

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDEN E. TABILE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61500

FILED

JAN 21 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Branden Tabile's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Tabile contends that the district court erred by denying his claims of ineffective assistance of trial and appellate counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Trial counsel's performance is prejudicial if "a reasonable probability [exists] that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Appellate counsel's performance is prejudicial if an "omitted issue would have a reasonable probability of success on appeal." *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996). Petitioner must prove the facts underlying his ineffective-assistance claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 102 P.3d 25, 33 (2004). We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the

court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Tabile claimed that trial counsel were ineffective for conceding his guilt to murder, kidnapping, and robbery during the trial and appellate counsel was ineffective for failing to raise this issue on appeal. The district court found that trial counsel did not concede guilt to felony murder, first-degree murder, kidnapping, or robbery; trial counsel did concede some guilt as to the murder charge in an attempt to avoid a first-degree murder conviction; Tabile and his mother agreed to trial counsels' concession strategy; and the strategy was reasonable given that Tabile had confessed to the police on videotape, told his roommates about the attempted robbery and shooting, and was found in possession of the murder weapon. The district court's factual findings are supported by the record and are not clearly wrong, and we conclude that Tabile has not demonstrated that trial counsels' performance was deficient in this regard. *See Armenta-Carpio v. State*, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013) ("A concession of guilt is simply a trial strategy—no different than any other strategy the defense might employ at trial."); *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (trial counsel's strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)).

Second, Tabile claimed that trial counsel were ineffective for failing to object to the admission of prejudicial hearsay evidence during the trial and appellate counsel was ineffective failing to raise this issue on appeal. The district court found that Detective Tremel's testimony regarding an anonymous tip that named Tabile as the shooter was not

offered for the truth of the matter asserted. The record supports the district court's factual finding. We conclude that the detective's testimony was not hearsay and did not implicate the Confrontation Clause. See NRS 51.035 (defining hearsay); *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Accordingly, Tabile has failed to demonstrate that trial and appellate counsel were ineffective in this regard.

Third, Tabile claimed that appellate counsel was ineffective for failing to challenge the first-degree kidnapping conviction on appeal because it was incidental to the attempted robbery. However, the record reveals that the jury was properly instructed on dual convictions, the evidence does not *clearly* indicate whether the victim's movement was incidental to the robbery or substantially increased the victim's risk of harm, and the jury could have found that the victim's movement had a purpose or significance that was independent of the underlying robbery. See *Mendoza v. State*, 122 Nev. 267, 275-76, 130 P.3d 176, 181 (2006) (suggesting jury instructions for use in dual-conviction cases); *Langford v. State*, 95 Nev. 631, 638-39, 600 P.2d 231, 236-37 (1979) ("[T]he questions of whether the movement of the victim was incidental to the associated offense and whether the movement increased the risk of harm to the victim are questions of fact to be determined by the jury in all but the *clearest* of cases." (emphasis added)). Under these circumstances, Tabile has not demonstrated that this issue had a reasonable probability of success on appeal.

Fourth, Tabile claimed that appellate counsel was ineffective for failing to challenge the first-degree murder conviction on appeal.

Tabile asserts that one of the State's theories of criminal liability was that the murder occurred during a kidnapping and therefore constituted first-degree murder under the felony-murder rule. Tabile argues that because the kidnapping conviction was invalid (see above) and the verdict did not indicate which theory the jury relied upon to find him guilty, he may have been convicted under an invalid theory and his first-degree murder conviction must be reversed. However, because Tabile has failed to demonstrate that his first-degree kidnapping conviction is invalid we conclude that he has not demonstrated that this issue had a reasonable probability of success on appeal.

Fifth, Tabile claimed that appellate counsel was ineffective for failing to challenge jury instructions 9 (implied malice), 11 (premeditation and deliberation), and 51 (equal and exact justice) on appeal. However, Tabile did not object to these instructions at trial, and he has not shown that they are plainly erroneous. *See Berry v. State*, 125 Nev. 265, 282-83, 212 P.3d 1085, 1097 (2009) (instructions that are not preserved for appeal are reviewed for plain error), *abrogated on other grounds by State v. Castaneda*, 126 Nev. ___, 245 P.3d 550 (2010); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (discussing plain-error review). Accordingly, he has not demonstrated that counsel's performance was deficient and challenges to these instructions would have had a reasonable probability of success on appeal.

We decline to consider the district court's denial of the additional claims in Tabile's proper person habeas petition because he has failed to present any argument regarding these claims. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues

not so presented need not be addressed by this court.”). We reject Tabile’s cumulative error claim because he has failed to demonstrate any error. *See State v. Perry*, 245 P.3d 961, 982 (Idaho 2010) (“[A] necessary predicate to the application of the doctrine [of cumulative error] is a finding of more than one error.”). And we conclude that Tabile has not demonstrated that he is entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. Elissa F. Cadish, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk