EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
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Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

June 2, 2021

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. ARNOLD ANDERSON aka ARNOLD KEITH ANDERSON
S.C. CASE: 82917
D.C. CASE: C-16-319021-1

Dear Ms. Brown:

In response to the e-mail dated June 2, 2021, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed May 27, 2021 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Amanda Hampton, Deputy Clerk

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ARNOLD ANDERSON,
#1202768

Defendant.

CASE NO: A-21-827381-W
C-16-319021-1

DEPT NO: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: APRIL 1, 2021
TIME OF HEARING: 12:30 PM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 1st day of April 2021, the Defendant not present, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, represented by and through MELANIE MARLAND, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On October 27, 2016, Arnold Anderson (hereinafter "Defendant") was charged by way of Information with the crimes of: Attempt Murder with Use of a Deadly Weapon (Category B Felony- NRS 200.010, 200.030, 193.330, 193.165- NOC 50031); Robbery with Use of a Deadly Weapon (Category B Felony- NRS 200.380, 193.165- NOC 50138); and Battery with Use of a Deadly Weapon resulting in Substantial Bodily Harm (Category Be Felony- NRS 400.281- NOC 50226).

On October 31, 2016, Defendant pled not guilty and invoked his right to a speedy trial. On November 4, 2016, Defendant filed a Pro Per Motion to "Dismiss Counsel and Represent Myself." On November 28, 2016, Defendant filed Motion to "Vacate Motion (12-6-16) to Dismiss Attorney of Record," where he stated that he changed his mind and wanted to keep his appointed counsel Ken Frizzell, Esq. On December 29, 2016, Defendant filed another Motion to "Dismiss Counsel and Appoint New Counsel Plus Pro-Per Ferretta Rights."

On January 24, 2017, the District Court held a hearing on Defendant's Motion to "Dismiss Counsel and Appoint New Counsel Plus Pro-Per Ferretta Rights," and after hearing from the parties the District Court continued the matter for a week for a status check. A week later during the status check, Defendant and Mr. Frizzell stated that they came to an understanding and that the conflict was resolved. On March 7, 2017, the District Court held a hearing on Defendant's renewed Motion to "Dismiss Counsel and Replace Counsel and Appoint Defendant Pro Per Status." At the conclusion of the hearing, the Court denied the motion.

On March 16, 2017, after conducting Faretta canvass, the Court granted Defendant's request to represent himself, finding that he knowingly, voluntary, and intelligently waived his right to be represented by counsel. On April 13, 2017, Defendant filed a Pro Per Notice of Motion and Motion to Suppress and a Pro Per Notice of Motion and Petition for Writ of Habeas Corpus. The State filed a Response to Defendant's Writ of Habeas Corpus on May 28, 2017, and an Opposition to Defendant's Motion to Suppress on May 1, 2017. The District Court denied both motions on May 4, 2017.

On May 4, 2017, Defendant filed the following motions: Defendant's Pro Per Motion and Notice of Motion to Seek Handwriting Specialist NRS 50.275; Defendant's Pro Per Notice of Motion and Motion to Compel State to Surrender Discovery; and Defendant's Pro Per Notice of Motion and Motion to reconsider Motion to Dismiss. On May 25, 2017, denied the Motion to Reconsider Motion to Dismiss, denied the Motion to Seek Handwriting Specialist, and set a status check to ensure Defendant received all the requisite discovery.

On May 25, 2017, Defendant filed the following motions: Defendant's Pro Per Notice of Motion Re Motion to Dismiss; Defendant's Pro Per Notice of Motion Re: Motion for Franks Hearing; Defendant's Pro Per Notice of Motion Re: Motion for Full Brady Discovery; Defendant's Pro Per Notice of Motion Re: Motion to Oppose State's Opposition to Dismiss; Defendant's Pro Per Motion Re: Motion to Dismiss-Based on Malicious Vindictive Prosecution; Defendant's Pro Per Notice of Motion Re: Motion to Dismiss Standby counsel Kenneth Frizzell; Defendant's Pro Per Notice of Motion Re: Motion of Alibi Witnesses; Defendant's Pro Per Notice of Motion Re: Motion to Dismiss-Case is Double Jeopardy; Defendant's Pro Per Notice of Motion Re: Motion Writ of Habeas Corpus to Test the Legality of This Arrest; Defendant's Pro Per Notice of Motion Re: Motion to Suppress; and Defendant's Pro Per Notice of Motion Re: Motion for Evidentiary Hearing. On June 13, 2017, the Court denied all of the motions except for: Defendant's Pro Per Motion for Full Brady Discovery. Defendant filed a Case Appeal Statement on June 22, 2017.

Following multiple continuances, the trial date was set and the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal/Felon on August 22, 2017. The State also filed a Notice of Motion and Motion in Limine on August 25, 2017. On August 29, 2017, Defendant filed a Pro Per "Notice of Motion and Motion to Strike and Oppode [sic] State's Motion to Seek Punishment as a Habitual Criminal Felony if a Felony Conviction Occur" on August 29, 2017. On September 14, 2017, the Nevada Supreme court Dismissed Defendant's appeal and filed an Order under Case No. 73351.

On August 28, 2017, Defendant's jury trial commenced. After a five-day jury trial, the jury returned a guilty verdict on Count 1 - Attempt Murder with Use of a Deadly Weapon, and Count 3 - Battery with Use of a Deadly Weapon resulting in Substantial Bodily Harm on September 1, 2017. On December 5, 2017, the Judgment of Conviction was filed, sentencing

Defendant to aggregate total of maximum 50 years and minimum parole eligibility after 20 years.

On December 27, 2016, Defendant filed a Notice of Appeal. On April 23, 2018, Defendant filed his opening brief. (Nevada Supreme Court Case No. 74076). On October 31, 2019, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued on March 16, 2020.

On January 5, 2021, Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). The State filed its Response on February 19, 2021. This Court denied the Petition on April 1, 2021.

STATEMENT OF FACTS

On August 23, 2016, Terry Bolden ("Bolden") was at his brother's house. Jury Trial Day 2 ("JT 2"), August 29, 2017, at 140. At or about 6:00 p.m., Defendant called Bolden for the purpose of meeting up to settle some debts. Id. at 141-2. When Defendant arrived, Bolden went outside his brother's house to meet the Defendant at his car. Id. Defendant immediately exited the vehicle and stated that Bolden owed the Defendant money. Id. at 144-5. Bolden responded that he would pay Defendant later but agreed to give Defendant gas money. Id. at 145. As Bolden pulled out money from his pocket, Defendant reached to grab Bolden's money from his hand. Id. Bolden resisted and as a result a fight ensued. Id. As they were fighting, Rhonda Robinson ("Robinson") exited Defendant's car. JT 2, at 65. Upon exiting the vehicle, Robinson testified that she saw Defendant point his gun at Bolden and shoot Bolden in the head, stomach, and three times in the leg. Id. at 70. Defendant then ran to his vehicle and fled from the scene, taking all of Bolden's money. Id.

Bolden subsequently gave a statement to the police. JT 2, at 158. In his statement, Bolden provided that the vehicle used was a black Camaro. Id. Bolden later told the Detective Gilberto Valenzuela ("Detective Valenzuela") that he remembered that Defendant said he typically picked up his mail from 3700 S. Nellis. JT 4, at 161. When Detective Valenzuela drove by the address, they saw a black Camaro. Id. After running the plate on the Camaro, Detective Valenzuela discovered the vehicle was owned by Defendant. Id. at 162. Detective Valenzuela then created a six-pack photo array and administered it to Bolden—where Bolden picked out Defendant. Id. at 163-4. At the same time, but separate from Bolden, another

detective administered a six-pack photo array to Robinson who witnessed the shooting. Id. at 165-6. Robinson also identified Defendant as the shooter. Id. at 168. Shortly after these identifications, Defendant was arrested. Id. at 168

AUTHORITY

I. DEFENDANT'S CLAIMS ARE BARRED BY THE LAW OF THE CASE

Out of the excess claims raised in this Petition, four of his arguments have already been raised on direct appeal and denied by the Nevada Supreme Court (Case No. 74076). Specifically, Defendant attempts to relitigate the following claims: (1) Defendant was denied his right to counsel when he was not appointed new counsel and instead represented himself because trial counsel, Kenneth Frizzell, Esq., was allegedly ineffective; (2) the district court erred in allowing Defendant to represent himself at trial; (3) Defendant's sentence violated the Double Jeopardy Clause; and (4) Defendant's Confrontation Clause rights were violated when the Court admitted Arndaejae Anderson's jail call through the testimony of Marco Rafalovich. Petition at 5, 10, 39, 65, 72, 74, 110, 127; see generally, Appellant's Opening Brief, April 23, 2018, 1-37. Defendant's claims are barred by the law of the case.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Here, the Nevada Supreme Court discussed and denied Defendant's claims on direct appeal. The Court found that: (1) the district court did not abuse its discretion in denying Defendant's requests for new counsel; (2) Defendant was not denied his right to counsel; (3) Defendant's sentence was not redundant; and (4) the forfeiture-by-wrongdoing exception to the Confrontation Clause allowed the

introduction of the jail phone call through Rafalovich. Nevada Supreme Court Order, November 27, 2019, at 1-13. Therefore, such claims are barred by the law of the case and are denied.

II. DEFENDANT'S CLAIMS ARE WAIVED FOR FAILING TO RAISE THEM ON APPEAL

Defendant raises a multitude of issues in the instant Petition, totaling to over 36 claims. However, Defendant had to opportunity to raise his complaints on direct appeal, which he had filed on April 23, 2016. See Nevada Supreme Court Case No. 74076. While Defendant raised only a few claims on direct appeal (all of which are reincorporated into this Petition)[1], he now attempts to relitigate the entirety of his case after failing to previously include such claims on direct appeal. Because Defendant failed to address these claims on direct appeal, they are summarily dismissed absent a showing of good cause and prejudice.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "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, 646-47, 29 P.3d 498, 523 (2001).

[1] See *supra*, Section I.

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

A defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice:

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
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> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

In the instant matter, Defendant does not even attempt to argue good cause as to why he failed to raise the 36 additional claims presented within the instant Petition on direct appeal. Thus, Defendant fails to establish good cause.

In terms of prejudice, Defendant claims that appellate counsel Sandra Stewart, Esq., ("Ms. Stewart" and/or "appellate counsel") was ineffective in her representation on direct appeal. Defendant argues that he was prejudiced by Ms. Stewart's refusal to include the entirety of his complaints on direct appeal. Defendant cannot establish prejudice because any claim that appellate counsel was ineffective is without merit. Thus, this Petition is denied for the following reasons.

III. APPELLATE COUNSEL WAS NOT INEFFECTIVE

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." Strickland, 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 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). Furthermore, 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 petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 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, "[Petitioner] *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).

Here, Defendant argues that appellate counsel failed to present all the issues he had wanted to raise on direct appeal. Petition at 114. Defendant claims that Ms. Stewart was ineffective for following reasons fails.[2]

A. Defendant's Claims of False Evidence Fail

Defendant alleges that appellate counsel was ineffective for failing raise claims of false evidence presented by the State at trial. Petition at 16-118. Defendant's claims are meritless.

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. Further, effective assistance of appellate counsel does not mean that appellate counsel must raise every non-

[2] The grounds upon which Defendant argues ineffective assistance of counsel are reiterated through the Petition as individual grounds for the dismissal of his case. To prevent redundancy, this Court has addressed the merits of Defendant's claims under its ineffective assistance of appellate counsel analysis.

frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751–54, 103 S.Ct. 3308, 3312–15, 77 L.Ed.2d 987 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F.Supp. 1170, 1176 (E.D.Mich.1994); Leaks v. United States, 841 F.Supp. 536, 541 (S.D.N.Y.1994), aff'd, 47 F.3d 1157 (2d Cir.), cert. denied, 516 U.S. 926, 116 S.Ct. 327, 133 L.Ed.2d 228 (1995). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Here, Defendant argues that appellate counsel was ineffective for not raising claims of "false evidence" regarding certain testimony at trial. Petition at 16, 37, 43, 78, 118. Specifically, Defendant takes issue with the testimonies of: (1) Laura Brook Cornell; (2) Jacob Werner; (3) Rhonda Robinson; (4) Michael Kahnke; (5) Terry Bolden; (5) Caitlin King; and (6) Gilberto Valenzuela. Id. Defendant's claims are irrelevant.

The Nevada Supreme Court has held that a criminal defendant has the right to cross-examine a witness as to bias or motives in testifying. Hughes v. State, 98 Nev. 437, 651 P.2d 102 (1982). Additionally, the broadest discretion is allowed when cross-examination is used to generally attack such credibility. Bushnell v. State, 95 Nev. 570, 599 P.2d 1038 (1979). At trial, Defendant was afforded ample opportunity and leeway to impeach those the State had called to testify at trial. Defendant was able to cross-examine each witness and impeach them regarding any inconsistent testimony he perceived at trial. Indeed, this was not a winning issue on appeal. Defendant was able to highlight misidentification, inconsistencies, and whether he thought a witness was lying out during cross-examination by showing prior-inconsistent statements. It is for the jury to decide the credibility of the evidence. McNair v. State, 108 Nev. 53, 825 P.2d 571 (1992) (it is the jury's function, not that of the court, to assess weight of the evidence and determine credibility of witnesses). Therefore, appellate counsel could not have

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been ineffective for recognizing the frivolity of these false evidence arguments on direct appeal. Thus, this claim is denied.

B. Appellate Counsel Not Ineffective for Not Arguing there was a Lack of Probable Cause at the Preliminary Hearing

Defendant contends that the State failed to present sufficient evidence at the preliminary hearing. Petition, at 25. Defendant's claim is meritless. Defendant was afforded a five-day jury trial which concluded in Defendant being found guilty of Attempt Murder With Use of a Deadly Weapon and Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm. Verdict, September 1, 2017, 1-2. Because Defendant was found guilty beyond a reasonable doubt, a more stringent standard than that required at a preliminary hearing, such claim could not win on appeal. Sheriff v. Steward, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993) (finding of "[p]robable cause to support a criminal charge '[m]ay be based on slight, even 'marginal' evidence'"). Thus, Defendant's claim that there was insufficient evidence to find probable cause at the preliminary is not only meritless, but immaterial.

Nevertheless, Defendant simultaneously claims there was insufficient evidence to find him guilty at trial. Petition at 122. Defendant's claim is belied by the record and without merit. The Nevada Supreme Court has found that in reviewing a claim of insufficient evidence, the relevant 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." State v. Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). In State v. Walker, 109 Nev. 683, 685 857 P.2d 1, 2 (1993), this Court delineated the proper standard of review to be utilized when analyzing a claim of insufficiency of evidence:

> Insufficiency of the evidence occurs where the prosecutor has not produced a minimum threshold of evidence upon which a conviction may be based. Therefore, even if the evidence presented at trial were believed by the jury, it would be insufficient to sustain a conviction, as it could not convince a reasonable and fairminded jury of guilt beyond a reasonable doubt. Id.

Furthermore, the Nevada Supreme Court has ruled it will not reverse a verdict even if the verdict is contrary to the evidence where there is substantial evidence to support it. State v. Varga, 66 Nev. 102, 117, 205 P.2d 803, 810 (1949).

Moreover, this Court has specifically stated that "[c]ircumstantial evidence alone may sustain a conviction." McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992); see also Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). The rationale behind this rule is that the trier of fact "may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her." Williams v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) citing People v. Scott, 176 Cal. App. 2nd 458, 1 Cal. Rptr. 600 (1959). In the present case, there was sufficient evidence to convict Defendant at trial.

To start, the victim, Bolden, testified at trial who committed the crime: Defendant. JT 4 at 163-4. The victim testified regarding the specific acts performed by the Defendant: (1) Defendant took money from the victim; (2) with the use of a deadly weapon, and (3) shot the victim five times. JT 2 at 141-150. Additionally, the victim testified that he was transported to the hospital and has several scars from the injuries inflicted by Defendant. JT 2 at 153-155. Inasmuch, a victim's testimony alone is sufficient to support Defendant's conviction beyond a reasonable doubt. Rosales v. State, 128 Nev. 931, 381 P.3d 657 (2012) (holding there was sufficient evidence to convict defendant for aggravated assault when the victim testified, he felt frightened, intimidated, harassed, and fearing substantial bodily harm). The word of the victim is sufficient to establish proof beyond a reasonable doubt because "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 100 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); See also, Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972), cert. denied 429 U.S. 895, 97 S.Ct. 257 (1976). Even still, Robinson, an eyewitness to the crime, also testified at trial that Defendant was the shooter and later identified Defendant in a photo array. JT 2 at 165-8. Therefore, counsel could

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not be ineffective for raising such meritless claim of insufficient evidence on appeal. As such, this claim is denied.

Confusingly, Defendant still argues that counsel was ineffective for failing to raise this claim on appeal because the victim was a "co-conspirator" in this case. Petition at 14. However, this completely misstates the trial testimony. Bolden testified that the Defendant assisted Bolden in paying for a place to live weekly. JT 2 at 140-45. Initially, Bolden believed Defendant was merely helping him; however, Bolden explained that he soon realized Defendant expected Bolden to assist in selling drugs. Id. at 145. During trial, Bolden told the jury that he in fact did not agree to sell drugs nor did he ever owe Defendant money for drugs. Id. Regardless, even if Bolden was involved in the drug sale, that alone does not make Bolden a co-conspirator in the crimes Defendant is charged with. Therefore, based on Bolden's testimony, he could not in any way be an accomplice to his *own* attempted murder and robbery. Such allegation is quite literally impossible. Therefore, Defendant's contention that Bolden 's role as a co-conspirator somehow negates his testimony is meritless. Thus, Defendant's claim that appellate counsel was ineffective for failing to bring these irrelevant claims of insufficient evidence is without merit.

C. Defendant's Claim that Appellate Counsel was Ineffective for Not Raising Claims of Unlawful Detention, Search, and Seizure Fail.

Defendant claims appellate counsel was ineffective for failing to allege that he was illegally arrested and that the search warrant in his case was illegally procured. Petition, at 30, 36, 87. Again, Defendant's claims had no reasonable probability of success on appeal. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

First, Defendant claims that he was illegally detained because he was not "arrested," there was no arrest warrant, nor any charges pending. Petition at 30-36. NRS 171.124 provides that an officer may arrest a person "when a felony or gross misdemeanor has in fact been committed, and the agent has reasonable cause for believing the person arrested to have committed it." Thomas v. Sheriff, Clark County, 85 Nev. 551, 553 (1969); See Ornelas v. U.S. 690, 695-96 (1996).

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There can be no debate that a reasonable person would believe Defendant committed the crime at hand. As noted *supra*, Bolden was shot multiple times, and both he and Robinson picked Defendant out of a six-pack photo array. JT 2 at 163-8. There simply cannot be any debate about whether Defendant's arrest was lawful. A fact Ms. Stewart informed Defendant of this fact. Exhibit B at 3. Thus, appellate counsel was if anything, effective, for not pursuing a meritless claim.

Second, Defendant contends that the vehicle stop that led to his arrest was unlawful. Petition at 30. As noted, probable cause is the question of whether a prudent person would believe a crime was committed. Thomas, 85 Nev. at 553. Given the facts known to the police at the time of Defendant's arrest, there was undoubtedly the existence of probable cause for a felony car stop. In fact, Defendant was stopped in the very vehicle that he used to flee from the crime scene. JT 4 at 162. Consequently, the police impounded the vehicle and prior to a search obtained a search warrant, following a positive identification from the victim and Robinson. JT 4 at 165-68. Thus, appellate counsel was not ineffective for informing Defendant of the issues with this claim and not raising it on appeal.

D. Appellate Counsel was Not Ineffective for Not Raising Alleged Juror Issues on Direct Appeal.

Defendant complains that appellate counsel was ineffective for failing to argue that that Defendant's right to a fair trial was violated due to juror misconduct. Petition at 42-82. Defendant raises the following claims of misconduct: (1) Juror No. 6 was biased because she recognized one of the prosecutors; (2) Juror No. 9 was biased because he allegedly "wrote the word dick in his jury note"; (3) Juror No. 4 should have been dismissed due to his alleged lack of comprehension of the English language; (4) Juror No. 3 should have been dismissed because she stated that she was "sad" when her car was stolen because it contained her grandson's pillow in it, who had recently passed away; (5) Juror No.10 should have been dismissed because she worked for a company that had been robbed previously; (6) Juror No. 1 should have been dismissed for previously possessing a stolen credit card; and (7) potential juror,

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Chatavia McGowan ("McGowan") was improperly dismissed even though she had a newborn child at home. Petition, at 51-85. Defendant's claims are waived and meritless.

During voir dire, Defendant failed to object to the confirmation of Jurors No. 1, 3, 4, 6, 9, 10. See Jury Trial Day 1, August 28, 2017, 261. Additionally, the Court concluded voir dire announcing the potential jury panel and questioned each party as to whether they had any objections to the potential jurors. Id. At no point did Defendant object, but instead conveyed that he had "no" objections to the panel. Id. The issues raised by Defendant were known to him at the time of voir dire as Defendant references the jurors' remarks as the reason that they should have been dismissed. However, a party waives any challenge to the seating of a juror on appeal where the party was aware of the basis for the challenge during voir dire. Savedzada v. State, 134 Nev. 283, 419 P.3d 184 (Nev. App, 2019) (holding where the party was aware of the basis of the challenge at the time of voir dire, had the opportunity to challenge the prospective juror on those facts, but declined to do so, and approved the juror's presence on the panel *waives any challenge on appeal*) (emphasis added). Clearly, appellate counsel could not have been ineffective for failing to raise these issues on appeal since Defendant never objected to the juror's presence on the jury panel. Thus, Defendant's claims were waived, and his claims of ineffectiveness are denied.

Further, Defendant alleges that Juror No. 9 wrote the expletive "dick" on his jury note. Defendant's presents a bare and naked claim. "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant provides this baseless argument to support the contention that Juror No. 9 "could" have been there to corrupt the jury. Defendant fails to provide any support of this claim. Therefore, appellate counsel could not be found ineffective for determining this claim unwinnable on direct appeal. Thus, this bare and naked claim is denied.

Finally, Defendant claims that potential juror McGowan was improperly dismissed from the jury panel because the Court failed to make a record as to why she was dismissed. This is not the case. The Court questioned McGowan as to whether she would be able to make

arrangements for her children if she were to be empaneled. JT 1 at 73-4. McGowan replied that she would try, but that she had not made childcare arrangements for her four year old and four month old children at that point in time. Id. The Court noted its concern for the newborn child, and Defendant did not object as to her exclusion on the jury panel. Thus, this claim is waived and denied.

E. Appellate Counsel was Not Ineffective for Failing to Raise Certain Claims Regarding Whether Trial Counsel was Ineffective.

i. Defendant was not denied his right to speedy trial

Defendant claims that appellate counsel was ineffective for not arguing that trial counsel was ineffective for waiving Defendant's right to a speedy trial. Petition, at 74. Defendant's claim is a losing one. Defendant authorized trial counsel to file a pre-trial Petition for Writ of Habeas Corpus. In filing the petition, Defendant "waive[d] his 60 day right to a trial." Petition for Writ of Habeas Corpus, December 8, 2016, 2. Such disclosure is evidenced within the petition itself and provides:

> Petitioner waives his (60) day right to a trial and further acknowledges that, if the Petition is not decided within fifteen (15) days before the date set for trial, Petitioner consents that the Court may, without notice of a hearing, continue the trial indefinitely or to a date designated by the Court, and further that if any party appeals the Court's ruling and the appeal is not determined before the dates set for trial, Petitioner consents that the date is automatically vacated and the trial postponed unless the Court otherwise orders.

Id. at 2.

Clearly, Defendant waived his right to a speedy trial in directing trial counsel to file the pre-trial petition. Thus, this issue would have been summarily denied on appeal and Ms. Stewart cannot be found ineffective for not raising this issue on appeal. As such, Defendant's claim is denied.

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IV. THE JURY INSTRUCTIONS PRESENTED WERE AN ACCURATE REPRESENTATION OF THE LAW

Defendant alleges that the jury instruction on Attempt Murder because it was "misleading." Petition, at 68. Confusingly, Defendant complains that the jury was misinformed because there is no such thing as "attempt malice." Id. Defendant simply provides a misinformed opinion on the law as his baseless argument is belied by the record because the instruction was not an incorrect statement of the law. Mann, 118 Nev. at 354, 46 P.3d at 1230. "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 319 (2008). Further, when an error has not been preserved, the Court employs plain-error review. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (explaining that failure to object to a jury instruction precludes appellate review except in circumstances amounting to plain error under NRS 178.602). Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights by causing "actual prejudice or a miscarriage of justice." Id.

Here, Defendant initially objected to the to the attempted murder instruction, but later retracted his objection once the Court clarified the definition of Attempt Murder. The following colloquy took place between the Court and Defendant:

> THE COURT: Thank you. All right. The next instruction is the attempt murder instruction, so if you'll remove that and replace it with the new one that the party's agreed upon, which adds, thus, in order to find the defendant guilty of attempt murder, you must find that the defendant had the specific intent to kill. And that's the instruction you proposed; is that correct, [Defendant]?
> THE DEFENDANT: Yes, but I was telling Mr.—Mr. Frizzell that I think attempt murder is misleading to the jury.
> …
> THE DEFENDANT: I said I objected to that one, because I think attempted murder is misleading to the jury if it's not showing what the statute is wording would attempt it is and then what murder is.
> THE COURT: Okay. We did define what an attempt is in the instruction right before, an act done with intent to commit a crime, intending, but failing, to accomplishment, is an attempt to commit

> that crime. And then the jury would be instructed on attempt murder. Any objection knowing now they'll be instructed on what attempt means, and then attempt murder?
> THE DEFENDANT: No.
> THE COURT: Okay. And we added, thus, in order to find the defendant guilty of attempt murder, you must find that the defendant has specific intent to kill. Okay.

Jury Trial Day 5, September 1, 2017, 12-13.

The Court walked Defendant through the Attempt Murder instruction, Defendant took no issue once the Court explained the meaning, and yet, now he raises this unsupported contention out of frustration with the result of his trial.

Regardless, the jury instruction for Attempt Murder is an accurate representation of the law. To be found guilty of Attempt Murder there must be the *intent* to kill a human being. See NRS 200.010, 200.030. Thus, this claim is denied.

V. THERE WAS NO PROSECUTORIAL MISCONDUCT AT TRIAL

Defendant raises multiple claims of prosecutorial misconduct at trial. Specifically, he claims: (1) there was misconduct because two prosecutors working on his case instead of just one; (2) the State failed to produce Defendant with discovery; (3) Deputy District Attorney ("DDA") Bryan Schwartz, Esq., allegedly gave misleading jury instructions[3] and presented lies to the jury; and (3) DDA Binu Palal, Esq., lied to the jury. Petition, at 46, 53, 96, 68, 101.

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). Should the Court disagree, then it is the State's position that Defendant's argument is without merit.

The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not

[3] See *supra*, Section IV, regarding the jury instructions presented at trial.

necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

First, Defendant claims it was misconduct to have two prosecutors working on his case instead of just one because he had chosen to represent himself. Petition, at 46. However, as noted by the Nevada Supreme Court in its affirmance of Defendant's direct appeal, Defendant filed three requests to substitute counsel and represent himself. Order of Affirmance, November 27, 2019, at 12. Defendant's decision does not, therefore, create an inherent unfairness for the State to engage in normal trial practice. It is standard procedure for many cases that go to trial for there to be a first and second chair attorney. Not only is this practice commonplace, but Defendant fails to address how he was prejudiced. Thus, this claim is denied.

Second, Defendant argues that the State failed to turn over discovery in his case, and that the Court denied all his discovery requests. Petition at 53. Defendant's claim is belied by the record. Mann, 118 Nev. at 354, 46 P.3d at 1230.

During Defendant's Faretta canvass, Defendant alerted the Court that he had not received complete discovery from either trial counsel or the State. In response to Defendant's concerns, the Court allowed Defendant the opportunity to file a Motion to Obtain A Full Brady Discovery And To Inspect All Evidence ("Brady Motion"). On April 13, 2017, the Court ruled on the Brady Motion as follows:

> 1. Police Report from Officer Hafen- Upon Court's inquiry, Mr. Schwartz confirmed a police report from Officer Hafen does not exist.
> 2. Officer A. Karas Report- Upon Court's inquiry, Mr. Schwartz confirmed there is no report from Officer A. Karas.
>
> Court advised Defendant the State cannot provide what does not exist.

3. Affidavit for warrant of search of the Camaro- Any search warrants will be turned over by the State, if any.
4. Affidavit and Summons for all suspects in Justice Court Case 16F14731, Department 5- Motion Off Calendar as there are no other suspects.
5. Affidavit and Summons for all suspects Case C319021-1- Motion Denied because Defendant is the only suspect in this case.
6. Arrest warrant for Arnold Anderson and all suspects in Cases 16F14731X an C319021-Motion Off Calendar as there was no arrest warrant, and the arrest occurred based on probable cause.
7. Affidavit and Summons for arrest warrant for Arnold Anderson- Motion Off Calendar as this does not exist.
8. Photo array issued by investigator Officer Valenzuela- Court NOTED a six pack of photos was produced in this case. COURT ORDERED, MOTION GRANTED as to six-pack photo line up; and State to overturn the photo line up.
9. Photo array- MOTION GRANTED as to photo line up; and State is to turn over the photo line up.
10. List of all witnesses expected to testify or have knowledge of the case- COURT ORDERED, State is to comply with NRS 174.234. Court NOTED State has already complied with the statute and turned over a witness list, and State has a continuing obligation, without Court ordering State to provide a witness list.
11. List of witnesses interviewed by Plaintiff- MOTION DENIED as State is not required to provide this.
12. All documents relating to investigation of this case—MOTION GRANTED to the extent it is required by NRS 174.235.
13. A list of former or present agents of Plaintiff who have participated who will or who will not be called as a witness- State is to comply with statutory obligations and provide Defendant with a witness list.
14. Copies of pictures of Camaro seized on 9-15-16 by Officer Valenzuela- MOTION GRANTED as to pictures taken during this search; and State is to provide these pictures.
15. Case summary for Case 16F14731-MOTION DENIED.
16. All photos involved in this case, all reports, any scientific test, copy of criminal proceedings of Arndaejae Anderson- MOTION GRANTED only to the extent it is required by statute.

Court Minutes, April 13, 2017, 1-3.

Indeed, Defendant was not precluded access to discovery as this Court afforded Defendant additional time to request the necessary documents, and further ordered the State to produce the necessary discovery pursuant to statute.[4] Therefore, Defendant's claim that the State committed prosecutorial misconduct for failing to turn over discovery is belied by the record. Thus, this claim is denied.

Further, when analyzing Defendant's claims specific to DDA Palal and Schwartz committing prosecutorial misconduct, such claims are bare and naked allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. On the contrary, it was Defendant who committed misconduct throughout the entirety of trial. Defendant objected to almost all the testimony making comments such as: "that's good acting" during victim testimony; "there's no doctor here to prove that [Bolden's] the one in the hospital" when the victim described his injuries; and refusing to comply with sustained objections during his cross-examination. JT 2, at 52, 151. Defendant exhibited outbursts throughout the entire trial and argued with the Court at every turn. Moreover, Defendant does not provide how the prosecutors' comments were so unfair that they denied him due process and/or were prejudicial. Therefore, Defendant fails to demonstrate the requisite factors to prove he was subject to unfair due process. Thus, this claim is denied.

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[4] In the same vein, Defendant additionally claims that the district court abused its discretion by precluding Defendant discovery and the ability to prepare for trial. Defendant's claim is belied by the record as this Court allowed Defendant supplemental time to receive discovery and file relevant motions. See Court Minutes, March 23, 2017, 1-3; Court Minutes, April 13, 2017, 1-3. Thus, this claim is denied. Mann, at 354, 46 P.3d at 1230.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 27th day of May, 2021

2EA 95A B58A 289D
Michelle Leavitt
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ ALEXANDER CHEN*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 19th day of May, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ARNOLD ANDERSON, #85509
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

BY */s/ L.M.*
Secretary for the District Attorney's Office

June 2, 2021

UNITED STATES OF AMERICA
DISTRICT COURT
OF THE
EIGHTH
JUDICIAL
DISTRICT
COUNTY OF CLARK
STATE OF NEVADA

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16F14731X/AC/mc/lm/GU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Arnold Anderson, Plaintiff(s) vs. Jerry Howell, Warden SDCC, Defendant(s)	CASE NO: A-21-827381-W DEPT. NO. Department 12

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.