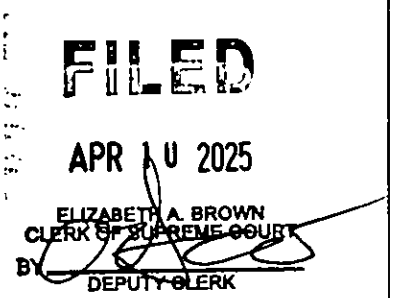
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES THOMAS TALLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87471-COA



ORDER OF AFFIRMANCE

Charles Thomas Talley appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 9, 2022, and a supplemental petition filed on January 30, 2023. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Talley argues the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Talley claimed trial counsel was ineffective for presenting an expert witness, Dr. Jones-Forrester, and her report to the jury. Talley alleged Dr. Jones-Forrester damaged the defense's strategy by testifying that Talley was a chronic alcoholic who continually drank alcohol for over ten years before his arrest, contradicting Talley's statement to police that he "blacked out" during the offenses from drinking alcohol because he was "not really a big drinker," having quit "four years ago." Further, Talley contended Dr. Jones-Forrester's report and testimony did not aid the defense because she discussed no serious mental deficiencies or any extraordinary condition. The district court found there was overwhelming evidence of Talley's guilt presented at trial and, therefore, Talley failed to demonstrate a reasonable probability of a different outcome at trial. Talley does not challenge the district court's findings related to overwhelming evidence on appeal, and these findings are supported by the record. Accordingly, Talley failed to demonstrate a reasonable probability of a different outcome at trial had counsel not called Dr. Jones-Forrester as an expert witness. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Talley claimed trial counsel was ineffective for failing to request a jury instruction concerning the officers' handling of blood or breath evidence. He appears to argue the officers failed to collect and/or failed to preserve his blood or breath for testing, thus resulting in the destruction of evidence. Nevada law distinguishes between the failure to collect evidence and the failure to preserve evidence. *See Daniels v. State*, 114 Nev. 261, 266-67, 956 P.2d 111, 114-15 (1998). To warrant a favorable jury instruction on a failure-to-collect claim, a defendant must show that the evidence was material and that the failure to collect the evidence was

the result of either gross negligence or bad faith. *Steese v. State*, 114 Nev. 479, 491, 960 P.2d 32, 329 (1998). A defendant is entitled to a favorable jury instruction on a failure-to-preserve claim where "the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed." *Daniel v. State*, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003).

To the extent Talley argues on appeal that officers failed to collect evidence, he did not make this argument below, and we decline to consider it on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). With regard to Talley's failure-to-preserve claim, Talley did not allege facts demonstrating the State failed to preserve material evidence. *See Daniels*, 114 Nev. at 266-67, 956 P.2d at 114-15 (considering Daniels' claim that the State's failure to take a blood sample for testing resulted in a failure to preserve evidence and concluding that such a claim "would be more tenable" if "the State gathered blood evidence from Daniels and then allowed it to be lost or failed to deliver it to [defense] counsel"); *see also Steese*, 114 Nev. at 491, 960 P.2d at 329 (commenting that the State's duty to preserve material evidence "presupposes that the State has possession and control of the evidence at issue"). Accordingly, Talley failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel sought an instruction regarding the failure to preserve evidence. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding counsel is not deficient for failing to make futile objections). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Talley claimed trial counsel was ineffective for failing to object to the following comment by the prosecutor during closing: "There's nothing about her body that illustrates consent. And I'm not going to do a ton of photos, but look at her face. On what planet does a woman look like that after she's just agreed to have sex with you?" Talley contended this comment amounted to improper golden rule argument because the use of the pronoun "you" required the jury to put themselves in the position of the defendant. *See Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008) ("An attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties."). Comments alleged to be prosecutorial misconduct are considered in context. *See Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014).

In context, it appears the prosecutor used the pronoun "you" in a rhetorical manner as opposed to asking the jurors to place themselves in the position of one of the parties. *See Witter v. State*, 112 Nev. 908, 928, 921 P.2d 886, 900 (1996), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011); *see also State v. Williams*, 162 A.3d 84, 96 (Conn. App. Ct. 2017) ("Accordingly, our courts have repeatedly held that a prosecutor does not violate the golden rule by using the pronoun 'you' or by asking the jurors to place themselves in the position of the witness if the prosecutor is using these rhetorical devices to ask the jury to assess the evidence from the standpoint of a reasonable person or to employ common sense in evaluating the evidence."). Accordingly, Talley failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel objected. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Therefore, we conclude the district court

did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Talley claimed trial counsel was ineffective for failing to investigate prior to trial. Specifically, Talley alleged counsel should have retained and called a sexual assault expert. Other than speculation as to an expert strengthening the foundations of his defense, Talley failed to specifically allege or demonstrate what an expert would have testified to or how any such testimony would have affected the outcome of his trial. Accordingly, Talley failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel sought such an expert. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Talley claimed trial counsel was ineffective for failing to object to the "express malice" and "reasonable doubt" jury instructions. Talley concedes the Nevada Supreme Court has repeatedly rejected challenges to the given instructions; he has thus failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had the instructions been challenged. *See Leonard v. State*, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (holding that the "abandoned and malignant heart" language is essential and informs the jury of the distinction between express and implied malice); *Elvik v. State*, 114 Nev. 883, 898, 965 P.2d 281, 290-91 (1998) (concluding the portion of NRS 175.211 defining reasonable doubt, as quoted in the jury instructions here, does not violate due process). Therefore, we conclude the district court

did not err by denying this claim without conducting an evidentiary hearing.[1]

Finally, Talley claimed the cumulative errors of counsel entitled him to relief. Even if multiple instances of deficient performance could be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Talley failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

[1]Talley also alleged appellate counsel was ineffective for failing to challenge the "express malice" jury instruction on direct appeal. For the reasons discussed above, we conclude Talley failed to demonstrate appellate counsel was deficient or a reasonable probability of success on appeal had counsel raised this issue. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

cc: Hon. Tierra Danielle Jones, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk