

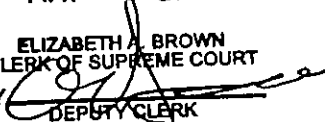
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL LEE MCDONALD,  
Appellant,  
vs.  
WILLIAM GITTERE, WARDEN;  
PIOCHE CONSERVATION CAMP; AND  
THE STATE OF NEVADA,  
Respondents.

No. 86282-COA

**FILED**

**MAY 05 2025**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Michael Lee McDonald appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on April 8, 2021, and a supplement filed on October 4, 2021. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

McDonald was convicted of three counts of burglary, three counts of forgery, two counts of offering a false instrument for filing or recording (offering a false instrument), and two counts of perjury. At trial, the State presented evidence that McDonald entered the courthouse on three occasions and filed a letter from his therapist, Nancy Hunterton, in regard to his child custody proceedings. The original letter from Hunterton stated that McDonald had been her patient and had been addressing issues related to his divorce and personal well-being as well as developing insight

into his separation from his ex-wife and his children. The letter filed by McDonald on the three occasions noted above added an extra line stating: "I do not believe Mr. McDonald is a harm to his children or himself." While McDonald had requested that Hunterton add extra information to the letter and Hunterton agreed, Hunterton never provided him with an updated letter. Further, Hunterton testified she would have provided more information than just the one sentence that was added to the letter. McDonald's conduct with regard to Hunterton's letter comprised the convictions for the three counts of burglary, three counts of forgery, and two counts of offering a false instrument.<sup>1</sup>

The State also presented evidence that McDonald filed a financial disclosure form in relation to his child custody proceedings. This form included information about McDonald's income and place of employment. In the form, McDonald stated he was unemployed but tried to do odd jobs to make at least \$800 a month. McDonald also testified at a hearing that he was unemployed and tried to make at least \$800 a month. However, at the time McDonald filed the form and testified at the hearing,

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<sup>1</sup>The State alleged, as an alternative theory for one of the counts of offering a false instrument (count 7), that McDonald offered the financial disclosure form discussed below as a false instrument. We note that McDonald was acquitted of a third count of offering a false instrument.

he was employed full time and was making \$1808.59 every two weeks. This conduct comprised the convictions for the two counts of perjury.

On appeal, McDonald argues the district court erred by denying his claims that trial and appellate counsel were ineffective. 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*). 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, 1114 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, 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). Further, counsel is not deficient for failing to make futile objections or motions. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). 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, McDonald claimed trial counsel was ineffective for failing to seek dismissal of the forgery charges prior to trial. McDonald claimed the State failed to establish fraudulent intent at the grand jury proceedings. The State only needs to present slight or marginal evidence to demonstrate probable cause to support a criminal charge. *See Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). And “where one in possession of a forged instrument seeks to pass it, . . . it is permissible to infer, for the purpose of establishing probable cause, that [the person] acted with the fraudulent intent necessary to support a charge of forgery.” *Patin v. Sheriff*, 92 Nev. 673, 675, 557 P.2d 708, 708-09 (1976). Here, the State presented evidence to the grand jury that McDonald was in possession of a document—the letter—that was altered and forged and sought to pass it to the clerk of the court. Thus, the State presented sufficient evidence to support the probable cause finding and a pretrial writ of habeas corpus or a motion to dismiss the charge would have been futile. Thus, McDonald failed to demonstrate counsel’s performance was deficient, *see Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding counsel is not deficient for failing to file futile objections), or a reasonable probability of a different outcome had counsel sought dismissal. Accordingly, we conclude the district court did not err by denying this claim.

Second, McDonald claimed trial counsel was ineffective for failing to seek dismissal of the charges for offering a false instrument. McDonald argued NRS 239.330 is unconstitutionally vague because “instrument” and “public office” are not defined by the statute. A statute is void for vagueness “if it fails to sufficiently define a criminal offense such that a person of ordinary intelligence would be unable to understand what conduct the statute prohibits.” *Nelson v. State*, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). We review a statute’s constitutionality de novo. *Id.* This court will not invalidate a statute unless the party challenging the statute “make[s] a clear showing of invalidity.” *Pimentel v. State*, 133 Nev. 218, 222, 396 P.3d 759, 763-64 (2017) (internal quotation marks omitted). “[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.* at 222, 396 P.3d at 764. NRS 239.330(1) defines the crime of offering a false instrument as “a person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in a public office . . . .”

We disagree with McDonald’s assertion that, because NRS 239.330 does not define “instrument” or “public office,” it fails to give reasonable notice of the conduct the statute prohibits. Rather, we conclude that the “well settled and ordinarily understood meaning” of the words, “when viewed in the context of the entire statute,” provides sufficient notice to a person of ordinary intelligence of the conduct prohibited. *Nelson*, 123

Nev. at 540-41, 170 P.3d at 522. Thus, we conclude McDonald failed to demonstrate the statute is void for vagueness. Consequently, he failed to demonstrate counsel was deficient for failing to file a motion to dismiss on this ground or a reasonable probability of a different outcome had counsel filed the motion. Therefore, we conclude that the district court did not err by denying this claim.

Third, McDonald claimed trial counsel was ineffective for failing to seek dismissal of the charges for offering a false instrument because the letter and the financial disclosure form provided by McDonald were not instruments and were not filed in a public office, as required by NRS 239.330. McDonald also claimed that appellate counsel was ineffective for failing to argue the State did not present sufficient evidence that the letter and financial disclosure form were instruments filed in a public office.

McDonald was convicted of two counts of offering a false instrument. In count 11, he was alleged to have filed the therapist letter as a false instrument by attaching it to a motion to recuse the district court judge in his child custody case. In count 7, he was alleged to have filed the therapist letter or the financial disclosure form as a false instrument by attaching them to his exhibit list filed with the family division of the district court (family court) for his child custody case.

We conclude that, for count 11, the State failed to demonstrate that the therapist's letter met the necessary requirements pursuant to NRS 239.330. An instrument is defined as "[a] written legal document that

defines rights, duties, entitlements, or liabilities.” *Instrument*, *Black’s Law Dictionary* (12th ed. 2024). The Legislature used the specific word instrument in the statute and not a more generic term, such as document. Thus, the statute requires that the thing offered for filing be more than just a document; it must be a legal document. Moreover, the State was required to prove that the therapist letter, “if genuine, *might be filed*, registered or recorded in a public office under any law of this State or of the United States.” NRS 239.330(1) (emphasis added). In *Vaughn v. State*, the Nevada Supreme Court determined that NRS 239.330(1) applies to instruments “having the present ability to be filed under state or federal law, but that are forged or contain false information.” 141 Nev., Adv. Op. 6, 563 P.3d 295, 301 (2025).

Here, the therapist’s letter was not an instrument nor did it have the present ability to be filed under state or federal law. The letter, on its own, did not have apparent legal significance such that it qualified as a legal document or could be filed as a stand-alone document; rather, because the therapist’s letter itself contained no case caption, McDonald had to attach it to another document bearing that caption to add it to the case file in the family court. We reject the State’s argument that any paper becomes an instrument when it is filed, as such an interpretation appears broader than the plain language contained in NRS 239.330. Therefore, we conclude trial and appellate counsels’ performance were deficient for failing to challenge count 11 pretrial and for failing to raise the sufficiency

argument on appeal. Further, because the therapist's letter was not an instrument and could not presently be filed, McDonald demonstrated he was prejudiced by trial counsel's failure to file the motion and by appellate counsel's failure to challenge the sufficiency of the evidence. Therefore, we reverse the district court's order as to this claim and order the conviction for count 11 vacated.<sup>2</sup> Because this claim implicates the sufficiency of the evidence, McDonald may not be retried on count 11. *Cf. State v. Combs*, 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))).

We conclude that, for count 7, the State demonstrated McDonald offered an instrument that could presently be filed when it demonstrated McDonald submitted the financial disclosure form for filing. In accord with the definition noted above, the financial disclosure form was a legal document for McDonald's legal matter in the family court, and it had the present ability to be filed under state or federal law. *See* NRCP 16.2(c),

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<sup>2</sup>McDonald also argued that trial counsel was ineffective for failing to offer a jury instruction with the definition of "instrument." In light of our decision above reversing the conviction on this count, we need not address this issue as to count 11.



