

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILL JOSEPH STONE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37728

FILED

AUG 28 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY: *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On July 15, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon, one count of conspiracy to commit robbery and one count of attempted robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole for the murder count and concurrent terms for the remaining counts. This court dismissed appellant's appeal from the judgment of conviction.<sup>1</sup> The remittitur issued on March 20, 2000.

On January 9, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

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<sup>1</sup>Stone v. State, Docket No. 30875 (Order Dismissing Appeal, December 20, 1999).

conduct an evidentiary hearing. On April 6, 2001, the district court denied appellant's petition. This appeal followed.<sup>2</sup>

In his petition, appellant claimed: (1) his trial counsel was ineffective for failing to present any evidence at the preliminary hearing; (2) his trial counsel failed to give him discovery; (3) his trial counsel failed to review materials prior to the preliminary hearing; (4) his trial counsel failed to file a motion to exclude the testimony of Diane Mancha based upon a suggestive identification; (5) his trial counsel failed to file a motion for discovery relating to the scientific testing of material evidence; (6) his trial counsel failed to file a motion in limine to preclude improper comment and argument; (7) his trial counsel failed to file a motion to restrict expert testimony or opinion; (8) his trial counsel failed to formalize discovery at the district court level to ensure full disclosure; (9) his trial counsel failed to contact and interview the alleged jailhouse informants Louis Myers and Douglas Daugherty; (10) his trial counsel failed to interview Christine Sooley's employer regarding the dates in question to corroborate appellant's trial testimony; (11) his trial counsel failed to prepare and investigate witnesses for the penalty phase; (12) his trial counsel failed to make proper objections at sentencing and present mitigating evidence and witnesses; (13) his trial counsel failed to give appellant any findings made by the defense investigator; (14) his trial counsel failed to form a meaningful relationship with appellant; (15) his

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<sup>2</sup>To the extent that appellant raised any of his claims as independent constitutional violations, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We address appellant's claims as they relate to the effective assistance of counsel.

trial counsel failed to investigate or research the fact that the victim's feet were stuck upward after he was shot and pushed across the front seat of the vehicle; (16) his trial counsel failed to contact Becky Cork for information about the credibility of Christine Sooley and Jack Brandon; and (17) his appellate counsel was ineffective for failing to argue that the State failed to preserve scientific evidence and disclose forensic results. Appellant failed to provide any specific facts supporting these claims.<sup>3</sup> Therefore, we conclude that appellant was not entitled to relief on these claims.

Next, appellant raised thirty claims of ineffective assistance of trial counsel. 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 errors were so severe that they rendered the jury's verdict unreliable.<sup>4</sup> The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file a motion to sever. Appellant failed to demonstrate that the performance of his counsel was deficient or that he was prejudiced. During a pretrial hearing, appellant's trial counsel informally sought severance, and the State did not oppose severance. However, prior to trial,

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<sup>3</sup>Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>4</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>5</sup>Strickland, 466 U.S. at 697.

appellant's co-defendant, Roy Mancha, entered a guilty plea and agreed to testify against appellant. Thus, nothing was left to sever at the time appellant's trial commenced. Appellant was not entitled to relief on this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to invoke the rule of witness exclusion at the beginning of the preliminary hearing.<sup>6</sup> Appellant failed to demonstrate that he was prejudiced by counsel's performance. Appellant failed to demonstrate that the witnesses present in the courtroom prior to invocation of the rule of witness exclusion were influenced by the testimony of the first witness or shaped their testimony to match the testimony of the first witness. Therefore, appellant was not entitled to relief on this claim.

Third, appellant claimed that his trial counsel was ineffective for telling him that he had no defense and advising him to enter a guilty plea. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant exercised his right to a jury trial. During the trial, appellant's trial counsel cross-examined the State's witnesses and presented an alibi defense. Therefore, appellant was not entitled to relief.

Fourth, appellant claimed that his trial counsel was ineffective for failing to present any evidence on behalf of appellant. The record on appeal belies appellant's claim.<sup>7</sup> Appellant's trial counsel presented witnesses in support of appellant's alibi defense. Appellant failed to

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<sup>6</sup>NRS 50.155.

<sup>7</sup>Hargrove, 100 Nev. 498, 686 P.2d 222.

indicate what further evidence should have been presented during the trial that would have had a reasonable probability of altering the outcome of the trial. Therefore, appellant was not entitled to relief.

Fifth, appellant claimed that his trial counsel was ineffective for advising appellant not to testify at the preliminary hearing. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that his testimony would have altered the outcome of the preliminary hearing.<sup>8</sup> Therefore, appellant was not entitled to relief.

Sixth, appellant claimed that his trial counsel's performance was deficient for failing to file a motion to suppress evidence obtained from a gym bag. Appellant claimed that the police were required to obtain a separate search warrant in order to open the gym bag found in his apartment. Appellant failed to demonstrate that a motion to suppress the evidence would have been meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the results of the trial.<sup>9</sup> After receiving information that appellant had shot a man in the head two times, the police obtained a search warrant for appellant's residence and found a gym bag containing .22 caliber ammunition and various writings of appellant.<sup>10</sup> Appellant failed to

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<sup>8</sup>Appellant testified at the trial in which he was convicted.

<sup>9</sup>Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

<sup>10</sup>The murder weapon, recovered at Roy Mancha's home, was a .22 caliber revolver. The ammunition found in the revolver was the same type as some of the ammunition found in the gym bag. Multiple fragments from a .22 caliber projectile were recovered from the victim's body during the autopsy.

demonstrate that the police were required to obtain a separate search warrant for the gym bag found in his apartment. Further, appellant failed to demonstrate that there was a reasonable likelihood that the exclusion of the evidence would have changed the results of the trial given the overwhelming evidence of guilt.<sup>11</sup> Therefore, appellant was not entitled to relief.

Seventh, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the extrajudicial police statements of Roy Mancha, Diane Mancha and Christine Sooley on the ground that they were under the influence of methamphetamine when they gave their statements to the police. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. A motion to suppress would not have been granted on the ground asserted by appellant.<sup>12</sup> Therefore, appellant was not entitled to relief.

Eighth, appellant claimed that his trial counsel was ineffective for failing to canvass the State's witnesses in regards to the testimony that they heard at the preliminary hearing prior to invocation of the rule of witness exclusion. Appellant also claimed that his counsel failed to file a motion to exclude the testimony of the State's witnesses that heard the testimony of another State's witness. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced by counsel's performance. As stated earlier, appellant failed to demonstrate that the testimony of the State's witnesses was influenced or shaped by

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<sup>11</sup>On direct appeal, this court concluded that there was overwhelming evidence of guilt.

<sup>12</sup>Kirksey, 112 Nev. at 990, 923 P.2d 1102 at 1109.

hearing the testimony of another of the State's witnesses. Appellant failed to indicate what a canvass of the witnesses would have revealed. Therefore, appellant was not entitled to relief.

Ninth, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the statements of Douglas Daugherty on the ground that appellant's statements to Daugherty were "illicitated police statements of (Jail House) Informant." Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. A motion to suppress the statements would not have succeeded. There is no indication in the record that the police placed Daugherty in a position to obtain incriminating statements from appellant.<sup>13</sup> Rather Daugherty testified that he knew appellant prior to their incarceration together at the jail and that he approached appellant and engaged him in a conversation. Daugherty testified that he later contacted the authorities because he was disturbed by what appellant had told him during their conversation.<sup>14</sup> Daugherty testified that he received no promises or benefit for his testimony. Therefore, appellant was not entitled to relief.

Tenth, appellant claimed that his trial counsel was ineffective for failing to file an opposition to the State's motion to endorse witnesses. Specifically, appellant claimed that his trial counsel should have opposed the endorsement of Douglas Daugherty and Louis Myers because they

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<sup>13</sup>Boehm v. State, 113 Nev. 910, 944 P.2d 269 (1997).

<sup>14</sup>Daugherty testified that appellant told him that he had shot the victim because he needed money. Appellant also told Daugherty that he had left evidence of the crime at Roy Mancha's house and that he thought Mancha might take the fall because of the evidence left in his house.

were not reliable and not credible. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. An opposition to the motion to endorse would not have succeeded on the ground asserted by appellant. Therefore, appellant was not entitled to relief.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the extrajudicial statements of Louis Myers. Myers testified that he lied during the preliminary hearing when he denied that appellant had told him anything in jail.<sup>15</sup> Because Myers changed his statements during the proceedings, appellant believed that Myers' statements should have been suppressed. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced because a motion to suppress would not have succeeded. The fact that Myers had changed his statement during the proceedings was presented to the jury and the jury was allowed to consider that in determining the weight and credibility of Myers' testimony. Therefore, appellant was not entitled to relief.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to file a motion in limine to preclude introduction of gang affiliation and reference to Nazi symbols. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to provide any specific facts in support of this claim. Appellant failed to demonstrate that the preclusion of these facts

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<sup>15</sup>Myers testified that he lied because he felt that he was "burned" by the police because he had not received any benefit for his testimony and because he was fearful of a "snitch jacket."



would have had a reasonable probability of altering the outcome of the trial. Therefore, appellant was not entitled to relief.

Thirteenth, appellant claimed that his trial counsel was ineffective for failing to file a motion to exclude disclosure of Roy Mancha's plea bargain with the State. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. It was permissible to disclose Mancha's plea agreement to the jury.<sup>16</sup> Therefore, appellant was not entitled to relief.

Fourteenth, appellant claimed that his trial counsel was ineffective for failing to file a motion in limine to preclude the State's invasion of the province of the jury to determine the credibility of the witnesses. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. A motion in limine would not have succeeded. Appellant's one citation to the record does not support his claim that the State invaded the province of the jury. Rather appellant's citation demonstrates that the State argued the evidence presented at the trial to the jury and told the jury it was for them to decide appellant's guilt or innocence. Therefore, appellant was not entitled to relief.

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<sup>16</sup>NRS 175.282, in pertinent part, provides:

If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to lesser charge or for a recommendation of a reduced sentence the court shall:

1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the plea agreement.

Fifteenth, appellant claimed that his trial counsel was ineffective for failing to file a motion in limine to preclude introduction of an uncharged prior bad act without a Petrocelli hearing.<sup>17</sup> Appellant claimed his drug use and drug dealing was improperly brought out during the trial. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. During a pre-trial hearing, appellant's trial counsel informed the district court that after discussing the matter with appellant that the defense would not oppose the State's introduction of this evidence during trial. Appellant's dealing in drugs played a crucial part in appellant's theory of defense in casting doubt upon the State's theory that the crime was motivated by appellant's desire to rob the victim.<sup>18</sup> These facts also were brought out in an attempt to question the credibility of Douglas Daugherty's testimony.<sup>19</sup> The fact that appellant used drugs was also used to raise doubts about Roy Mancha's credibility as Mancha was appellant's supplier. Therefore, appellant was not entitled to relief.

Sixteenth, appellant claimed that his trial counsel was ineffective for failing to advise appellant about testifying on his own behalf. Appellant failed to demonstrate that he was prejudiced by counsel's performance. Prior to testifying, the district court advised appellant of his right to testify and the consequences of testifying. During

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<sup>17</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

<sup>18</sup>Appellant testified that he did not need money because he earned money through dealing drugs.

<sup>19</sup>Appellant testified that he was Daugherty's supplier, directly conflicting with Daugherty's testimony that he did not use drugs.

the discussion, trial counsel informed the district court that appellant did have a prior felony conviction and appellant was informed that he could be questioned about the prior felony conviction. Finally, the district court recessed with a final advisement for appellant to discuss whether or not he would testify with his attorney. Appellant subsequently decided to testify. Therefore, appellant was not entitled to relief.

Seventeenth, appellant claimed that his trial counsel was ineffective for failing to oppose prejudicial letters and writings. Appellant's claim is belied by the record on appeal.<sup>20</sup> Appellant's counsel opposed the introduction of the letters as highly prejudicial and questioned their credibility.<sup>21</sup> The district court determined that the letters would not be allowed to be presented during the guilt phase but would be allowed to be presented during the penalty phase. This court already determined that the admission of the letters into the penalty phase was not error. The doctrine of the law of the case prevents further relitigation of this issue.<sup>22</sup> Therefore, appellant was not entitled to relief.

Eighteenth, appellant claimed that his trial counsel was ineffective for failing to timely comply with the notice of alibi provisions.<sup>23</sup> Appellant failed to demonstrate that his counsel's performance was

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<sup>20</sup>Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>21</sup>Appellant's counsel questioned whether the letters could have been written for creative writing purposes.

<sup>22</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>23</sup>NRS 174.233 (1) (providing that the defense shall provide a notice of alibi, including the names and last known addresses of the witnesses by whom the defendant proposes to establish the alibi, not less than 10 days before trial or at such other time as the court may direct).

deficient or that he was prejudiced. Appellant did not provide any specific facts in support of this claim.<sup>24</sup> To the extent that appellant was referring to counsel's failure to submit Richard Deobom's name in a timely notice of alibi, appellant was not entitled to relief. This court determined on direct appeal that the district court erred in excluding Deobom's testimony but concluded that the error was harmless because of the overwhelming evidence of guilt. The doctrine of the law of the case prevents further relitigation of this issue and cannot be avoided by a more detailed and precisely focused argument made after a reflection upon the prior proceedings.<sup>25</sup> Further, appellant's counsel could not have been ineffective for failing to timely comply with NRS 174.233(1) because counsel only learned that Deobom had information relating to appellant's alibi defense during trial and immediately approached the court upon learning of his existence. Therefore, appellant was not entitled to relief on this claim.

Nineteenth, appellant claimed that his trial counsel was ineffective for failing to move to continue the trial to investigate Richard Deobom. Appellant failed to demonstrate that he was prejudiced by counsel's performance. As stated above, appellant's counsel only learned of the existence of Deobom during the middle of the trial. As stated above, the exclusion of Deobom's testimony was determined to be harmless by this court because of the overwhelming evidence of guilt. Therefore, appellant was not entitled to relief.

Twentieth, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the videotape of Roy

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<sup>24</sup>Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>25</sup>Hall, 91 Nev. at 316, 535 P.2d at 799.

Mancha's interview with the police. During the videotape, an individual, identified as appellant by the detective interviewing Mancha, was heard screaming and yelling in the background.<sup>26</sup> Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. A motion to suppress the videotape would not have been successful. The detective interviewing Mancha testified that the videotape accurately depicted the interview that he conducted of Mancha. The detective further testified that he left the interview several times to have the screaming and yelling individual quieted. The detective testified that he was positive that it was appellant screaming and yelling. Therefore, appellant was not entitled to relief.

Twenty-first, appellant claimed that his trial counsel was ineffective for failing to interview Chris and Patti Martinez about Richard Deobom and other potential alibi witnesses. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. There are no facts in the record to indicate that either Chris or Patti Martinez were able to confirm that Deobom saw appellant at the Martinez house on the night of the murder. Appellant failed to allege any specific facts or provide any supporting documents establishing that a further investigation of these witnesses would have produced information that would have had a reasonable probability of altering the outcome of the trial. Therefore, appellant was not entitled to relief.

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<sup>26</sup>The detective testified that appellant yelled, "This is bogus." The detective further testified that appellant screamed, "Lies, lies, lies," and "You're lying, Roy." A second detective, the detective that talked to appellant when he was brought to the Henderson Police Department, testified that appellant yelled, "Roy, don't talk. Don't say nothing."

Twenty-second, appellant claimed that his trial counsel was ineffective for failing to contact Patti Martinez's employer to corroborate the testimony of Patti Martinez and her son Chris that she was home sick on November 12, 1996, the day of the murder. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Patti and Chris Martinez testified that Patti Martinez was home sick on November 12, 1996. Patti Martinez testified that she had given appellant a ride to her home in the late afternoon of November 12, 1996, but that she had no personal knowledge of appellant's whereabouts from 5 p.m. until 5 a.m. the next morning. The testimony at trial indicated that the murder occurred at or around 7 p.m. in the evening of November 12, 1996. Thus, there was no reasonable probability that the results of the trial would have been different if counsel had contacted her employer. Therefore, appellant was not entitled to relief.

Twenty-third, appellant claimed that his trial counsel was ineffective for failing to contact Chris Martinez's school to corroborate the date and time of an alleged parent conference. Chris Martinez testified that he remembered that it was on November 12, 1996, that appellant was at his home because he had a required parent conference the day before or the week before. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. During the State's cross-examination, the State presented records from the Chris Martinez's school that indicated that there was not a required parent conference on November 11, 1996, or November 4, 1996.<sup>27</sup> Thus, appellant failed to

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<sup>27</sup>Rather the school records revealed that parent conferences were held on October 28, 1996, and December 2, 1996.

demonstrate that there was a reasonable probability that the results of the trial would have been different if counsel had contacted the school for Chris Martinez's records. Therefore, appellant was not entitled to relief.

Twenty-fourth, appellant claimed that his trial counsel was ineffective for failing to interview Alex Stone, appellant's brother. Appellant appeared to indicate that Alex Stone would have testified that it was Alex Stone at Patti Martinez's house on the morning after the murder.<sup>28</sup> Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Patti Martinez testified that she was positive that it was appellant she saw in her house at 5 a.m. the morning after the murder. Even assuming that Alex Stone would have testified that he was at Patti Martinez's house the morning after the murder, it would not establish an alibi for the time of the killing. Therefore, appellant was not entitled to relief.

Twenty-fifth, appellant claimed that his trial counsel was ineffective for failing to contact Diane Mancha regarding conflicting statements allegedly made to the police by Roy Mancha and Christine Sooley. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to provide facts supporting this claim.<sup>29</sup> Therefore, appellant was not entitled to relief.

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<sup>28</sup>Appellant appeared to be attempting to clarify discrepancies in the testimony of two of his alibi witnesses. Appellant's mother testified that she saw appellant in bed at 6 a.m. the morning after the murder. Patti Martinez testified that she saw appellant in her house at 5 a.m. the morning after the murder.

<sup>29</sup>To the extent that appellant may have claimed that the conflict related to whether or not Christine Sooley and Roy Mancha had a conversation in Mancha's home after the murder, appellant's claim is

*continued on next page . . .*

Twenty-sixth, appellant claimed that his trial counsel was ineffective for failing to investigate the fact that Christine Sooley's shirt, wet and stained with blood, was found on the floor of appellant's bathroom. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Testimony regarding how Sooley's shirt came to be found in appellant's residence was presented at trial. Sooley, appellant's girlfriend, was an eyewitness to the murder. Sooley testified that she was in the backseat of the victim's car when appellant shot the victim twice in the head. She testified that she changed her pants at the Mancha home but did not change her shirt because there was only a little blood on her shirt. Sooley testified that she left the Mancha's home that night and spent the night at appellant's residence. Sooley testified that she took off her shirt and left it at appellant's residence. Appellant testified that he was with Chris Martinez at the time of the murder playing videogames and that Sooley did not spend the night at his residence. Appellant cannot demonstrate prejudice because this matter was presented to the jury, and the jury had a full and fair opportunity to evaluate the matter of Sooley's shirt.<sup>30</sup> Therefore, appellant was not entitled to relief.

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*... continued*

without merit. Christine Sooley, Diane Mancha, and Roy Mancha testified that Sooley and Roy Mancha had a brief conversation in the Mancha home after the murder. Therefore, further investigation of Diane Mancha would not have led to evidence that could have been used for impeachment.

<sup>30</sup>Homick v. State, 112 Nev. 304, 913 P.2d 1280 (1996).



Twenty-seventh, appellant claimed that his trial counsel was ineffective for failing to interview Roy Mancha's neighbors. Appellant claimed that the shooting must have occurred at Mancha's house because Christine Sooley stated that there was a chain link fence at the site of the shooting and because Roy Mancha's house had a chain link fence. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced given the overwhelming evidence of guilt. The record reveals that the shooting did not occur at Mancha's house. Rather the police discovered the scene of the actual shooting at a different location. At this location the police discovered tire tracks, an empty .22 caliber casing, and a pack of cigarettes that Sooley acknowledged were the brand that she smoked. Thus, there was not a reasonable probability that further investigation into this matter would have altered the outcome of the trial. Therefore, appellant was not entitled to relief.

Twenty-eighth, appellant claimed that his counsel was ineffective for failing to argue for lesser-included offenses. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant presented an alibi defense at the trial. Thus, an argument for lesser-included offenses was not consistent with this defense. Moreover, the jury was instructed about the lesser-included offenses of murder, and the jury verdict form contained the lesser-included offenses of murder. Appellant failed to indicate what further arguments should have been made that would not have been inconsistent with appellant's alibi defense and would have altered the outcome of the trial. Therefore, appellant was not entitled to relief on this claim.

Twenty-ninth, appellant claimed that his trial counsel failed to properly develop a theory of defense and abandoned his theory that he was innocent of the crimes. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant's theory at trial was that he was innocent and that he had an alibi for the time of the murder. Appellant presented several witnesses and testified on his own behalf in support of his alibi defense. Appellant further attempted to impeach the credibility of the State's witnesses during cross-examination and through the presentation of defense witnesses. Thus, his trial counsel did not abandon his theory of innocence. Appellant failed to indicate what further steps could have been taken to develop his theory of defense that would have had a reasonable probability of altering the outcome of the trial given the overwhelming evidence of guilt. Therefore, appellant was not entitled to relief.

Thirtieth, appellant claimed that his counsel failed to investigate and present evidence that Roy Mancha and Christine Sooley killed the victim. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Many of the facts that appellant pointed to as demonstrating the guilt of Mancha and Sooley were presented during the trial. Although appellant attempted to cast a wide net in claiming that further investigation should have been conducted, appellant offered no specific facts about what a more thorough investigation would have revealed beyond appellant's attempt to throw suspicion upon Mancha and Sooley. This court already determined on direct appeal that there was overwhelming evidence of appellant's guilt. Therefore, appellant was not entitled to relief.

Next, appellant raised seven claims of ineffective assistance of appellate counsel. “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).”<sup>31</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>32</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>33</sup> “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”<sup>34</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the rule of witness exclusion had been violated at the preliminary hearing. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The record on appeal reveals that the rule of witness exclusion was not violated. The State’s witnesses left the courtroom after appellant’s co-defendant’s counsel invoked the rule of witness exclusion during the testimony of the State’s first witness. Therefore, appellant was not entitled to relief.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the State presented false testimony. Appellant claimed that because Louis Myers changed his statements

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<sup>31</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

<sup>32</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>33</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>34</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

during the proceedings that the State knowingly presented false testimony. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The fact that Myers changed his statements during the proceedings was presented to the jury. Myers testimony at trial was that he had lied during the preliminary hearing but that his testimony at trial was the truth. Thus, the State did not knowingly present perjured testimony at appellant's trial. Therefore, appellant was not entitled to relief.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the evidence in the gym bag was erroneously admitted because there was not a separate search warrant for the gym bag. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. As discussed earlier, appellant failed to demonstrate that a separate search warrant was required. Therefore, appellant was not entitled to relief.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State placed a jailhouse informant in his cell in order to get appellant to make incriminating statements. Appellant failed to demonstrate that his issue had a reasonable probability of success on appeal. As discussed earlier, there is no factual support in the record to support appellant's assertion that a jailhouse informant was placed in his cell in order to get appellant to make an incriminating statement. Therefore, appellant was not entitled to relief.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State failed to disclose Brady

material.<sup>35</sup> Appellant it appears claimed that the State failed to disclose police statements and notes of investigations of Christine Sooley made after her initial statements. Appellant claimed that these statements would have shown conflicts in her statements to the police. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant failed to provide any specific facts of what conflicts existed between Sooley's various statements. Further, there is no indication in the record on appeal that subsequent reports or investigation notes were made after her initial statements. Therefore, appellant was not entitled to relief.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State failed to disclose the videotape of Roy Mancha's interview with the police that depicted appellant yelling and screaming in the background. Appellant further argued that his appellate counsel failed to challenge the authenticity of the videotape. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The State presented the videotape during the testimony of a rebuttal witness due to the fact that appellant denied yelling and screaming during the defense's case-in-chief. There is no indication in the record that the videotape was altered in any manner. The detective conducting Mancha's interview testified that the videotape accurately depicted the interview and that he was positive that appellant was the individual yelling and screaming in the background. Therefore, appellant was not entitled to relief.

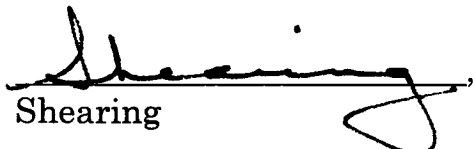
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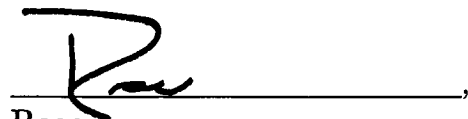
<sup>35</sup>Brady v. Maryland, 373 U.S. 83 (1963).

Seventh, appellant claimed that his appellate counsel failed to argue that the district court abused its discretion in allowing the prior bad acts of Roy Mancha to be presented to the jury. Appellant claimed that Mancha's drug use and prior felony conviction were improperly admitted. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant's trial counsel stipulated that the State could bring forth evidence that Mancha, Christine Sooley, the victim, and appellant were using methamphetamine the day of the murder. Mancha's prior felony conviction was relevant for impeachment purposes. Therefore, appellant was not entitled to relief.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>36</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Shearing, J.

  
Rose, J.

  
Becker, J.

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<sup>36</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Jeffrey D. Sobel, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Bill Joseph Stone  
Clark County Clerk