



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDUARDO ESTRADA-PUENTES,
Appellant,
vs.
TIM GARRETT, WARDEN, LOVELOCK
CORRECTIONAL CENTER,
Respondent.

No. 91107-COA

ORDER OF AFFIRMANCE

Eduardo Estrada-Puentes appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 8, 2019. Fourth Judicial District Court, Elko County; Hon. Alvin R. Kacin, Judge.

Estrada-Puentes strangled his wife, Stephanie Gonzalez, to death in their trailer home in Elko and was charged with open murder. At trial, Estrada-Puentes, represented by David Lockie and Sherburne Macfarlan,¹ contended that the killing was not the result of deliberation or premeditation but rather the result of a sudden heat of passion and thus constituted voluntary manslaughter. Estrada-Puentes was ultimately convicted of first-degree murder and sentenced to life in prison without the possibility of parole. This court affirmed the judgment of conviction on direct appeal, *see Estrada-Puentes v. State*, No. 72335-COA, 2018 WL

¹Lockie also represented Estrada-Puentes on direct appeal.

1720662 (Nev. Ct. App. Mar. 30, 2018) (Order of Affirmance), and Estrada-Puentes filed the instant postconviction habeas petition, raising several claims of ineffective assistance of trial and appellate counsel. The district court held a two-day evidentiary hearing on the petition, at which several witnesses testified, including Lockie, Macfarlan, and Estrada-Puentes. The district court subsequently entered an order denying the petition.

On appeal, Estrada-Puentes argues the district court erred by denying his claims of ineffective assistance of trial counsel. 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, 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). 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, Estrada-Puentes claimed trial counsel were ineffective for defending the case on the theory that the killing constituted voluntary manslaughter rather than second-degree murder. Estrada-Puentes contended that a voluntary-manslaughter theory was "weak and

unsupported.” At the evidentiary hearing, Lockie and Sherburne testified that they considered pursuing a second-degree murder theory but made a tactical decision to proceed under a voluntary-manslaughter theory because there was evidence to support the theory and they believed the jury might compromise and render a verdict of second-degree murder.

“[T]rial counsel’s strategic or tactical decisions [are] virtually unchallengeable absent extraordinary circumstances,” *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (internal quotation marks omitted), and Estrada-Puentes failed to demonstrate extraordinary circumstances to warrant challenging counsels’ strategic decision. Based on the evidence presented at trial, counsel could reasonably argue that Estrada-Puentes had just discovered Stephanie was in a sexual relationship with another man, that this discovery provoked Estrada-Puentes into a sudden heat of passion and was sufficient to excite an irresistible passion in a reasonable person, and that Estrada-Puentes killed Stephanie before this passion had subsided. *See Roberts v. State*, 102 Nev. 170, 173-74 & n.2, 717 P.2d 1115, 1116-17 & n.2 (1986). And the availability of other defenses does not indicate counsels’ performance was deficient. *See Lara*, 120 Nev. at 184-85, 87 P.3d at 533 (recognizing that “reasonable minds can most certainly differ on how a defendant in a criminal prosecution should be defended”); *see also Strickland*, 466 U.S. at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”). Accordingly, we conclude the district court did not err by denying this claim.

Second, Estrada-Puentes claimed trial counsel were ineffective for failing to call him as a witness at trial because his testimony might have supported the voluntary-manslaughter theory. As an initial matter, it is not for defense counsel to decide whether a defendant will testify at trial; that decision lies with the defendant alone. *Browning v. State*, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004). At the evidentiary hearing, Estrada-Puentes testified that (1) he did not want to testify at trial; (2) he was canvassed on, and understood, his right to testify; (3) he understood the decision was his alone; and (4) he chose not to testify knowing that counsel was defending his case on a voluntary-manslaughter theory. Thus, counsel were not ineffective for failing to have Estrada-Puentes testify at trial because Estrada-Puentes, not counsel, made that decision. *See id.* at 360-61, 91 P.3d at 49.

To the extent Estrada-Puentes contended that counsel were ineffective for *advising* him not to testify, he failed to demonstrate extraordinary circumstances to warrant challenging counsels' strategic decision. *See Foster v. State*, 121 Nev. 165, 175-76, 111 P.3d 1083, 1090 (2005) (recognizing that counsel's decision to advise a client not to testify in their own defense is a tactical matter). As previously discussed, counsel could reasonably argue that Estrada-Puentes committed voluntary manslaughter when he strangled Stephanie absent Estrada-Puentes' testimony. Moreover, Lockie provided several reasonable justifications for why he advised Estrada-Puentes not to testify at trial: (1) he did not want Estrada-Puentes to face cross-examination on what was said or not said the morning of the murder; (2) he did not want to delve into the nature of

Estrada-Puentes' relationship with other women; (3) he was concerned the State would paint Estrada-Puentes as a control freak rather than a brokenhearted man wanting to reunite with his family; (4) he was concerned Estrada-Puentes' prior domestic violence convictions or episodes would potentially be introduced; and (5) he did not want to give the State the chance to amplify all of the details regarding Estrada-Puentes' decision to flee the country after the crime. Thus, Estrada-Puentes failed to demonstrate that counsels' performance was deficient or a reasonable probability of a different outcome at trial had counsel advised him to testify. *See Browning*, 120 Nev. at 361, 91 P.3d at 49. Accordingly, we conclude the district court did not err by denying this claim.

Third, Estrada-Puentes claimed trial counsel were ineffective for failing to challenge evidence that his then-five-year-old daughter, K.G., informed multiple people that he stated "you're dead" or something similar to Stephanie the morning of the murder. Estrada-Puentes claimed counsel should have challenged this evidence by (1) presenting evidence that K.G. was confabulating and getting this detail from the horror movie *Bride of Chucky*, which she watched with him the night before the murder; (2) cross-examining Stephanie's mother on her public and social media statements to show she hated Estrada-Puentes and pressured K.G. into making the statement; and (3) requesting a more comprehensive jury instruction on child witness testimony.

Collectively, Lockie and Macfarlan testified that they were aware Estrada-Puentes watched *Bride of Chucky* with K.G. the night before the murder and considered arguing that K.G. was confabulating details of

the murder. However, they decided against it for several reasons: (1) doing so would likely require Estrada-Puentes to testify; (2) the jury would not like it if they found out Estrada-Puentes watched a horror movie with his five-year-old daughter; and (3) the evidence that came out regarding what was said that morning was “probably about as good as it might get” considering a violent homicide had taken place.² Lockie also testified that he believed attacking a vulnerable witness like K.G. would be a “terrible mistake” because he did not know what K.G. might say, K.G. could break down in front of the jury, and intense cross-examination could evoke animus toward him. He testified that he did not want to focus the defense on whether K.G. was lying because the jury would hold that against them.

In sum, counsel made a strategic decision not to challenge K.G.’s pretrial statements, and Estrada-Puentes failed to demonstrate extraordinary circumstances to warrant challenging counsels’ strategic decision.³ And although Estrada-Puentes presented some evidence at the

²At trial, which took place more than five years after the crime was committed, K.G. testified that she heard Estrada-Puentes and Stephanie arguing and that she heard Estrada-Puentes call Stephanie a “bitch” three or four times. She further testified that she did not remember Estrada-Puentes saying anything else, she did not remember talking to other people about the incident, and she did not remember telling anyone that Estrada-Puentes had stated “you’re dead” or something similar.

³For this reason, we also reject Estrada-Puentes’ claim that counsel was ineffective during closing argument for failing to rebut the prosecution’s assertion that Estrada-Puentes said “you’re dead” or something similar. We note that defense counsel argued that Estrada-Puentes made this statement in the context of a sudden heat of passion, and

evidentiary hearing that K.G.'s pretrial statements may have been confabulated, he did not present any evidence that Stephanie's mother or anyone else had pressured or coerced K.G. into making those statements.

Regarding trial counsels' failure to request a more comprehensive jury instruction on child witness testimony, Lockie testified that he had done "[q]uite a few" cases with child witnesses, that he believed the instructions given were adequate, and that there was nothing "particularly unique" about this case that would have caused him to "seek some stronger form of instruction than what was given." Given defense counsels' strategic decision not to challenge K.G.'s pretrial statements, and the fact that the jury was properly instructed regarding their duty to judge and give weight to the testimony presented, Estrada-Puentes failed to demonstrate that counsels' performance was deficient or a reasonable probability of a different outcome had counsel sought more specific instructions regarding child witness testimony. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Estrada-Puentes claimed trial counsel were ineffective for failing to tender certain jury instructions regarding manual strangulation. The record indicates that defense counsel filed two proposed jury instructions regarding manual strangulation with the trial court. The first instruction stated that "[m]anual strangulation alone is insufficient

we agree with the district court that this statement is not inconsistent with the defense's theory of voluntary manslaughter.

evidence to support a finding that the killing is willful, deliberate and premeditated.” The second instruction stated that

[t]he length of time involved in the act of manual strangulation may, but does not necessarily, support an inference that the killing is willful, deliberate and premeditated. Opportunity may be a factor for you to consider, but does not alone establish those elements. In order to find the defendant guilty of First Degree Murder, you must find that he actually engaged in deliberation and premeditation, as opposed to merely having the opportunity to do so.

Despite this filing, Estrada-Puentes contends that counsel failed to actually offer these instructions.

Even assuming counsel failed to offer these two instructions,⁴ Estrada-Puentes did not demonstrate that the first instruction was an accurate statement of Nevada law. Estrada-Puentes’ instructions were derived from *State v. Bingham*, in which the Washington Supreme Court issued a 5-4 decision holding that the fact of manual strangulation alone was insufficient to demonstrate that a killing was premeditated. 719 P.2d 109, 114 (Wash. 1986). However, *Bingham* is not binding authority, and the Nevada Supreme Court has never held that manual strangulation alone

⁴At the evidentiary hearing, Lockie testified that he and the State offered competing instructions on manual strangulation, that there was “probably” an off-the-record conference regarding the settling of jury instructions, and that he believed neither his nor the State’s instructions were given as a result of that conference. However, he also testified that he could not remember how it “went down procedurally” or whether there was an agreement for both parties to withdraw their instructions.

is insufficient to demonstrate a killing was premeditated. *Cf. Leonard v. State*, 117 Nev. 53, 76 & n.16, 17 P.3d 397, 411-12 & n.16 (2001) (holding that a jury may consider the time involved in a strangulation in determining whether a killing was deliberate and premeditated and noting that some courts have accorded such a factor “great significance”); *see also Marin v. State*, No. 67860, 2017 WL 2334518 (Nev. May 26, 2017) (Order of Affirmance) (concluding that there was sufficient evidence for a jury to conclude that the defendant “acted willingly with deliberation and premeditation” where it took the defendant up to five minutes to strangle the victim to death). Therefore, counsels’ performance was not deficient insofar as they failed to offer such an instruction.

To the extent the second instruction is consistent with Nevada law, *cf. Leonard*, 117 Nev. at 76, 17 P.3d at 411 (recognizing that “a ligature strangulation may not always evidence a premeditated and deliberate murder”), Estrada-Puentes failed to demonstrate that it was objectively unreasonable for counsel not to offer the instruction or any resulting prejudice. The jury was instructed on the elements of first-degree murder, the definitions of deliberation and premeditation, the nature of direct and circumstantial evidence, and how acts done or omitted by a person may provide circumstantial evidence of their intent. The instructions provided were accurate statements of law, *see Byford v. State*, 116 Nev. 215, 234-37, 994 P.2d 700, 713-15 (2000), and allowed the parties to argue whether the amount of time it took Estrada-Puentes to kill Stephanie indicated the killing was deliberate and premeditated. Indeed, Macfarlan argued in closing that four minutes of manual strangulation was insufficient to

demonstrate premeditation and deliberation beyond a reasonable doubt. Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Estrada-Puentes claimed trial counsel were ineffective for failing to challenge the State's argument that Estrada-Puentes strangled Stephanie for about four minutes. Estrada-Puentes contended that Stephanie may have suffocated after losing consciousness or that Stephanie may have died after being strangled for a shorter time, even as short as 15 to 20 seconds, and such arguments should have been made to the jury.

At trial, a forensic pathologist, Dr. P. Kubiczek, testified that Stephanie's injuries were consistent with strangulation, that a person usually loses consciousness after being strangled for about 10 to 15 seconds, and that a person usually dies if continuous pressure is applied for about 4 minutes. On cross-examination, Dr. Kubiczek testified that the amount of time continuous pressure must be applied for death to occur "varies from case to case" and could take more or less time than four minutes. At the evidentiary hearing, Lockie testified that he looked in "pretty extensive detail" on how to combat Dr. Kubiczek's testimony but found that there was not "any real disagreement" with Dr. Kubiczek's findings and that Dr. Kubiczek's report was reasonably accurate.

At the evidentiary hearing on the instant petition, another forensic pathologist, Dr. K. Raven, also testified that it takes approximately three to four minutes of continuous pressure to strangle someone to death. Although Dr. Raven testified that, in "very rare" scenarios, a person may die after being strangled for 15 to 20 seconds if pressure is applied to a

certain location on the carotid artery during a specific moment of a heartbeat (carotid artery reflex), Estrada-Puentes testified that he was unaware of this maneuver. In addition, Lockie testified that, although he did not consider carotid artery reflex, he would have been cautious about presenting such evidence because, if he presented evidence of something that is “vaguely possible and highly unlikely,” there could be a subtle shifting of the burden onto the defense.

Dr. Raven also testified that suffocation could not be excluded as the cause of death. However, she further testified that suffocation can never be ruled out in a case based on a victim’s injuries alone because it is a passive obstruction of the airways that shows no signs or symptoms; thus, she could not rule out suffocation even if the decedent had been shot. The lead detective in the case who discovered Stephanie’s body, K. Blue, testified that there was nothing over Stephanie’s head or in her mouth to suffocate her and that her body was found in a position such that she would have been able to breathe if she were alive.

In light of the foregoing, Estrada-Puentes failed to demonstrate counsels’ performance was deficient for failing to argue that Stephanie died due to suffocation or carotid artery reflex. And even assuming counsels’ performance was deficient for failing to argue that Stephanie may have been strangled for less than four minutes, Estrada-Puentes failed to demonstrate that any such argument had a reasonable probability of altering the outcome of the trial. Estrada-Puentes did not present any evidence at the evidentiary hearing that Stephanie was in fact strangled for less than four minutes. Although Estrada-Puentes presented evidence that

a two-to-three-minute strangulation could not necessarily be ruled out, Dr. Raven indicated that a two-minute strangulation was “less likely,” and Dr. Kubiczek testified that death could occur in less than four minutes. Moreover, a finding that Estrada-Puentes strangled Stephanie for two or three minutes would not necessarily preclude a finding of deliberation and premeditation. *See id.* at 237, 994 P.2d at 714-15 (“The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated.”). Accordingly, we conclude the district court did not err by denying this claim.

Sixth, Estrada-Puentes claimed trial counsel were ineffective for erroneously arguing that second-degree murder requires a specific intent to kill. During closing argument, Macfarlan stated the following:

So second-degree murder. Second-degree murder, you have to have that malice aforethought, that deliberate intent to kill. You don't have to have that premeditation and determination, but you have got to have that specific – that intent to kill, that malice aforethought.

And again the State has failed to show beyond a reasonable doubt that what occurred in the early morning of June 25th of 2011 involved malice aforethought.

To the extent Macfarlan suggested that second-degree murder requires a specific intent to kill, this was incorrect. *See Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964); *see also Collman v. State*, 116 Nev. 687, 715, 7 P.3d 426, 443-44 (2000) (recognizing that “[s]pecific intent to kill is not synonymous with malice” and, thus, “not every murder requires a specific

intent to kill”). However, the district court found that Macfarlan simply misspoke, that he zealously argued against first-degree murder, and that he argued the killing was done without any malice consistent with the theory of defense. The district court’s findings are supported by the record. Moreover, Estrada-Puentes does not contend that the jury was incorrectly instructed on second-degree murder, and the jury is presumed to follow the district court’s instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, Estrada-Puentes failed to demonstrate a reasonable probability of a different outcome had Macfarlan not misspoken during closing argument.

Seventh, Estrada-Puentes claimed trial counsel were ineffective for failing to request a *Remmer*⁵ hearing. In particular, Estrada-Puentes contended that, before the jury was empaneled, one prospective juror was seen hugging Stephanie’s mother, that another prospective juror was seen talking to Stephanie’s family members, and that counsel should have requested a hearing to determine whether the other prospective jurors witnessed those events or also had conversations with Stephanie’s family members.

Estrada-Puentes did not present any evidence that any seated juror had improper communication with Stephanie’s mother or any other witness during trial, nor did he present any evidence that any seated juror

⁵*Remmer v. United States*, 347 U.S. 227 (1954).

witnessed any such improper contact.⁶ Rather, Estrada-Puentes merely speculated that jurors *may have* witnessed other prospective jurors improperly contact Stephanie's family during the jury selection process and *may have* been influenced as a result. Such speculation is insufficient to demonstrate counsel performed deficiently or resulting prejudice. *See Remmer v. United States*, 347 U.S. 227, 229-30 (1954) (holding that a trial court should conduct a hearing to determine whether a private contact with a juror about a matter pending before the jury was prejudicial); *see also Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (stating the petitioner must demonstrate the underlying facts by a preponderance of the evidence). Accordingly, we conclude the district court did not err by denying this claim.

Eighth, Estrada-Puentes claimed trial counsel were ineffective for failing to seek individual voir dire given the case's pretrial publicity. Estrada-Puentes contended that 16 prospective jurors stated they had heard about the case and had already formed opinions about the case that they could not set aside,⁷ and that this created pressure on the other prospective jurors to agree with those opinions. The district court found that there was pretrial news coverage of the case but that such coverage did not itself mandate individualized voir dire. It also found that the

⁶The two aforementioned prospective jurors were excused during the jury selection process, before the petit jury was sworn.

⁷On appeal, Estrada-Puentes claims that there were 23 prospective jurors who stated that they had heard about the case and had already formed an opinion that they could not set aside.

prospective jurors who had already formed opinions about the case were excused and that the venire was not exposed to the nature of any media-informed opinions that their peers may have reached.

The district court's factual findings are supported by the record, and the court correctly determined that the existence of pretrial publicity does not necessarily mandate individualized voir dire. *See Leonard v. State*, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001) (stating a “district court has discretion in deciding a request for individual voir dire”). Moreover, Lockie testified that he was aware of the case's pretrial publicity, that he had tried cases in the past that had received just as much pretrial publicity and that had excused just as many people, and that he addressed the case's pretrial publicity during voir dire. Estrada-Puentes did not present any evidence that any empaneled juror was influenced by the case's pretrial publicity or the fact that others had already formed opinions as to the case. In light of the foregoing, Estrada-Puentes failed to demonstrate counsels' performance was deficient or a reasonable probability of a different outcome had counsel requested individual voir dire.

Ninth, Estrada-Puentes claimed trial counsel were ineffective for failing to call the author of an F.B.I. report, M. Yoder, to testify at trial.⁸

⁸Estrada-Puentes also claimed trial counsel was ineffective for failing to seek admission of the F.B.I. report, but he does not appear to dispute the district court's determination that the report was inadmissible hearsay on appeal. Therefore, Estrada-Puentes has waived any such argument, and we conclude the district court did not err by denying this claim. *See Hung v. Genting Berhad*, 138 Nev. 547, 549, 513 P.3d 1285, 1287 (Ct. App. 2022) (“It is equally well established that an appellant's failure to timely raise an

Yoder reviewed case materials submitted by the police department and issued a report indicating that the motivation for the crime was “personal cause” and that the act was “spontaneous.” The district court determined that Yoder would not have been permitted to testify as a lay witness and that Estrada-Puentes failed to demonstrate that Yoder would have been permitted to testify as an expert witness. After review, we agree with the district court. Even assuming Yoder would have testified consistently with his report,⁹ Estrada-Puentes failed to demonstrate that Yoder’s crime scene analysis “concern[ed] information within the common knowledge of or capable of perception by the average layperson” such that he could have testified as a lay witness. *See Burnside v. State*, 131 Nev. 371, 382-83, 352 P.3d 627, 636 (2015). Moreover, Estrada-Puentes did not present any evidence regarding Yoder’s qualifications to testify as an expert.¹⁰ *See Perez v. State*, 129 Nev. 850, 856-57, 313 P.3d 862, 866-67 (2013) (listing “factors that are useful in determining whether a witness is qualified in an area of scientific, technical, or other specialized knowledge” (internal quotation

issue in its briefing on appeal, even if it raised the issue before the district court, generally results in a waiver of that issue.”).

⁹Estrada-Puentes did not call Yoder to testify at the evidentiary hearing.

¹⁰On appeal, Estrada-Puentes contends that Yoder was “[o]bviously” a qualified crime scene analyst because Detective Blue relied on his expertise in evaluating the case. Estrada-Puentes is not entitled to relief based on this conclusory assertion. *See Means*, 120 Nev. at 1012, 103 P.3d at 33.

marks omitted)). Therefore, Estrada-Puentes failed to demonstrate that counsels' performance was deficient or a reasonable probability of a different outcome had counsel called Yoder to testify at trial. Accordingly, we conclude the district court did not err by denying this claim.

Estrada-Puentes also argues the district court erred by denying his claims of ineffective assistance of appellate counsel. 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). 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*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Estrada-Puentes claimed appellate counsel was ineffective for requesting that the appellate court "reduce" the first-degree murder conviction to voluntary manslaughter as opposed to second-degree murder. On direct appeal, counsel argued that the evidence was only sufficient to convict him of voluntary manslaughter in conjunction with the argument that there was insufficient evidence to support the first-degree murder conviction. Because this court concluded that the evidence

presented was sufficient to sustain the conviction,¹¹ *see Estrada-Puentes v. State*, No. 72335-COA, 2018 WL 1720662, at *1-2 (Nev. Ct. App. Mar. 30, 2018) (Order of Affirmance), any argument that Estrada-Puentes' conviction should have been "reduced" to second-degree murder was necessarily futile. Therefore, Estrada-Puentes failed to demonstrate that appellate counsel's performance was deficient or a reasonable probability of success on appeal had such an argument been raised. *Cf. Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Accordingly, we conclude the district court did not err by denying this claim.

Second, Estrada-Puentes claimed appellate counsel was ineffective for failing to argue that the sentencing court abused its discretion in sentencing him to life in prison without the possibility of parole. In particular, Estrada-Puentes contended that (1) the sentencing court stated the crime was "spontaneous" but imposed a sentence inconsistent with that statement; (2) the sentencing court improperly made an "expert forecast" that he would commit future violent acts based off his prior domestic violence convictions; and (3) the sentencing court failed to consider his immigration status and the fact that, if he was granted parole, he would likely be paroled to an I.C.E. hold, deported, and never return to the United States.

¹¹This court's prior determination that there was sufficient evidence to support Estrada-Puentes' conviction for first-degree murder does not indicate that the evidence for voluntary manslaughter was so weak that counsel were ineffective for arguing that theory.

On direct appeal, Lockie argued that there was insufficient evidence to support the first-degree murder conviction and that the State committed prosecutorial misconduct during closing argument. *See generally Estrada-Puentes*, No. 72335-COA, 2018 WL 1720662. At the evidentiary hearing, Lockie testified that he and Macfarlan discussed the issues to be raised on appeal and that he did not wish he had raised any additional arguments on appeal. In light of the claims raised on direct appeal and the fact that a district court “is vested with wide discretion regarding sentencing,” *see Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), Estrada-Puentes failed to demonstrate that appellate counsel was deficient for failing to challenge his sentence on appeal.

He also fails to demonstrate that any such argument had a reasonable probability of success on appeal. “[T]his court has repeatedly declined to interfere with sentencing when the sentence is legal and within the statutory limits and where the appellant cannot show that the district court relied on highly suspect or impalpable evidence.” *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). After review, the sentencing court’s statement that the crime was “spontaneous” did not refer to whether Estrada-Puentes had the requisite intent to commit first-degree murder but to the crime generally. To that extent, it was consistent with the evidence presented at trial. Moreover, the sentencing court did not make an improper “expert forecast” as to whether Estrada-Puentes would commit future violent crimes; rather, it properly considered Estrada-Puentes’ criminal history in determining the appropriate sentence. *See Denson*, 112 Nev. at 492, 915 P.2d at 286. And the sentencing court did not

abuse its discretion in declining to consider Estrada-Puentes' immigration status. *See Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145-46 (1998); *but see Ruvalcaba v. State*, 122 Nev. 961, 965, 143 P.3d 468, 471 (2006) (holding a sentencing court may consider a defendant's status as an illegal immigrant in assessing the defendant's ability to comply with the terms of probation). Accordingly, we conclude the district court did not err by denying this claim.

Finally, Estrada-Puentes argues that 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 Estrada-Puentes 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). Accordingly, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



Bulla, C.J.



Gibbons, J.



Westbrook, J.

cc: Hon. Alvin R. Kacin, District Judge
Richard F. Cornell
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk