

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN STANISLOUIS HEUSNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62055

FILED

NOV 14 2013

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

ORDER OF AFFIRMANCE

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

Appellant argues that the district court erred in denying the claims of ineffective assistance of counsel raised in his June 2, 2011, petition. 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*, 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). We give deference to the district court's factual findings if supported by

substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel was ineffective for conceding his guilt to voluntary manslaughter without obtaining appellant's consent. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, counsel testified that they discussed their trial strategy, including potentially conceding guilt for voluntary manslaughter, with appellant and he never told them he did not agree. In addition, appellant also testified at the evidentiary hearing that he went along with his attorneys' trial strategy because he trusted them.¹ Given the overwhelming evidence of appellant's guilt as appellant testified that he took a baseball bat to confront the victim and his ex-wife and that he hit the victim repeatedly with the bat because he was angry, appellant fails to

¹In addition, this court's decision in *Hernandez v. State*, 124 Nev. 978, 990-91, 194 P.3d 1235, 1243 (2008), *overruled by Armenta-Carpio v. State*, 129 Nev. ___, ___, 306 P.3d 395, 398-99 (2013), which stated that the district court should canvass the defendant to determine whether the defendant had consented to the concession of guilt, was not issued until after completion of appellant's trial. Therefore, appellant's counsel were not ineffective for failing to request the district court to canvass appellant regarding the concession strategy because counsel cannot be faulted for failing to anticipate this court's later decision. *See Nika v. State*, 124 Nev. 1272, 1293-94, 198 P.3d 839, 854 (2008); *Leonard v. State*, 114 Nev. 639, 659-60, 958 P.2d 1220, 1235 (1998), *modified on other grounds by Collman v. State*, 116 Nev. 687, 717 n.13, 7 P.3d 426, 445 n.13 (2000).

demonstrate a reasonable probability of a different outcome had he and his counsel discussed conceding guilt for voluntary manslaughter in more depth. *See Armenta-Carpio*, 129 Nev. at ___, 306 P.3d at 399. Therefore the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to object to inaccurate testimony regarding the DNA evidence and for allowing an inaccurate stipulation regarding the DNA report to be read to the jury. The jury was informed that the DNA from the blood samples recovered from the crime scene and appellant's car matched the victim. However, appellant asserts that information was inaccurate because the DNA report states that one of the samples was a mixture of two individuals' DNA, that the report stated that the victim could not be excluded from the sources of that particular sample, and that appellant's DNA was never tested in order to ascertain whether he was a contributor to the DNA mixture.

Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. For three of the blood samples, the victim was positively identified as the source. For the remaining sample, the report stated that the victim could not be excluded as the major contributor. The report then stated, "[t]he estimate of this DNA profile in the population is 1 in 650 million. Identity is assumed." The report then requests a sample from appellant for further testing. Given the conclusions contained in the report, which was admitted into evidence, appellant fails to demonstrate that the statements to the jury that the victim was identified as the source of the blood were inaccurate, and therefore, appellant fails to demonstrate that counsel allowed inaccurate

information to be presented to the jury. As appellant's own testimony demonstrated that he killed the victim without legal justification, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel challenged the DNA evidence. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to object when a witness testified about the DNA report despite not having performed the DNA testing herself. Appellant asserts that his confrontation right was violated because he could not question the actual author of the DNA report and that the witness' statements regarding the report were inadmissible hearsay. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant stipulated to the admission of the DNA report, waiving his right to confront its author. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (discussing a defendant's confrontation rights regarding scientific analysts and that defendants often stipulate to the admission of forensic testing to avoid highlighting unfavorable forensic analysis). Given appellant's testimony that he took a baseball bat to confront the victim and that he hit the victim with the bat because he was angry, appellant fails to demonstrate prejudice related to testimony regarding the DNA test report. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to object when an unqualified witness testified regarding blood splatter evidence. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The witness testified

regarding her training and qualifications as a forensic analyst, which included training in analysis of blood splatter. Accordingly, her testimony regarding the analysis of the blood splatter found at the crime scene was properly admitted at trial to help explain how the killing occurred. See NRS 50.275; *Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 658 (2010). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the admission of the blood splatter evidence on the basis of the qualifications of the witness or challenged the witness' conclusions at greater length. Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that his trial counsel was ineffective for stipulating to the admission of appellant's prior conviction for a crime of domestic violence. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. After appellant testified that he would never want to harm his ex-wife, the State sought to introduce evidence of appellant's conviction for battery constituting domestic violence, which occurred shortly before the murder at issue in this matter. Counsel objected to admission of that conviction, but after the district court indicated that it would admit the conviction, counsel and the State agreed to limit evidence to the conviction itself and to refrain from discussing the details of the crime. Under these circumstances, appellant fails to demonstrate that counsel's actions were unreasonable. Given the overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability of a different outcome had counsel raised additional objections to admission of this evidence. Therefore, the district court did not err in denying this claim.

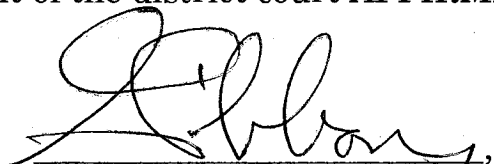
Sixth, appellant argues that his trial counsel was ineffective for failing to object to questions concerning appellant's angry reaction when appellant was served with the temporary protective order. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At a pretrial hearing, the district court concluded that evidence related to service of the protective order on appellant was admissible to show that appellant was not legally permitted access to his ex-wife's residence and appellant fails to demonstrate his counsel's actions regarding the questioning of the service of the order was objectively unreasonable. Given the overwhelming evidence of appellant's guilt presented at trial, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to questioning regarding appellant's angry reaction to receipt of the protection order. Therefore, the district court did not err in denying this claim.

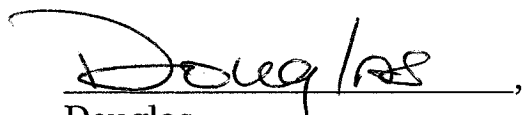
Seventh, appellant argues that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. As appellant did not demonstrate that any of his claims of ineffective assistance of counsel had merit, he fails to demonstrate they cumulatively amount to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.


Finally, appellant argues that the district court erred in denying additional claims from the proper person petition. Appellant fails to provide any cogent argument as to how or why the district court erred in denying these claims and merely refers to the proper person petition without discussing any of the claims contained therein. "It is appellant's

responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.” *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, appellant may not incorporate by reference arguments contained in documents filed before the district court. See NRAP 28(e)(2). Thus, we need not address these claims.

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

 J.
Gibbons

 J.
Douglas

 J.
Saitta

cc: Hon. Carolyn Ellsworth, District Judge
Coyer & Landis, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk