IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY WAYNE COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33727

FILED

APR 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On November 3, 1995, the district court convicted appellant, pursuant to a bench trial, of murder with the use of a deadly weapon (Count II) and robbery with the use of a deadly weapon (Count III). The district court sentenced appellant to serve two consecutive terms of life without the possibility of parole for Count II, and two consecutive terms of fifteen years for Count III, to be served concurrently to Count II, in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.[1]

On October 13, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 28, 1999, the district court denied appellant's petition. This appeal followed.

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[1]Collins v. State, Docket No. 28155 (Order Dismissing Appeal, January 22, 1998).

02-07654

In his petition, appellant raised many claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the verdict unreliable.[2] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[3]

First, appellant claimed that his counsel was ineffective because he failed to file a motion for a new trial after the prosecutor improperly suggested to the trial court that it should find defendant guilty of the charged offenses as well as the deadly weapon enhancements. We conclude that the district court did not err in denying this claim. Appellant failed to show how a motion for a new trial would have been meritorious.[4] The State was merely asking the court to clarify whether it was finding defendant guilty of just murder and robbery or whether it was finding defendant guilty of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Thus, counsel was not ineffective for failing to file a motion for a new trial.[5]

Second, appellant claimed that his counsel was ineffective for failing to move to suppress the handgun that was admitted into evidence as the murder weapon. We conclude that the district court did not err in

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]See Strickland, 466 U.S. 668.

[4]See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

[5]See Strickland, 466 U.S. 668; Kirksey, 112 Nev. 980, 923 P.2d 1102.

denying this claim. The eyewitness to the crime, Ricky Gladstone, testified that the handgun presented at the trial was the weapon used during the commission of the robbery and the murder. In addition, Gladstone and two other witnesses testified that the handgun presented at the trial belonged to appellant. Appellant failed to show that a motion to suppress would have been meritorious and that the exclusion of the evidence would have changed the results of the trial.[6] Thus, counsel was not ineffective in this regard.

Third, appellant claimed that his counsel was ineffective for failing to cross-exam Rodney Morgan, a State witness, because he was a "principal trial witness." We conclude that the district court did not err in denying this claim. Appellant failed to state what points his counsel should have cross-examined Morgan on and how cross-examination of Morgan would have changed the results of the trial.[7] Thus, counsel was not ineffective in this regard.

Fourth, appellant claimed that his counsel was ineffective for failing to object to the State's questioning of the senior crime scene analyst, Jerry Autrey, regarding the recovery of fingerprints from the scene of the crime. Specifically, appellant claimed that counsel should have objected when Autrey testified that the surface where the crime scene analysts attempted to recover fingerprints was covered with dirt and grease and that this was not a good surface for recovering latent fingerprints. Appellant further claimed that counsel should have objected because the parties stipulated at the beginning of trial that identifiable

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[6]See Kirksey, 112 Nev. at 990, 923 P.2d at 1109.

[7]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Strickland, 466 U.S. 668.

fingerprints were recovered by other analysts but that none of the fingerprints matched appellant's fingerprints. We conclude that the district court did not err in denying this claim. Autrey stated during his testimony that he was present when the other analyst recovered fingerprints and that none of the fingerprints matched defendant's fingerprints. Appellant failed to demonstrate that the results of the trial would have been different but for counsel's alleged errors.

Fifth, appellant claimed that counsel was ineffective for failing to object to the admission of the handgun into evidence. Appellant claimed that counsel should have objected because there was no evidence presented at trial that the handgun admitted into evidence was the actual murder weapon. We conclude that the district court did not err in denying this claim. As stated previously, the eyewitness to the crime testified that the handgun presented at the trial was the weapon used during the commission of the robbery and the murder. Additionally, the eyewitness and two other witnesses testified that the handgun presented at the trial belonged to appellant. Moreover, counsel objected to the admission of the gun on two occasions prior to the final admission. Thus, counsel was not ineffective in this regard.

Lastly, appellant claimed that his trial counsel was ineffective for failing to "request any admonitions" during trial. We conclude that the district court did not err in denying this claim. Appellant failed to support this claim with sufficient factual allegations.[8] Appellant did not specifically state what admonitions counsel should have made and when counsel should have made them. Thus, counsel was not ineffective in this regard.

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[8]See Hargrove, 100 Nev. 498, 686 P.2d 222.