NRCF 16.205(c) (requiring each party in a family law action to complete, file, and serve a General Financial Disclosure Form).<sup>3</sup>

We also conclude that, for count 7, the State demonstrated McDonald offered the instrument for filing in a public office when it demonstrated McDonald submitted the financial disclosure form to the county clerk's office for filing. We disagree with McDonald's argument that a clerk's office did not qualify as a public office pursuant to NRS 239.330. According to McDonald, a public office is "[a]n office created by a constitution or legislative act, having a definite tenure, and involving the power to carry out some governmental function," and he argues a public office is where legally operative documents are filed. A court clerk's office is within this definition. See NRS 3.250-.380; *cf. State ex. rel. Harvey v. Second Jud. Dist. Ct.*, 117 Nev. 754, 760, 32 P.3d 1263, 1267 (2001) (determining that the county clerk's office is public office for *quo warranto* purposes). Therefore, McDonald failed to demonstrate trial and appellate counsels' performances were deficient or a reasonable probability of a

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<sup>3</sup>As to McDonald's argument that trial counsel was ineffective for failing to seek a definition of "instrument" jury instruction, given our conclusion that the financial disclosure form was an instrument, McDonald fails to demonstrate a reasonable probability of a different outcome at trial as to count 7 had the instruction been given. Therefore, we conclude the district court did not err by denying McDonald's jury-instruction claim as to count 7.

different outcome had trial counsel sought dismissal of count 7, or had appellate counsel challenged the sufficiency of the evidence regarding this count. Accordingly, we conclude the district court did not err by denying this claim.<sup>4</sup>

Fourth, McDonald claimed trial counsel was ineffective for failing to seek dismissal of the perjury charges, counts 6 and 8. McDonald argued the counts in the indictment did not clearly delineate which statute, NRS 199.120 or NRS 199.145, each count was being prosecuted under because the indictment listed the statutes at the beginning of the document but did not include the statutes in the specific counts. He argued this did not give him adequate notice of the charges against him.

Criminal defendants have “a substantial and fundamental right to be informed of the charges against [them] so that [they] can prepare an adequate defense.” *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005). Accordingly, an indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” NRS 173.075(1). “[The] indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts

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<sup>4</sup>McDonald also argued that trial counsel was ineffective for failing to offer a jury instruction with the definition of “public office.” We conclude McDonald has not demonstrated counsel’s performance was deficient in this regard or resulting prejudice, and we therefore conclude that the district court did not err by denying this claim.

showing how the defendant allegedly committed each element of the crime charged.” *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998) (citing *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988)).

Here, as alleged by the State, count 6 related to perjury for a filed document. Count 6 alleged that McDonald:

did on or about March 13, 2018 willfully, unlawfully, feloniously, and knowingly, make a false statement in a declaration, affidavit, oath or other instrument, under penalty of perjury, in the following manner, to wit: by submitting to the EIGHTH JUDICIAL DISTRICT COURT, in case number D-15-518905-D, an affidavit signed by Defendant, titled “General Financial Disclosure Form” in which Defendant falsely stated he was unemployed and/or falsely stated his income.

This necessarily implicated NRS 199.145(1), which states: “A person who, in a declaration made under penalty of perjury . . . [m]akes a willful and false statement in a matter material to the issue or point in question . . . is guilty of perjury.” Thus, the State provided adequate notice of the crime charged as the statement in the indictment included the required elements and facts alleging how McDonald committed each of the alleged elements.

Further, as alleged by the State, count 8 related to perjury for testimony. Count 8 alleged that McDonald:

Did on or about March 16, 2018 willfully, unlawfully, feloniously, and knowingly, after taking a lawful oath in a judicial proceeding swear or affirm willfully and falsely in a matter material

to the issue or point in question, to wit: by providing false sworn testimony in Case number D-15-518905-D, as to Defendant's employment status and income.

This necessarily implicated NRS 199.120, which in pertinent part states:

A person, having taken a lawful oath or made affirmation in a judicial proceeding or in any other matter where, by law, an oath or affirmation is required and no other penalty is prescribed, who . . . [s]wears or affirms willfully and falsely in a matter material to the issue or point in question . . . is guilty of perjury.

Thus, the State provided adequate notice of the crime charged as the statement in the indictment included the required elements and facts alleging how McDonald committed each of the alleged elements. Therefore, McDonald had notice of the elements of the charges against him and the essential facts constituting the charged offenses. Counsel's performance was therefore not deficient for failing to seek dismissal, and McDonald failed to demonstrate a reasonable probability of a different outcome had counsel sought dismissal. Accordingly, we conclude the district court did not err by denying this claim.

Fifth, McDonald claimed trial counsel was ineffective for failing to seek dismissal of the perjury charges because the State failed to prove at the grand jury proceedings that the financial disclosure form and McDonald's testimony regarding his finances were material to the underlying family court proceedings. McDonald argued that the family

court hearing for which the financial disclosure form was filed was limited to only custody and parenting time and that child support was not at issue.

As stated above, only slight or marginal evidence is required to demonstrate probable cause to indict. *See Hodes*, 96 Nev. at 186, 606 P.2d at 180. While monetary issues were not specifically at issue at the hearing on custody and parenting time, the financial disclosure form provided information, such as employment obligations, for the district court to consider when determining what sort of custody and parenting time would be entertained. It also was misleading the other side and the court as to his financial status for any potential need to address child support obligations, even if those were not specifically at issue at that point. Further, McDonald was required to file the financial disclosure form as part of his family court case. *See* NRCP 16.2(c), NRCP 16.205(c). Thus, the form was material to the hearing. Therefore, McDonald failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had counsel sought dismissal. Accordingly, we conclude the district court did not err by denying this claim.

Sixth, McDonald claimed trial counsel was ineffective for failing to seek dismissal of redundant charges based on the Double Jeopardy Clause. McDonald argued that the charges for forgery and offering a false instrument arose from the same conduct. He also argued there is nothing in the statutes authorizing dual charges for the same conduct.

Double jeopardy precludes multiple punishments for the same offense. *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1277-78 (2012). We apply the test outlined in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine “whether each offense contains an element not contained in the other; if not, they are the same offence and double jeopardy bars additional punishment and successive prosecution.” *Jackson*, 128 Nev. at 604, 291 P.3d at 1278 (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)). Further, the Nevada Supreme Court has rejected the “same conduct” test for determining whether charges constitute the “same offense” for double jeopardy purposes. *See id.* at 608-09, 291 P.3d at 1280-81.

McDonald did not argue the *Blockburger* test precluded his prosecution for both forgery and offering a false instrument. Instead, he argued the charges violated the Double Jeopardy Clause because they encompassed the same conduct. Because the “same conduct” test has been specifically repudiated by the Nevada Supreme Court, this argument is unavailing. Further, we note the crimes of forgery and offering a false instrument each contain an element that the other does not. *See* NRS 205.090; NRS 205.095; NRS 205.110 (defining forgery); NRS 239.330 (defining offering a false instrument for filing). Thus, McDonald failed to demonstrate the charges violated the Double Jeopardy Clause on this ground.

McDonald also claimed the charges violated the Double Jeopardy Clause because the Legislature did not intend to authorize

multiple punishments for the same conduct. Even if charges pass the *Blockburger* test, there may still be a Double Jeopardy violation where the Legislature created mutually exclusive alternative offenses and did not intend to authorize multiple punishments. See *Alvarez v. State*, 140 Nev., Adv. Op. 79, 561 P.3d 23, 27 (2024). In *Alvarez*, the Nevada Supreme Court noted that the crimes of sexual assault and lewdness were mutually exclusive by the terms of NRS 201.230 and, in resolving the issue before it, concluded that, pursuant to caselaw, a person could not be convicted of both a theft crime and possessing the proceeds of that theft. 140 Nev., Adv. Op. 79, 561 P.3d at 27-28. Here, neither statute nor caselaw demonstrates that the Legislature intended forgery and offering a false instrument to be mutually exclusive. On the contrary, the offering-a-false-instrument statute specifically states “[t]he provisions of subsection 1 do not apply to a person who is punishable pursuant to NRS 293.800,” which is a statute defining unlawful acts concerning registration of voters, violations of laws governing elections, and crimes by public officers. NRS 239.330(2). Thus, under the negative-implication canon, the fact that the Legislature specifically excluded multiple punishments for violations of NRS 239.330 and NRS 293.800 shows the Legislature’s intent to not prohibit multiple punishment for NRS 239.330 and any other statute, such as forgery. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (defining the negative-implication canon as the expression of one thing implies the exclusion of others). Therefore, we conclude

McDonald failed to demonstrate counsel's performance was deficient for failing to seek dismissal of the charges under the Double Jeopardy Clause. Further, McDonald failed to demonstrate a reasonable probability of a different outcome had counsel sought dismissal. Accordingly, we conclude the district court did not err by denying this claim.

Seventh, McDonald claimed trial counsel was ineffective for failing to sever the perjury charges from the rest of the charges. He argued the perjury charges only related to the financial disclosure form and had nothing to do with the letter. He argued that joinder of the offenses gave the prosecutor the ability to portray him as a person of bad character who was more likely to have committed the crimes.

NRS 173.115(1)(b) provides that “[t]wo or more offenses may be charged in the same indictment or information . . . if the offenses charged . . . are . . . [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” A “common plan” exists between crimes where they are committed for the purpose of accomplishing a particular goal. *Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017) (internal quotation marks omitted).

The district court concluded that McDonald's crimes constituted a common scheme or plan to defraud the court and the children's mother and thus that counsel's performance was not deficient for failing to file a motion to sever. We agree. We further conclude McDonald failed to demonstrate that the joinder of the charges was so prejudicial as to require



severance. *See Middleton v. State*, 114 Nev. 1089, 1107-08, 968 P.2d 296, 309 (1998) (considering when the trial court should sever offenses even if permissibly joined). Thus, McDonald failed to demonstrate a reasonable probability of a different outcome had counsel filed a motion to sever. Therefore, we conclude the district court did not err by denying this claim.

Eighth, McDonald claimed trial counsel was ineffective for failing to seek suppression of his statement to police in which he admitted to having the letter on his computer and to changing the letter. McDonald argued that his statements should have been suppressed pursuant to *Miranda*<sup>5</sup> because, while he was not under arrest at the time he was interrogated, the interrogation occurred in his home while officers searched his home. Thus, he argued his home became police dominated and his interrogation became custodial.

McDonald argued his case was similar to *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2003). In *Craighead*, police officers from three different agencies searched the defendant's home. *Id.* at 1078. Some of the officers unholstered their weapons while completing the search. *Id.* As the home was searched, two armed police officers shut the defendant in a storage room to interrogate him. *Id.* A police officer wearing a flak jacket and a sidearm stood near the door, ostensibly blocking the

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<sup>5</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant's exit. *Id.* Further, the door to the room was shut. *Id.* The Ninth Circuit found this was a coercive environment akin to being in custody; thus, the defendant should have been given his *Miranda* warnings. *Id.* at 1089.

The circumstances surrounding McDonald's questioning differ greatly from those recounted in *Craighead*. Only one police agency was present at McDonald's residence, and McDonald was not isolated or interrogated in a small room with law enforcement. McDonald was informed he could leave, and he did not demonstrate that his movement through the home was restricted. Moreover, the officers at McDonald's residence did not have guns visible or unholstered. Thus, unlike in *Craighead*, the situation did not become police dominated, and McDonald was not in custody when he gave his statements. Therefore, counsel's performance was not deficient for failing to file a motion to suppress, and McDonald failed to demonstrate a reasonable probability of a different outcome had counsel filed the motion. Accordingly, we conclude the district court did not err by denying this claim.

Ninth, McDonald claimed trial counsel was ineffective for failing to impeach Hunterton with her prior testimony and statements. In an affidavit and in her preliminary hearing testimony, Hunterton said she agreed to alter her letter and to add language that McDonald did not pose a threat to his family. McDonald argued counsel should have impeached Hunterton with the affidavit and preliminary hearing testimony because

Hunterton testified at trial that she agreed to alter the language but she would have added much more than a sentence—she would have recommended supervised parenting time with several conditions. At trial, counsel did impeach Hunterton with her prior testimony, and McDonald therefore failed to demonstrate deficiency. Further, the State questioned Hunterton regarding her affidavit wherein she stated she agreed with the sentiment that McDonald did not pose a danger to his children. Thus, the information McDonald claims counsel should have presented at trial through impeachment was presented through the State. McDonald therefore failed to demonstrate a reasonable probability of a different outcome had counsel further questioned Hunterton given the evidence presented at trial. Accordingly, we conclude the district court did not err by denying this claim.

Tenth, McDonald claimed trial counsel was ineffective for failing to object to four instances where other act evidence was introduced. “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” NRS 48.045(2).

McDonald argued the State presented other act evidence when it showed he missed several appointments with Hunterton after she wrote the letter. McDonald failed to demonstrate this evidence was introduced to prove his character in order to show he acted in conformity therewith, as contemplated by the statute. *See id.* Therefore, he failed to demonstrate

counsel's performance was deficient for failing to object to this evidence. We further conclude he failed to demonstrate a reasonable probability of a different outcome had counsel objected to the evidence given the evidence presented at trial.

Next, McDonald argued the State elicited testimony that, as of December 2017, the Regional Justice Court officials identified him as a person of interest. Even assuming without deciding this was other act evidence as contemplated by NRS 48.045(2), McDonald failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to this testimony given the evidence presented at trial.

Next, McDonald argued the State presented evidence that McDonald's family court judge requested and received extra security during McDonald's family court hearings. The statement at trial was that the officer "became familiar with [McDonald] during his divorce case. His divorce judge asked for an extra marshal to be present in the courtroom and that generally was – I was the only free one so generally be me." This statement does not demonstrate the extra security was due to defendant's behavior or character. Thus, McDonald failed to demonstrate this was other act evidence as contemplated by NRS 48.045(2). Therefore, counsel's performance was not deficient for failing to object. Further, even assuming counsel's failure to object was objectively unreasonable, McDonald failed to demonstrate a reasonable probability of a different outcome given the evidence presented at trial.

Finally, McDonald argued the State introduced a video of McDonald testifying in the family court proceedings that he began taking classes at UNLV after he got out of jail. The State argued below, and the district court found, that the “after he got out of jail” line was edited out of the video.<sup>6</sup> Further, below, McDonald conceded that this line was edited out of the video presented at trial. Therefore, McDonald failed to demonstrate counsel’s performance was deficient for failing to object and failed to demonstrate a reasonable probability of a different outcome at trial.

Having concluded McDonald failed to demonstrate ineffective assistance of counsel related to these alleged instances of other act evidence, we conclude the district court did not err by denying this claim.<sup>7</sup>

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<sup>6</sup>McDonald did not provide this court with a copy of the video on appeal, and we presume the video supports the district court finding that the statement was edited out of the video. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d, 131, 135 (2007) see also NRAP 3C(e)(2)(C); NRAP 30(b)(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on appellant.”).

<sup>7</sup>To the extent McDonald argued that counsel should have requested a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), modified in part by *McLellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), we conclude McDonald failed to demonstrate a reasonable probability of a different outcome had counsel requested the instruction.

Eleventh, McDonald claimed trial counsel was ineffective for failing to object to a jury instruction that minimized the State's burden of proof. At trial, a jury instruction was given that ignorance of the law is not an excuse. Specifically, the jury instruction stated:

Ignorance of the law is no excuse. Everyone is conclusively presumed to know the law and one accused of a crime is precluded from using as a defense his or her ignorance of the law. Thus, when the evidence shows that a person voluntarily did that which the law declares to be a crime, it is no defense that he or she did not know that his or her act was unlawful or that he or she believed it to be lawful.

McDonald failed to demonstrate this was an incorrect statement of the law. *See Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) (concluding that "[i]t is well established that mistake or ignorance of the law is not a defense to a criminal action"). Thus, McDonald failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel objected. Accordingly, we conclude that the district court did not err by denying this claim.

Twelfth, McDonald claimed trial counsel was ineffective for failing to advance a viable defense to the perjury charges. McDonald argued counsel should have argued the financial disclosure form was not an affidavit, declaration, or other legally operative instrument as required by NRS 199.120. Further, McDonald claimed counsel should have argued

McDonald did not take an oath because he did not initial the "under penalty of perjury" portion of the form. He also claimed counsel should have argued the financial disclosure form was not material to the hearing. Finally, he contended counsel should have argued he did not testify falsely because his income did fluctuate, he did try to make at least \$800 a month, and he was hired for a full-time job, laid off, and hired again within a few months.

McDonald failed to demonstrate the financial disclosure form did not satisfy the requirements of NRS 199.120. The form required McDonald to submit the form under penalty of perjury. While McDonald did not specifically initial that portion of the disclosure form, he did sign the form just below this statement. Further, counsel did argue the financial disclosure form was not material to the hearing. Finally, McDonald's testimony and information included in the financial disclosure form were egregiously false because he was employed at a full-time job. Therefore, McDonald failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel made further argument. Accordingly, we conclude the district court did not err by denying this claim.

Thirteenth, McDonald claimed trial counsel was ineffective for failing to present evidence, either through cross-examination of the State's expert or through the defense's case-in-chief, regarding the immateriality of his financial status at the time of the custody hearing. Counsel asked questions about the materiality of the financial disclosure form. Counsel

also argued that McDonald's financial status was not material to the custody hearing. McDonald failed to demonstrate that further questioning on this issue would have resulted in a reasonable probability of a different outcome at trial. Accordingly, we conclude the district court did not err by denying this claim.

Fourteenth, McDonald claimed trial counsel was ineffective for proffering an opening statement that misconstrued facts, omitted key information, and failed to advance a viable defense to the charged the crimes. Even assuming counsel's performance was deficient, McDonald failed to demonstrate a reasonable probability of a different outcome at trial because opening statements are not evidence on which the jury may rest its verdict, and the jury was so instructed. *See Rodriguez v. State*, 128 Nev. 155, 160 n.3, 273 P.3d 845, 848 n.3 (2012). Accordingly, we conclude the district court did not err by denying this claim.

Fifteenth, McDonald claimed appellate counsel was ineffective for failing to include the pre- and post-trial motions or the hearing transcripts in the appendix. McDonald also claimed appellate counsel was ineffective for failing to raise any claims about the pre- and post-trial motions that were filed. McDonald failed to support this claim on appeal with cogent argument or citation to caselaw. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). McDonald did not specifically allege which motions counsel should have challenged or provide any specific argument



as to how those motions were meritorious. Therefore, we decline to consider this claim on appeal.

Sixteenth, McDonald claimed appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. 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).

As outlined at the beginning of this order, the State presented evidence that McDonald entered the courthouse three times and filed a letter that was written by his therapist but that he had altered. Given this evidence, the State presented sufficient evidence for a rational juror to find beyond a reasonable doubt that McDonald committed three counts of burglary, see NRS 205.060, and three counts of forgery, see NRS 205.090; NRS 205.095; NRS 205.110.

As stated above, the State also presented evidence that McDonald filed a financial disclosure form that included false information. He also testified to that false information at the child custody hearing. As concluded above, McDonald’s financial status would have provided pertinent information for the family court judge to consider when deciding what type of parenting time to allow and when and thus his financial disclosure form and testimony regarding his finances were material to the

custody hearing. Accordingly, the State presented sufficient evidence for a rational juror to find beyond a reasonable doubt that McDonald committed two counts of perjury, *see* NRS 199.120; NRS 199.145, and one count of offering a false instrument, *see* NRS 239.330(1).

With the exception of count 11, as discussed above, the State produced sufficient evidence that McDonald committed the crimes for which he was convicted. Therefore, we conclude McDonald failed to demonstrate appellate counsel was ineffective for failing to argue this claim on appeal. Further, he failed to demonstrate a reasonable probability of success on appeal had appellate counsel argued sufficiency of the evidence. Accordingly, we conclude the district court did not err by denying this claim.

Seventeenth, McDonald claimed appellate counsel was ineffective for failing to prosecute any of the claims raised in his petition. Given this court's conclusions, above, regarding McDonald's claims, we conclude McDonald failed to demonstrate, with the exception of the sufficiency of the evidence claim regarding count 11, that the underlying claims raised in his petition would have had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err by denying this claim.


Finally, McDonald argues the district court erred by denying his claim that the cumulative errors of counsel warrant 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), we conclude McDonald failed to demonstrate the cumulative errors of counsel entitled him to relief, see *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845,854-55 (2000) (stating the relevant factors to consider in evaluating a claim of cumulative error). Therefore, we conclude the district court did not err by denying this claim.

In light of the foregoing, 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 conviction in count 11 for offering a false instrument.

  
\_\_\_\_\_, C.J.  
Bulla

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Ronald J. Israel, District Judge  
Jean J. Schwartzer  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk