

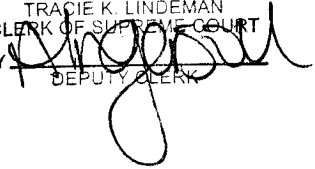
IN THE SUPREME COURT OF THE STATE OF NEVADA

COLBERT NICHOLS A/K/A COLBERT
F. NICHOLS,
Appellants,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61868

FILED

NOV 14 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michael Villani, Judge.

In his petition, appellant asserted numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of 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 there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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*). Both components of the inquiry must be shown, *Strickland*,

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed that his trial counsel was ineffective for failing to cross-examine the medical examiner. Appellant failed to demonstrate deficiency because counsel did cross-examine the medical examiner. To the extent that appellant claimed that his counsel should have posed different questions to the medical examiner, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel questioned the medical examiner differently. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for allowing the medical examiner to testify, even though she only reviewed the autopsy report and did not perform the actual autopsy. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel objected to the medical examiner's testimony on that basis, but the district court denied the objection. Appellant cannot demonstrate prejudice because the underlying claim was raised on direct appeal and this court rejected that claim, concluding that the medical examiner properly testified as an expert witness and, even assuming error in the admission of the autopsy report though a medical examiner that did not perform the autopsy, any error was harmless. *Nichols v. State*, Docket No. 52157 (Order of Affirmance, January 8, 2010). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective because counsel only spent one hour preparing appellant for his testimony

and discussing the consequences of appellant testifying. Appellant failed to demonstrate that he was prejudiced. During trial, the district court explained to appellant that he had to decide whether to testify, and that he would be subject to cross-examination if he did testify. Appellant stated that he understood and had no questions. Given that discussion, appellant failed to demonstrate a reasonable probability of a different outcome had counsel further discussed testifying with appellant. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel should not have proceeded with the trial because counsel knew appellant was under the influence of antipsychotic medication during the trial. Appellant failed to demonstrate deficiency or prejudice because he made only a bare claim that he was under the influence of medication during the trial and did not explain how that medication affected his ability to participate in the trial. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). To the extent appellant claimed the medication made him incompetent, he failed to demonstrate that he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to seek an independent medical evaluation of appellant. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant did not provide any information as to what a

medical evaluation would have discovered and bare claims are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Given appellant's testimony at trial that he had a bad back, but was able to work long hours at his physically demanding job, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel sought a medical evaluation of appellant. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel failed to investigate the State's witnesses or to effectively cross-examine the State's witnesses. Appellant failed to demonstrate deficiency or prejudice for this claim because he made only a bare claim, which is insufficient to demonstrate he is entitled to relief. *See id.* Therefore, the district court did not err in denying this claim

Seventh, appellant claimed that his counsel was ineffective for failing to review a document prior to its admission into evidence, as counsel was unaware that the document had writing on the back. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Shortly after the document was admitted into evidence, counsel objected and said that the State had not informed him that there was writing on the back of the exhibit. The State then recalled its witness, who explained the writing. The district court then readmitted the document with the writing on the back. Given this situation, appellant failed to demonstrate that counsel's actions were objectively unreasonable. As the writing was explained by the witness and the document admitted into evidence by the district court, appellant failed to demonstrate a reasonable probability of a different outcome had

counsel reviewed the document in more detail. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments, as appellant claimed the State misstated the evidence and misstated the legal definition of murder and manslaughter. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. A review of the record reveals that the State's arguments were supported by evidence presented at trial and the State made reasonable inferences based on the evidence. *Greene v. State*, 113 Nev. 157, 177, 931 P.2d 54, 66-67 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000)). In addition, the State did not misstate the legal definition of murder and voluntary manslaughter. *See* NRS 200.010; NRS 200.030; NRS 200.040; NRS 200.050. Appellant failed to demonstrate a reasonable probability of a different outcome had counsel raised objections on these bases. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel failed to present mitigation evidence at the sentencing hearing. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel argued that the circumstances of this case supported the minimum sentence, which was the sentence imposed by the district court. In addition, appellant did not identify any mitigation evidence that counsel should have presented. As the district court agreed with counsel regarding the length of sentence, appellant failed to demonstrate a reasonable probability of a different outcome had counsel presented

mitigation evidence. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. To prove 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). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, 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).

First, appellant claimed that his appellate counsel should have argued that the State withheld exculpatory evidence in the form of x-rays from the autopsy of the victim. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Given appellant's testimony that he stabbed the victim twice, he failed to demonstrate that x-rays from an autopsy of the victim would have been favorable. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). In addition, appellant did not demonstrate that the State actually withheld the x-rays or that the x-rays could not have been uncovered through diligent investigation by the defense. *See Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). Finally, appellant failed to demonstrate that he was prejudiced by any failure to disclose the x-rays, as he did not demonstrate a reasonable probability of a different outcome at trial had he

possessed that evidence. *See Bennett*, 119 Nev. at 599, 81 P.3d at 8. Therefore, the district court did not err in denying this claim.


Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred by failing to hold a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985) before admitting testimony that appellant asked a fellow inmate at the pretrial detention center to ensure that a witness was not available to testify and for prohibiting testimony about the victim's violent character. Appellant cannot demonstrate deficiency or prejudice for these claims because both of the underlying claims were raised on direct appeal and rejected by this court. *Nichols v. State*, Docket No. 52157 (Order of Affirmance, January 8, 2010). Therefore, the district court did not err in denying this claim.

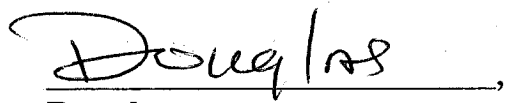
Third, appellant claimed his appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct during closing arguments, as appellant claimed the State misstated the evidence and misstated the legal definition of murder and manslaughter. Appellant failed to demonstrate his counsel's performance was deficient or that he was prejudiced. As discussed previously, the State's arguments were supported by the evidence presented at trial and the State did not misstate the definition of murder and voluntary manslaughter. Therefore, the district court did not err in denying this claim.

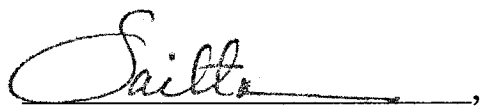
Finally, appellant claimed that the district court erred in refusing his proposed jury instructions. This claim was considered and rejected on direct appeal. *Nichols v. State*, Docket No. 52157 (Order of Affirmance, January 8, 2010). The doctrine of law of the case prevents further litigation of this claim 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 this claim.

Having concluded appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


Gibbons, J.


Douglas, J.


Saitta, J.

cc: Hon. Michael Villani, District Judge
Colbert Nichols
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk