

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES RAY EARL WALKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 62838

**FILED**

NOV 25 2014

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 in a death penalty case. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant James Ray Walker stabbed to death Christine Anziano as she exited a Las Vegas drug store and stole her purse and items that she had purchased. About 24 hours later, Walker slit the throat of Kirk Cole and absconded with his money. Walker's girlfriend, Myrdus Archie, assisted in perpetrating these crimes. Walker had also stolen Susan Simon's purse while Simon was sitting in a car in a store parking lot. A jury convicted Walker of conspiracy to commit robbery, burglary, two counts of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, murder with the use of a deadly weapon, and sentenced Walker to death. Walker appealed, and this court affirmed the convictions and sentences. *See Walker v. State*, Docket No. 49507 (Order of Affirmance, March 3, 2010), *reh'g denied* Docket No. 49507 (Order Denying Rehearing but Clarifying Decision, May 17, 2010). In this appeal from the denial of his post-conviction petition for

a writ of habeas corpus, Walker argues that the district court erred in denying his claims of ineffective assistance of counsel and trial error.

*Ineffective assistance of counsel*

Walker argues that the district court erred by denying numerous claims of ineffective assistance of trial and appellate counsel without conducting an evidentiary hearing. “A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review,” *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court’s purely factual findings are entitled to deference, *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). Under the two-part test established by the United States Supreme Court in *Strickland v. Washington*, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) prejudice. 466 U.S. 668, 687-88, 694 (1984); *Kirksey v. State*, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996); see *Riley v. State*, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994) (“The defendant carries the affirmative burden of establishing prejudice.”). A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697. An evidentiary hearing is warranted only if a petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

*Forensic video examiner*

Walker argues that the district court erred in denying his claim that trial counsel were ineffective for failing to consult a forensic video examiner to analyze the edited surveillance video introduced during

the State's case-in-chief. We conclude that this argument lacks merit for three reasons. First, Walker failed to demonstrate that his counsel's performance was deficient as the record indicates that Walker's counsel consulted an expert but elected not to call that witness to testify. This was a tactical decision that is entrusted to counsel, *see Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (noting that "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call"), and Walker did not allege extraordinary circumstances sufficient to challenge counsel's decision, *see Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). Second, Walker failed to demonstrate prejudice. The video evidence, which showed Walker attacking Anziano and meeting Cole, was not the only evidence connecting him to the crimes. Witnesses observed Walker at the scene of the murder and fleeing from it. Anziano's property was recovered from the home he shared with Archie. Cole and Deborah Lazar identified Walker and Archie as the perpetrators, Cole's blood was found on Walker's shoe and Archie's car, and Cole's fingerprint was recovered from the interior of Archie's car. As to the Simon robbery, Simon identified Walker as the man who stole her purse and her property was recovered from Archie's home. Third, Walker failed to plead sufficient facts to warrant relief. Walker asserted in his petition below that he sought an expert who could "explain to the jury all the ways in which video can be augmented," to demonstrate that the video evidence presented was unreliable. However, he did not explain how the expert testimony would have impugned the video in evidence. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

*Identification expert*

Walker argues that the district court erred in denying his claim that his counsel were ineffective for failing to call an identification expert at trial. We disagree. Walker asserted in his petition that expert testimony would have shown that eyewitness accounts may be affected by the extreme stress of traumatic events. However, Walker failed to demonstrate prejudice. As discussed above, the eyewitness accounts were corroborated by physical evidence. Video evidence showed the attack on Anziano and corroborated Cole's testimony. Moreover, Simon, Cole, and Lazar observed and interacted with Walker prior to the time he engaged in criminal action against them; thus, their identifications were less likely to be affected by the emotional concerns Walker asserts were attendant to their identifications. Therefore, the district court did not err in denying this claim.

*Unrecorded bench conferences*

Walker contends that the district court erred in denying his claim that counsel were ineffective for failing to preserve objections during trial and ensure the recording of bench conferences. We conclude that this argument lacks merit. Walker has not identified any issue that he was unable to argue due to the failure to record a portion of the proceeding. *See Archanian v. State*, 122 Nev. 1019, 1033, 145 P.3d 1008, 1019 (2006) (requiring appellant to "show that the subject matter of the omitted portions of the record [were] so significant that this court cannot meaningfully review his claims of error and the prejudicial effect of any error"). Therefore, the district court did not err by denying this claim.

*DNA expert*

Walker argues that the district court erred in denying his claim that trial counsel were ineffective for failing to call a DNA expert to testify at his trial. We conclude that this argument lacks merit for three reasons. First, Walker failed to demonstrate that his counsel's performance was deficient as the record indicates that counsel retained an expert to evaluate the DNA evidence. The decision not to call the witness at trial was within counsels' discretion, *see Rhyne*, 118 Nev. at 8, 38 P.3d at 167, and Walker did not allege extraordinary circumstances sufficient to challenge counsels' decision, *see Ford*, 105 Nev. at 853, 784 P.2d at 953 ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). Second, Walker failed to demonstrate that but for counsel's failure to procure this expert testimony, he would not have been convicted. Cole and Lazar identified him as the perpetrator. Cole's testimony was corroborated by video evidence showing Walker meeting Cole and Cole's fingerprint in Archie's car. Third, Walker failed to plead sufficient facts to warrant an evidentiary hearing. In his petition, Walker generally asserted that a DNA expert was necessary to "contradict, challenge, put into context or to provide alternative explanations for the damaging DNA evidence presented by the State." However, Walker did not identify the expert who would have offered that testimony or allege how that testimony would have specifically challenged the evidence at trial. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

*Fingerprint expert*

Walker contends that the district court erred in denying his claim that trial counsel were ineffective for failing to call a fingerprint

analysis expert. We conclude that this argument lacks merit. Walker asserted that an expert witness could have challenged testimony about the fingerprint or offered an alternative explanation for the presence of Cole's fingerprint in Archie's car. However, he did not identify the expert or allege how the testimony would specifically impugn the evidence at trial. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Even assuming Walker pleaded sufficient facts to substantiate this claim, he did not demonstrate prejudice in light of the remaining evidence of his guilt. Therefore, the district court did not err in denying this claim.

*Brady violations*

Walker argues that the district court erred in denying his claim that trial counsel were ineffective for failing to object to the State's failure to provide discovery. In his petition below, Walker asserted that the State failed to provide video evidence in a timely manner, original versions of video evidence, audio of Walker's statement to police in 1978, documents related to the laboratory used for DNA testing, and a copy of the victim's social security card introduced during the victim's mother's testimony. Walker's claim does not allege how any of the evidence he claims the State failed to produce is favorable to his defense. *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (noting obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to reveal evidence that is favorable to the defense). Accordingly, he has not satisfied the first component of the *Brady* analysis. Moreover, considering the overwhelming nature of the evidence against him, he failed to demonstrate that he was prejudiced by counsel's failure to object to the discovery process. Therefore, the district court did not err in denying this claim.

*Prosecutorial misconduct*

Walker contends that the district court erred in denying his claim that trial counsel were ineffective for failing to object to instances of prosecutorial misconduct. Under the *Strickland* test, Walker has the burden of establishing that counsel were deficient in failing to object to the prosecutor's allegedly improper comments and prejudice as a result of counsel's failure to object or argue issues of prosecutorial misconduct on appeal. See *Riley*, 110 Nev. at 646, 878 P.2d at 278. To show prejudice based on counsel's failure to object, Walker must demonstrate that it is reasonably probable that, but for counsel's error, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone," *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)), therefore Walker must demonstrate that the challenged comments "so infected the proceedings with unfairness as to make the results a denial of due process," *id.* Prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt. *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000). We conclude that the claims lack merit for the reasons discussed below.

First, Walker asserts that the State improperly disparaged defense counsel by characterizing the defense's questioning of the medical examiner as "a second victimization of Christine Anziano." As Walker's counsel objected to this statement and appellate counsel raised the issue on appeal, he cannot demonstrate that counsel's performance was deficient. Further, Walker cannot demonstrate he was prejudiced, as this

court concluded that the comment did not warrant relief under the harmless-error standard. *See Walker*, Docket No. 49507, at 9.

Second, Walker asserts that the State improperly appealed to the passions of the jurors by beseeching the jury to end Anziano's victimization and the victimization of the other victims, police, and witnesses.<sup>1</sup> We disagree. The prosecutor commented on defense counsel's cross-examination of the medical examiner respecting the presence of old bruises on Anziano's body (suggesting Anziano might have been a victim of domestic abuse), the poor condition of her teeth (she had a denture in her upper mouth), the presence of methamphetamine in her body, whether the needle marks were definitely caused by medical intervention, and whether cysts on her kidneys were a result of high blood pressure. The prosecutor reasoned that the defense suggested that "[m]aybe the victim if she'd moved a little faster wouldn't be dead. Maybe Christine, if she'd moved a little slower, if she hadn't resisted, if she'd been a little nicer she wouldn't be dead." Considering this context, we conclude that the comment was not improper. The prosecutor merely responded to the defense's apparent attempt to deflect attention away from Walker to

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<sup>1</sup>During its rebuttal, the State made the following argument:

Christine Anziano is entitled to the protections of the law and the time for victimization of Christine is over now. We've heard the evidence, it's time for justice, it's time for truth. So let's stop the victimization of not only her but the other victims in this case, and even the police and of some other witnesses to a certain extent and let's talk about the truth.

This court considered the comment in Walker's direct appeal and concluded that it did not rise to the level of plain error. *See Walker*, Docket No. 49507, at 9.



Anziano's character and social circumstance and argued that Walker, not Anziano, was solely responsible for her death. Therefore, counsel had no basis to object to the comment. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). To the extent that the prosecutor's comments may be considered improper, we conclude that Walker failed to demonstrate prejudice given the overwhelming evidence of his guilt. *See Strickland*, 466 U.S. at 687-88.

Third, Walker contends that the State committed prosecutorial misconduct by referring to him as a coward and predator, as well as implying that he lacked intelligence. We conclude that Walker failed to demonstrate that his counsel's performance was deficient as the challenged statements constituted fair comment on the evidence. Given the compelling evidence against Walker, including his presence on video surveillance tapes and eyewitness identification of him, it was reasonable to infer that he would be caught. The prosecutor's statements regarding Anziano's murder and how the attack on Cole unfolded were supported by the evidence. Further, the evidence showed Walker met all of his victims while loitering near store entrances or in parking lots. To the extent that identifying Walker as not very smart, cowardly, or a predator may be considered disparaging, he failed to demonstrate he was prejudiced by counsel's failure to object as there was overwhelming evidence of his guilt. *See Strickland*, 466 U.S. at 687-88.

Fourth, Walker asserts that the State committed prosecutorial misconduct by playing audio of his statement to police even though the court had ruled that it could not be played to the jury. We conclude that Walker failed to demonstrate that his counsel's performance was deficient.

During the penalty hearing, the State prepared to play the audio from Walker's statement to police regarding his 1978 robbery and attempted murder. Defense counsel objected on the basis that the State had represented that the audio on the recording was of such poor quality that it could not be understood nor could a transcript be generated. The court listened to both recordings outside the presence of the jury. It recognized that the copy the State intended to play was more clearly audible than the defense copy but concluded both were intelligible. It ruled that the State could play the copy given to the defense at trial. Therefore, Walker's trial counsel succeeded in litigating their objection in the trial court and held the State to introduce only the evidence that it previously provided the defense during the discovery process. Moreover, Walker failed to demonstrate prejudice as the State had already introduced testimony about the statement he provided to police. Therefore, the district court did not err in denying this claim.

*Failure to object to inadmissible evidence*

Walker argues that the district court erred in denying his claim that his trial counsel were ineffective for failing to object to the introduction of certain evidence. We conclude that this contention lacks merit for the reasons discussed below.

First, Walker asserts that the State introduced bad act evidence in the form of testimony that 17 purses were discovered in the search of Archie's residence and that his hand bore older injuries that appeared to be received during a stabbing. Given the context of the trial and that Walker was accused of stealing purses from two of the victims as well as stabbing two of the victims, the presence of a number of purses and older knife wounds on his hand suggests more extensive criminal activity.

See NRS 48.045(2) (“Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.”). Therefore, counsel should have objected to the statement about the purses and provided more sufficient legal argument to support the objection to the testimony about the older wounds. However, Walker fails to demonstrate prejudice considering the brief nature of the testimony, the fact that the prosecutor did not draw further attention to this testimony during trial, and the overwhelming evidence of his guilt.

Second, Walker asserts that the State introduced evidence that was more prejudicial than probative. He asserts that (1) the evidence about his prior record was convoluted and confusing; (2) Doris Stempien’s testimony during the penalty hearing about Walker’s battery of her was inconsistent with the police reports that the State read into evidence, which had not been turned over during discovery in violation of *Brady*; and (3) the district court should not have permitted the introduction of pictures of Anziano’s children at her funeral. We conclude that Walker failed to demonstrate that counsel’s performance was deficient for failing to object to this evidence. Evidence concerning Walker’s prior crimes was relevant to the sentencing determination. See *Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (“The focus of a capital penalty hearing is not the defendant’s guilt, but rather his character, record, and the circumstances of the offense.”). It was presented through an officer from the parole and probation department and was not confusing. While Stempien’s testimony was inconsistent with the police reports, that fact went to the weight of the evidence, not its admissibility. See *Page v. State*, 88 Nev. 188, 193, 495 P.2d 356, 359 (1972) (holding that any discrepancy

in witness's identification testimony went only to weight and not admissibility). And, this court has already evaluated the victim impact evidence and concluded that no improper victim impact evidence was admitted at the penalty hearing. *Walker*, Docket No. 49507, at 10. Walker further failed to demonstrate prejudice. Five of the six aggravating circumstances proven by the State related to convictions involving the use of or threat of violence. The convictions spanned much of Walker's life from his 1978 conviction for robbery and attempted murder with the use of a deadly weapon, to battery by a prisoner with the use of a deadly weapon, and culminating with the instant offenses. The aggravating circumstances are compelling in that they demonstrate Walker's long held adherence to violence to accomplish his criminal goals. Moreover, they show that his behavior was not controlled or reformed by his time in prison. In view of these circumstances, he did not demonstrate that the result of the penalty hearing would have been different had he been able to exclude Stempien's testimony. Therefore, the district court did not err in denying this claim.

*Failure to present mitigating evidence*

Walker argues that the district court erred in denying his claim that trial counsel were ineffective for failing to introduce credible mitigating evidence. He asserts that (1) counsel should have ensured that the defense experts kept records and generated reports to bolster their testimony; (2) Dr. Pohl's testimony about alcohol abuse and intoxication was not as compelling as it could have been had Dr. Pohl been able to testify as to whether Walker was intoxicated at the time of the offense; (3) the lay witnesses were not adequately prepared for their testimony as it was inconsistent regarding key issues; (4) counsel imprudently fixated on

a drug addiction theory of mitigation that could not be substantiated at trial; and (5) counsel should have presented more recent evidence showing the effect of Walker's early childhood poverty, later drug addiction, and how neurological impairments affected his later life.

We conclude that these arguments lack merit for two reasons. First, Walker failed to substantiate his claim that counsel's performance was deficient for failing to put forth the asserted evidence. He did not include any statements from experts or witnesses demonstrating that those experts or witnesses could have provided the evidence he asserts they were capable of producing. He did not allege that he was intoxicated at the time of the crimes to substantiate the claim that Dr. Pohl could have testified about that fact. He alleged that the experts who testified at trial could have generated reports so that the district court could properly assess the impact of better substantiated expert testimony; he did not, however, submit those reports or allege specific facts about the reports necessary to warrant further inquiry. He further failed to identify how the lay witnesses' testimony was contradictory. In addition, Walker did not identify the more recent mitigation evidence he contends that his counsel should have presented or identify an expert or the specific testimony that would have linked the early life mitigation evidence with him at the time of the crime.

Second, Walker failed to demonstrate that the result of the penalty hearing would have been different had trial counsel presented the purported evidence. The jury found the presence of six aggravating circumstances. Five of the aggravating circumstances involved Walker's prior crimes of violence: two robberies with the use of a deadly weapon, two attempted murders with the use of a deadly weapon, and one battery

by a prisoner with the use of a deadly weapon. The aggravating circumstances were compelling. Walker's criminal history demonstrated that he was prone to violent crimes and continued committing acts of violence even while incarcerated. Further, his most recent violent crimes occurred within one day of the murder. The fact that the jury failed to find the presence of mitigating factors does not mean that trial counsel failed to present credible evidence of those factors but instead suggests that he failed to present mitigating circumstances compelling enough to mitigate Anziano's murder. Therefore, he did not demonstrate that even if the presented testimony was better substantiated, the result of the hearing would have been different.

*Failure to challenge false testimony*

Walker argues that the district court erred in denying his claim that trial counsel were ineffective for failing to address testimony during the penalty hearing about parole and sentencing credits, that he contends, suggested he might be released if not sentenced to death. We disagree. The testimony about the sentencing scheme under which Walker was sentenced for his prior armed robbery did not indicate that he could be released early if the jury did not sentence him to death. Moreover, the jury was properly instructed that Walker would not be eligible for parole if sentenced to life without the possibility of parole or would serve at least 40 years if sentenced to life with the possibility of parole or given a definite term of 100 years. Therefore, the district court did not err in denying this claim.<sup>2</sup>

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<sup>2</sup>Walker also argues that the district court erred in denying his claim that the prosecutor knowingly introduced false testimony. This claim could have been raised in Walker's direct appeal and he failed to  
*continued on next page...*

*Cumulative error*

Walker argues that the cumulative effect of his trial counsel's errors deprived him of a fair trial. We disagree. This court has never determined whether multiple deficiencies in counsels' performance can be considered cumulatively for purposes of the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and in particular, when the individual deficiencies did not result in prejudice. See *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009). However, even assuming that counsel's deficiencies may be cumulated, see *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies); *State v. Thiel*, 665 N.W.2d 305, 322 (Wis. 2003) (concluding that multiple incidents of deficient performance may be aggregated in determining prejudice under *Strickland*), because we have only found one error, for which we determined Walker failed to demonstrate prejudice, there is nothing to cumulate. Therefore, the district court did not err by denying this claim.

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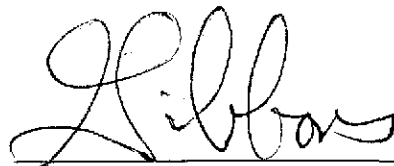
assert cause for the failure to do so, other than the previously discussed claim of ineffective assistance of counsel, or actual prejudice. See NRS 34.810(1)(b). Therefore, the district court did not err in denying this claim.

*Direct appeal claims*

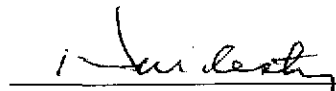
Walker contends that the district court erred in denying his claims that the trial court erred in excluding evidence of his intoxication and that the State committed prosecutorial misconduct during its penalty phase arguments. These claims could have been raised in the appeal taken from Walker's judgment of conviction and he failed to assert cause for the failure to do so. *See* NRS 34.810(1)(b). Therefore, the district court did not err in denying this claim.<sup>3</sup>

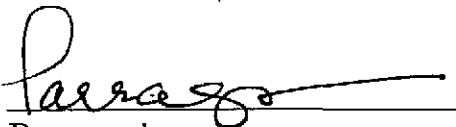
Having considered Walker's contentions and concluding that they lack merit, we

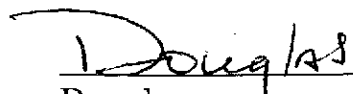
ORDER the judgment of the district court AFFIRMED.


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

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

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

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

  
\_\_\_\_\_, J.  
Douglas

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

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<sup>3</sup>Walker's brief tacks on an ineffective-assistance argument in the heading of the prosecutorial misconduct claim and neglects to further develop this issue. Accordingly, he failed to raise a sufficient argument for consideration of this claim. *See Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).



CHERRY, J., dissenting:

I respectfully dissent. I would reverse the district court's decision and remand for an evidentiary hearing on several of Walker's claims. Specifically, I conclude that the district court erred in denying Walker's claims that counsel failed to introduce expert testimony and that counsel were ineffective in challenging the admission of uncharged bad act evidence.

*Failure to call expert witnesses*

In his petition, Walker alleged that his counsel were ineffective for failing to introduce testimony of a forensic video examiner, an eyewitness identification expert, a DNA analysis expert, and an expert on fingerprint analysis. He alleged that these experts could explain how video evidence could be manipulated; testify about the accuracy and reliability of eyewitness identifications resulting from witnessing a traumatic event; contradict, challenge, or offer alternative explanations for the presence of the victim's DNA on Walker's shoe's and Myrdus Archie's car; and contradict or offer other explanations for the presence of the victim's fingerprint in Archie's car.

The district court denied Walker's claim and the majority affirms the denial of most of these claims partially on the basis that Walker failed to plead sufficient facts to warrant relief or otherwise substantiate his claims. I contend that the majority decision holds Walker's pleading to an unreasonable standard. An evidentiary hearing is warranted where a petitioner raises claims supported by specific factual

allegations that are not belied by the record and, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); *see also* NRS 34.780(1) (stating that the Nevada Rules of Civil Procedure apply to proceedings for post-conviction petitions for a writ of habeas corpus to the extent they are not inconsistent with NRS Chapter 34); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (noting a complaint need only set forth sufficient facts to establish all necessary elements of a claim for relief). Courts must liberally construe pleadings to place issues into matters which are fairly noticed to the adverse party. *Hay*, 100 Nev. at 198, 678 P.2d at 674.

Walker's pleading provided the State adequate notice that he intended to demonstrate that the evidence introduced against him at trial could be impeached by the introduction of expert testimony. Walker's only obligation with the filing of his petition was to allege that he could prove those facts. He was not required to prove his claims with his petition. *See* NRS 34.370(4) (noting that "supporting documents are unnecessary" to a post-conviction petition). The district court denied him an opportunity to substantiate his claims when it denied his petition without conducting an evidentiary hearing.

I further conclude that the majority's analysis of these claims incorrectly concluded that Walker failed to demonstrate prejudice. The majority decision addresses each claim regarding an expert that Walker asserts his trial counsel failed to produce at trial. In concluding that Walker failed to demonstrate prejudice from that failure to introduce each

expert, the majority decision points to the remaining evidence introduced against Walker. However, Walker had contended that much of the remaining evidence, including that relied upon by the majority in affirming each claim, should have also been challenged via expert testimony. The majority fails to recognize the interconnected nature of his claims and appreciate the need for an evidentiary hearing to fully evaluate the holistic effect of counsel's failures to investigate or introduce expert testimony. Accordingly, I would reverse the judgment of the district court and remand for an evidentiary hearing on these claims.

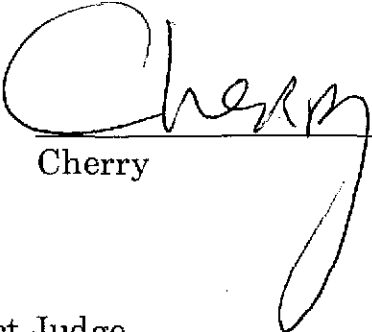
*Prior bad act testimony*

Walker argues that the district court erred in denying his claim that trial counsel was ineffective for failing to object and litigate objections to prior bad act evidence. The majority agrees that the evidence was improperly admitted at trial and that counsel were deficient in failing to properly challenge this evidence. However, the majority concludes that Walker failed to demonstrate prejudice considering the brevity of the comment and evidence of his guilt. I disagree with this holding for two reasons.

First, I disagree with the premise that the terseness of the comments mitigated their impact. It is unquestioned that evidence of Walker's uncharged conduct is not admissible to prove his propensity to engage in criminal activity. NRS 48.045(2); see *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) ("A presumption of inadmissibility attaches to all prior bad act evidence." (quoting *Rosky v. State*, 121 Nev.

184, 195, 111 P.3d 690, 697 (2005))). Such evidence may be admissible for other purposes, but its admission would be closely guarded. *See Quails v. State*, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (recognizing court must consider three-step process prior to admitting evidence of prior bad acts); *see also Rhymes v. State*, 121 Nev. 17, 23, 107 P.3d 1278, 1282 (2005) (requiring use of limiting instruction). These prohibitions and precautions are necessary because of the enormous potential that evidence, which generally portrays the accused as a criminal, has to unfairly sway the jury to believe he acted similarly with regard to the charged crimes. The evidence becomes more prejudicial where, instead of generally characterizing the accused as a criminal, it specifically implicates him in similar crimes to the charged conduct. *See United States v. Shapiro*, 565 F.2d 479, 481 (7th Cir. 1977) (“When the prior conviction and the charged act are of a similar nature . . . [t]he jury is more likely to . . . regard the prior convictions as evidence of a propensity to commit crime or of guilt . . .”). Walker was charged with murdering one victim while stealing her purse, slashing one victim while conducting a robbery, and stealing the purse of a third victim. The prior bad act evidence, that Archie’s residence had an inordinate number of purses and his hand bore older wounds suggesting the use of a knife as a weapon, did not just portray Walker as a criminal, but strongly insinuated that he had a habit of committing the type of knifepoint robberies for which he was on trial. Thus, despite the short time it was discussed, the evidence admitted in this case could have been unfairly prejudicial.

Second, I conclude that the majority improperly relies on the remaining evidence of his guilt in concluding that he failed to demonstrate prejudice. As previously discussed, Walker asserted that much of the evidence introduced against him was susceptible to impeachment through expert testimony. Therefore, I conclude that the majority is incorrect to rely on this evidence, which Walker was denied the opportunity to challenge in an evidentiary hearing, in concluding that Walker failed to demonstrate prejudice. If anything, these errors should be seen as working in tandem to deny Walker a fair trial. Accordingly, I would reverse and remand for an evidentiary hearing on this claim.

  
Cherry, J.

cc: Hon. Valerie Adair, District Judge  
Justice Law Center  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk