

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW WASHINGTON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: C-13-294695-1

Docket No: 75777-COA

FILED

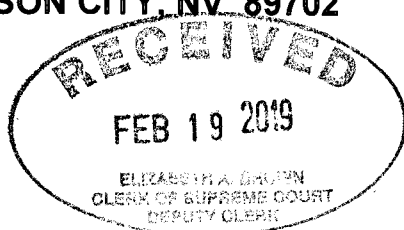
FEB 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *J. Hendrix*
DEPUTY CLERK

RECORD ON APPEAL VOLUME 11

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19-07897

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CLERK OF COURT

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1 **ORDR**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 **THE STATE OF NEVADA,**

6 **Plaintiff,**

7 **v.**

8 **MATTHEW WASHINGTON,**

9 **Defendant.**

CASE NO.: C-13-294695-1

DEPT NO.: XV

**ORDER DENYING
DEFENDANT'S PETITION FOR
WRIT OF HABEAS CORPUS**

10
11 This matter having come on for hearing on 22nd day of March, 2018 at 9:00 a.m., Defendant
12 Matthew Washington ("Defendant") not being present, represented by Mitchell L. Posin, Plaintiff
13 State of Nevada ("State") represented by Steven B. Wolfson, Clark County District Attorney,
14 through Steven L. Waters, Chief Deputy District Attorney. The Court having reviewed the papers
15 and pleadings on file herein, heard arguments of counsel, hereby denies Defendant's Petition for
16 Writ of Habeas Corpus. The Court makes the following Findings of Fact and Conclusions of Law:

17 **I. FINDINGS OF FACT**

18 **A. Statement of the case**

19 On April 7, 2014, Defendant was charged by way of Amended Information with the
20 following: Conspiracy to Commit Murder (Count 1); Murder With Use of a Deadly Weapon (Count
21 2); three counts of Attempt Murder With Use of a Deadly Weapon (Count 3, 5, 6); Battery With Use
22 of a Deadly Weapon Resulting in Substantial Bodily Harm (Count 4); Battery With Use of a Deadly
23 Weapon (Count 7); and ten counts of Discharging a Firearm At or Into Structure, Vehicle, Aircraft,
24 or Watercraft (Counts 8-17).

25 On April 7, 2014, the jury trial commenced. On April 11, 2014, the State filed a Second
26 Amended Information to correct a grammatical error, correct the name of the victim for Count 7, and
27 to remove the substantial bodily harm language from Count 4. On April 16, 2014, the jury returned a
28 verdict of guilty on all counts. The State filed a Second Amended Information, charging Defendant

**Hon. Joe Hardy
District Court
Department XV**

1 with Possession of Firearm by Ex-Felon. A separate trial was held regarding the additional count and
2 the jury found Defendant guilty. On April 17, 2014, the penalty hearing was conducted; the jury
3 imposed a sentence of life with eligibility for parole after 20 years.

4 On June 18, 2014, Defendant was sentenced to the Nevada Department of Corrections as
5 follows: Count 1 – a minimum of 48 months and a maximum of 120 months; Count 2 – life with the
6 possibility of parole after 240 months, with a consecutive term of a minimum of 60 months and a
7 maximum of 240 months for the use of the deadly weapon, to run concurrent to Count 1; Count 3 – a
8 minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60
9 months and a maximum of 240 months for the use of the deadly weapon, to run consecutive to
10 Count 3; Count 4 – a minimum of 48 months and a maximum of 120 months, to run concurrent to
11 Count 3; Count 5 – a minimum of 96 months and a maximum of 240 months, with a consecutive
12 term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon,
13 to run consecutive to Count 4; Count 6 – a minimum of 96 months and a maximum of 240 months,
14 with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of
15 the deadly weapon, to run consecutive to Count 5; Count 7 – a minimum of 48 months and a
16 maximum of 120 months, to run concurrent to Count 6; Counts 8-17 – a minimum of 28 months and
17 a maximum of 72 months for each count, each to run concurrent to the preceding count;
18 Count 18 – a minimum of 28 months and a maximum of 72 months, to run concurrent with Count
19 17. The Judgment of Conviction was filed on June 27, 2014.

20 On June 30, 2014, Defendant filed a Notice of Appeal as a self-represented party. On July
21 17, 2014, Defendant through counsel, filed a timely Notice of Appeal. The Nevada Supreme Court
22 affirmed the Judgment of Conviction on August 12, 2016,¹ and remittitur issued on December 19,
23 2016.

24
25 ¹ Defendant challenged his conviction on several grounds: (1) the sufficiency of the evidence to
26 convict him of first-degree murder, attempted murder, conspiracy to commit murder, discharging a
27 firearm into an occupied structure; (2) the State did not prove the existence of the unnamed co-
28 conspirator at trial; (3) a jury instruction improperly informed the jury that the charges against him
were felonies; (4) the district court erred in rejecting his proffered jury instruction on motive; (5) the
State committed prosecutorial misconduct during its closing arguments by stating that the jury could
find that Defendant acted with specific intent if it found that he discharged a firearm; (6) the State

1 On December 19, 2017, Defendant through counsel, filed a Petition for Writ of Habeas
2 Corpus ("Petition"). The State responded on January 24, 2018. On February 6, 2018, the Court
3 ordered further briefing from the parties. On February 25, 2018, Defendant through counsel, filed a
4 Post-conviction brief ("Post-conviction brief") and the State responded on March 12, 2018. On
5 March 16, 2018, Defendant filed a reply to the State's response.

6 **B. Statement of facts**

7 In the early morning hours on November 5, 2013, Marque Hill ("Hill"), LaRoy Thomas
8 ("Thomas"), Nathan Rawls ("Rawls", and Ashely Scott ("Scott") were asleep in an apartment in Las
9 Vegas when they were awakened by gunshots being fired into the apartment in rapid succession.
10 Scott was shot in the foot, Thomas was shot in the ankle, and Rawls was killed. Darren and Lorraine
11 DeSoto ("Desotos"), who resided in a neighboring apartment, were also awakened by the sound of
12 the gunshots. The DeSotos observed a silver Dodge Magnum drive slowly past their window and
13 called 911.

14 An officer with the Las Vegas Metropolitan Police Department ("LVMPD") was on patrol
15 when he received notification of the shooting. Within minutes, the officer observed a vehicle
16 matching the description given by the DeSotos. The officer pulled the vehicle over and conducted a
17 felony vehicle stop. Defendant was the driver, and Martell Moten ("Moten") was a passenger in the
18 rear driver-side seat. Washington told the officer that "he was by the Stratosphere and he just picked
19 up his friend and they were going home." An officer testified that the Stratosphere is "fairly close"
20 to the apartment where the shooting occurred.

21 The DeSotos were brought to the scene and identified the silver Dodge Magnum as the one
22 they observed drive slowly past their window. Defendant and Moten were then taken into custody.
23 Because the vehicle doors had been left open, an officer observed a handgun underneath the front
24 passenger seat. The gun was later determined to be a Smith & Wesson 9 millimeter. The vehicle was

25
26 was required to obtain a new search warrant before conducting a second search of his vehicle; (7)
27 the State's forensic scientist improperly testified that she and three of her colleagues had come to the
28 same conclusion regarding bullets and shell casings found at the scene; (8) the district court erred in
allowing evidence of field interview stops to be admitted during the penalty phase without sua
sponte conducting an evidentiary hearing to determine whether the stops were constitutional; and (9)
he was prejudiced when the State introduced evidence of his tattoos during the penalty hearing.

1 towed to a crime lab, and a search warrant was obtained. After the vehicle was processed by the
2 crime lab but while it was still in the possession of the crime lab, a detective learned that another
3 handgun was still in the vehicle. The detective searched for and found a handgun concealed in the
4 vehicle's steering column. This gun was later determined to be a .40 caliber Glock.

5 An LVMPD crime scene analyst testified that seven .40 caliber and six 9 millimeter cartridge
6 casings were found outside the apartment. The seven .40 caliber cartridge casings were determined
7 to have been fired from the Glock found in the steering column of Defendant's vehicle, and the six 9
8 millimeter cartridge casings were determined to have been fired from the Smith & Wesson found
9 under the front passenger seat of the vehicle.

10 **II. CONCLUSIONS OF LAW**

11 Defendant's Petition and Post-conviction brief alleged that the State committed prosecutorial
12 misconduct during the penalty phase of his trial by eliciting testimony about Defendant's prior
13 criminal history. Specifically, Defendant asserted it was improper because the prior crimes were
14 ultimately negotiated to misdemeanors or not charged. However, the Court finds that Defendant's
15 prosecutorial misconduct claims were waived and without merit. Additionally, Defendant alleged
16 that his trial counsel provided ineffective assistance of counsel by failing to object to the improper
17 testimony regarding his prior criminal history. The Court, however, finds that Defendant's
18 ineffective assistance of counsel claim is without merit. As such, Defendant's Petition is denied.

