

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS WESLEY,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

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Case No. 82690

Electronically Filed
Oct 25 2021 01:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 25, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

BRET O. WHIPPLE, ESQ.
Counsel for Appellant

KAREN MISHLER
Chief Deputy District Attorney

BY /s/ E. Davis
Employee, District Attorney's Office

KM/John Taylor/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

APR 12 2010

NARCUS S. WESLEY A/K/A NARCUS SAMONE
WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52127

District Court Case No. C232494

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 11th day of March, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed
the seal of the Supreme Court at my Office in Carson City,
Nevada, this 8th day of April, 2010.

Tracie Lindeman, Supreme Court Clerk

By:

Deputy Clerk

A. Ingerson

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY A/K/A NARCUS SAMONE
WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52127

District Court Case No. C232494

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 8, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):

Hon. James M. Bixler, District Judge
Clark County District Attorney
The Law Office of Dan M. Winder, P.C.

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on APR 9 2 2010

HEATHER LOFQUIST

Deputy District Court Clerk

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10-06999

ORIGINAL

FILED

1 **ORDR**

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JAN 4 5 00 PM '11

[Signature]
CLERK OF THE COURT

7 **DISTRICT COURT**
8
9 **CLARK COUNTY, NEVADA**

07C232494-2
FFCO
Findings of Fact; Conclusions of Law and C
1146887



10 THE STATE OF NEVADA,
11
12 Plaintiff,

CASE NO: C232494-2

13 -vs-

DEPT NO: XXIV

14 NARCUS WESLEY,
15 # 1757866

Defendant.

16 **FINDINGS OF FACT, CONCLUSIONS OF**

17 **LAW AND ORDER**

18 DATE OF HEARING: DECEMBER 7, 2010
19 TIME OF HEARING: 8:30 A.M.

20 THIS CAUSE having come on for hearing before the Honorable KATHY
21 HARDCASTLE, District Judge, on the 7th day of December, 2010, the Petitioner not being
22 present, being represented by ARNOLD WEINSTOCK, the Respondent being represented
23 by DAVID ROGER, District Attorney, by and through LISA LUZAICH, Chief Deputy
24 District Attorney, and the Court having considered the matter, including briefs, transcripts,
25 arguments of counsel, and documents on file herein, now therefore, the Court makes the
26 following findings of fact and conclusions of law:

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JAN 4 2011

CLERK OF THE COURT

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1 FINDINGS OF FACT

2 1. On April 20, 2007, the State filed an Information charging Narcus S. Wesley
3 (hereinafter "Defendant") and Delarian K. Wilson (hereinafter "Wilson") with
4 multiple counts of Conspiracy, Burglary, Robbery, Assault, Kidnapping, Sexual
5 Assault, Coercion, and Open or Gross Lewdness, all with use of a deadly weapon.
6 Co-Defendant Wilson entered into negotiations with the State and pleaded guilty to
7 two counts of Robbery with Use of a Deadly Weapon and one count of Sexual
8 Assault.

9 2. Defendant's jury trial began on April 9, 2008, and concluded on April 18, 2008. The
10 jury convicted Defendant of all eighteen (18) counts alleged in the Second Amended
11 Information. On July 3, 2008, Defendant was adjudged guilty of all eighteen (18)
12 counts and sentenced as follows¹: as to Counts I and XVIII – TWELVE (12) months;
13 as to Counts II, III, and XI – TWENTY-EIGHT (28) to SEVENTY-TWO (72)
14 months; as to Counts IV, VI, VII, and IX – SIXTY (60) to ONE HUNDRED
15 EIGHTY (180) months plus an equal and consecutive term of SIXTY (60) to ONE
16 HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts V
17 and VIII – TWENTY-FOUR (24) to SEVENTY-TWO (72) months; as to Count X –
18 SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months plus an equal and
19 consecutive term of SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180)
20 months for the use of a deadly weapon; as to Counts XII – XV, and XVII – TEN (10)
21 years to LIFE plus an equal and consecutive term of TEN (10) years to LIFE for the
22 use of a deadly weapon; and as to Count XVI – TWENTY-FOUR (24) to
23 SEVENTY-TWO (72) months plus an equal and consecutive term of TWENTY-
24 FOUR (24) to SEVENTY-TWO (72) months for the use of a deadly weapon; all
25 counts to run concurrently.

26 //

27
28 ¹ The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17 as the court had previously given Wesley EIGHT (8) to TWENTY (20) years instead of TEN (10) to LIFE as called for under the Statute. The court corrected the sentence at a hearing on September 23, 2008. Defendant was present with counsel during said hearing. The corrected sentence is listed above.

- 1 3. Judgment of Conviction was filed on July 18, 2008, and an Amended Judgment of
2 Conviction reflecting a correction in the sentence to Counts XII – XV, and XVII was
3 filed on October 8, 2008. Defendant filed a Notice of Appeal with the Supreme
4 Court of Nevada on July 24, 2008. The Nevada Supreme Court affirmed Defendant's
5 conviction on March 11, 2010. Remittitur was issued on April 8, 2010.
- 6 4. On October 8, 2010, Defendant filed a petition for writ of habeas corpus to which the
7 State filed an opposition on December 6, 2010.
- 8 5. There is no evidence to support Defendant's first ground for relief that his counsel
9 was ineffective.
- 10 6. Defendant's first claim of ineffective assistance regarding his lawyer's failure to use a
11 police report that purportedly contradicted the victim's testimony fails as it is a bare
12 allegation wholly unsupported by anything in the record. Additionally, Defendant
13 failed to demonstrate any actual prejudice stemming from the failure to use this
14 report.
- 15 7. Defendant's second and tenth claims of ineffective assistance regarding his lawyer's
16 purported acceptance of the Government's version of the facts surrounding the sexual
17 assault fails because Defendant presented a duress defense that conceded that he did
18 commit the sexual assault upon the victim. To the extent that Defendant argued his
19 counsel was ineffective in this respect because Defendant disagreed with this theory
20 of defense, this argument also fails because defense counsel is entitled to handle trial
21 strategy and the day-to-day decision-making during a trial. Furthermore, Defendant
22 failed to demonstrate how a different theory of defense would have led to a better
23 result in his case.
- 24 8. Defendant's third claim of ineffective assistance regarding his lawyer's purported
25 failure to conduct a sufficient pretrial investigation fails as Defendant failed to show
26 how a better investigation in these respects would have rendered a more favorable
27 outcome.

28 //

- 1 9. Defendant's fourth, ninth and twelfth claims of ineffective assistance regarding that
2 Defendant's belief that there was a conflict of interest between his trial counsel and
3 himself fails as Defendant could not demonstrate that an actual conflict existed
4 between he and his counsel.
- 5 10. Defendant's fifth claim of ineffective assistance regarding Defendant's belief that his
6 lawyer failed to force Danielle Browning to undergo physical and psychological
7 examination to test her credibility is without merit as Defendant failed to demonstrate
8 how such an examination would have led to a more favorable outcome. Moreover, it
9 would have been futile for defense counsel to make such a request.
- 10 11. Defendant's sixth claim of ineffective assistance regarding Defendant's belief that his
11 lawyer did not to present a series of witnesses that would testify to Defendant's good
12 character fails because the trial tactics and day-to-day decision-making during a trial
13 are up to the attorney and not the client. Moreover, Defendant failed to demonstrate
14 how the introduction of such good character evidence would have led to a better
15 result in his case.
- 16 12. Defendant's seventh claim of ineffective assistance regarding Defendant's belief that
17 his lawyer was ineffective for admitting his Co-Defendant's hearsay statements and
18 Guilty Plea agreement was in fact an issue raised on direct appeal and is now barred
19 the doctrine of law of the case. Even if considered on the merits, the argument fails
20 as the trial tactics and day-to-day decision-making during a trial are up to the attorney
21 and not the client. Moreover, Defendant failed to demonstrate how the absence of
22 such statements from his co-defendant would have led to a better result in his case.
23 Moreover, since the Nevada Supreme Court deemed the admission of this evidence to
24 be proper it would have been futile for counsel to raise this issue at trial.
- 25 13. Defendant's eighth claim of ineffective assistance regarding his belief that his lawyer
26 failed to object to acts of prosecutorial misconduct, the introduction of irrelevant and
27 prejudicial testimony of Grant Heib is not an actual ineffective assistance claim, but
28 rather a claim that should have been raised on direct appeal. Since Defendant failed to

1 raise this matter on direct appeal, the issue is now waived. Even if considered on the
 2 merits the issue fails as it is a bare allegation devoid of any factual support.

3 14. Defendant's eleventh claim of ineffective assistance regarding Defendant's belief that
 4 his lawyer purportedly forced Defendant into arguing the duress defense during trial
 5 is without merit as trial tactics and day-to-day decision-making during a trial are up to
 6 the attorney and not the client. Moreover, Defendant failed to demonstrate how an
 7 alternative defense strategy would have led to a better result in his case.

8 15. Defendant's thirteenth claim of ineffective assistance regarding Defendant's belief
 9 that his lawyer failed to challenge the sufficiency of the evidence on the sexual
 10 assault charge fails as Defendant already raised a challenge to the sufficiency of the
 11 evidence used to convict him on direct appeal and the Nevada Supreme Court held
 12 that there was sufficient evidence to convict him for the eighteen counts.
 13 Accordingly, such a motion at trial would have been futile.

14 16. Defendant's fourteenth claim of ineffective assistance regarding Defendant's belief
 15 that his lawyer failed to investigate the purported "motives" for the witnesses' false
 16 accusations fails as it a bare allegation wholly unsupported by anything in the factual
 17 record. Moreover, Defendant failed to show how a better investigation in these
 18 respects would have rendered a more favorable outcome.

19 17. Defendant's second, fourth and sixth grounds for relief are procedurally barred
 20 pursuant to NRS 34.810(1)(b) as they should have been raised on direct appeal and
 21 are now waived.

22 18. Defendant failed to establish any good cause to overcome the procedural bar of NRS
 23 34.810(1)(b).

24 19. Defendant's third and fifth grounds for relief are barred by the doctrine of law of the
 25 case.

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CONCLUSIONS OF LAW

1. The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 2064. The Nevada Supreme Court has held that "claims of ineffective assistance of counsel must be reviewed under the 'reasonably effective assistance' standard articulated by the U.S. Supreme Court in Strickland, requiring a defendant to show that counsel's assistance was 'deficient' and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

2. With respect to the first prong, a defendant is not entitled to errorless counsel. Rather, "'Deficient' assistance of counsel is representation that falls below an objective standard of reasonableness." Kirksey, 112 Nev. at 987, 923 P.2d at 1107 (1997) citing to Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1286 (1993). What appears by hindsight to be a wrong or poorly advised decision of tactics or strategy is not sufficient to meet the defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998)

(quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)). An attorney cannot be deemed ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

3. In order to meet the second “prejudice” prong of the test, “the defendant must show a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Kirksey, 112 Nev. at 988, 825 P.2d at 1107 (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).
4. Strategy or decisions regarding the conduct of defendant’s case are “virtually unchallengeable absent extraordinary circumstances.” Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996), quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). There is a “*strong presumption* that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, *supra* at 689, 2065, emphasis added.
5. The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). In sum, the framework for analysis is as follows:

Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel’s performance fell below a standard of objective reasonableness, and finally the petition must establish prejudice by showing a reasonable probability that, but for counsel’s deficient performance, the outcome would have been different.

Means, *supra* at 1013, 33.

6. Any claims for relief asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (emphasis added). “Bare” and “naked” allegations are not sufficient, nor are those belied and repelled by the record. Id.

- 1 7. If a claim is denied on appeal further consideration of those issues presented on
2 appeal are barred by the doctrine of law of the case. Hall v. State, 91 Nev. 314,
3 315-16, 535 P.2d 797, 798-99 (1975). In Hall, the Supreme Court of Nevada
4 stated that “[t]he law of a first appeal is the law of the case on all subsequent
5 appeals in which the facts are substantially the same.” Id. This doctrine also
6 “cannot be avoided by a more detailed and precisely focused argument
7 substantially made after reflection upon previous proceedings.” Id. at 316.
- 8 8. It is well established in this State that trial tactics and day-to-day decision-making
9 during a trial are up to the attorney and not the client. Rhyne v. State, 118 Nev. 1,
10 38 P.3d 163 (2002).
- 11 9. If a defendant claims that his attorney is ineffective for failing to pursue a specific
12 strategy, a defendant must demonstrate how a different strategy would have led to
13 a better result in his case. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538
14 (2004).
- 15 10. If there is an actual conflict of interest that results in an adverse effect in a
16 lawyer’s performance a presumption of prejudice to Defendant is created. Clark v.
17 State, 108 Nev. 324, 831 P.2d 1374 (1992). However, “[c]onflict of interest and
18 divided loyalty situations can take many forms, and whether an actual conflict
19 exists must be evaluated on the specific facts of each case. In general, a conflict
20 exists when an attorney is placed in a situation conducive to divided loyalties.” Id.
21 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).
- 22 11. If it would have been futile for defense counsel to make a specific type of request,
23 counsel cannot be deemed ineffective in this respect. Ennis v. State, 122 Nev. 694,
24 137 P.3d 1095 (2006).

25 //

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12. NRS 34.810(1)(b) provides:

The court *shall* dismiss a petition if the court determines that:

The petitioner's conviction was the result of a trial and the grounds for the petition could have been: (1) Presented to the trial court; (2) Raised in a direct appeal or a prior petition for writ of habeas corpus or post conviction relief; or (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

(Emphasis added).

13. "A court must dismiss a habeas petition if it presents claims that *either were or could have been presented* in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-647, 29 P.3d 498, 523 (2001) (emphasis added); Franklin v. State, 110 Nev. 750 (1994).

14. "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506 (2003); *citing* Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537; Lozada, 110 Nev. at 353, 871 P.2d at 946. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable". Hathaway, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); *see also* Gonzalez, 53 P.3d at 904; *citing* Harris v. Warden, 114 Nev. 956, 959-60 n. 4, (64 P.2d 785 n. 4 (1998).

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ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus shall be, and is, denied without prejudice.

DATED this 14th day of December, 2010.


DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY


LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

hjc/SVU

07C232494-2

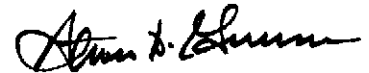
IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 57473
District Court Case No. C232494

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CLERK'S CERTIFICATE



CLERK OF THE COURT

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 12th day of February, 2013.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
February 12, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57473

FILED

JAN 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On appeal from the denial of his September 9, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. 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 697, 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). To warrant an evidentiary hearing, a petitioner

must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant argues that trial counsel was ineffective for conceding his guilt. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel conceded that the facts of the crime occurred, but argued appellant was not criminally liable because he acted under duress based upon perceived threats from his codefendant. See Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 49 (2004) (stating "[u]nder NRS 194.010(7), duress requires a reasonable belief that one's life would be endangered or that one would suffer great bodily harm"). As trial counsel argued appellant was not criminally liable for the charged offenses as appellant acted under duress, counsel's admission that the facts surrounding the crime were true did not amount to a concession of guilt. Appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued the facts surrounding the crime had not occurred as there was overwhelming evidence of appellant's guilt given appellant's confession. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that trial counsel was ineffective for improperly introducing statements made by the codefendant. Appellant fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's counsel introduced statements made by appellant's codefendant, which included statements incriminating appellant. During a lengthy discussion, in appellant's presence but not

before the jury, counsel informed the district court that he believed the codefendant's statements would show that the codefendant was the leader during the incident and that the codefendant changed his story so often that the jury would not believe the codefendant's version of events. This was a tactical decision related to appellant's duress defense and, as such, is "virtually unchallengeable absent extraordinary circumstances," Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant did not demonstrate. Given the substantial evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel not introduced these statements. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that trial counsel was ineffective because of a conflict of interest as the public defender's office represented appellant's father. To show that an actual conflict of interest existed, appellant must demonstrate that his counsel was placed in "a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." Id. (quoting Smith, 923 F.2d at 1320). Appellant does not demonstrate that his counsel was placed in a situation that divided his loyalties. The public defender's office represented appellant's father regarding a charge of felon in possession of a firearm based on a firearm that was recovered during a search of the father's residence during the investigation of this case. All parties agreed that the

firearm belonged to the father,¹ but counsel stated he felt he could not state to the jury in appellant's case that the father owned the firearm, as that was effectively accusing a client represented by his office of a crime. The district court instructed the jury that the firearm belonged to the father, not appellant, thereby relieving counsel of the burden of posing questions regarding the father's gun ownership. Accordingly, appellant fails to demonstrate that an actual conflict of interest existed. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.²

Fourth, appellant argues that trial counsel was ineffective for failing to investigate character witnesses. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant fails to discuss any witnesses who could have provided testimony of appellant's good character or state what further investigation counsel should have performed regarding those potential witnesses. Appellant fails to demonstrate a reasonable probability of a different

¹The firearm recovered from the residence was a rifle, not the handguns that were used by the assailants during the commission of this crime.

²Appellant also argues that appellate counsel was ineffective for failing to argue that trial counsel had a conflict of interest. As appellant fails to demonstrate that trial counsel had an actual conflict of interest, he therefore fails to demonstrate his appellate counsel was ineffective for failing to assert the underlying claim on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Strickland, 466 U.S. at 697.

outcome had counsel conducted further investigation into character witnesses. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, appellant fails to demonstrate that the district court erred in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that trial counsel was ineffective for failing to impeach a victim with contradictions between her statement to police and her trial testimony. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant does not identify what portion of the victim's testimony conflicted with her statements to police and therefore, makes only unsupported claims. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Trial counsel questioned the victim regarding differences between her preliminary hearing testimony and her trial testimony and appellant fails to demonstrate a reasonable probability of a different outcome had counsel pursued further similar questioning. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, appellant argues that trial counsel was ineffective for failing to investigate the motives of the victims to make false allegations. Appellant makes only a bare claim that the victims fabricated their allegations, and therefore fails to demonstrate deficiency or prejudice for this claim. See id. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Seventh, appellant argues that trial counsel was ineffective for failing to preclude suggestive pretrial identification of appellant by his codefendant. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The codefendant

knew appellant and told the police appellant's first name and that appellant attended UNLV before the police showed a photograph of appellant to the codefendant for identification purposes. Thus, the identification of appellant was not "unnecessarily suggestive and conducive to irreparable mistaken identification." Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967), abrogated on other grounds by Griffith v. Kentucky, 479 U.S. 314 (1987)). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued that the pretrial identification by the codefendant was suggestive as appellant admitted to police that he participated in the incident and appellant's defense was that appellant participated under duress, rendering identification of the participants a nonissue at trial. See Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001) (stating that the defendant's own statements may be considered in assessing whether improper admission of a codefendant's statements was harmless error). Therefore, the district court did not err in denying this claim.

Eighth, appellant argues that trial counsel was ineffective for failing to seek a psychological evaluation of the female victim. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Here, multiple victims testified about the crimes, and their stories, including the female victim's, were substantially similar. Appellant fails to demonstrate that a psychological evaluation of the victim would have been appropriate as he fails to demonstrate there was little or no corroboration evidence or a reasonable basis for believing the female victim's mental or emotional state may have affected her veracity.

See Abbott v. Nevada, 122 Nev. 715, 724, 138 P.3d 462, 468 (2006). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought a psychological evaluation of the female victim. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant argues that the jury did not represent a fair cross-section of the public and that his convictions should be reversed due to cumulative error. These claims could have been raised in appellant's direct appeal, and appellant fails to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b)(2). Therefore, the district court did not err in denying these claims.³

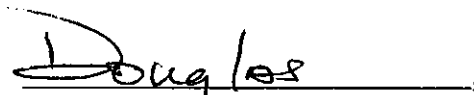
Finally, appellant argues that the district court erred in denying additional claims from the proper person petition. Appellant fails to provide any cogent argument as to how or why the district court erred in denying these claims and merely refers to the proper person petition without discussing any of the claims contained therein. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, appellant may not incorporate by reference arguments contained in documents filed before

³To the extent appellant asserts that cumulative errors of counsel amounted to ineffective assistance of counsel, appellant fails to demonstrate deficiency or prejudice for any of his claims, and therefore, fails to demonstrate cumulative error amounted to ineffective assistance of counsel.

the district court. See NRAP 28(e)(2). Thus, we need not address these claims.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


Gibbons, J.


Douglas, J.


Saitta, J.

cc: Hon. James M. Bixler, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk




CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: FEBRUARY 12TH 2013

Supreme Court Clerk, State of Nevada

By  Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 57473
District Court Case No. C232494

REMITTITUR

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 12, 2013

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):

Hon. James M. Bixler, District Judge
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on FEB 22 2013.

HEATHER UNGERMANN

~~Deputy~~ District Court Clerk

RECEIVED

FEB 20 2013

CLERK OF THE COURT