IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYA SPLOND,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82989

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals, as it is a post-conviction appeal that involves a challenge to a denial of a petition for writ of habeas corpus.

STATEMENT OF THE ISSUE(S)

1. Whether the district court erred in denying the Petition for Writ of Habeas Corpus.
2. Whether the district court abused its discretion when it denied Appellant's claim that counsel was ineffective for failing to convey an offer.
3. Whether the district court abused its discretion when it denied Appellant's claim that counsel was ineffective for failing to oppose the State's Motion to Consolidate.
4. Whether the district court abused its discretion when it denied Appellant's claim that trial counsel was ineffective for failing to present expert testimony.
5. Whether the district court abused its discretion when it denied Appellant's claim that trial counsel was ineffective for failing to request jury instructions.

6. Whether the district court abused its discretion when it denied Appellant's claim that trial counsel was ineffective for failing to elicit testimony negating the elements of possession of stolen property, failing to argue that the State failed to prove the elements, and failing to argue on appeal the sufficiency of the evidence regarding the possession of the stolen firearm.

STATEMENT OF THE CASE

An Amended Indictment was filed in open court on April 8, 2015, charging Kenya Splond (hereinafter, "Appellant") by way of Amended Indictment with Count 1 – Conspiracy to Commit Robbery (Category B Felony - NRS 200.380, 199.480 - 50147); Count 2 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138) Count 4 – Possession of Stolen Property (Category B Felony - NRS 205.275(2)(c) - 56060), Count 5 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 6 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138); Count 7 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); and Count 8 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138). Appellant's Appendix, Volume I ("I AA") 000081-000084. On April 20, 2015, Appellant's defense counsel, Frank Kocka, withdrew as attorney of record, and Augustus Claus confirmed as trial counsel for Appellant. II AA 000279.

On March 15, 2016, Appellant filed a Motion to Preserve and Produce Evidence. I AA 000137-000149. On March 16, 2016, the district court granted the motion in part. I AA 000038. On March 18, 2016, Appellant filed a Motion to Suppress Evidence Obtained as Result of Illegal Stop. I AA 000150-000160. The district court denied that motion on March 21, 2016. II AA 000388-000432. The jury trial commenced on March 21, 2016 and concluded on March 24, 2016. II AA 000493- IV AA 000833.

On March 24, 2016, the jury found Appellant guilty on all counts. I AA 000226-000228. On July 20, 2016, the date set for sentencing, Appellant requested a continuance to correct errors in Appellant's Presentence Investigation Report (hereinafter "PSI). IV AA 000834-000839.

On February 2, 2017, after six (6) more continuances, Appellant was sentenced as follows: Count 1 – twelve (12) to sixty (60) months; Count 2 – twenty-eight (28) to one hundred fifty-six (156) months, concurrent with Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the Use of a Deadly Weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, concurrent with Counts 1, 2, and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to Counts 1, 2, 3, and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of

twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon, concurrent with Count 5; Count 7 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to other counts; Count 8 – twenty-eight (28) to one hundred fifty-six (156) months plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon, concurrent with Count 7. II AA 000223-000225, IV AA 840-884.

The aggregate total sentence equaled one hundred sixty-eight months (168) to nine hundred thirty-six (936) months. II AA 000256-000258. Appellant received nine hundred thirty-five (935) days credit for time served. IV AA 000875-000883.

On February 13, 2017, Appellant's Judgment of Conviction was filed. I AA 000039. The Nevada Court of Appeals affirmed Appellant's Judgment of Conviction on December 17, 2018. Respondents Appendix, (hereinafter "RA") 019-029. Remittitur issued on January 15, 2019. Id. 030.

Appellant filed a Petition for Writ of Habeas Corpus (hereinafter "Petition") on April 29, 2019. IV AA 000937-V AA 001003. Appellant filed a Motion for Appointment of Counsel, and Request for Evidentiary Hearing on November 12, 2019. RA 031-034. On November 25, 2019, the State filed a Response to Appellant's Petition, Motion for Appointment of Counsel, and Request for Evidentiary Hearing. V AA 001004-001028.

On December 16, 2019, the district court granted Appellant's Motion for Appointment of Counsel, noting that "the claims are not difficult, however, the issues that could be presented could be substantial." V AA 001029. The Court then ordered Appellant's Petition and Request for Evidentiary hearing off calendar and set the matter for confirmation of counsel. Id.

On October 12, 2020, Appellant filed a Supplemental Memorandum of Points and Authorities in Support of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supplemental Petition"). V AA 001030-001095. The State's Response was filed on January 12, 2021. V AA 001096-001128. Appellant filed a Reply on January 25, 2021. V AA 001129-001142. On February 1, 2021, the district court ordered a limited evidentiary hearing set regarding prior counsel Mr. Kocka conveying the offer and denied all remaining issues. V AA 001143-001152. On March 11, 2021, Appellant filed a Second Supplemental Memorandum of Points and Authorities in Support of Appellant's Petition For Writ Of Habeas Corpus (Post-Conviction) without requesting leave of the district court. V AA 001153-001244.

On April 15, 2021, the district court heard testimony from Mr. Kocka, Lisa Wallace and Appellant. V AA 001245-VI AA 001291. The district court stated its findings noting that Mr. Kocka's testimony was credible, and Appellant noted in his testimony that Mr. Kocka was a good attorney. VI AA 001317, V AA 001219-001220, 001241. The district court noted that Appellant had the burden of proof and

his testimony did not seem credible. V AA 001243. The district court added that Appellant never questioned or inquired if there was an offer and Mr. Kocka stated many times on the record he was waiting for a better offer. Id.

The district court found that the Strickland prongs were not met and subsequently denied the remainder of the Appellant's Supplemental Petition. Id. The Findings of Fact, Conclusions of Law and Order was filed on May 12, 2021. V AA 001245 - VI AA 001291.

On May 24, 2021, Appellant filed a Notice of Appeal. VI AA 001340-001342.

STATEMENT OF THE FACTS

JANUARY 22, 2014, CRICKET WIRELESS

Samuel Echeverria (hereinafter "Echeverria"), who was working at Cricket Wireless, testified that on January 22, 2014, a black male adult came into the store with a black hoodie, a black baseball cap, black shirt, black shoes, and regular blue jeans. III AA 000517-518. The man, later identified as Appellant, presented himself as a customer. Id. 000527-000530. Appellant came up to the register and asked for a specific battery for his girlfriend. Id. 000519. Echeverria walked up to the front of the store to see if the battery was in stock and walked behind the desk to grab the keys to unlock the holsters. Id.

Everyone had left the store, except for Appellant and Echeverria. Id. When Echeverria started ringing Appellant up for the battery, he looked up and Appellant

pulled out a black gun and said, "[g]ive me all the money before I blow your brains out." Id. Echeverria described the gun as a black revolver. Id. 000520. In a photo lineup, Echeverria identified Appellant with 100 percent certainty. Id. 000521-000522. The robbery was also caught on surveillance video and played for the jury. Id. 000524-000525. Echeverria immediately called the police after Appellant left the store. Id. 000520.

Although Echeverria was not able to identify Appellant in court, he testified that he identified him approximately a month after the robbery as the person in the number two position in the photo lineup. Id. 000527-000530. While testifying, Echeverria maintained that he was 100 percent certain then that the person who robbed him was in the number two spot in the photo lineup. Id.

Alisa Williams (hereinafter "Williams") testified that on January 22, 2014, after getting out of work, she saw a black male adult come out of the Cricket Wireless Store and jump into the back seat of a silver car. Id. 000539-000546. She also saw a light-skinned black female adult with white shades on driving the car. Id. 000541. She remembered the male had a hat on his head and a scar on his face, more specifically his jaw. Id. 000543. When testifying, she said the second photo in the photo lineup looked like it might be him, but she was not sure it was him when she testified, and was not sure it was him back when she was initially shown the photo lineup. Id. 000543-000545.

JANUARY 28, 2014, METRO PCS

On January 28, 2014, Graciela Angles (hereinafter "Angles") was working at Metro PCS on 6663 Smoke Ranch. Id. 000642. Around 2:00 PM Appellant came into the store. Id. He looked at phones and asked Angles about phone plans. Id. Appellant asked about a Galaxy S4, so Angles went and grabbed it. Id. 000646. Appellant then asked about the Omega, so Angles took the Galaxy S4 back and brought out the Omega. Id. Appellant then pulled out the gun and asked Angles to step back and give him the money. Id. 000647. In fear, Angles grabbed all the money out of the cash drawer while Appellant was pointing the gun at her, and Appellant took the cash and the Omega and left. Id. Angles immediately called 911. Id. 000657.

About a month later, a police officer with Metro showed Angles a photo lineup. Id. 000647-000648. She circled picture number two, wrote her name under it, and said she was 100 percent sure that was the person who robbed her. Id. 000649. She also identified Appellant in court and further testified she still was 100 percent sure that was who robbed her. Id. 000651. Video surveillance of the robbery was shown to the jury. Id. 000652-000658. She was the only employee in the store at the time of the robbery. Id. 000655.

FEBRUARY 2, 2014, STAR MART

Brittany Slathar (hereinafter "Slathar") was working at Star Mart as a cashier on February 2, 2014, around 2:45 AM. Id. 000513. She saw Appellant come in and

go to the gum section. Id. 000552. She then got up and walked to the counter. Id. Appellant picked up some Wrigley Spearmint gum. Id. No one else was in the store. Id. Slathar asked Appellant if he needed anything else and that is when he said two packs of Newport 100s. Id. As Slathar was ringing the cigarettes up, Appellant pulled out a gun and told Slathar to give him all the money in the cash register. Id. Slathar told Appellant that she was in the middle of a transaction and she could not open her register. Id. Appellant kept saying, "Give me the money. Give me the money. I'm gonna kill you. You're gonna die." Id. He called her a "dumb white bitch" and told her she was stupid. Id.

Slathar never opened the register because she thought she would have to pay back the money he stole. Id. 000553. Appellant left, but told Slathar he would be back, and that she was lucky. Id. Appellant grabbed the cigarettes and gum and left. Id. 000554. Slathar immediately called Metro and Officer Jeremy Landers took her to the location where a suspect had been apprehended and gave her a Show Up Witness Instruction Sheet. Id. 000554. Slather identified Appellant with 100 percent certainty. Id. 000556. Slathar read the statement she wrote down for police into the record. Id. 000555-000554. She read, "[t]he male in front of the police car was the man who robbed me at the—robbed me at gunpoint. He was wearing blue jeans, red T-shirt, and black tennis shoes. When he came in the store he was wearing blue jeans, a black hooded sweatshirt and a light beanie with dark brown spots." She

testified it was a camouflage beanie. Id. She also identified Appellant in court. Id. 0000561.

Slather said Appellant had a small black revolver with no clip. Id. 000558. When Appellant came into the store, Slather recognized him as a previous customer that had been in the store before. Id. 000559. The robbery was also caught on video surveillance. Id.

Officer Joshua Rowberry (hereinafter "Officer Rowberry") testified that on February 2, 2014, he received a call involving a robbery around 2:57 a.m. at 5001 North Rainbow. Id. 000607-000610. The information Officer Rowberry received was that the suspect had left the store and he was traveling northbound on Rainbow. Id. 000610. Moments later, Officer Rowberry saw a car north on Rainbow. Id. 000611. He testified it was the only vehicle in the area, it was in close proximity to the robbery, and it was headed northbound away from where the robbery had just occurred. Id. 000611-000613. He stopped the vehicle because it was leaving the area of the robbery and because there was damage to the rear of the vehicle as if it was just involved in an accident. Id. 000611-000615.

As he followed the vehicle, it turned into a residential neighborhood, wherein Officer Rowberry activated his lights and sirens. Id. 000616. The car stopped, he exited his vehicle, and approached the car on the driver's side rear passenger door. Id. He could not see through the windows due to the dark tint. Id. 000616. Kelly

Chapman (hereinafter "Chapman") was the driver of the vehicle. Id. 000618. After she rolled down the window, Officer Rowberry noticed there was an adult black male laying in the back seat, covered up by a blanket and breathing heavily. Id. 000619.

Officer Rowberry gave Appellant instructions to show his hands, which he did not do. Id. Officer Rowberry initiated code red on his radio, signaling to other officers he needed backup. Id. 000620. Once the other officers arrived, Officer Rowberry instructed Chapman and Appellant to step out of the car. Id. 000621. Officer Rowberry was able to see inside the car when Appellant and Chapman got out, and he saw two packs of Newport cigarettes and a pack of spearmint Wrigley's gum, which were the items taken from the store. Id. 000622.

Officer Rowberry also found a black sweatshirt and camouflage beanie. A revolver was inside a pocket of the sweatshirt. Id. 000625- 000628. Out of the six (6) possible rounds, there were four (4) rounds in the revolver. Id. 000629. Appellant's shirt also had some black dots on it and small cotton fibers from the sweatshirt. Id. 000631-000632.

Jeffrey Habberman (hereinafter "Habberman") testified that he was the owner of a 38-caliber Colt revolver that was stolen when someone broke into his home and stole the entire gun safe. Id. 000576-000580. He testified that he did not know the Appellant sitting at counsel table, he did not know a Kenny Splond, he never gave

Appellant permission to go into his house, never gave him permission to borrow his firearm, and he never gave permission to any of his friends or relatives to ever use his gun. Id. 000580-000581. Habberman identified Exhibit #28 as a picture of his gun. Id. 000581-000582.

SUMMARY OF THE ARGUMENT

Appellant has not demonstrated that he is entitled to relief on his claims. First, the district court properly denied Appellant's claim that counsel was ineffective for failing to convey an offer because the record is clear that not only did Appellant's counsel properly convey the offer provided by the State to Appellant, but also that Appellant rejected the offer.

Second, the district court properly denied Appellant's claim that counsel was ineffective for failing to oppose the State's Motion to Consolidate because all three (3) robberies were connected together by common scheme as evidence of each offense was cross admissible for the purpose of intent. Additionally, all three (3) of the robberies in this case share relevant factors such as similarity in offense, victims, temporal proximity, physical proximity, number of victims, weapon, and method. Further, Appellant fails to assert how consolidating these cases deprived him of a fair trial.

Third, the district court properly denied Appellant's claim that counsel was ineffective for failing to present expert testimony because the State provided

sufficient evidence of proper identification, Appellant's counsel questioned the officer about his lineup procedure, and Appellant failed to claim, let alone establish how expert testimony on a different lineup procedure would have reasonably changed the outcome at trial.

Fourth, the district court properly denied Appellant's claim that counsel was ineffective for failing to request jury instructions because Appellant failed to assert any evidence to support a jury instruction on his theory of defense, show how the instructions given to the jury did not sufficiently cover witness identification, and/or demonstrate that the Court would have agreed to give the requested instruction.

Fifth, the district court properly denied Appellant's claim that counsel was ineffective for failing to elicit testimony negating elements of possession and failing to argue that the State failed to prove the elements because the State did not fail to prove the elements of Count 4 – Possession of Stolen Property. The State presented evidence at trial that Appellant had never registered the gun and was using it to rob stores; thus, even if counsel had elicited testimony about the elements of possession from the detective, this testimony would not have changed the outcome at trial.

Sixth, the district court properly denied Appellant's claim that counsel was ineffective for failing to argue in appeal the sufficiency of the evidence regarding the possession of the stolen firearm because as the revolver was both registered and reported stolen, there was sufficient evidence supporting the State's argument that

Appellant reasonably should have known that the revolver was stolen. Therefore, Appellant has failed to establish that challenging his conviction as to Count 4 – Possession of Stolen Property would have been successful. Therefore, Appellant has failed to make a showing that he is entitled to relief, and his conviction should be affirmed.

ARGUMENT

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. *See* State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), *cert. denied*, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. *See* Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court as long as they are supported by the record. *See* Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CONVEY AN OFFER.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance

of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S.Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103

P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See, Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless

charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petition must prove the disputed factual allegations underlying his ineffective-assistance claim by a

preponderance of the evidence." Means, 120 Nev. 1001, 1012, 103 P.3d 25, 33. Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the Appellant to relief. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Appellant] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Appellant claims that counsel prior to trial, Mr. Kocka, was ineffective because he did not convey an offer of negotiation to Appellant for the two (2) years Appellant's case was pending trial. Appellant's Opening Brief ("AOB") 19. Appellant further appears to indicate that when Mr. Claus replaced Mr. Kocka as counsel of record, he confirmed that he never received an offer. Id. As a result, Appellant argues that if he had accepted the offer, his sentence would have been less than what he was ultimately sentenced to after trial. AOB 20. Appellant finally claims that he established that he would have accepted the plea negotiation because he "asked the court to intervene when counsel made a record regarding the offer." Id. Appellant's claim is belied by the record.

In this case, the record is clear that Mr. Kocka received an offer of negotiation from the State, conveyed it to Appellant and Appellant rejected that offer:

> COURT
> Hey. Is this case resolved?
>
> MR. KOCKA
> It is not, Your Honor. I did receive an offer on the case; the offer is not acceptable to my client. So at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, but I'm going to have to get him over to the PD's office because he wants to go to trial.

RA 016-018. The Court minutes reflect that Appellant was present on April 20, 2015. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations. Therefore, Appellant's claim that his counsel never informed him of the offer is belied by the record.

Moreover, counsel cannot be deemed ineffective for not receiving an offer of negotiation prior to April 2015. Rather, a review of the transcripts indicate that Mr. Kocka was diligently seeking an offer of negotiation from the State and that they did not extend one because Appellant had multiple cases. See generally, RA 001-011. Specifically, on June 16, 2014, Mr. Kocka explained to the district court the status of the negotiations:

> Your Honor, we have been going back and forth with Ms. Lexis of the DA's Office trying to get an offer, a global offer on the table. He has a prelim down at Department 3, and a sentencing currently set in Department 2. I know we set this a couple of times for status checks. Ms. Lexis has assured me she's going to make an offer. She's cautioned it by saying I may not like the offer, but she's going to be getting me an offer for sure.

RA 006-007. On September 15, 2014, Mr. Kocka explained that he had received an offer:

> Ms. LEXIS
> I did convey an offer, You Honor, previously which involved both cases while the second case was still in Justice Court. I can reconvey that offer. All though I know Mr. Kocka did not like it very much, so.
>
> Mr. KOCKA
> Ms. Trippiedi has the other case, Judge. Maybe I'll talk to her and see if I can get a better deal.
>
> […]
>
> Mr. KOCKA
> I'm going to get the offer, Judge.

RA 012-015.

That Mr. Kocka believed he could secure a better offer does not make him ineffective. Indeed, as the record is clear that he did receive and convey an offer to Appellant, the record instead indicates that Mr. Kocka was effective in diligently seeking to obtain a favorable offer of negotiation. Defense counsel cannot be deemed ineffective for his failure to secure a more favorable offer. Counsel does not have control over what the State offers. See, Young v. District Court, 107 Nev. 642, 818 P.2d 844 (1991). Therefore, both Appellant's claims that counsel did not convey or attempt to receive an offer of negotiation from the State is belied by the record.

Moreover, that Mr. Claus claimed he did not receive the offer of negotiation on the first day of trial is of no import. Mr. Claus was appointed to Appellant's case to proceed to trial after all offers of negotiation had been revoked. RA 016-018. That another more favorable offer was not extended while Mr. Claus represented

Appellant does not make either Mr. Kocka or Mr. Claus ineffective. Indeed, on the first day of trial, the State made clear that there had not been other offers extended and that any offer of negotiation was revoked when Appellant rejected it two (2) years prior. II AA 000323-000326. Again, neither Mr. Kocka nor Mr. Claus had any control over what plea negotiation the State offers or whether the State offers any plea negotiation whatsoever. See, Young, 107 Nev. 642, 818 P.2d 844.

Appellant claims that Mr. Kocka failed to effectively convey an offer. AOB 26-27. First, the ADKT Standards are intended as guidelines, to be tailored to a case's circumstances. ADKT 411 Standards 9(d) and (e), RA 043. The U.S. Supreme Court has stated that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 668, 688–89, 104 S.Ct. at 2052.

Second, ADKT Standard 9(e) applies to counsel's actions "Prior to the entry of the plea." As there was never a plea in this case, this standard does not apply. The ADKT Standard 9(d) simply states that counsel is to (1) inform the client, explaining the full content, including "advantages, disadvantages, and potential consequences of the agreement", (2) "not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client", and (3) if "counsel reasonably

believes that acceptance of the plea offer is in the best interest of the client-counsel should advise the client of the benefits". RA 083.

Appellant's claim that "the record does not in any way reflect that counsel did what ADKT411 mandates when conveying an offer" is belied by the record. AOB 29. While Appellant may seek to frame the State's questioning in a light most favorable to a reversal of his jury conviction, the context of Mr. Kocka's statements during the hearing show that Appellant's portrayal is incorrect. During the Evidentiary Hearing on April 15, 2021, Mr. Kocka explained his general practice when conveying an offer:

> Q Do you remember … August 13th of 2014, you mentioned on the record that the State had made an offer but it wasn't that great?
>
> A I see that there was an outstanding offer and I believe at that time there was mention of a new case coming up in the system. And I believe eventually he was indicted in a new case. So there was some talk going around about trying to negotiate this as separately. So thus as my memory serves me, the case that I was representing along at that time, they wanted to negotiate that separate and apart from the case that was coming through the Grand Jury system. And I'm sure as myself, as most defense attorneys, would not usually think that's a good offer to separate the two of them without doing a global negotiation which I think I actually referred to later on and for the day about trying to get a global negotiation. So as best as my memory would serve that they were trying to negotiate them separately and that was not a good negotiation for the benefit of my client.It's to create, as much as possible, an even result; correct?
>
> Q Did you have a conversation in August of 2014, around that time, with Mr. Splond, about why you thought that offer -- what they were offering and why you thought it wasn't a good idea?

> A I don't want to assume, but I can tell you what my general practice is that yes -- if I get an offer, I would discuss it with my client and if I feel that it's not a good offer as here trying to negotiate the cases separately, I will recommend to my client they not accept the offer until we can try and get something better.

V AA 001204-001206. Mr. Kocka clearly states that his general practice to "discuss" offers with his clients and "recommend" a course of action. Thus, Mr. Kocka's general practice includes more than simply telling his clients what the offer is. As Mr. Kocka's general practice includes a discussion, where he recommends a course of action, his general practice meets the ADKT411's Standard 9(d) of explaining the "advantages, disadvantages, and potential consequences" of an offer. ADKT 411 Standard 9(d).

To the extent Appellant alleges that counsel was ineffective for failing to file motions, that claim also fails. AOB 19. As an initial matter, Appellant does not explain what motions Mr. Kocka should have filed and has not explained how any of those motions would have been successful or impacted Appellant's decision to proceed to trial. This claim is further belied by the record because despite Appellant's claim, Mr. Kocka said he would be filing motions if Appellant's case did not resolve through a plea negotiation. I AA 000075-000080. Therefore, Appellant's claim is nothing but a bare and naked allegation that is belied by the record and suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Appellant cannot establish prejudice. While Appellant relies on Missouri v. Frye, 566 U.S. 134, 148, 132 S.Ct. 1399, 1410 (2012) to claim that failure to convey an offer of negotiation amounts to ineffective assistance of counsel, Appellant fails to recognize that Frye also held that before a defendant can establish said ineffectiveness, they must show "a reasonable probability they would have accepted" the offer that that "if the prosecution had the discretion to cancel it… there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." AOB 20.

Appellant claims that he has established that he can show that he would have accepted an offer of negotiation because he asked the Court to intervene. Appellant does not point this Court to where that alleged request was made. Even if Appellant had made such a request, the district court cannot force the State to convey an offer of negotiation and cannot insert itself into the plea-bargaining process. Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006).

Regardless, as the record is clear that Appellant rejected the offer provided by the State, any claim of prejudice or reliance on Frye fails. RA 016-018, 566 U.S. 134, 148, 132 S.Ct. 1399, 1410 (2012). That Appellant now wishes he had accepted an offer of negotiation after he was convicted at trial does not render counsel ineffective. It was Appellant's decision to reject the State's offer of negotiation. Counsel cannot be deemed ineffective merely because the Defendant's risk in

disregarding counsel's advice did not pay off. See Cronic, 466 U.S. at 657 n.19, 104 S.Ct. at 2046 n.19 (noting counsel is not required to do what is impossible). Accordingly, Appellant's counsel was effective in conveying an offer of negotiation to him prior to trial. Therefore, the district court did not abuse its discretion in denying this claim.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OPPOSE THE STATE'S MOTION TO CONSOLIDATE

Appellant argues that counsel should have opposed the State's Motion to Consolidate because Appellant's three (3) crimes were not factually similar and would not have been cross-admissible. AOB 21. Appellant further claims that he can establish prejudice because there were identification issues for one (1) of the three (3) robberies and that he was likely only convicted of that third robbery because of the joint trial. AOB 24-25. Appellant's claims fail.

Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellant cannot establish that counsel could have successfully opposed the State's Motion to Consolidate because the State's Motion was legally correct.

The charges in each case were based on two (2) or more acts or transactions connected or constituting parts of a common scheme or plan as described above in the Statement of Facts. Additionally, consolidation was warranted because it promotes judicial economy, efficiency and administration, and the evidence would be cross-admissible at trial.

NRS 174.155 addresses consolidation of Informations. It states in pertinent part:

> "The court may order two or more indictments or information or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

In considering whether to allow consolidation, courts have looked at the conflicting policies of economy and efficiency in judicial administration, seeking to control court calendars in avoidance of multiple trials, and any resulting prejudice to the defendant which might arise from being prosecuted at trial by presentation of evidence of other crimes flowing from a common plan or scheme. Cantano v. United States, 176 F.2d 820 (4th Cir. 1948); United States v. Fletcher, 195 F. Supp. 634 (D. Conn. 1960), aff'd, 319 F.2d 604 (4th Cir. 1963).

Moreover, as the Nevada Supreme Court has repeatedly held, the decision to allow the joinder of offenses lies within the sound discretion of the trial court and such a decision will not be reversed absent an abuse of discretion. Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990); Mitchell v. State, 105. 735, 782 P.2d 1340

(1989); Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976). The United States Supreme Court has noted that joint trials are preferred because "they promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" United States v. Zafiro, 113 S.Ct. 933 (1993). Further, the United State Supreme Court held that joinder of criminal offenses is not an issue that raises constitutional concern. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648 (1967).

Eighth Judicial District Court Rule 3.10 also promotes judicial economy. It provides:

> (a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.
>
> (b) Unless objected to by one of the judges concerned, criminal cases, writs or motions may be consolidated or reassigned to any criminal department for trial, settlement or other resolution.

Cross-admissibility is an additional factor leading toward consolidation. In Robins, our Supreme Court was faced with the joinder of a child abuse charge and a murder charge. 106 Nev. 611, 798 P.2d 558 (1990). It was held that "[i]f evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Id. at 619, 563 (*citing* Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342). NRS 173.115 further provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each

> offense if the offenses charged, whether felonies or gross misdemeanors or both, are:
>
> (1) Based on the same act or transaction; or
>
> (2) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Additionally, there must be more prejudice shown than is inherent in any joinder of counts. United States v. Bright, 630 F.2d 804 (5th Circ. 1980). It is insufficient to show that severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. United States v. Martinez, 486 F.2d 15 (5th Cir. 1973).

A. All Three (3) Robberies are Connected Together by a Common Scheme.

In his AOB, Appellant takes issue with the State's reliance on Tillema v. State, 112 Nev. 266, 914, P.2d 605 (1995), in its Motion to Consolidate. AOB 22. Specifically, Appellant claims that Tillema is factually dissimilar from Appellant's offenses because "[t]he distinguishing feature in Tillema in allowing joinder of the cases is that the auto burglaries were similar enough to be connected, and the store burglary occurred the very same day, within hours, of the auto burglary. Here, the burglary of the cell phone stores, and the burglary of the Star Mart are similar in that they are burglary/robbery cases." AOB 23. However, in doing so, Appellant neglects to note the other similarities in all three (3) of Appellant's offenses.

Tillema involved the joinder of two (2) vehicular burglaries and one (1) store burglary. 112 Nev. at 268. Specifically, Tillma was charged with a vehicular

burglary occurring on May 29, 1993, and a vehicular and store burglary occurring on June 16, 1993. AOB 267-68; 914 P.2d at 606. In Tillema, the Nevada Supreme Court held that when separate crimes are connected by a continued course of conduct, joinder is appropriate. Id. Additionally, the court found that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed. Id. The court held that the two (2) vehicular burglaries evidenced a common scheme or plan because both offenses involved vehicles in casino parking garages and occurred only seventeen (17) days apart. Id. As a result, the court concluded that evidence from both cases would be cross admissible to prove Tillema's felonious intent in entering the vehicles. Id. The court further concluded that evidence of the store burglary was admissible and properly joined because the arresting detective witnessed Tillema enter the store right after completing the second vehicular burglary. Id. 269.

Like Tillema, Appellant's offenses were properly consolidated because they were factually similar and involved a common scheme. Appellant was charged with three (3) store burglaries, all of which occurred over a twelve (12) day span. In each store burglary, Appellant entered the store, waited until he and the clerk were the only people in the store, and asked the clerk to get him something that was behind the counter and near the cash register. Then, in each robbery, Appellant pulled out a revolver and pointed it at the clerk, threatening the clerk and demanding money from

the cash register. Appellant was able to receive money in the first two (2) store robberies because the clerk in the third robbery refused to open the register. Therefore, contrary to Appellant's claim that the only similarity between all three (3) offenses was time, there were additional significant and notable similarities between all offenses supporting joinder. Additionally, evidence of each offense was cross admissible in the other offenses for intent, as they all evidenced a common scheme or plan.

Appellant fails to assert how these three (3) crimes were different, simply arguing that the robberies were "garden variety, run of the mill robberies". AOB 32-37. Relying on Farmer, Appellant argues that the robberies in this case were not "idiosyncratic", or unique enough. Id., Farmer v. State, 133 Nev. 693, 697, 405 P.3d 114, 120 (2017). However, Appellant fails to place the quote from Farmer in context. The Supreme Court in Farmer clearly rejected any reading of this quote in a way that narrows the Court's similarity analysis for a common scheme.

> "[T]he term 'common scheme' describes crimes that share features idiosyncratic in character." Thus, in addition to rejecting any reading of Weber that would suggest a narrowing of our decisions, we clarify that the similarity analysis in our prior decisions derives from NRS 173.115(2)'s language that offenses may be joined when they are committed as parts of a common scheme.

Farmer, 133 Nev. 693, 697, 405 P.3d 114, 120 (2017) (citations omitted). Additionally, the Farmer Court held that a common scheme exists when offenses "share such a concurrence of common features as to support the inference that they

were committed pursuant to a common design." Id. at 699, 405 P.3d at 121. Thus, crimes do not have to be one-of-a-kind to have "common design". Further, all three (3) of the robberies in this case share relevant factors from Farmer, such as: (1) degree of similarity of offenses (all were armed robberies); (2) degree of similarity of victims (all victims were store clerks); (3) temporal proximity (all committed within a twelve (12) day span); (4) physical proximity (all took place within five (5) miles of each other); (5) number of victims (each robbery had one victim); and (6) other context specific features (same gun and method). Accordingly, Appellant cannot show that these three (3) robberies were improperly consolidated. Id.

Finally, Appellant's claim of prejudice fails. While Appellant relies on Hubbard v. State, 422 P.3d 1260, 1262 (2018), to claim that prejudice can outweigh any probative value, Hubbard dealt with admission of a prior conviction, not joinder of multiple charged offenses. Id. Therefore, Hubbard would have been irrelevant to the district court's determination of whether Appellant's cases should have been joined.

Regardless, there must be more prejudice shown than is inherent in any joinder of counts. Bright, 630 F.2d 804. It is insufficient to show that severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. Martinez, 486 F.2d 15. Video surveillance of the first two (2) store robberies was shown to the jury and the victims of all three (3) robberies

identified Appellant with one hundred (100) percent certainty. This joinder also did not prevent counsel from cross examining witnesses on any identification or forensic issues. Given the overwhelming evidence of Appellant's guilt, Appellant's claim that he was prejudiced because there was more significant evidence of guilt as to one (1) robbery fails.

Accordingly, as the district court properly consolidated Appellant's cases, Appellant has failed to demonstrate that counsel was ineffective for not opposing the State's Motion to Consolidate. Appellant has not demonstrated that any opposition would have been successful, and he has not demonstrated that he was prejudiced by consolidation given the overwhelming evidence of Appellant's guilt in each robbery. Therefore, Appellant's claim that the consolidation was prejudicial fails, and the district court did not abuse its discretion in denying this claim.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EXPERT TESTIMONY

Appellant argues that trial counsel was ineffective for failing to call an eyewitness identification expert to testify as to the two (2) photo lineups used to identify Appellant for the January 22, 2014 and January 28, 2014 robberies. AOB 39. Specifically, Appellant claims that while trial counsel cross examined Detective Kavon about the procedure behind compiling the lineups and if he used a procedure known as the "double blind setup," he did not call an expert to testify to the accuracy

of photo lineups. Id. Had counsel done so, Appellant claims this expert would have testified as to what the "double blind setup" is and how not using this setup increases the likelihood of inaccurate identifications. Id. 31-32. According to Appellant, counsel's failure to call such an expert deprived Appellant from presenting a meaningful defense. Id. Appellant's claim fails.

Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Howard v. State, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003)). In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (*citing* Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066). Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id.

Further, counsel is not required to call an expert when it is clear that they vigorously cross-examined State witnesses. Id. at 110, 131 S.Ct. at 791. The decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118

Nev. 1, 38 P.3d 163 (2002); see also Dawson, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.

In many instances, cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. State, 131 S.Ct. at 791, 131 S.Ct. at 110. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Here, Appellant cannot establish that counsel was ineffective for not calling an expert in photo lineups. First, Appellant has not identified that any such expert existed or would have been available to testify to the lineups used here. While Appellant includes a report supporting his claim as to the double-blind setup, the simple existence of a report published in 2007 does not establish that an expert was available.

Second, counsel's decision not to call an unidentified expert is a virtually unchallengeable strategic decision. Appellant has not established that this unidentified expert would have been permitted to testify at all, let alone would have been permitted to testify to the accuracy of the photo lineup procedures used here. Appellant appears to contend that this expert would have testified that the photo

lineup procedure used by Detective Kavon for each victim was unreliable and that the double-blind setup is a more reliable form of picture identification. AOB 31-32. However, Appellant has not established, and does not claim, that such testimony would have been admissible. Moreover, as this double-blind set up was not used for any of Appellant's lineups, any testimony about that procedure or its accuracy is entirely irrelevant.

Further, there was sufficient evidence regarding the process of assembling the line up at trial. Detective Kavon testified during direct examination as to how a six-pack photo lineup is assembled:

> Metro Police Department has a database, a database of photos that are in this database. Hundreds and hundreds and thousands of photographs are in this database. These photographs are separated into categories by race, by gender, that sort of thing, by age.
> It's data inputted in when the photograph was taken. You know, they put in the age of the person, their name and their ID number and, you know, how tall they are and how much they weigh and that's all in the database.
>
> When we create a photo array or sometimes it's referred to as a six-pack, you go into this database and you input the information for the known person that you want included in there. In this case, I input the information for Kenny Splond. Then that pulls Kenny Splond's picture out of the database.
> And then you also put in criteria of what you want to match with that. You -- you put in, obviously, you wouldn't want to put in female with a male suspect. So you eliminate all the females. You eliminate Caucasian or -- or white -- white people. You eliminate all sorts of various things. You make sure the ages are close and the height and weights are close.
>
> And when that computer program or that database randomly generates about 200 to 300 more photographs that it thinks is similar to, in this case, Kenny Splond. From there, then the detective will take -- and in this case, I took and I pulled out photographs that, you know, the hairs were -- the hair color, it was similar, and things like that that the computer just can't do.
>
> And I chose five other photographs to go along with Kenny Splond's photograph and told the computer to compile that. The

> computer randomly puts those pictures into -- on one sheet of paper, so to speak, in one, two, three, four, five, six pictures. And it generates that document for you.

III AA 000712-IV AA 000713. Detective Kavon further testified that prior to showing anyone a photo line-up, he reads them the following instructions:

> In a moment, I'm going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are being shown to you should not cause you to believe or guess that a guilty person has been caught.
>
> You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those that are guilty. Please keep in mind that hair styles, beards, mustaches, are easily changed. Also, photographs do not always depict the true complexion of a person. It may be lighter or darker than shown in the photo.
> You should pay no attention to any markings or numbers that may appear on the photos. Also pay no attention to whether the photos are in color or black and white or any other differences in the type or the style of the photographs.
>
> You should only study the person shown in each photograph. Please do not talk to anyone, other than police officers while viewing the photos. You must make up your own mind and not be influenced by any other witnesses, if any.
>
> When you've completed viewing the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate to any other witnesses that you have or have not made an identification. Thank you.

Id. After explaining this procedure, Detective Kavon confirmed that all three (3) victims identified Appellant with one hundred (100) percent certainty, which was rare in his twenty-five (25) year experience as a police officer. Id. This evidence sufficiently established that the photo line-up was reliable.

Even so, counsel nevertheless vigorously challenged the line-up procedure. On cross examination, counsel peppered Detective Kavon with questions about this double-blind set up and Detective Kavon testified that he did not and had not ever

used it. Id. Detective Kavon did testify that he had heard about this procedure but was not aware of any police departments that were using it. Id. Counsel then continued asking Detective Kavon numerous questions about the procedure of the lineups, all of which Detective Kavon answered to the best of his ability, before returning to questions regarding the double-blind setup. Id. When counsel did so, he asked about the purposes of the double-blind set up and Detective Kavon stated he did not know what the policy reasons supporting the double-blind set up were. Id. Counsel then rephrased and engaged in the following colloquy with Detective Kavon:

> Q Then let's go broader. You've testified that you know generally what a double-blind survey is; correct?
>
> A Correct.
>
> Q All right. And so the purpose of a double-blind survey is to stop the person who's giving the survey from advertently or inadvertently -- one of the major purposes of a double-blind survey is to keep the person who's giving the survey from inadvertently signaling the person who's taking the survey to what sort of answer they want them to give; correct?
>
> A That seems fair, yes.
>
> Q It's to create, as much as possible, an even result; correct?
>
> A Okay.
>
> Q And some police departments are using this method in their six-packs today; correct?
>
> A I don't know that
>
> Q This method was not used in this six-pack; correct?
>
> A Correct.

Q When you gave the six-pack to Mr. Echeverria, you knew who was in the number 2 slot and you knew who the suspect was that you were interested in information about; correct?

A Correct.

Q When you gave the survey to Ms. Angles, you knew who was in the number 2 spot and you knew who the suspect was that you were interested in getting information about; correct?

A The six-pack, you mean?

Q Yes.

A Yes, that's correct.

Q I'm sorry if I misspoke.

Id.

During closing argument, counsel argued that the photo lineup should be questioned because even Detective Kavon confirmed that there could be some outward influence when presenting those pictures. IV AA 000766-000767. Counsel then transitioned and focused his argument on the lack of forensic evidence linking Appellant to the crimes before returning back to the concept of double-blind setups and arguing that because that setup was not used here, the identifications should be rejected, and the jury should instead focus on the lack of forensic evidence. IV AA 000768-000770.

That counsel's argument did not exonerate Appellant does not render counsel deficient because there was overwhelming evidence of Appellant's guilt. The procedure of the photo lineup does not change the fact that all three (3) victims of three (3) different crimes, who had never met, all identified the same person:

Appellant; and that there was video surveillance evidence of Appellant's guilt. Ultimately, Appellant does not claim, let alone establish that evidence or testimony about this double-blind set up would have reasonably changed the outcome at trial. Accordingly, Appellant failed to show that any testimony by this unidentified expert would have reasonably changed the outcome at trial. Therefore, the district court did not abuse its discretion in denying this claim.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST JURY INSTRUCTIONS[1]

Appellant claims that because Appellant's identification was the critical defense, and because there were eyewitness identification issues, counsel was ineffective for failing to request an instruction regarding the reliability of any eyewitness identification because that instruction would have gone to the heart of Appellant's defense. AOB 41.

While "the defense has the right to have the jury instructed on its theory of the case ... no matter how weak or incredible that evidence may be," Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991), the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by the instructions given to the jury. Earl v. State, 111 Nev.

In Appellant's AOB, there is no Section 4.

1304, 1308, 904 P.2d 1029, 1031 (1995). Indeed, instructions cannot be worded such that they are misleading, state the law inaccurately, or duplicate other instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Specifically, Appellant cannot show that counsel was ineffective for failing to request an instruction regarding eyewitness identification. At trial, the jury received the following instructions regarding credibility of witness testimony and the State's burden of proof:

> The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests, or feelings, his opportunity to have observed the manner to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Jury Instruction No. 8, IV AA 000743.

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense or offenses.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control of person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are ln such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt.
>
> Doubt to be reasonable must be actual, not mere possibility or speculation. If you have a reasonable doubt as to the guilt of the Defendant, the Defendant is entitled to a verdict of not guilty.

Jury Instruction No. 9, Id. 000743-000744. The Nevada Supreme Court has repeatedly held that the credibility and burden of proof instructions negate the need for any specific instruction regarding eyewitness issues. United States v. Masterson, 529 F.2d 30 (9th Cir.), cert. denied, 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976); Sparks v. State, 96 Nev. 26, 604 P.2d 802 (1980); See also United States v. Sambrano, 505 F.2d 284 (9th Cir.1974). Specifically, the Nevada Supreme Court has held that "specific eyewitness identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt." Nevius v. State, 101 Nev. 238, 248–49, 699 P.2d 1053, 1060 (1985). Given this well-established law, Appellant has failed to demonstrate that the Court would have agreed to give the requested instruction or that it would have been error for the court to reject his instruction.

Lastly, Appellant claims he was entitled to an instruction on the theory of his defense, relying on the holding in Allen v. State, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981) which states in part "a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses". However, Appellant fails to assert what evidence supports the jury instruction he requests.

The Court in Allen also held that "the testimony of the defendant is not the determining factor as to what legal defenses may be shown by the evidence; such a rule would improperly remove from the jury the question of the defendant's

credibility." Id. The Court in Allen thus clarified that evidence, outside the defendant's testimony, must support a jury instruction on a theory of defense. Id. As Appellant has failed to assert any evidence to support a jury instruction on his theory of defense and failed to show how the instructions given to the jury did not sufficiently cover witness identification, Appellant's claims fail. Therefore, the District Court did not abuse its discretion in denying this claim.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ELICIT TESTIMONY NEGATING THE ELEMENTS OF POSSESSION OF STOLEN PROPERTY, FAILING TO ARGUE THAT THE STATE FAILED TO PROVE THE ELEMENTS, AND FAILING TO ARGUE IN APPEAL THE SUFFICIENCY OF THE EVIDENCE REGARDING THE POSSESSION OF THE STOLEN FIREEARM

A. Trial Counsel was Not Ineffective for Failing to Elicit Testimony Negating Elements of Possession and Failing to Argue that the State Failed to Prove the Elements

Appellant argues that counsel should have elicited testimony from Detective Kavon regarding Appellant's knowledge as to whether the firearm was stolen. AOB 43. Specifically, Appellant claims counsel should have asked Detective Kavon about the fact that Nevada allows for private party firearm sales because that would have undermined the State's theory that Appellant knew or should have known that the revolver was stolen. Id. According to Appellant, failing to do so was per se ineffective and that Appellant is entitled to a new trial. Id. Appellant's claim fails.

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). In order to establish ineffectiveness an Appellant must allege and prove what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003).

Here, Appellant has offered this Court nothing more than naked speculation as to whether asking Detective Kavon whether he knew that private firearm sales were legal in Nevada would have changed the outcome at trial. Indeed, such questioning was of no import because that would not negate Appellant's guilt as to Count 4 – Possession of Stolen Property. Appellant has not demonstrated how Appellant came to own the revolver and has not provided any information that Appellant purchased the gun privately. As such, Appellant's claim is nothing but a bare and naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Even if Appellant could make the showing required by Molina, he still cannot demonstrate ineffective assistance of counsel. He is unable to establish deficient

performance because "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call." Rhyne, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). This is especially true considering the State's argument:

> How about the firearm? Jeffrey Haberman. Folks, we're not alleging that he stole the firearm. We're not charging him with stealing the firearm. We're charging him with possession of stolen property. And what evidence do you have that he's guilty of possession of stolen property?
>
> Well, first, let's take a look at the law. Any person who possesses a stolen firearm and either knows the firearm is stolen or -- or possesses the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen is guilty of possession of stolen property.
>
> Jeffrey Haberman told you, he owns that firearm. It was stolen from him. Never seen the Defendant before. Never gave anyone permission to take his gun. Yet, that man has his gun. Now, I underlined, how do we know he either knows or possesses a firearm under such circumstances he should cause a reasonable person to know the firearm is stolen?
>
> Again, under such circumstances as should have caused a reasonable person to know a firearm is stolen. Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that checks registration or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

IV AA 000764-000765.

Based on the State's evidence, whether counsel inquired of Detective Kavon's knowledge of private gun sales would not have changed the outcome at trial. Moreover, any such questions were irrelevant because, again, Appellant has not

established or explained that Appellant acquired the gun through a legal private sale. Indeed, he cannot as his actions with the revolver suggest the opposite. Therefore, Appellant's claim fails.

B. Counsel was Not Ineffective for Failing to Argue in Appeal the Sufficiency of the Evidence Regarding the Possession of the Stolen Firearm

Appellant argues that appellate counsel should have argued that there was insufficient evidence that Appellant knew or should have known that the firearm used during all three (3) robberies was stolen. AOB 44. According to Appellant, because private parties are allowed to sell firearms in Nevada, there was no evidence that Appellant knew the revolver was stolen when he purchased it or that he purchased the revolver under circumstances that would indicate that the revolver was stolen. Id. Appellant's claim fails.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149–50 (2012). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly]

resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)).

It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319, 99 S.Ct. at 2789. Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d

at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Here, Appellant cannot show that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence as to Appellant's conviction of Count 4 – Possession of Stolen Property. Pursuant to N.R.S. 205.275:

> 1. Except as otherwise provided in NRS 501.3765, a person commits an offense involving stolen property if the person, for his or her own gain or to prevent the owner from again possessing the owner's property, buys, receives, possesses or withholds property:
>
> (a) Knowing that it is stolen property; or
>
> (b) Under such circumstances as should have caused a reasonable person to know that it is stolen property.

At trial, Jeffery Haberman testified that in October of 2013, someone broke into his home, took his entire gun safe, which included a 38-caliber Colt Revolver Appellant used in the commission of the robberies here. III AA 000538-000547. Mr. Haberman further testified that he registered the revolver, reported it stolen, and that he did not know Appellant and never gave him permission to use the revolver. Id. 91-92. During closing argument, the State argued that while Appellant was not charged with stealing Mr. Haberman's revolver in 2013, there was sufficient circumstantial evidence that Appellant reasonably should have known the revolver was stolen. Appellant did not attempt to register the revolver when he purchased it, and instead used it to commit three (3) store robberies:

> Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that checks registration

> or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

IV AA 000764-000765.

This was sufficient evidence that Appellant was guilty of Possession of Stolen Property. Appellant has not provided any evidence that Appellant legally purchased the revolver. Indeed, as the revolver was both registered and reported stolen, it is hard to imagine that there is any evidence contradicting the State's argument that Appellant reasonably should have known that the revolver was stolen. Therefore, Appellant has failed to establish that challenging his conviction as to Count 4 – Possession of Stolen Property would have been successful.

Finally, Appellant cannot show prejudice because his twenty-four (24) to sixty (60) month sentence on Count 4 was imposed concurrently with his sentences for Counts 1, 2, and 3. As Appellant was sentenced to twelve (12) to sixty (60) months as to Count 1, twenty-eight (28) to one hundred fifty-six (156) months and to Count 2, and twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the deadly weapon enhancement as to Count 3; Appellant's sentence in Count 4 was subsumed by his other sentences. Accordingly, Appellant's claim fails and the district court did not abuse its discretion in denying this claim.

CONCLUSION

Based on the above reasons, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Petition and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 15th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,588 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of November, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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