19 **A. Defendant's prosecutorial misconduct claims are waived**

20 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and
21 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction
22 proceedings in the district court. . . . all other claims that are appropriate for a direct appeal must be
23 pursued on direct appeal, or they will be considered waived in subsequent proceedings." *Franklin v.*
24 *State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (*overruled on other grounds by Thomas v.*
25 *State*, 115 Nev. 148, 979 P.2d 222 (1999)). "[A] court must dismiss a habeas petition if it presents
26 claims that either were or could have been presented in an earlier proceeding, unless the court finds
27 both cause for failing to present the claims earlier or for raising them again and actual prejudice to
28 the petitioner." *Evans v. State*, 117 Nev. 609, 621-22 (2001).

1 Here, Defendant raised new allegations of prosecutorial misconduct that allegedly occurred
2 during the penalty phase of his trial and at sentencing. Defendant failed to raise the allegations in his
3 direct appeal. (Petition at 6–7). The new allegations have been available to Defendant since the
4 penalty phase of his trial and sentencing. Thus, Defendant had the opportunity to raise them in his
5 direct appeal. Furthermore, Defendant did not provide any reasons for failing to bring the claims on
6 direct appeal nor has he alleged any prejudice if the Court found the claims waived. Therefore,
7 Defendant's claims are waived for failing to raise them on direct appeal and are denied.

8 **B. Alternatively, Defendant's prosecutorial misconduct claims are without merit**

9 Alternatively, assuming the prosecutorial misconduct claims were raised in an appropriate
10 fashion and considered, they would still fail. Defendant did not object at trial, and the claims would
11 be reviewed under the plain error standard.

12 Claims of prosecutorial misconduct that have not been objected to at trial are reviewed under
13 the plain-error standard. *See Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008). "Under that
14 standard, an error that is plain from a review of the record does not require reversal unless the
15 defendant demonstrates that the error affected his or her substantial rights, by causing 'actual
16 prejudice or a miscarriage of justice.'" *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93,
17 95 (2003)). When deciding whether prosecutorial misconduct is prejudicial, the relevant inquiry is
18 whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial
19 of due process. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

20 Here, Defendant did not object at trial and has failed to demonstrate that the error affected
21 his substantial rights. Defendant alleges it was prosecutorial misconduct for the prosecutor to elicit
22 testimony from Detective Gillis regarding Defendant's criminal history during the penalty phase.²
23 Additionally, Defendant claims the prosecutor's subsequent arguments at sentencing "infected the
24 proceedings with unfairness as to make the results a denial of due process." (Petition at 7). NRS
25 175.552(2) allows evidence to be presented concerning aggravating circumstances relevant to a
26

27 ² Defendant claims that the record is not clear whether the State complied with NRS 200.033 when
28 it disclosed his criminal history. However, Defendant's counsel did not object to the introduction of
the evidence. Additionally, Defendant did not pursue a claim of ineffective assistance of counsel
against his appellate counsel.

1 defendant's sentence. Thus, this did not amount to misconduct; eliminating these aggravating
2 circumstances would not have led to a different outcome. Therefore, Defendant fails to show actual
3 prejudice and his claims do not amount to misconduct.

4 Further, even assuming, Defendant is correct, the error was harmless. "[W]here evidence of
5 guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."
6 *Smith v. State*, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004). Here, assuming this claim was not
7 waived, it would constitute harmless error because Defendant had already been found guilty of the
8 crimes charged beyond a reasonable doubt. The State presented overwhelming evidence of guilt,
9 which included two different firearms were used to discharge a total of 13 cartridges into the
10 apartment where Rawls, Thomas, Hill, and Scott were sleeping. There is no evidence that the jury
11 thought Defendant's prior uncharged or not convicted crimes were an issue. Therefore, even if this
12 claim was not waived, the alleged prosecutorial misconduct would have amounted to harmless error.

13 **C. Defendant's ineffective assistance of counsel claim lacks merit**

14 Defendant claims that trial counsel was ineffective for not objecting to testimony concerning
15 Defendant's criminal history. (Post-conviction brief at 2–6). This claim lacks merit.

16 Ineffective assistance of counsel claims are analyzed under a two-pronged test where the
17 defendant must show (1) that counsel's performance was deficient, and (2) that the deficient
18 performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A court
19 may consider the two test elements in any order and need not consider both prongs if the defendant
20 makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102,
21 1107 (1997); *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). The question is whether
22 an attorney's representations amounted to incompetence under prevailing professional norms, "not
23 whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S.
24 86, 88 (2011).

25 The court begins with a presumption of effectiveness and then must determine whether the defendant
26 has demonstrated by a preponderance of the evidence that counsel was ineffective. *Means v. State*, 120 Nev.
27 1001, 1011–1012, 103 P.3d 25, 32–33 (2004). The role of a court in considering alleged ineffective
28 assistance of counsel is "not to pass upon the merits of the action not taken but to determine

1 whether, under the particular facts and circumstances of the case, trial counsel failed to render
2 reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)
3 (citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)).

4 This analysis does not indicate that the court should "second guess reasoned choices between
5 trial tactics, nor does it mean that defense counsel, to protect himself against allegations of
6 inadequacy, must make every conceivable motion no matter how remote the possibilities are of
7 success." *Donovan*, 94 Nev. at 675. In essence, the court must "judge the reasonableness of
8 counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's
9 conduct." *Strickland*, 466 U.S. at 690. However, counsel cannot be deemed ineffective for failing to
10 make futile objections, file futile motions, or for failing to make futile arguments. *Ennis v. State*, 122
11 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

12 Not only must the defendant show that counsel was incompetent, but he must also
13 demonstrate that but for that incompetence the results of the proceeding would have been different:

14
15 In assessing prejudice under *Strickland*, the question is not whether a court can be
16 certain counsel's performance had no effect on the outcome or whether it is possible a
17 reasonable doubt might have been established if counsel acted differently. Instead,
18 *Strickland* asks whether it is reasonably likely the results would have been different.
19 This does not require a showing that counsel's actions more likely than not altered the
outcome, but the difference between *Strickland*'s prejudice standard and a more-
probable than-not standard is slight and matters only in the rarest case. The likelihood
of a different result must be substantial, not just conceivable.

20 *Harrington*, 562 U.S. at 111-12 (internal quotation marks and citations omitted).

21 Moreover, when raising a *Strickland* claim, the defendant bears the burden to demonstrate
22 the underlying facts by a preponderance of the evidence. *Means*, 120 Nev. at 1012. "Bare" or
23 "naked" allegations are not sufficient to show ineffectiveness of counsel. *Hargrove v. State*, 100
24 Nev. 498, 502, 686 P.2d 222, 225 (1984). Claims asserted in a petition for post-conviction relief
25 must be supported with specific factual allegations which, if true, would entitle defendant to
26 relief. *Id.*

27 ///

28 ///

1 Here, Defendant claims that his trial counsel was ineffective for not objecting to the alleged
2 prosecutorial misconduct discussed above. The entirety of his claim is two sentences – “Defense
3 counsel’s failure to object to the same constituted denial of effective assistance of counsel” and
4 “Defense counsel failed to object to the introduction of the testimony regarding crimes charges, but
5 for which defendant was not convicted.” (Petition at 7; Post-conviction brief at 6). These are simply
6 bare and naked allegations which are not sufficient to show ineffective assistance of counsel.³
7 Defendant does not reference any specific facts to show how his trial counsel was ineffective in any
8 way. Defendant has not – and cannot – establish prejudice given the overwhelming evidence of
9 guilt. As a result, Defendant has not demonstrated prejudice.


10 **III. CONCLUSION**

11 Thus, Defendant’s prosecutorial misconduct claims were waived and without merit.
12 Defendant’s ineffective assistance of counsel claim is meritless. As such, Defendant’s Petition is
13 denied.

14 **ORDER**

15 **THEREFORE, IT IS HEREBY ORDERED** that the Petition for Writ Habeas Corpus is
16 **DENIED.**

17 DATED this 12th day of February, 2019.

18 
19 _____
20 JOE HARDY
21 DISTRICT JUDGE
22 DEPARTMENT XV
23
24
25
26
27

28 ³ Claims asserted in a petition for post-conviction relief must be supported with specific factual
allegations which, if true, would entitle petitioner to relief. *See Hargrove*, 100 Nev. at 502.

Certification of Copy

State of Nevada }
County of Clark } SS:

Pursuant to the Court of Appeals order dated January 25, 2019, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the supplemental trial court record for the case referenced below. The record comprises volume eleven with pages numbered 2269 through 2276.

STATE OF NEVADA,

Plaintiff(s),

vs.

MATTHEW WASHINGTON,

Defendant(s),

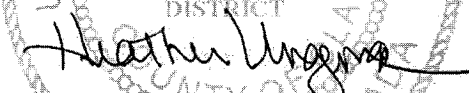
Case No: C-13-294695-1

Dept. No: XV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 13 day of February 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

