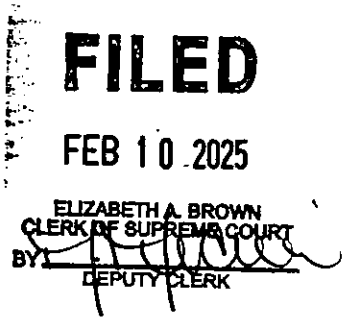
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUSTON MILLER,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 88148-COA



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Duston Miller appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 23, 2023. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Miller argues the district court erred by denying his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), 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). 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*,

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105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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, Miller claimed that appellate counsel was ineffective for failing to argue that his Fourth Amendment rights were violated because his consent to a search of his vehicle was limited to the arresting officer. This court previously concluded that trial counsel was not ineffective for failing to file a motion to suppress because Miller admitted he gave consent to search his vehicle and "did not expressly limit that consent." *See Miller v. State*, No. 79795-COA, 2020 WL 6019373, at *2 (Nev. Ct. App. Oct. 9, 2020) (Order Affirming in Part, Reversing in Part and Remanding). Given that conclusion, Miller failed to demonstrate this claim had a reasonable probability of success on appeal or that appellate counsel was deficient for failing to make the same futile argument on appeal. *Cf. Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (concluding counsel was not deficient for failing to file a futile motion to suppress). Therefore, we conclude that the district court did not err by denying this claim.

Second, Miller claimed that appellate counsel was ineffective for failing to argue that his confrontation rights were violated when one of the victims, D. Whittington, did not testify at trial. The Sixth Amendment's Confrontation Clause provides an accused with the right to confront all witnesses against them. *See Chavez v. State*, 125 Nev. 328, 337, 213 P.3d 476, 483 (2009). To that end, "the Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity

for cross-examination.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

Here, the State did not introduce any statements made by Whittington. Instead, the State presented surveillance video of the robbery to the jury. The surveillance videos were silent and did not include testimonial statements. *Cf. People v. Lopez*, 286 P.3d 469, 478 (Cal. 2012) (recognizing that machines are not declarants for purposes of the Confrontation Clause). Because no testimonial statements by Whittington were introduced at trial, Miller's confrontation rights were not violated when Whittington did not testify at trial. Thus, Miller failed to demonstrate that appellate counsel's performance was deficient for failing to raise this claim on appeal or that this claim had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Third, Miller claimed that appellate counsel was ineffective for failing to argue that his confrontation rights were violated when a witness who provided the police with the "be on the look out" (BOLO) notice did not testify at trial. Miller claimed this witness and the BOLO notice were the basis for his arrest when he was pulled over. However, the officer who arrested Miller testified at trial that the arrest was based on information he received from dispatch and his own knowledge of the robberies. And at trial, there was no mention of the witness who provided the BOLO notice or the BOLO notice itself. Therefore, Miller failed to demonstrate counsel's performance was deficient for failing to raise this claim on appeal or that this claim had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err by denying this claim.

Fourth, Miller claimed that appellate counsel was ineffective for failing to fully argue his claim that the State committed misconduct during closing by arguing facts not in evidence. On appeal, counsel argued that the State committed prosecutorial misconduct during closing argument when the State improperly identified him three times on surveillance videos. This court determined that the State's arguments were based on reasonable inferences from the evidence presented at trial and thus there was no error by the prosecutor. *See Miller v. State*, No. 83883-COA, 2022 WL 3211438, at *2 (Nev. Ct. App. Aug. 8, 2022) (Order of Affirmance). Although Miller outlined in the instant petition what counsel should have emphasized on appeal, he did not undermine the finding by this court that the State's arguments were based on reasonable inferences from the evidence. Therefore, Miller failed to demonstrate this claim had a reasonable probability of success had counsel added additional arguments on appeal. Accordingly, we conclude that the district court did not err by denying this claim.

Fifth, Miller claimed that appellate counsel was ineffective for failing to argue that the recording of his police statement was a surreptitious recording prohibited by NRS 200.650, which prohibits using a listening device to listen to or record a private conversation unless authorized to do so by one of the persons engaging in the conversation. The detective testified at trial that he brought the tape recorder with him when he interviewed Miller and, therefore, the detective—a person engaged in the conversation—authorized the recording and its disclosure. Because the interview was not surreptitiously recorded, Miller failed to demonstrate that appellate counsel's performance was deficient or that this claim had a

reasonable probability of success on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Next, Miller argues the district court erred by denying claims 3, 5, 7, 9, 11, and 12 in the instant petition as procedurally barred because he alleged good cause in his petition. The district court denied these claims because they could have been raised on direct appeal and because Miller failed to demonstrate good cause and actual prejudice to overcome the procedural bar. *See* NRS 34.810(1)(b)(2).

In his petition, Miller argued he had good cause to raise these claims because appellate counsel failed to raise them on appeal. While the district court did not specifically consider whether ineffective assistance of appellate counsel provided good cause to overcome the procedural bar, it did consider the underlying merits of claims 3, 5, 9, 11 and 12 as ineffective assistance of appellate counsel claims elsewhere in its order and found that Miller failed to demonstrate ineffective assistance of appellate counsel. In addition, this court has considered the underlying merits—above for claims 3, 5, 9, and 11 and below for claim 12—in the context of ineffective assistance of appellate counsel and concluded that Miller failed to demonstrate appellate counsel was ineffective with respect to these claims. Thus, we conclude that the district court did not err by denying these claims.[1]

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[1]To the extent that Miller claims the district court erred by denying claim 7 in the instant petition, we conclude that Miller failed to provide any cogent argument regarding this claim on appeal, *see Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); *see also Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (recognizing that a showing of prejudice implicates the merits of a claim), and he is not allowed to incorporate arguments by reference, *see* NRAP 28(e)(2) ("Parties shall not incorporate

Finally, Miller claimed that appellate counsel was ineffective for failing to make several specific arguments about the State's failure to present sufficient evidence of his guilt. Appellate counsel argued that the State presented insufficient evidence of Miller's guilt. This court determined that the appeal failed "to identify which of the charges" were not supported by sufficient evidence and that it did not "provide any argument as to how the evidence presented at trial was insufficient." *Miller*, No. 83883-COA, 2022 WL 3211438, at *1. In his petition, Miller identified seven arguments appellate counsel should have made regarding the sufficiency of the evidence presented at trial.

Initially, we note that, when reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And "circumstantial evidence may constitute the sole basis for a conviction." *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016) (quotation marks omitted).

First, Miller claimed appellate counsel should have argued that the State failed to prove he was the person committing the crimes because

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by reference briefs or memoranda of law submitted to the district court or refer the . . . Court of Appeals to such briefs or memoranda for the arguments on the merits of the appeal."). Thus, we decline to consider this claim on appeal. *Maresca,* 103 Nev. at 673, 748 P.2d at 6.

he was not identified by the witnesses or victims. At trial, the State presented surveillance video of several of the crimes that showed Miller participating in the crimes. Further, Miller identified himself in one of the videos, and his vehicle, a white BMW, was identified by either himself or the victims as being involved in several of the crimes. This evidence was sufficient for a rational jury to find beyond a reasonable doubt that Miller was a participant in the crimes. Therefore, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

Second, Miller claimed appellate counsel should have argued that, in count 7, the State failed to prove a robbery was committed because the State alleged that the robbery was committed with a firearm but the jury did not find him guilty of using a firearm. At trial, the State argued that one of Miller's codefendants showed the victim a gun when he pulled up his shirt and demanded the cigarettes. This was after the clerk refused to give them the cigarettes. The surveillance video did not show what was under the shirt. While the jury did not find that a deadly weapon was used based on the evidence presented, a rational jury could have found beyond a reasonable doubt that the codefendant took the cigarettes by force or threat of force. *See* NRS 200.380(1) (defining robbery). Therefore, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

Third, Miller claimed appellate counsel should have argued that the State failed to prove he was the getaway driver in count 16. The State presented surveillance video depicting the crime in count 16, and two codefendants, with whom Miller had participated in other crimes, were seen

in the video. A white BMW was seen outside of the convenience store where the crime occurred. Miller was arrested driving a white BMW, and he told the police that he drove a white BMW and that no one else drove his vehicle. A white BMW was identified by witnesses as being involved in several of the crimes. Miller's license plate number was also noted in at least one of the crimes. Further, Miller admitted his involvement in another larceny and admitted that he had participated in six other larcenies that coincided with the time frame when this incident occurred. Given this evidence, the State presented sufficient circumstantial evidence for a rational juror to find beyond a reasonable doubt that Miller was the getaway driver in count 16. Therefore, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

Fourth, Miller claimed appellate counsel should have argued that insufficient evidence existed for him to be convicted of counts 11 (robbery) and 16 (robbery). Miller was alleged to have committed grand larceny in both of the incidents implicated in counts 11 and 16, either by directly committing the crimes, aiding or abetting in the commission of the crimes, or conspiring to commit the crimes, and the State argued that the robberies were the natural and probable consequence of the grand larcenies. Miller argues that the State did not demonstrate a separate and distinct agreement to commit further crimes apart from the grand larcenies and that the natural and probable consequences doctrine did not apply.

While the Nevada Supreme Court has disavowed the natural and probable consequences doctrine for specific intent crimes, it specifically stated "vicarious coconspirator liability may be properly imposed for general intent crimes [but] only when the crime in question was a reasonably

foreseeable consequence of the object of the conspiracy." *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) (internal quotation marks omitted), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). The State presented sufficient evidence for a rational juror to find beyond a reasonable doubt that Miller and his codefendants conspired to commit the grand larcenies implicated in counts 11 and 16. Robbery is a general intent crime, *see Litteral v. State*, 97 Nev. 503, 508, 634 P.2d 1226, 1228-29 (1981), *disapproved on other grounds by Talancon v. State*, 102 Nev. 294, 301, 721 P.2d 764, 769 (1986), and a rational juror could have also found beyond a reasonable doubt that the robberies in counts 11 and 16 were reasonably foreseeable consequences of the object of the conspiracy—the grand larcenies. Therefore, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

Fifth, Miller claimed appellate counsel should have argued that, for count 11, the State failed to prove the property was taken "feloniously" because the victim did not testify and Miller did not confess to taking the property. While not clear, it appears Miller's argument was that the State failed to prove the property was taken by force or threat of force. *See* NRS 200.380(1) (defining robbery). The incident was captured on surveillance video and presented to the jury. The surveillance video constituted sufficient evidence for any rational juror to find him guilty beyond a reasonable doubt of robbery. Therefore, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

Sixth, Miller claimed appellate counsel should have argued that insufficient evidence was presented that he committed counts 5, 6, and 7 because a detective improperly identified him on the surveillance video. This claim concerned the admissibility of evidence and thus did not implicate the sufficiency of the evidence. *See Stephans v. State*, 127 Nev. 712, 721, 262 P.3d 727, 734 (2011) ("In assessing a sufficiency of the evidence challenge, a reviewing court must consider all of the evidence admitted by the trial court, *regardless [of] whether that evidence was admitted erroneously*." (internal quotation marks omitted)). Accordingly, Miller failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Miller also appeared to argue that appellate counsel failed to challenge the detective's identification of him on the surveillance video. Because no objection was made at trial, this claim would have been subject to plain error review on appeal. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To demonstrate plain error, an appellant must show there was an error, the error was plain or clear, and the error affected appellant's substantial rights. *Id.*

"Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Rossana v. State*, 113 Nev. 375, 380-81, 934 P.2d 1045, 1048 (1997) (internal quotation marks omitted). Here, the State did not provide foundation that the police officer was more likely to correctly identify Miller from the video than the jury. Thus, we conclude it was error for the detective to identify Miller on the surveillance video at

trial, and accordingly counsel's performance was deficient for failing to argue this claim on appeal. However, given the evidence presented at trial, outlined above, we conclude that the error did not affect Miller's substantial rights. Accordingly, Miller failed to demonstrate this claim had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Seventh, Miller claimed appellate counsel should have argued that the State failed to prove the value of goods taken during the incidents, and therefore, his convictions for grand larceny in counts 2, 4, 9, and 17 should be reversed. Miller first argued that there was *insufficient evidence* to support his convictions for grand larceny in counts 2, 4, 9, and 17 because the State used inadmissible evidence, testimonial evidence rather than documentary evidence, to support the value of the goods taken. Miller's claim did not implicate the sufficiency of the evidence presented, *see Stephans*, 127 Nev. at 721, 262 P.3d at 731, and thus Miller failed to demonstrate that this claim had a reasonable probability of success on appeal. We therefore conclude that the district court did not err by denying this claim.

Within this claim that appellate counsel was ineffective, Miller also argued that his convictions for grand larceny in counts 2, 4, 9, and 17 should be reversed because *inadmissible evidence* was used to prove the value of the goods. Specifically, he claimed that documentary evidence, rather than just the testimony of workers, was required to prove the value of the goods pursuant to *Stephans*.

There was no objection made during trial to the admissibility of the evidence used to support the value of the goods taken in counts 2, 4, 9, and 17. Thus, this claim would have been subject to plain error review on

appeal. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. The value of goods taken during a grand larceny is an element of the crime. *See* NRS 205.220 (defining grand larceny). And the Nevada Supreme Court has held that lay witnesses with personal knowledge of the price of a good may testify regarding its value. *Stephans*, 127 Nev. at 716, 262 P.3d at 731. However, a person without personal knowledge cannot testify as to the value of a good by reading a price tag without also admitting the price tag, as this would constitute hearsay. *Id.* at 718-19, 262 P.3d at 732.

Here, for counts 2, 4, and 9, the State presented testimony from lay witnesses with personal knowledge of the price of the cigarettes taken. In addition, for counts 2 and 4, the State presented documentary evidence to support the personal knowledge of one of the lay witnesses.[2] We conclude the evidence was properly admitted, and Miller failed to show any error. Thus, Miller failed to demonstrate this claim had a reasonable probability of success on appeal, and we conclude that the district court did not err by denying this claim.

As to count 17, the State only presented the testimony of the delivery driver to prove the value of the goods taken.[3] The State failed to establish that the delivery driver had personal knowledge of the value of

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[2]To the extent Miller argues this documentary evidence was hearsay because the witness did not prepare the document, an audit report, this claim is belied by the record. The witness testified that he helped prepare the report.

[3]This court ordered the State to respond to Miller's brief on appeal. The State responded to Miller's claims regarding counts 2, 4, and 9 and argued that the evidence was admissible and thus that there was sufficient evidence produced to support Miller's convictions on those counts. The State failed to respond to Miller's claims regarding count 17 and, as is discussed below, count 12.

the goods taken during the incident. Similar to *Stephans*, the delivery driver based his testimony regarding value on an inventory sheet rather than his personal knowledge. Further, the State did not establish the value of the goods taken with documentary evidence as the State did not introduce the inventory sheet at trial. Thus, this error is plain on the record. Further, Miller demonstrated that his substantial rights were violated because the State failed to establish the value of the goods taken with competent evidence as the delivery driver's testimony regarding value was hearsay. Accordingly, Miller demonstrated appellate counsel's performance was deficient and a reasonable probability of success on appeal for this claim, and we conclude that the district court erred by not granting the petition as to this claim. Therefore, we reverse the district court's order as to this claim and order the conviction for count 17 vacated. We note that, as stated above, this claim did not implicate the sufficiency of the evidence, *see id.* at 721, 262 P.3d at 733-34 (providing that a defendant is entitled to reversal of the conviction for grand larceny when improper evidence is used to prove value but is not entitled to acquittal because the claim does not implicate the sufficiency of the evidence), thus the State may retry Miller on this count.

Eighth, Miller argues that counsel should have argued that insufficient evidence was presented as to the value of the goods taken for count 12, grand larceny. After reviewing the trial record, we conclude that the record is devoid of any evidence regarding the value of the goods taken as alleged in count 12. Neither testimony nor documentary evidence was presented to establish value. Because insufficient evidence was presented to support the charge of grand larceny in count 12, we conclude appellate counsel's performance was deficient for failing to make this argument on appeal and this claim had a reasonable probability of success. Accordingly,

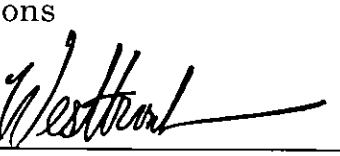
we conclude that the district court erred by not granting the petition in regard to this claim. We therefore reverse the district court's order as to this claim and order the conviction for count 12 vacated. Because Miller established that the State presented insufficient evidence as to count 12, he may not be retried on count 12. *Cf. Combs v. State*, 116 Nev. 1178, 1181, 14 P.3d 520, 521 (2000) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution." (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978) (internal quotation marks omitted.)))

Having concluded that Miller is entitled to relief on two of the claims raised in his postconviction petition for a writ of habeas corpus, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND with instructions to grant the petition in part and to vacate the convictions of grand larceny imposed in counts 12 and 17.

_____, C.J.
Bulla

_____, J.
Gibbons



_____, J.
Westbrook

cc: Hon. Kathleen E. Delaney, District Judge
Duston Miller
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk