IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA BACHARACH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82886

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for ten Category B felonies. NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUES

1. Whether the district court erred by finding that trial counsel did not render ineffective assistance by not objecting to the trial court's admonition of Nazaroff.
2. Whether the district court erred by finding that trial counsel did not render ineffective assistance by failing to object to Detective Jaeger's testimony.
3. Whether the district court erred by finding that trial counsel did not render ineffective assistance by failing to object to the prosecutor's closing argument.
4. Whether the district court erred by rejecting Appellant's arguments in his pro per petition.

STATEMENT OF THE CASE

On July 16, 2014, Joshua W. Bacharach, aka, Joshua William Bacharach, ("Appellant") was charged by way of Indictment with the following: Count 1 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010,

200.030, 193.330, 193.165); Counts 2, 4, 6, 8 and 10 – Discharge of Firearm from or within a Structure or Vehicle (Category B Felony – NRS 202.287); Counts 3, 5, 7, 9 and 11 – Assault with a Deadly Weapon (Category B Felony – NRS 200.471); Count 12 – Stop Required on Signal of Police Officer (Category B Felony – NRS 484B.550.3b); Count 13 – Resisting Public Officer with Use of a Firearm (Category C Felony – NRS 199.280); Count 14 – Possession of Firearm with Altered or Obliterated Serial Number (Category D Felony – NRS 202.277); and Counts 15 through 17 – Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360). AA I 88–93. On July 28, 2014, Appellant was arraigned and pled not guilty. AA I 95–97. An Amended Indictment was filed on November 2, 2015, making clerical corrections. AA I 109–14.

On November 2, 2015, Appellant's jury trial commenced. AA I 116. On November 5, 2015, the jury returned a verdict finding Appellant guilty of Counts 1 through 8, and 11 through 17. AA V 936, 942–43.

On December 30, 2015, Appellant was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – a maximum of 240 months with a minimum parole eligibility of 96 months, plus a consecutive term of 240 months maximum with a minimum parole eligibility of 96 months for the deadly weapon enhancement; Count 2 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 3 – a maximum of 72 months with a minimum parole

eligibility of 28 months; Count 4 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 5 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 6 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 7 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 8 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 11 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 12 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 13 – a maximum of 60 months with a minimum parole eligibility of 24 months; Count 14 – a maximum of 48 months with a minimum parole eligibility of 19 months; Count 15 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 16 – a maximum of 72 months with a minimum parole eligibility of 28 months; and Count 17 – a maximum of 72 months with a minimum parole eligibility of 28 months; all counts to run consecutive to each other; with zero days credit for time served. Appellant's aggregate total sentence being 1,884 months maximum with a minimum of 747 months. AA V 953, 960–62. The Judgment of Conviction was filed on January 8, 2016. AA V 964.

On January 26, 2016, Appellant filed a Notice of Appeal. AA V 967. On November 29, 2016, the Nevada Court of Appeals filed an Order Affirming

Defendant's Judgment of Conviction. AA V 1037. Remittitur issued on November 15, 2016. AA V 1037.

On November 8, 2017, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). AA V 1039. On December 29, 2017, the State filed a Response to Defendant's Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. Respondent's Appendix (RA) I 1. On January 10, 2018, James A. Oronoz was confirmed as counsel. AA V 1057. On March 14, 2018, the Court set a briefing schedule. AA V 1058–60.

On February 24, 2020, Appellant through counsel filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. AA V 1067. On March 27, 2020, the State filed a Response to Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing. RA I 13 On April 7, 2020, Appellant filed a Reply to State's Response to Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing. RA I 42. On April 5, 2021, the district court denied the Petition. AA V 1092, 1101.

On May 6, 2021, Appellant filed a Notice of Appeal. RA I 59.

STATEMENT OF THE FACTS

On the evening of June 26, 2014, Bacharach arrived at Eufrasia Nazaroff's home and asked to borrow her Maroon Dodge Intrepid. AA II 322, 324–25. Eufrasia and Bacharach have three children in common but were not cohabitating at that time.

AA II 323–24. Bacharach was wearing a bright yellow shirt and a white ballistic bullet-proof vest over his clothing when he left with her vehicle. AA II 362; AA IV 691.

At about 10:45 p.m., Ryan McNabb, a Police Officer with the Las Vegas Metropolitan Police Department, was at the corner of Walnut and Lake Mead when he noticed a Dodge Intrepid, occupied by a male driver, with the high beams on. AA II 384, 388, 390, 392. Officer McNabb went north on Walnut, activated his emergency lights, got behind the vehicle, and radioed dispatch that he was going to make a car stop. AA II 390–91. As he was getting ready to inform dispatch of the license plate of the vehicle, the male driver, later identified as Bacharach, reached out of the driver door and fired a gun up in the air. AA II 392–93. Officer McNabb heard the shot and saw the muzzle flash. AA II 393.

Officer McNabb, informed dispatch that Bacharach had discharged a weapon and activated his body camera. AA II 394. The vehicle accelerated right after the shot and continued north on Walnut, then turned right on Carey, running through a Stop sign. AA II 394. As soon as Officer McNabb turned on Carey, Bacharach fired two shots at the patrol car. AA II 395. Officer McNabb had the patrol car driver side window halfway open and heard a "zing" sound right by his left ear. AA II 395. Bacharach accelerated to about 70 to 80 miles an hour and passed through a solid red light at the intersection of Lamb and Carey. AA II 397. Then two more shots,

deemed to be the fourth and fifth shots, were fired by Bacharach in the direction of Officer McNabb's patrol vehicle after the intersection of Lamb and Carey. AA II 397.

The Dodge Intrepid being driven by Bacharach went over the curb at the corner of Carey and Dolly and came to a stop. AA II 398–399. Bacharach jumped out of the driver door, ran around the trunk, turned towards Officer McNabb, raised the gun at a parallel angle to the ground and fired at him. AA II 399.

Officer McNabb stopped the patrol car in front of 4585 East Carey, got out of the vehicle and saw Bacharach start to point the gun in his direction again. AA II 357; 400–01. This time Bacharach was unable to fire and seemed to be manipulating the gun as if reloading or clearing a malfunction. AA II 400. Officer McNabb fired approximately five rounds to try to stop or incapacitate Bacharach. AA II 400. Bacharach fell backwards, turned, and took off running southbound on Dolly. AA II 402. Officer McNabb followed on foot and saw Bacharach near the intersection of Dolly and El Tovar. AA II 404. As Officer McNabb went around the corner onto El Tovar, he saw a shadow go to his right across the sidewalk by a white truck. AA II 406. Officer McNabb heard sirens approaching and waited for back-up. AA II 407.

K9 Officer Ernest Morgan arrived at the Dolly and El Tovar area and performed a scan but could not locate Bacharach. AA III 480. Officer Morgan got his K9 out and went west on El Tovar when a woman exited her residence, located

at 4586 El Tovar. AA II 407; AA III 481, 483, 507. She stated an unknown male was in her backyard. AA III 507. K9 Officer Morgan entered the home and as he exited to the back yard, located Bacharach by the east side of the rear of the home. AA III 487. Bacharach was laying on the ground and refused to comply with the commands to show his hands. AA III 489. The K9, Claymore, was released and ran directly towards Bacharach and bit him in the lower part of his leg. AA III 489. Bacharach was placed into handcuffs. AA III 487–88. Officer McNabb identified Bacharach as the person he had been chasing, although he was no longer wearing what was believed to have been a white shirt. AA III 487–88.

A ballistic vest with a white cover and .45 caliber semi-automatic Colt handgun on top of it, were located underneath the white pickup truck parked in front of 4586 El Tovar. AA III 529–30, 598. Bacharach's left thumb print was identified towards the base of the Colt .45 magazine. AA IV 806. A cartridge case was located on the northbound lane of North Walnut, by a church, a second cartridge case in the eastbound travel lanes of Carey, and a third cartridge case in the north gutter just south of 4060 East Carey. AA III 547, 550, 554–55, 559. All three cartridge cases had head stamps that read "Speer 45 Auto." AA III 550, 558, 562. Those three cartridge cases were identified as having been fired from the Colt .45. AA IV 725.

Two unfired .45 caliber cartridges with head stamps of "Speer 45 Auto" were located on the ground by the maroon Dodge parked on the corner of the intersection

of Carey and Dolly. AA III 573–75. Another unfired .45 cartridge was located on the sidewalk west of Dolly with a head stamp of "Winchester 45 Auto", which was still the same caliber but different manufacturer. AA III 577–59.

Crime Scene Analysts located an AK-style rifle, wrapped in a white shirt in the back seat of the Dodge Intrepid. AA III 616. A Colt .25 caliber firearm, with an obliterated serial number, was recovered from a black bag on the front driver's side floorboard of the Dodge. AA III 618; AA IV 728. A rifle magazine was also recovered from that black bag. AA III 619. Bacharach's DNA was located on the Dodge Intrepid's steering wheel cover. AA IV 701.