Next, appellant raises sixteen claims of ineffective assistance of appellate counsel.[9] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[10] Appellate counsel is not required to raise every non-frivolous issue on appeal.[11] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[12] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[13]

First, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor committed misconduct by characterizing defendant as a liar during closing arguments. Specifically, the prosecutor stated that "the man has been lying throughout these proceedings. From the first time anyone talked to him until now." After the prosecutor made this statement, defense counsel objected and the prosecutor withdrew the word "lying" and used the word "disingenuous." The prosecutor then proceeded to support his statement with facts in evidence. We conclude that the district court did not err in

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[9]To the extent that appellant raises these claims as ineffective assistance of trial counsel, appellant failed to demonstrate that his counsel was ineffective for the reasons discussed. See Strickland, 466 U.S. 668.

[10]See Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[11]See Jones v. Barnes, 463 U.S. 745 (1983).

[12]See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

[13]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

denying this claim.[14] Appellant was not prejudiced by the prosecutor's statement.[15] This court determined in appellant's direct appeal that there was overwhelming evidence of his guilt.[16] Moreover, appellant was convicted after a bench trial and "[a]s to any prosecutorial misconduct, trial judges are presumed to know the law and to apply it in making their decisions."[17] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor improperly interjected his personal opinion regarding appellant's guilt during his closing argument when the prosecutor stated, "The best thing that can be said about the defendant . . . on June 4, 1993, in the Subway

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[14]See Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (1998) (holding characterization of a witness's testimony as a lie is improper, quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)); see also Rowland v. State, 118 Nev. ___, 39 P.3d 114, 119 (2002) (stating that a prosecutor's use of the word "lying" should not automatically mean that prosecutorial misconduct has occurred).

[15]See Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (stating that in order for error to be reversible, it must be prejudicial and not merely harmless).

[16]See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error); Skiba, 114 Nev. at 614-15, 959 P.2d at 960-61 (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant's guilt); Rippo v. State, 113 Nev. 1239, 1254, 946 P.2d 1017, 1026 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).

[17]See Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991).

Shop, is that he was a robber and a killer and I hope the court agrees." We conclude that the district court did not err in denying this claim. The prosecutor made this statement at the conclusion of his closing argument as a deduction or conclusion from the facts in evidence, which does not amount to prosecutorial misconduct.[18] Moreover, appellant was not prejudiced by this statement because there was overwhelming evidence of his guilt and he was convicted after a bench trial.[19] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor interjected his personal opinion during closing argument when he stated that Rodney Morgan ordered appellant out of Morgan's house and that he had to come back to Morgan's house to get his clothing. Appellant claimed that there was no evidence of this fact presented at trial. We conclude that the district court did not err in denying this claim. Appellant testified at trial that Morgan kicked him out of his house and that appellant returned later to retrieve his clothing. The prosecutor was properly stating facts in evidence. Appellant failed to demonstrate that

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[18]See Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (holding that it is prosecutorial misconduct for the prosecutor to interject his or her beliefs into an argument; however, statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or a conclusion from the evidence introduced in the trial, are permissible and unobjectionable.).

[19]See Ross, 106 Nev. at 928, 803 P.2d at 1106; see also King, 116 Nev. at 356, 998 P.2d at 1176; Skiba, 114 Nev. at 614-15, 959 P.2d at 960-61; Rippo, 113 Nev. at 1254, 946 P.2d at 1026; Jones, 107 Nev. at 636, 817 P.2d at 1181.

this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor improperly commented on the credibility of appellant during rebuttal argument when he stated, "We have a man who took the stand and could offer no credible explanation for any of his testimony or whereabouts." We conclude that the district court did not err in denying this claim. Appellant was not prejudiced by this statement.[20] Appellant testified at trial, there was overwhelming evidence of his guilt, and appellant was convicted after a bench trial.[21] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor improperly vouched for the credibility of the eyewitness, Ricky Gladstone, and senior crime scene analyst, Jerry Autrey during closing argument and during rebuttal argument. We conclude that the district court did not err in denying this claim. The prosecutor did not vouch for the credibility of the witnesses, but commented on the failure of defendant to counter or

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[20]See Ross, 106 Nev. at 926, 803 P.2d at 1106.

[21]See Evans v. State, 117 Nev. ____, 28 P.3d 498 (2001) (holding that as long as comments do not call attention to defendant's failure to testify, it is permissible to comment on the failure of defendant to counter or explain evidence presented); see also King, 116 Nev. at 356, 998 P.2d at 1176; Skiba, 114 Nev. at 614-15, 959 P.2d at 960-61; Rippo, 113 Nev. at 1254, 946 P.2d at 1026; Jones, 107 Nev. at 636, 817 P.2d at 1181.

explain evidence presented.[22] As to Ricky Gladstone, the prosecutor accurately repeated what Ricky Gladstone testified to observing in the Subway shop. The prosecutor then stated, "none of the important points (of Gladstone's testimony) were challenged either at all or certainly successfully on cross-examination." As to Jerry Autrey, the prosecutor stated, "the testimony of Jerry Autrey was uncontroverted by the public defender." Appellant was not prejudiced by these statements.[23] There was overwhelming evidence of appellant's guilt and appellant was convicted pursuant to a bench trial.[24] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor knowingly used the perjured testimony of senior crime scene analyst, Jerry Autrey. Specifically, appellant claimed that Jerry Autrey's testimony was perjured testimony and he should not have been allowed to testify regarding fingerprint evidence because the parties stipulated to the fact that three other crime scene analysts recovered fingerprints and none of the fingerprints matched appellant's fingerprints. We conclude that the district court did not err in denying this claim. There was no evidence

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[22]See Rippo, 113 Nev. at 1253-54, 946 P.2d at 1026 (holding that such comments can be viewed as shifting the burden of proof of the defense, however, error was harmless in light of the overwhelming evidence of guilt); see also Evans, 117 Nev. ___, 28 P.3d 498.

[23]See Ross, 106 Nev. at 926, 803 P.2d at 1106.

[24]See King, 116 Nev. at 356, 998 P.2d at 1176; Skiba, 114 Nev. at 614-15, 959 P.2d at 960-61; Rippo, 113 Nev. at 1254, 946 P.2d at 1026; Jones, 107 Nev. at 636, 817 P.2d at 1181.

presented at trial that Autrey's testimony was perjured. Autrey testified that he was present when fingerprint recovery was occurring and that he noticed that the condition of the area where other analysts were testing for fingerprints was not a good surface to recover fingerprints from because there was grease and dirt on the surface. Defense counsel cross-examined Autrey regarding the surface. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor committed "subornation of perjury." Specifically, appellant claimed that the prosecutor improperly suggested to the eyewitness, Ricky Gladstone, that he change his testimony regarding the amount of time that he observed the victim and appellant in the back of the Subway shop during the robbery. We conclude that the district court did not err in denying this claim. At the preliminary hearing, Gladstone testified that appellant and the victim were in the back of the shop for five minutes and at trial he testified they were in the back of the shop for a couple of seconds. Trial counsel thoroughly cross-examined Gladstone on this inconsistent statement and on the issue of the prosecutor advising Gladstone to re-evaluate the time span. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor misstated facts in evidence during his closing argument when he stated that appellant's mother knew that appellant was going to Memphis.

Appellant claimed that no evidence of this fact was presented at trial. We conclude that the district court did not err in denying this claim. Appellant's mother testified that she did not know that he was going to Memphis but that once appellant arrived in Memphis he phoned her and told her that he was in Memphis. Although the prosecutor misstated this fact, appellant was not prejudiced by the prosecutor's statement.[25] There was overwhelming evidence of appellant's guilt and appellant was convicted after a bench trial.[26] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor misstated the evidence regarding the number of shots that were fired and misstated that the bullets recovered were similar in all characteristics. We conclude that the district court did not err in denying this claim. Appellant failed to show that the prosecutor misstated the evidence. The eyewitness to the crime testified that two shots were fired. Also, two bullets were removed from the victim's head. Crime scene analyst, Richard Good, who examined the bullets stated that the two bullets that were recovered had similar rifling characteristics and could have been fired from the handgun. Appellant was not prejudiced by these

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[25]See Ross, 106 Nev. at 928, 803 P.2d at 1106; see also King, 116 Nev. at 356, 998 P.2d at 1176; Rippo, 113 Nev. at 1255, 946 P.2d at 1027.

[26]See id.; see also Jones, 107 Nev. at 636, 817 P.2d at 1181.

statements.[27] Appellate counsel was not ineffective for failing to raise this claim on direct appeal because appellant failed to demonstrate that it would have had a reasonable probability of success on appeal.

Tenth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor mischaracterized the fingerprint evidence during rebuttal argument and in doing so interjected his personal opinion when he stated that "the fact that fingerprints weren't found . . . is fairly obvious, I believe . . . with all the fingers resting there (on the countertop) it's going to be very difficult to find any fingerprints." Appellant claimed that this statement led to an improper inference that no fingerprints were found. He also claimed that this statement was "an improper inference of prosecutor's personal belief as to why Defendant's fingerprints weren't found." We conclude that the district court did not err in denying this claim. It was testified to during the trial that fingerprints were found but that none of the fingerprints matched appellant's fingerprints. It was also testified to that it was difficult to recover fingerprints from the countertop because of dirt and grease. Therefore, this statement was a deduction or conclusion from the facts in evidence, which does not amount to prosecutorial misconduct.[28] Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

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[27]See Ross, 106 Nev. at 926, 803 P.2d at 1106; see also King, 116 Nev. at 356, 998 P.2d at 1176; Skiba, 114 Nev. at 614-15, 959 P.2d at 960-61; Rippo, 113 Nev. at 1254, 946 P.2d at 1026; Jones, 107 Nev. at 636, 817 P.2d at 1181.

[28]See Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993).

Eleventh, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor made improper statements about appellant during his rebuttal argument which were designed to appeal to the judge's emotion. Specifically, the prosecutor stated that "when Rodney Morgan took the stand, your honor, and when Mr. Seaton mentioned the name Evo, Rodney Morgan broke down and cried; he was shaking." Appellant claimed that this did not happen during the trial and that this was an improper inference. We conclude that the district court did not err in denying this claim. The prosecutor was stating what had occurred when Rodney Morgan testified. Morgan did break down and cry during his testimony when he was asked if appellant had a nickname. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Twelfth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor attempted to shift the burden of proof by commenting on defense counsel's failure to cross-examine witness Rodney Morgan. We conclude that the district court did not err in denying this claim. Appellant was not prejudiced by this comment. There was overwhelming evidence of his guilt and he was convicted pursuant to a bench trial.[29] Moreover, appellant's counsel objected to the prosecutor's statement and the objection was sustained. Appellant failed to demonstrate that this claim

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[29]See Rippo, 113 Nev. at 1253-54, 946 P.2d at 1026 (It is generally improper for a prosecutor to comment on a defendant's failure to call a witness because it can be viewed as impermissibly shifting the burden of proof; however, error can be harmless when there is overwhelming evidence of guilt.); Jones, 107 Nev. at 636, 817 P.2d at 1181.

would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Thirteenth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor attempted to shift the burden of proof when he asked appellant during his testimony why he did not call his cousin as a witness. We conclude that the district court did not err in denying this claim. Appellant was not prejudiced by this question. There was overwhelming evidence of his guilt and he was convicted pursuant to a bench trial.[30] Moreover, appellant's counsel objected to the prosecutor's statement but the objection was overruled. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Fourteenth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that there was insufficient evidence "adduced" at trial to convict him. We conclude that the district court did not err in denying this claim. On direct appeal, this court concluded that there was overwhelming evidence of defendant's guilt. In addition, there was an eyewitness to the crime who observed appellant using the handgun that was admitted as the murder weapon at trial, two other witnesses testified that the handgun belonged to appellant, appellant made incriminating statements to two of his friends who testified at the trial, and appellant fled out of state shortly after the murder was committed. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus,

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[30]See id.

appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Fifteenth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor improperly suggested that the trial court find appellant guilty of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. We conclude that the district court did not err in denying this claim. The State was merely asking the court to clarify whether it was finding defendant guilty of just murder and robbery or whether it was finding defendant guilty of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Sixteenth, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court committed prejudicial error by commenting on the evidence. We conclude that the district court did not err in denying this claim. Appellant failed to provide sufficient understandable facts to support this claim.[31]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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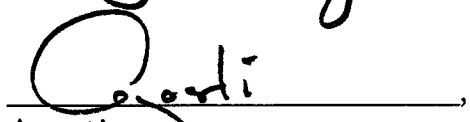
[31]See Hargrove, 100 Nev. 498, 686 P.2d 222.

briefing and oral argument are unwarranted.[32] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[33]

_____, J.
Young



_____, J.
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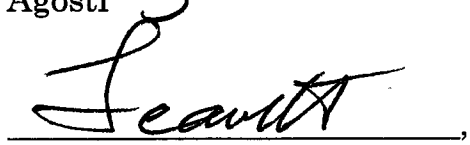

_____, J.
Leavitt

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Johnny Wayne Collins
Clark County Clerk

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[32]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[33]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.