

IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS GUY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50350

**FILED**

**FEB 24 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *T. Cherry*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Guy was convicted of first-degree murder and sentenced to death for his role in the shooting death of Ceasor Evans during a dispute over cocaine. We affirmed his conviction and sentence on direct appeal. Guy v. State, 108 Nev. 770, 786, 839 P.2d 578, 588 (1992). In 1994, Guy filed a post-conviction petition for a writ of habeas corpus in the district court. Over 13 years later, the district court denied Guy's petition. This appeal followed.

In this appeal from the denial of his first post-conviction petition for a writ of habeas corpus, Guy claims that the district court erred by denying his claims that: (1) the jury's consideration of two invalid aggravating circumstances requires a new penalty hearing; (2) trial counsel was ineffective for failing to (a) challenge inadequacies in the indictment, (b) raise objections to the State's vindictive prosecution, (c) communicate with him regarding plea offers from the State, (d) conduct

effective voir dire, (e) object to improper jury instructions, (f) request certain instructions, (g) make a sufficient record to support motions for a directed verdict, (h) investigate the disposition of the codefendant's cases, (i) investigate and present mitigation evidence at the penalty hearing, (j) challenge the admission of information in PSI reports, and (k) challenge prosecutorial misconduct; (3) appellate counsel was ineffective for failing to raise claims on appeal or "federalize" the issues that were raised; and (4) considered cumulatively, the numerous trial errors and deficiencies in the performance of counsel warrant reversal of his conviction and sentence. We conclude that Guy's claims are without merit and affirm the judgment of the district court.

I. Invalid aggravating circumstances

Guy claims that the district court erred by refusing to consider mitigating evidence presented during post-conviction proceedings as part of the reweighing process and concluding that the jury's consideration of two invalid aggravating circumstances was harmless beyond a reasonable doubt. The district court did not err.

In McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), this court "deem[ed] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." McConnell "applies in cases where the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict." Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d 265, 274 (2006); see also Archanian v. State, 122 Nev. 1019, 1039, 145 P.3d 1008, 1022-23 (2006).

Here, McConnell is implicated because Guy was charged with first-degree murder based on three theories—(1) he aided and abetted his codefendant, Larry Pendleton, in murdering Evans; (2) he and Pendleton conspired to rob Evans who was killed in furtherance of the conspiracy; and/or (3) Evans was killed during a robbery perpetrated by Guy and Pendleton—and the jury verdict did not specify upon which theory it relied in finding Guy guilty of first-degree murder. Therefore, the robbery and pecuniary gain aggravators are invalid. See Bejarano, 122 Nev. at 1081, 146 P.3d at 275.

However, Guy's McConnell claim was appropriate for direct appeal and is subject to dismissal absent a showing of cause and actual prejudice. NRS 34.810(1)(b). Because McConnell was decided well after Guy's direct appeal was final and it has retroactive application, Bejarano, 122 Nev. at 1078, 146 P.3d at 274, Guy established good cause to raise this claim in a post-conviction petition. However, the district court determined that Guy failed to show prejudice. We conclude that the district court did not err.

In order to uphold a death sentence after striking an invalid aggravating factor, this court must reweigh. Archanian, 122 Nev. at 1040, 145 P.3d at 1023. A McConnell error is harmless if, after reweighing, this court can conclude beyond a reasonable doubt that the jury would have found the defendant death eligible and would have selected the death penalty absent the erroneous aggravating circumstance. See Hernandez v. State, 124 Nev. 978, 986, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1082, 146 P.3d at 276; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Absent the invalid McConnell aggravators, two remain: (1) Guy was under a sentence of imprisonment at the time of the murder and (2) he had previously been convicted of a felony involving the use or threat of violence to the person of another. These aggravators are supported by evidence that Guy was on parole for a prior burglary conviction at the time of the murder and he had previously been convicted of the armed robbery and attempted murder of Richard French. The jury did not specify which mitigating circumstances it found but determined that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances and selected the death penalty.

Of the four aggravators found by the jury, the two invalid aggravators were less compelling, and the mitigating evidence was of limited persuasiveness. Guy's claim that this court should consider mitigating evidence gathered after trial and presented for the first time during post-conviction proceedings is wholly without merit. See Bejarano, 122 Nev. at 1081, 146 P.3d at 276 ("Reweighting requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?"); Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three McConnell aggravators and reweighing, looking only to the record for mitigating evidence); Archanian, 122 Nev. at 1040-41, 145 P.3d at 1023 (same); State v. Haberstroh, 119 Nev. 173, 184 n.23, 69 P.3d 676, 684 n.23 (2003) (reweighing does not involve factual findings "other than those of the jury at the original penalty hearing"); Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a "review of the trial record"). Accordingly, we conclude that it is beyond a

reasonable doubt that absent the invalid aggravators, the jury would have found Guy eligible for the death penalty.

We also conclude that it is beyond a reasonable doubt that, absent the invalid aggravators, the jury would have sentenced Guy to death. In addition to the evidence of Guy's role in Evans' death and the aggravating evidence that Guy shot Richard French in the head at point blank range during a home-invasion robbery, the State presented overwhelming evidence of Guy's violent character. Guy had robbed Colleen Fulkerson by holding a knife to her seven-year-old son's throat. During another home-invasion robbery, Pendleton and Guy slit the throat of Jennifer Courtney to prevent her from identifying them. When Courtney escaped through a bedroom window despite having been tied up with tape, Pendleton and Guy chased her down in a vehicle and shot at her in another attempt to kill her. Additionally, Guy has numerous prior convictions: three convictions for burglary and convictions for assault with a deadly weapon, petty larceny, vagrancy prowling, attempted grand larceny, possession of a stolen vehicle, and carrying a concealed weapon. Moreover, Guy admitted to a criminal lifestyle that included about ten home-invasion burglaries per week. Guy has made multiple attempts to kill; it is only through extremely fortunate circumstances that Robert French and Jennifer Courtney survived. We conclude that the jury's selection of the death penalty in this case was not based solely on the killing of Ceasor Evans—in which Guy played a lesser role—but on his extremely violent history and character. The jury did not act improperly. McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) (“[A]

defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime.").

Because Guy's death sentence was based in large measure upon his history of violence, we conclude that the elimination of the robbery and pecuniary gain aggravators would not have changed the result of trial. Therefore, Guy failed to show prejudice sufficient to overcome the procedural bars and the district court did not err in denying his claim.

## II. Ineffective assistance of trial counsel

On appeal, Guy challenges the district court's denial of 11 claims of ineffective assistance of trial counsel.<sup>1</sup> To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense such that there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). While we independently review a claim of ineffective assistance of counsel, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993), the "purely factual findings" of the district court "are entitled to deference on . . . review," Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

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<sup>1</sup>To the extent that Guy raised the underlying substantive claims, they were procedurally barred. See NRS 34.810(1)(b)(2).

A. Failure to challenge the indictment

Guy claims that the district court erred by denying claims that trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the indictment on the grounds that it (1) was supported by insufficient evidence, (2) was barred by collateral estoppel, (3) failed to state a homicide offense, (4) included improper surplusage, and (5) was untimely.<sup>2</sup> The district court properly denied these claims because these challenges to the indictment lack merit, as explained below, and therefore Guy failed to demonstrate that trial counsel's performance was unreasonable or that he was prejudiced.

Guy claims that the indictment was invalid because there was insufficient evidence to support it. However, "[t]he efficacy of an indictment can be sustained upon 'the slightest sufficient legal evidence.'" Echavarria v. State, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) (quoting Franklin v. State, 89 Nev. 382, 387, 513 P.2d 1252, 1256 (1973)). The fact that the original complaint was dismissed in justice court is not proof that the evidence was insufficient to support the subsequent indictment. NRS 178.562(2) specifically authorizes a prosecutor to seek an indictment after the dismissal of a prior complaint. Guy's claim that there was no probable cause to indict him is further belied by the fact that a jury found him guilty beyond a reasonable doubt. See United States v. Mechanik, 475

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<sup>2</sup>Other than citing NRS 178.556(1), Guy wholly failed to explain his timeliness argument, and therefore the district court did not err in denying it.

U.S. 66, 70 (1986) (any error in grand jury proceedings was harmless where defendants were found guilty beyond a reasonable doubt at trial); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998) (citing Mechanik).

Guy also claims that the indictment was barred by collateral estoppel. However, NRS 178.562(2) specifically authorizes the State to seek an indictment following the dismissal of a criminal complaint at a preliminary hearing, and this court has previously concluded that the statute does not “offend[ ] any constitutional proscription.” State of Nevada v. District Court, 114 Nev. 739, 743-44 n.4, 964 P.2d 48, 51 n.4 (1998).

Guy next contends that the indictment failed to state a homicide offense because it was brought under the mayhem statute. This claim is belied by the record. Prior to trial, defense counsel informed the State and the district court that the indictment referred to NRS 200.300 rather than NRS 200.030, and the district court corrected the transposition by interlineation.

Finally, Guy claims that the indictment was subject to challenge on the basis of surplusage. NRS 173.085 permits a district court to strike surplusage from an indictment upon the motion of the defendant. However, there is no authority requiring the dismissal of an entire indictment based on redundant language, and NRS 173.095(1) permits the State to amend an indictment at any time prior to the jury’s verdict.



Accordingly, a challenge to the language of the indictment was not reasonably likely to change the results of trial.<sup>3</sup>

B. Failure to challenge vindictive prosecution

Guy claims that the district court erred by denying a claim that trial counsel was ineffective for failing to challenge the prosecutor's decision to seek an indictment and the death penalty after the charges were dismissed in justice court as retaliatory and vindictive. This claim lacks merit because Guy failed to make out a prima facie case of vindictiveness. See U.S. v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995).

The prosecutor's decision to seek an indictment after the complaint was dismissed is authorized by statute and does not create an appearance of vindictiveness. Furthermore, the charges in the indictment were fewer in number than those originally filed. See United States v. Spiesz, 689 F.2d 1326, 1328 (9th Cir. 1982) ("A claim for vindictive prosecution arises when the government increases the severity of alleged charges in response to the exercise of constitutional or statutory rights." (emphasis added)).

With regard to the death penalty, the record indicates that the prosecutor intended to seek it from the beginning. The State's filing of a notice of intent to seek the death penalty after Guy's rejection of the pre-

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<sup>3</sup>Guy also claims that trial counsel failed to challenge the indictment because he did not contact Guy's previous attorney and was not aware that a criminal complaint had been dismissed after a preliminary hearing. Guy fails to identify any support for this assertion in the record. Even if Guy's assertion is true, he failed to demonstrate prejudice.

indictment plea offers does not create an appearance of vindictiveness because the State's notice is not normally filed until after the filing of an information or indictment. See SCR 250(4)(c). The notice was filed one week after the indictment. We conclude that trial counsel acted reasonably in not raising a claim of prosecutorial vindictiveness and that, even if the claim had been raised, there is no reasonable likelihood that it would have been successful.

C. Failure to communicate regarding plea offers

Guy claims that the district court erred by denying a claim that trial counsel was ineffective for failing to communicate with him about plea offers from the State. However, the record indicates that both Guy's initial attorney and his trial attorney discussed various plea offers with Guy, which he consistently rejected. Because Guy's claim was belied by the record, the district court did not err in denying it. See Hargrove v. State, 100 Nev. 498, 503-03, 686 P.2d 222, 225 (1984).

D. Failure to conduct effective voir dire

Guy claims that the district court erred by denying a claim that trial counsel was ineffective during voir dire.<sup>4</sup> The district court did not err because Guy's claims were without merit.

Guy claimed that trial counsel was ineffective for failing to rehabilitate five potential jurors who expressed concern with the death

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<sup>4</sup>Guy also claims that the district court erred by imposing pressure to complete voir dire in one day and conveying favoritism to the State. These claims could have been raised on direct appeal and are procedurally barred. NRS 34.810(1)(b)(2).

penalty. See Witherspoon v. Illinois, 391 U.S. 510, 520-21 (1968) (holding that jurors cannot be excused for cause merely because they are morally opposed to the death penalty; rather, they must be unable to make an impartial decision or consider the death penalty at all). The defense and the State stipulated to the dismissal of one potential juror because she had recently lost her husband. The remaining four potential jurors were either unwilling to make a determination of guilt or unable to consider the death penalty. Therefore, counsel's actions were not unreasonable and the district court did not err in denying this claim.

Guy claimed that trial counsel was ineffective for failing to conduct further questioning of two potential jurors who may not have been fair and impartial.<sup>5</sup> However, Guy offered no evidence that these two potential jurors were biased and neither of them served on the jury. Therefore he failed to show prejudice based on counsel's conduct and the district court did not err in denying this claim.

Next, Guy claimed that trial counsel was ineffective for failing to more strenuously question and challenge three jurors: the dean of students at Eldorado High School who had met the prosecutor in connection with the prosecution of a student at the school, a legal secretary working for one of the trial judge's former law clerks, and a trauma nurse who had met State's witness Dr. Giles Sheldon Green in connection with his work in the Clark County Coroner's Office. On

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<sup>5</sup>One of these potential jurors was excused by the State with a peremptory challenge.

examination, these jurors testified that their deliberations would not be influenced by their acquaintances and that they would consider the testimony objectively. Therefore, Guy failed to demonstrate that there was any reason to challenge these jurors for cause or that, had counsel questioned them more strenuously, the result of trial would have been different.

Guy claimed that trial counsel was ineffective for failing to question potential jurors about their exposure to pretrial publicity or their ability to consider mitigating evidence. This claim was conclusory and unsupported by the record.

Finally, Guy claimed that trial counsel was ineffective for waiving five of his eight peremptory challenges when there were jurors who knew the prosecutors and witnesses and “were heavily in favor of imposing death.”<sup>6</sup> Guy failed to demonstrate that the unchallenged jurors were unfavorably disposed to him, see Mattheson v. King, 751 F.2d 1432, 1438-39 (5th Cir. 1985), or that counsel’s failure to exercise peremptory challenges prejudiced him, see U.S. v. Taylor, 832 F.2d 1187, 1195 (10th Cir. 1987). And he failed to present evidence to support his assertion that the jurors “were heavily in favor of imposing death.” Therefore, the district court did not err in denying this claim.

E. Failure to object to jury instructions

Guy claims that the district court erred by denying claims that trial counsel was ineffective for failing to object to instructions on felony

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<sup>6</sup>The State waived seven of its eight peremptory challenges.

murder, conspiracy, aiding and abetting, the burden of proof, premeditation, mere presence, malice, and commutation. The district court did not err in denying these claims because Guy failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced.

1. Theories of murder based on robbery

Relying on NRS 178.562, Guy claimed that trial counsel should have objected to instructions on felony murder and conspiracy on the basis that, because the robbery charges were dismissed at the preliminary hearing and were not included in the indictment, the State was foreclosed from seeking a conviction for first-degree murder under theories of liability based on robbery. However, alleging a theory of first-degree murder based on robbery is not equivalent to seeking a conviction for robbery. Therefore, this claim was without merit.<sup>7</sup>

Guy also claimed that trial counsel should have challenged the instructions on felony murder and conspiracy on the grounds that the State failed to provide adequate notice of those theories. Trial counsel's performance was not deficient because, at the time of Guy's trial, the State

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<sup>7</sup>To the extent that Guy raised a constitutional claim, he failed to demonstrate that double jeopardy applies here. A dismissal in justice court is not an acquittal. See Lee v. United States, 432 U.S. 23, 30 (1977) ("The critical question is whether the [dismissal] contemplates an end to all prosecution of the defendant for the offense charged."). The dismissal of the criminal complaint at preliminary hearing did not foreclose the possibility of prosecution for the charged crimes; the Nevada statute authorized prosecution for the same crimes through indictment. NRS 178.562(2).

was not required to allege felony murder or conspiracy in an indictment. See Redmen v. State, 108 Nev. 227, 232, 828 P.2d 395, 398 (1992), overruled by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995); Goldsmith v. Sheriff, 85 Nev. 295, 304, 454 P.2d 86, 92 (1969).

2. Conspiracy and aiding and abetting

Guy claimed that trial counsel was ineffective for failing to challenge several instructions related to conspiracy and aiding and abetting. We conclude that trial counsel's performance was not deficient in this regard and that Guy failed to show prejudice because, even if counsel had successfully challenged these instructions, the results of trial would not have been different; Guy was clearly guilty of felony murder. See Cortinas v. State, 124 Nev. 1013, 1028-29, 195 P.3d 315, 325-26 (2008), cert. denied, 558 U.S. \_\_\_, 130 S. Ct. 416 (2009); Guy, 108 Nev. at 774-76, 839 P.2d at 581-82.

3. Burden of proof

Guy claimed that trial counsel was ineffective for failing to object to several instructions that permitted him to be convicted based on a lesser burden of proof. His claims in this regard were without merit.

First, Guy asserted that an instruction stating, "The intent with which an act is done is shown by the facts and circumstances surrounding the case" was flawed because it lacked permissive language and therefore directed the jury to presume an essential element of the offense. The instruction was consistent with the Nevada statutes, see NRS 193.200, and trial counsel's decision not to challenge this instruction was reasonable. Furthermore, Guy cannot demonstrate prejudice because other instructions informed the jury that to convict Guy of felony murder

“the specific intent to commit robbery must be proven beyond a reasonable doubt,” and that the State had the burden of “proving beyond a reasonable doubt every material element of the crime charged.”

Guy next claimed that the reasonable doubt instruction improperly minimized the burden of proof. However, the instruction that was given at trial is mandated by statute, NRS 175.211, and has been repeatedly upheld by this court, Garcia v. State, 121 Nev. 327, 339-40, 113 P.3d 836, 844 (2005); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991). Therefore, counsel acted reasonably in failing to challenge it.

Guy claimed that the instruction to the jurors that they should not consider the guilt of any other person because they were “here to determine the guilt or innocence of the defendant” conflated the burden of proof by requiring the jury to find Guy innocent in order to acquit, rather than merely not guilty. This claim was patently without merit. There are countless instances in which we have referred to the jury’s determination as one of guilt or innocence. See, e.g., Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 475 (2008); Chartier v. State, 124 Nev. 760, 762, 191 P.3d 1182, 1183-84 (2008); Browning v. State, 124 Nev. 517, 527, 188 P.3d 60, 67 (2008). And other instructions clearly instructed the jury that the State had the burden to prove every element beyond a reasonable doubt. Therefore, Guy failed to show prejudice resulting from counsel’s failure to object.

Finally, Guy claimed that the “equal and exact justice” and anti-sympathy instructions lowered the burden of proof because, in contrast with civil proceedings, parties to a criminal case are not on equal footing. We have previously rejected such arguments as meritless. See,

e.g., Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824-25 (2004). Guy failed to show that he was prejudiced by counsel's failure to object to this instruction.

4. Premeditation

Guy claimed that trial counsel was ineffective for failing to object to an improper instruction on premeditation, also known as the Kazalyn<sup>8</sup> instruction. However, this instruction was widely used at the time of trial and was not disapproved until years after Guy was convicted. See Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Therefore, counsel was not unreasonable for failing to challenge it. Moreover, we have since held that the decision in Byford does not have retroactive application and does not apply to Guy, whose conviction was final in 1993. See Nika v. State, 124 Nev. 1272, 1287, 198 P.3d 839, 849-50 (2008).

5. Mere presence

Guy claimed that trial counsel was ineffective for failing to object to the order of two mere-presence instructions. This argument lacks merit. The jury was also instructed that "the order in which the instructions are given has no significance as to their relative importance." Therefore, trial counsel was not unreasonable when he failed to raise this issue.

6. Malice

Guy claimed that trial counsel was ineffective for failing to make a "sufficiently thorough objection" to the malice instructions. This

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<sup>8</sup>Kazalyn v. State, 108 Nev. 67, 76, 825 P.2d 578, 583-84 (1992).



claim was patently without merit. The instructions given at Guy's trial have been repeatedly upheld by this court, see, e.g., Thomas, 120 Nev. at 49-50, 83 P.3d at 827, and were upheld on direct appeal from Guy's conviction and sentence, Guy, 108 Nev. at 776-77, 839 P.2d 582-83, and therefore Guy failed to demonstrate that a more strenuous argument had any likelihood of changing the results of trial.

#### 7. Commutation

Guy claimed that trial counsel was ineffective for failing to object to a commutation instruction given at his penalty hearing. He failed to demonstrate that trial counsel's performance was deficient. At the time of Guy's trial, this instruction was a correct statement of Nevada law and had been upheld by this court. See Petrocelli v. State, 101 Nev. 46, 54-55, 692 P.2d 503, 509-10 (1985), superceded by NRS 213.085. It was not until 1995 that the Legislature changed the law and precluded the pardons board from commuting sentences of death or life without the possibility of parole. See Thomas, 120 Nev. at 44-45, 83 P.3d at 823.

Guy asserts that the instruction was nevertheless improper and misled the jury because, under NRS 213.1099(4), he would not have been eligible for parole under any circumstances. See Geary v. State, 112 Nev. 1434, 1440-41, 930 P.2d 719, 723-24 (1996), clarified on reh'g, 114 Nev. 100, 952 P.2d 431 (1998). This claim lacks merit; the "unique circumstances" that existed in Geary are not present here. See Sonner v. State, 114 Nev. 321, 324-26, 955 P.2d 673, 675-77 (1998); Geary, 112 Nev. at 1440, 930 P.2d at 724. In this case, there was no evidence that Guy had previously been sentenced to life without parole, nor did counsel argue or infer the possibility that a sentence of life without parole could result in

release. Rather, the jury was instructed that “life imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole.” The jury was also instructed not to speculate whether the imposed sentence could be changed at a later date. Therefore, Guy failed to show prejudice, see Sonner, 114 Nev. at 326, 955 P.2d at 677, and the district court did not err in denying this claim.

F. Failure to request jury instructions

Guy claims that the district court erred by denying a claim that trial counsel was ineffective for failing to request instructions regarding drug transactions, the intent required to find first-degree murder under a theory of aiding and abetting, the result of an acquittal of a codefendant, mere presence, lesser-included offenses, unanimous findings of aggravating circumstances, and the discretionary nature of the death penalty. The district court did not err.

1. Drug transaction

Guy claimed that trial counsel was ineffective for failing to request a limiting instruction informing the jury that Guy’s intention to obtain drugs with Pendleton could not be considered as evidence of his propensity to commit robbery or murder.<sup>9</sup> Because evidence of the drug

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<sup>9</sup>He also claimed that trial counsel should have requested an instruction specifying that the drug transaction was not the object of the alleged conspiracy or a crime that subjected a person to the felony-murder rule. As discussed earlier, Guy failed to show prejudice because the conspiracy instruction specified that he was guilty of murder if Pendleton committed the murder during “the perpetration of an agreed upon robbery.”

transaction was necessary to describe the alleged crime and provided a motive for murder, it was admissible under NRS 48.035(3). Accordingly, a limiting instruction pursuant to NRS 48.045 was not required, and Guy failed to show that a cautionary instruction pursuant to NRS 48.035 would have changed the result of trial. Therefore, the district court did not err in denying this claim.

2. Intent

Guy claimed that trial counsel was ineffective for failing to request the instruction on intent in Hooper v. State, 95 Nev. 924, 926 n.2, 604 P.2d 115, 116 n.2 (1979), and argue that Guy was not guilty of murder unless he had the specific intent to commit murder. See Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). We conclude that trial counsel's performance was not deficient because until Sharma was decided a decade after Guy was convicted, Nevada law did not clearly require a jury to find specific intent to commit murder before convicting a person of first-degree murder under a theory of aiding and abetting. See id. Even if trial counsel should have argued for the instruction in Hooper, Guy failed to show prejudice because he was clearly guilty of felony murder.

3. Acquittal of a codefendant

Guy claimed that trial counsel was ineffective for failing to request an instruction pursuant to State v. Cushing, Et Al., 61 Nev. 132, 147, 120 P.2d 208, 215 (1941), informing the jury that his codefendant, Pendleton, had been acquitted of all criminal charges arising out of the

case.<sup>10</sup> We conclude that Cushing is distinguishable on its facts and that the suggested instruction was unnecessary and likely to lead to confusion. Accordingly, trial counsel was not unreasonable for failing to request this instruction, and, even if had he made the request, there was no reasonable likelihood that the instruction would have been given to the jury. Therefore, the district court did not err in denying this claim.

4. Mere presence

Guy claimed that trial counsel was ineffective for failing to request additional language on mere presence explaining that his social association with a murderer was not evidence that he was guilty of a crime. However, other instructions explained that Guy was guilty only if the jury found beyond a reasonable doubt that he was “a participant and not merely a knowing spectator.” Therefore, trial counsel was not unreasonable for failing to request this additional language. Moreover, in light of the evidence of Guy’s direct participation in the crime, he failed to show that this additional language was reasonably likely to change the result of trial.

5. Lesser-included offenses

Guy claimed that trial counsel was ineffective for failing to request instructions and verdict forms for the lesser-included offenses of accessory to murder and larceny. Neither of these crimes are lesser-

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<sup>10</sup>Pendleton’s charges in this case were dropped as part of a plea bargain in which he pleaded guilty to murder in another case and accepted a sentence of two consecutive terms of life without parole.

included offenses of murder. See Blockburger v. United States, 284 U.S. 299, 304 (1932); Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); NRS 200.010 (defining murder); NRS 195.030 (defining accessories); NRS 205.2175 (defining larceny). Moreover, Guy's claim that trial counsel failed to request an instruction on accessory to murder is belied by the record. And Guy failed to show prejudice because he was clearly guilty of felony murder.

6. Unanimity regarding aggravating circumstances

Guy claimed that trial counsel was ineffective for failing to request an instruction stating that the jury had to make a unanimous finding regarding at least one of the aggravating circumstances in order to find Guy eligible for the death penalty. To the extent that counsel's performance was deficient, Guy failed to show prejudice. The jury was instructed that its verdicts "must be unanimous." The jury's special verdict reflected that it found all four aggravators beyond a reasonable doubt. Accordingly, even with the additional instruction proposed by Guy, there was no reasonable probability of a different result at trial.

7. No requirement to impose death penalty

Guy claimed that trial counsel was ineffective for failing to request a jury instruction stating that the death penalty is not required under any circumstances. Trial counsel was not unreasonable because the jury instructions that were given correctly stated the law and used permissive language regarding the choice to impose death. Therefore, even if counsel had requested an additional instruction, there was no reasonable probability of a different result.

G. Motion for a directed verdict

Guy claimed that trial counsel was ineffective for failing to make an adequate record supporting his motion for a directed verdict of acquittal. At the conclusion of testimony, trial counsel made a motion for a directed verdict. In his petition below, Guy asserted that if trial counsel had used the preliminary hearing transcript to bolster his motion and argued it more thoroughly, it would have been granted. This claim lacks merit.

First, Guy claimed that trial counsel was ineffective because he did not specifically argue that there was insufficient evidence of an “unlawful taking” and some related “force or violence or fear of injury,” and therefore the State had failed to prove that a robbery had occurred. See NRS 200.380(1). This court rejected Guy’s claim of insufficient evidence on direct appeal, concluding “that substantial evidence supports the jury’s finding that appellant and Pendleton robbed Evans.” Guy, 108 Nev. at 776, 839 P.2d at 582. Guy now argues that this court’s decision on direct appeal was faulty and asks the court to overturn it. See Nika v. State, 124 Nev. 1272, 1299, 198 P.3d 839, 857 (2008) (“The doctrine [of the law of the case] . . . is not absolute, and this court has discretion to revisit the wisdom of its legal conclusions if warranted.”). Guy presents no new law or facts that would justify revisiting the issue.

Next, Guy argued that trial counsel was ineffective for failing to renew his motion for a directed verdict regarding conspiracy after closing argument. This claim is patently without merit. The arguments of counsel are not evidence, see Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001), and thus there was no less evidence of the crimes

after closing argument than there was prior to argument. Accordingly, trial counsel was not ineffective for failing to renew the motion and even if he had, there was no reasonable probability of a different outcome.

Finally, Guy contended that “[t]rial counsel was ineffective for failing to move for a directed verdict of acquittal on the grounds that the [S]tate failed to prove that Mr. Guy aided and abetted Mr. Pendleton in the murder of the victim.” This claim is belied by the record. In moving for a directed verdict, trial counsel specifically argued that there was “no evidence” to show that Guy was “an aider or abettor to the murder of Mr. Evans.” Because trial counsel did exactly what Guy argued he should have done, the district court did not err in denying this claim.

H. Failure to investigate the disposition of his codefendant’s cases

Guy claims that the district court erred by denying a claim that trial counsel was ineffective for failing to contact his other attorneys regarding other pending cases or discover that Pendleton’s charges had been dismissed. The district court did not err.

First, Guy claimed that trial counsel was unaware of his other cases and should have contacted his attorneys in those cases to prevent him from pleading guilty to crimes that were used as evidence against him in the penalty phase of his murder trial. Guy’s claim that trial counsel was unaware of his other cases is belied by the record. Furthermore, the record reveals that neither of the two crimes to which Guy pleaded guilty after trial counsel’s appointment were used as aggravating circumstances at trial, and both would have been admissible as “other matter” evidence even if Guy had not pleaded guilty. See NRS 175.552(3).

Guy argued that trial counsel should have contacted his attorney in the French case and asked him to either withdraw the plea or delay sentencing so the conviction in that case could not be used as an aggravating circumstance. Any assertion that counsel in the French case would have agreed to do so and been successful is purely speculative. Even had the undertaking been successful, there would have been three other aggravating circumstances at trial and the French incident would have been admissible as "other matter" evidence. Therefore, Guy failed to show prejudice and the district court did not err in denying this claim.

Guy claimed that trial counsel was ineffective for failing to discover that the charges against Pendleton had been dismissed due to negotiations in another case. Guy asserts that, at the time of trial, Pendleton was willing to testify in his behalf and that trial counsel's mistaken belief that Pendleton was still facing charges in this case led him not to contact Pendleton about testifying. This claim is purely speculative. Guy presented no evidence at the evidentiary hearing that trial counsel was unaware of what had happened in Pendleton's case or that Pendleton would have been willing to testify in his behalf. Therefore, the district court did not err in denying this claim.

I. Failure to investigate and present mitigating evidence

Guy claims that the district court erred by denying his claim that trial counsel was ineffective for failing to investigate and present possible mitigating evidence. Guy failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced.

While it is likely that trial counsel could have presented more mitigating evidence, Guy failed to demonstrate that counsel's performance



fell below an objective standard of reasonableness. The record reflects that Guy invoked his speedy trial rights and trial commenced less than two months after the indictment was filed. Trial counsel met or spoke with Guy at least 16 times prior to trial. During those visits and discussions, Guy never mentioned any of the mitigating witnesses that he now claims should have been presented at the penalty hearing; in fact, he only gave his attorney the names of two potential witnesses. The record indicates that trial counsel attempted to contact numerous potential witnesses and issued subpoenas to witnesses discovered through his independent efforts.

Nor did Guy demonstrate that he was prejudiced. While additional testimony may have presented a broader view of Guy's childhood, the evidence was of minimal mitigating effect. Furthermore, the presentation of cumulative testimony from more distant relatives would have afforded the prosecution the opportunity to engage in more forceful and condemning cross-examination regarding Guy's recent crimes. Accordingly, we conclude that the district court did not err in denying this claim.

J. Failure to challenge PSI evidence

Guy claims that the district court erred by denying his claim that trial counsel was ineffective for failing to object to the testimony of parole and probation officer Joy Mundy-Neal regarding Guy's criminal record and statements he made during a presentence investigation interview. For two reasons, Guy's claim clearly lacked merit and the district court did not err in denying it.

First, Guy's claim was belied by the record. Guy acknowledges in his opening brief that "[t]rial counsel objected numerous times throughout [Mundy-Neal's] testimony to no avail." Therefore, he failed to show that trial counsel's performance was deficient.

Second, Guy raised a claim of error based on the admission of this evidence on direct appeal. This court rejected Guy's claim as "untenable," concluding that the evidence was clearly admissible under NRS 175.552 and prior Nevada case law. Guy, 108 Nev. at 782, 839 P.2d at 586. Guy argues that this court's decision should be revisited due to intervening changes in the law. See Herman v. State, 122 Nev. 199, 208-09, 128 P.3d 469, 474-75 (2006). However, at Guy's trial, the district court precluded any evidence of prior arrests that did not result in conviction. Thus, the type of evidence found prejudicial in Herman was not introduced at Guy's trial, and Herman does not constitute an intervening change in the law warranting this court's reconsideration of its decision on direct appeal.

K. Failure to object to prosecutorial misconduct in closing argument

Guy claims that the district court erred by denying a claim that trial counsel was ineffective for failing to object to the prosecutor's argument that Guy should be punished for crimes other than the instant offense. During closing argument at the penalty hearing, the prosecutor argued that Guy should be punished for all of his crimes because they showed "his entire character." This argument was not improper. See McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) ("[A] defendant's character and record are relevant to the jury's determination

of the appropriate sentence for a capital crime.”). Therefore, the district court did not err.

### III. Ineffective assistance of appellate counsel

Guy raises numerous claims of ineffective assistance of appellate counsel in connection with the claims of ineffective assistance of trial counsel discussed above. However, none of these claims were presented to the district court. Because Guy’s claims of ineffective assistance of appellate counsel are not properly before this court, they need not be considered. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

As for Guy’s claim that appellate counsel was ineffective for failing to raise claims in the context of federal constitutional error, he did not show that his claims would have been reviewed under a more favorable standard or were likely to succeed. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Therefore, the district court did not err in denying this claim.


### IV. Cumulative error

Guy claimed below that his conviction and death sentence should be reversed as the result of the cumulative deficiencies of counsel. “The cumulative effect of errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually.” Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Based on the foregoing discussion, we conclude that Guy failed to make any meritorious claims of ineffective assistance of counsel. Therefore, Guy’s


claims, considered either individually or cumulatively, do not warrant relief.

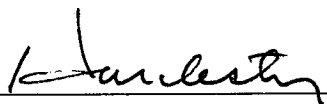
Having considered Guy's claims and concluded that no relief is warranted, we

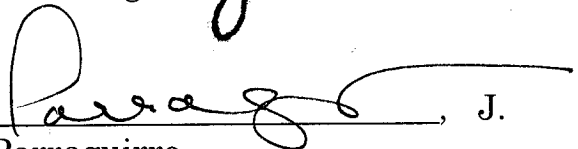
ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Donald M. Mosley, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Law Office of Lisa Rasmussen  
Eighth District Court Clerk

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<sup>11</sup>The Honorable Michael L. Douglas and the Honorable Michael A. Cherry, Justices, voluntarily recused themselves from participation in this matter.