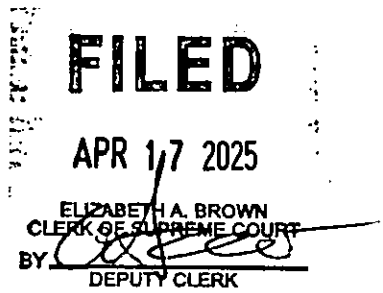
IN THE SUPREME COURT OF THE STATE OF NEVADA

SAID ELMAJZOUB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87053



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Appellant Said Elmajzoub was convicted, pursuant to a jury verdict, of battery with intent to commit sexual assault resulting in substantial bodily harm, attempted sexual assault, and first-degree kidnapping, for which the district court imposed an aggregate sentence of life without the possibility of parole.[1] This court affirmed the judgment of conviction on appeal. *Elmajzoub v. State* (*Elmajzoub I*), No. 53682, 2010 WL 3394658 (Nev. June 7, 2010) (Order of Affirmance). Following a partially successful postconviction petition for a writ of habeas corpus, Elmajzoub was granted a penalty phase retrial to allow for jury sentencing on Count 1, battery with intent to commit sexual assault resulting in substantial bodily harm. *See State v. Elmajzoub* (*Elmajzoub II*), No. 63484, 2015 WL 9464444, at *2 (Nev. Dec. 18, 2015) (Order of Affirmance). A new district court judge

[1]We include only the portions of this matter's lengthy procedural history relevant to our consideration of the instant appeal.

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held a three-day penalty hearing before a jury, which again resulted in a life sentence without the possibility of parole for Count 1. At a subsequent hearing, the district court ordered the existing 24 to 96 month sentence for Count 2, attempted sexual assault, to run consecutive to the jury's sentence for Count 1. In doing so, the court modified the original sentence, under which Counts 1 and 2 ran concurrently. On appeal, this court affirmed both the propriety and outcome of the second sentencing. *Elmajzoub v. State* (*Elmajzoub III*), No. 76232, 2019 WL 4740532 (Nev. Sept. 26, 2019) (Order of Affirmance). This matter now comes before us in the context of a postconviction petition for a writ of habeas corpus challenging the penalty phase retrial. Elmajzoub argues on appeal that the district court erred in denying numerous claims of ineffective assistance of trial and appellate counsel.

To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's deficient performance fell below an objective standard of reasonableness, and that the prejudice from the deficient performance creates a reasonable probability that there would have been a different outcome absent counsel's errors. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984); *see also Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (applying the *Strickland* test to claims of ineffective assistance of appellate counsel). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. "With respect to the prejudice prong, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d

1266, 1273 (2017) (quoting *Strickland,* 466 U.S. at 694). Both components of the inquiry must be shown, *Strickland,* 466 U.S. at 697, and the petitioner must demonstrate the underlying facts of his or her claims by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We defer to the district court's factual findings that are supported by substantial evidence and not clearly wrong but review its application of the law to those facts de novo. *Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Omission of NRS 16.030(5) oath

Elmajzoub first argues that trial counsel should have objected to the district court's failure to administer an oath affirming that potential jurors' voir dire answers would be truthful, *see* NRS 16.030(5), and that appellate counsel should have raised this trial-error on direct appeal. Relying on *Weaver v. Massachusetts,* 582 U.S. 286 (2017), Elmajzoub contends that automatic reversal is warranted, without a showing of prejudice under *Strickland,* because the district court committed structural error that rendered the penalty phase retrial per se fundamentally unfair. We disagree.

The Supreme Court observed in *Weaver* that "[a]n error can count as structural . . . [but] not lead to fundamental unfairness in every case." *Id.* at 296. Elmajzoub has not shown that the error at issue falls within the limited class of errors that are structural because they always result in a fundamentally unfair proceeding. *See id.* at 295-96; *see also Barral v. State,* 131 Nev. 520, 525, 353 P.3d 1197, 1200 (2015) (classifying errors in complying with NRS 16.030(5) as structural because due process requires strict adherence to procedural safeguards intended to prevent "*even the probability* of unfairness" in jury selection (internal quotation

marks omitted)). Additionally, regardless of the rationale for classifying a particular error as structural, *Weaver* did not eliminate a petitioner's burden to demonstrate prejudice under *Strickland*. *See* 582 U.S. at 300. While structural errors generally warrant automatic reversal when preserved at trial and raised on direct appeal, a petitioner raising an ineffective-assistance claim based on counsel's failure to raise a structural error must establish either a reasonable probability of a different outcome but for counsel's deficient performance or that the structural error resulted in a fundamentally unfair proceeding. *Id.* at 300-01, 304.

Here, trial counsel should have called attention to the district court's failure to administer the oath before voir dire. Elmajzoub thus demonstrated deficient performance. But trial counsel testified during the evidentiary hearing that he could not think of any resulting prejudice. None of the responses provided during the extensive group and individual voir dire raised concerns that venire members were obscuring their true beliefs nor does Elmajzoub suggest that any veniremember's answers would have differed had the oath been properly administered. *See Barral*, 131 Nev. at 525, 353 P.3d at 1200 (noting that the purpose of swearing the venire is to protect the integrity of the jury selection process). Further, Elmajzoub does not allege that any impaneled juror was biased or partial. Therefore, Elmajzoub has not demonstrated prejudice arising from trial counsel's deficient performance.

As to the appellate-counsel aspect of this claim, Elmajzoub has not demonstrated deficient performance or prejudice. Had appellate counsel raised the unpreserved structural error on appeal, counsel would have needed to show plain error affecting Elmajzoub's substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error

affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice." *Id.* at 51, 412 P.3d at 49. As discussed above, Elmajzoub failed to demonstrate that the district court's failure to swear the venire rendered the retrial unfair or resulted in prejudice. Accordingly, it is not reasonably probable that this issue would have been successful had it been raised on direct appeal. For these reasons, we conclude that the district court did not err in denying this ineffective-assistance claim as to trial and appellate counsel.

Allegations of prosecutorial misconduct

Elmajzoub next argues that trial counsel should have objected to prosecutorial misconduct and appellate counsel should have raised the issue of prosecutorial misconduct. The alleged instances of prosecutorial misconduct are based on two occasions where the victim's son, Nicolas Sotirakis, referred to Elmajzoub as an "animal" while providing victim impact testimony. Elmajzoub suggests that this testimony amounted to prosecutorial misconduct because the State has a responsibility to prevent its witnesses from making improper statements.

As a victim impact witness testifying during a penalty hearing, Sotirakis had broad latitude to "reasonably express" views regarding the offense, the person responsible, the impact of the offense, and any requested restitution. NRS 176.015(3)(b); NRS 176.015(5)(d)(3); *see also Randell v. State*, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993) (approving of other states' "expansive views" of the right to make a victim impact statement in non-capital cases). Even assuming Sotirakis's characterization of Elmajzoub as an "animal" fell outside the broad scope of permissible victim impact testimony, this does not amount to prosecutorial misconduct. In particular, a prosecutor does not commit misconduct when a witness independently

makes an unprompted remark in response to a question intended to elicit admissible testimony. *See* NRS 50.115(1) (providing parameters for interrogation of witnesses); *Collier v. State*, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) (rejecting that prosecutors may "blatantly attempt to inflame a jury"); *cf. Gumm v. Mitchell*, 775 F.3d 345, 381-82 (6th Cir. 2014) (finding prosecutor's questioning of witnesses amounted to misconduct because the prosecutor "knew what testimony he was searching for" and intentionally elicited prejudicial responses and inflammatory language). Sotirakis's comments followed the State's questions about what he remembered after his mother was attacked and whether there was anything else about his mother's recovery he wished to share. Nothing in the record suggests that the prosecutor intended to elicit the comparison made by Sotirakis. And the prosecutor did not use that comparison in argument. Given these circumstances, Elmajzoub has not established any actions by the State that would amount to prosecutorial misconduct. Therefore, Elmajzoub failed to demonstrate deficient performance by either trial or appellate counsel. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("[C]ounsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Furthermore, we conclude that the rhetorical force of the two brief comments was negligible when considered alongside the admissible victim impact testimony detailing the physical injury and trauma resulting from the offenses. Therefore, Elmajzoub also failed to demonstrate prejudice.

Elmajzoub also claims that appellate counsel should have challenged the State's presentation of a closing argument slide containing the question, "[w]hat kind of person does it take to do that?" Elmajzoub urges us to interpret this question as an implicit reference to the testimony

characterizing Elmajzoub as an animal. We cannot make that leap because the prosecutor did not directly refer to the slide during closing argument and the record does not reveal the context in which the slide was presented. We therefore decline to give the slide any meaning beyond that conveyed by its plain language. The meaning conveyed by the slide's plain language—a question about the defendant's character—is within the scope of proper argument in a penalty hearing.[2] *See Collier*, 101 Nev. at 478, 705 P.2d at 1129 (observing that a sentencing jury's "proper purpose" is to determine "the proper sentence for the defendant before them, based upon his own past conduct"). Elmajzoub thus failed to demonstrate that a challenge alleging that the slide constituted prosecutorial misconduct would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Because Elmajzoub failed to establish appellate counsel's deficient performance or resulting prejudice, we conclude that the district court did not err in denying this ineffective-assistance claim.

Investigation and presentation of mitigating evidence

Elmajzoub next argues that trial counsel should have investigated and presented mitigating evidence demonstrating Elmajzoub's good behavior in prison. Elmajzoub failed to identify any specific witnesses

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[2]To the extent Elmajzoub suggests that this court previously warned the State to refrain from using similar language, this assertion is inaccurate. In the first postconviction appeal, we concluded that the district court did not err in rejecting claims of prosecutorial misconduct. *Elmajzoub II*, 2015 WL 9464444, at *3. Nevertheless, we expressed concern with a rhetorical argument the prosecutor made in closing wherein the prosecutor posed and then answered the question of "what type of person would walk a woman home, get jumped, and walk away without any follow-up." *Id.* at *3 n.6. Our concern was with disparaging language used in the prosecutor's answer. We expressed no opinion as to the phrasing of the question. *See id.*

that trial counsel should have contacted before the new penalty hearing. *See Moore v. State*, 134 Nev. 262, 266, 417 P.3d 356, 361 (2018) (requiring appellant to identify specific mitigating witnesses counsel should have sought out). And the record shows that counsel prepared for the proceeding and presented a mitigation case. Indeed, counsel presented character witnesses and numerous letters written on Elmajzoub's behalf.

Furthermore, the record shows that the jury was aware of Elmajzoub's good behavior while incarcerated.. In fact, Elmajzoub addressed that topic during the allocution, telling the jury that he completed a structured living program, volunteered to teach classes, and helped fellow inmates with financial and conflict-solving skills. Those statements were corroborated by certificates and prison records. And although the trial court admonished counsel for offering that evidence after resting the defense case, the court did so outside the jury's presence and admitted the evidence, thus eliminating any prejudice to Elmajzoub based on counsel's deficient performance in not timely offering the evidence. Elmajzoub failed to demonstrate that a specific witness would have conveyed this information more persuasively. Regardless, it is unlikely that even model behavior in prison would have outweighed the deliberate and particularly brutal nature of the offenses. Accordingly, the district court did not err in denying this ineffective-assistance claim.

Rejection of proposed jury instructions

Elmajzoub next contends that appellate counsel should have argued that the district court erred in rejecting four proposed penalty phase jury instructions. We conclude that the district court did not err in rejecting this claim.

The rejected instructions included guidance on identifying, considering, and weighing mitigating and aggravating circumstances and provided a list of mitigating circumstances. Elmajzoub acknowledges that the instructions were derived from procedures that apply in capital sentencing proceedings but argues those procedures provide the most appropriate analogue where a jury is tasked with determining a noncapital sentence. We disagree.

The procedures that govern capital sentencing proceedings stem from the severity of possible outcome, not from the fact that a jury is tasked with making the sentencing decision. *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect . . . is far more important than in noncapital cases."); *Mason v. State*, 118 Nev. 554, 562, 51 P.3d 521, 526 (2002) (recognizing that SCR 250 provides a heightened procedural safeguard in capital cases because the defendant "may be sentenced to death"). As we observed in Elmajzoub's prior appeal, in the absence of specific guidance from the Legislature, the procedure at the sentencing retrial was within the district court's discretion. *Elmajzoub II*, 2015 WL 9464444, at *2 n.4; *see also Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (stating law of the case doctrine, under which "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same" (internal quotation marks omitted)). The rejected instructions thus were misleading because they presented irrelevant sentencing procedures as if they were legal requirements binding the jury's deliberations. *See Crawford v. State*, 121

Nev. 744, 754, 121 P.3d 582, 589 (2005) (stating that a defendant is not "entitled to instructions that are misleading, inaccurate, or duplicitous"). Because an argument based on the rejected jury instructions thus lacked merit and had no reasonable probability of success on appeal, Elmajzoub has failed to demonstrate deficient performance or prejudice based on appellate counsel's omission of this argument.

Pro se habeas petition

Elmajzoub also asserts that the district court erred in rejecting claims raised in the pro se habeas petition, including claims that trial and appellate counsel should have: (1) challenged NRS 200.400 as unconstitutionally vague, (2) challenged the district court's jurisdiction to alter the sentence for Count 2, and (3) challenged the penalty phase retrial and resulting sentence on double jeopardy grounds. Some of the claims in the pro se petition were raised and rejected on direct appeal. *See Elmajzoub III*, 2019 WL 4740532, at *2. They cannot be relitigated now. *See Hall*, 91 Nev. at 315, 535 P.2d at 798 (discussing law-of-the-case doctrine). As to any other claims in the pro se petition, Elmajzoub's appellate briefs fail to provide cogent argument and relevant legal authority. *See Chappell v. State*, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (requiring appellate briefs to address claims of ineffective assistance of counsel with specificity, "not just in a *pro forma*, perfunctory way or with a conclusory[ ] catchall statement that counsel provided ineffective assistance" (internal quotation marks omitted)). We therefore decline to consider those claims. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Cruel and unusual punishment

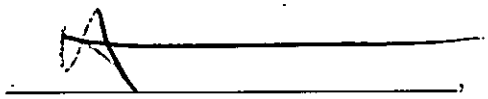
Elmajzoub next argues that trial and appellate counsel should have argued that the sentence of life without the possibility of parole violates the Eighth Amendment's prohibition on cruel and unusual punishment. Specifically, Elmajzoub contends that the sentence shocks the conscience and is grossly disproportionate to the offense of battery with the intent to commit sexual assault resulting in substantial bodily harm. Elmajzoub previously made a more detailed, but structurally similar, argument on direct appeal from the original judgment of conviction. There, we rejected the argument in light of the severity of the offenses. *Elmajzoub I*, 2010 WL 3394658, at *2. Given that neither the circumstances of the crime nor aggregate sentence have changed, Elmajzoub has failed to demonstrate deficient performance or prejudice. Therefore, the district court did not err in denying this ineffective-assistance claim.

Cumulative error

Finally, Elmajzoub argues that the cumulative errors by trial and appellate counsel resulted in a fundamentally unfair penalty phase retrial, warranting reversal. Even assuming that multiple instances of deficient performance can be considered cumulatively for purposes of proving prejudice, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (assuming without deciding that multiple deficiencies may be cumulated for a showing of prejudice under *Strickland*), there is no cumulative prejudice here. As discussed above, Elmajzoub demonstrated two instances of deficient performance by trial counsel: failure to call attention to the district court's omission of the NRS 16.030(5) oath prior to voir dire and an untimely offer of documentary evidence. Elmajzoub failed to demonstrate prejudice in either instance and does not explain how

deficient performance during different parts of the penalty phase retrial would have a cumulative prejudicial effect. *See Jeremias v. State*, 134 Nev. 46, 60, 412 P.3d 43, 55 (2018) (requiring appellant to demonstrate how errors occurring in different phases of trial could be cumulated). Thus, the district court did not err in denying this claim.

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



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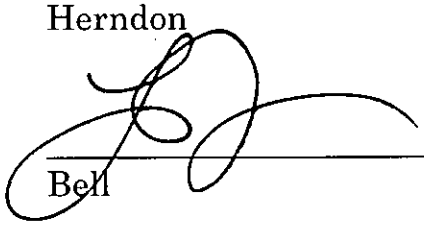

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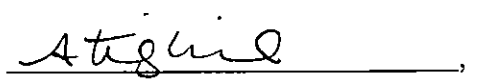

_____, J.
Stiglich

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