FILED
10/08/2026
ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRAVIS DONALD MICKELSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 90903-COA

ORDER OF AFFIRMANCE

Travis Donald Mickelson appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 27, 2021, and a supplemental petition filed on February 15, 2022. First Judicial District Court, Carson City; Hon. James Todd Russell, Senior Judge.

Mickelson argues the district court erred by denying his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). We give deference to the district court's factual findings if

supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Mickelson argued appellate counsel was ineffective for failing to raise a claim that the State improperly cross-examined Mickelson about, and made comments during closing argument regarding, his invocation of the right to counsel and the right to remain silent. Mickelson did not object to the State's questioning or closing argument. Thus, this claim would have been forfeited and would have been reviewed for plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

As to the right to counsel, the State cross-examined Mickelson about his seeking an attorney before speaking to the police. This cross-examination occurred in response to Mickelson's testimony on direct examination that he sought an attorney before speaking to the police. Thus, Mickelson opened the door to this line of questioning,[1] *see Cordova v. State*, 116 Nev. 664, 670, 6 P.3d 481, 485 (2000) (explaining that a defendant may open the door to the State's questions on a subject), and it was not improper

[1]We note that, at the evidentiary hearing on the instant postconviction habeas petition, trial counsel testified he pursued this line of questioning as a strategic decision to counter the State's argument that Mickelson's actions after the incident constituted flight.

for the State to question Mickelson on this subject or to reference it in closing argument. Therefore, we conclude Mickelson failed to demonstrate that there was plain error, that appellate counsel was deficient, or that this claim had a reasonable probability of success on appeal.

As to the right to remain silent, the State asked a few questions regarding Mickelson's choice not to provide a statement to the police after his arrest. We conclude that Mickelson did not open the door to this line of questioning and that such questioning constituted error that is clear under current law from a casual inspection of the record. *See Coleman v. State*, 111 Nev. 657, 664, 895 P.2d 653, 658 (1995) (concluding "that use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct"); *see also Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"). However, Mickelson failed to demonstrate his substantial rights were affected. This was not a case that rested solely on Mickelson's testimony versus the victims' testimonies. *See Gaxiola v. State*, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005) (concluding that "comments on post-arrest silence are not harmless in cases which rest solely on the defendant's word versus the victim's word" (internal quotation marks omitted)). Rather, in addition to the victims' testimonies, the State presented some video evidence, forensic firearm evidence, and Mickelson's calls to family members to support the charges against Mickelson. Further, while the State asked a few questions regarding Mickelson's failure to speak with police, the State did not argue this point in closing argument. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (holding that "comments [on a defendant's right to remain silent] are harmless beyond a reasonable doubt if . . . the comments were

merely passing in nature"). Therefore, we conclude Mickelson failed to demonstrate this claim would have had a reasonable probability of success on appeal. Thus, we conclude the district court did not err by denying this claim.

Second, Mickelson asserted appellate counsel was ineffective for failing to argue the State committed prosecutorial misconduct at sentencing by arguing that Mickelson had not shown remorse. Mickelson argued at sentencing that, based on reflection, he overreacted and that he was regretful for what happened. In response, the State argued Mickelson's statements after the crime and at trial showed that he did not think he overreacted and that he was not regretful. The State contended that Mickelson had shown no remorse or recognition that he did anything wrong. Mickelson objected to this commentary by the State. While the district court did not rule on the objection, the district court did not mention Mickelson's lack of remorse when announcing its sentencing decision.

Mickelson failed to demonstrate the prosecutor committed misconduct at sentencing. *Cf. Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (holding that claims of prosecutorial misconduct at trial are reviewed for improper conduct). The prosecutor's argument was in direct response to Mickelson's argument at sentencing, and Mickelson failed to demonstrate the prosecutor's argument was improper. *See Sherman v. State*, 114 Nev. 998, 1016, 965 P.2d 915 (1998) (concluding that the prosecutor's argument at sentencing regarding a defendant's lack of remorse was not improper where the defense implied that the defendant felt remorse and the prosecutor was responding to that argument). Thus, we conclude Mickelson failed to demonstrate appellate counsel was deficient for failing to raise this claim on appeal.

Further, even assuming the prosecutor should not have made that argument, Mickelson failed to demonstrate he was prejudiced. On direct appeal from a judgment of conviction, an appellate court will reverse a sentence that is within the statutorily prescribed limits when the record "demonstrate[s] prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). A defendant's Fifth Amendment rights are violated, and an abuse of discretion occurs, when a district court considers a defendant's lack of remorse in its sentencing decision, even when a defendant testifies at trial. *Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245-46 (1997). Here, the record does not demonstrate the district court relied on the prosecutor's statement regarding remorse when sentencing Mickelson. Therefore, we conclude Mickelson failed to demonstrate this claim would have had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err by denying this claim.

Next, Mickelson argues the district court erred by denying his claims that trial counsel was ineffective. However, Mickelson failed to support this claim with cogent argument as he failed to allege how the district court erred.[2] *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by the court."). Instead,

[2]To the extent Mickelson's listing of the claims raised in his postconviction habeas petition and supplemental petition in the fact section of his opening brief on appeal is meant to include his argument below about the listed claims, an appellant is not allowed to incorporate by reference documents filed in the district court. *See* NRAP 28(e)(2); *Thomas v. State*, 120 Nev. 37, 43 n.3, 83 P.3d 818, 822 n.3 (2004).

Mickelson argues that the State failed to present sufficient evidence of his guilt and of the sentencing enhancement and that he maintained his innocence. These claims were not raised below, and we decline to consider them on appeal.[3] *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). In his reply brief, Mickelson argues the district court erred by denying his claim that trial counsel was ineffective for failing to object to the State's cross-examination and comments regarding his right to counsel and right to remain silent. Because this claim was raised for the first time in the reply brief, we decline to consider it. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014); *see also* NRAP 28(c) (stating a reply brief is "limited to answering any new matter set forth in the opposing brief"). Therefore, we conclude Mickelson is not entitled to relief, and we

ORDER the judgment of the district court AFFIRMED.

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: First Judicial District Court, Dept. No. 1
Attorney General/Carson City
Carson City District Attorney
Karla K. Butko
First District Court Clerk

[3]In a different section of the opening brief, Mickelson argues trial counsel was ineffective for failing to investigate his cellphone and its contents. This claim was not raised below, and we decline to consider it for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).