment of conviction.²


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Eighth Judicial District Court Dept. 15
Ricky Nolan
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.