SUMMARY OF THE ARGUMENT

The district court correctly exercised its discretion in denying Appellant's Petition for Writ of Habeas Corpus.

First, counsel was not ineffective for failing to object to the district court's comments. The district court, to protect Appellant's right to a fair trial, explained that there would be penalties if the uncooperative witness violated the court's order to not discuss certain topics. Even if trial counsel's choice was deficient, Appellant faced no prejudice considering the overwhelming evidence of guilt.

Second, counsel was not ineffective for failing to object to Detective Jaeger's testimony. Detective Jaeger's lay testimony relied upon his experience as an officer and common sense. His testimony did not require any specialized knowledge. Thus,

any failure to object would be futile and insufficient to prove ineffective assistance of counsel.

Third, counsel was not ineffective for failing to object to the State's closing argument. In closing argument, the State did not quantify reasonable doubt. The State only argued that the evidence presented to the jury satisfied the element of identification. Thus, any failure to object would be futile and insufficient to prove ineffective assistance of counsel.

Fourth, Appellant's claims from his pro per petition are insufficient for appellate review. Appellant solely makes conclusory assertions and fails to cite relevant authority. Thus, these claims should be dismissed.

As such, the district court properly denied Appellant's Petition for Writ of Habeas Corpus.

ARGUMENT

Appellant argues the following: (1) Counsel was ineffective for failing to object to the district court's comments; (2) Counsel was ineffective for failing to object to Detective Jaeger's testimony; and (3) Counsel was ineffective for failing to object to the State's argument regarding the definition of reasonable doubt. Appellant also includes issues raised in his pro per petition.

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).

Additionally, 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.

I. THE DISTRICT COURT PROPERLY FOUND THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY NOT OBJECTING TO THE TRIAL COURT'S ADMONITION OF NAZAROFF

Appellant complains that the Court inappropriately threatened a witness, Nazaroff, in the jury's presence and that counsel was ineffective for failing to object. However, this claim is meritless.

As a preliminary matter, Appellant has waived any allegation of judicial error by failing to raise this claim on direct appeal. NRS 34.724(a); NRS 34.810(1)(b)(2); Evans v. State, 117 Nev. 609, 646–47, 29P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Appellant cannot demonstrate good cause to ignore his default because all the facts and law necessary to raise his claim were available when he filed his direct appeal. Further, Appellant fails to demonstrate an impediment external to the defense that prevented him from raising this complaint on direct appeal. Appellant also cannot demonstrate prejudice to rebut

the bar to his judicial error claim or demonstrate ineffective assistance of counsel since his underlying complaint is meritless.

NRS 50.115(1) provides:

> The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:
>
> (a) To make the interrogation and presentation effective for the ascertainment of the truth;
> (b) To avoid needless consumption of time; and
> (c) To protect witnesses from undue harassment or embarrassment.

In the instant case, outside the presence of the jury, trial counsel alerted the court of her and the State's concern regarding Nazaroff causing a mistrial. AA II 250. Specifically, the State and trial counsel wanted to ensure that since Nazaroff refused to meet with both parties, she did not testify to inadmissible evidence in front of the jury:

> MS. THOMSON: We have a witness, Eufrasia Nazaroff. She is the mother of the Defendant's children. She obviously has knowledge about all kinds of things that she's not allowed to talk about. She declined to come meet with us for pretrial, so we have not had that conversation with her about all the things she can't talks about. And because I expect that she probably won't be what I would call cooperative, I'd ask that the Court admonish her because my admonishing her is going to not have as much effect.
> MS. NGUYEN: I would say –
> MS. THOMSON: Please.
> MS. NGUYEN: -- mostly my concerns are that have to do with actually my client's rights. I don't know what she would have to say. She has -- she hasn't been in contact

> with me and I know my investigators attempted to contact her as well. But I know that there's references at some point to Little Locos gang. I just want her to be admonished not to make reference to that, him being on probation, parole –
> THE COURT: Right. What –
> MS. NGUYEN: -- prior convicted felon, his moniker. I think there were admissions -- references to drugs or weed.
> THE COURT: What do you have her coming in for?
> MS. THOMSON: It is her car that he is driving on the night of the incident. She'll identify the vehicle, she will indicate that he was wearing the bullet-proof vest when he came to pick up the car from her. She will indicate that he had -- she had seen him with the firearms that were ultimately recovered in this case previously; that those were not firearms that she had in the vehicle and did not allow in her house.

AA II 250.

Recognizing that both parties were not able to pretrial Nazaroff, and still outside the presence of the jury, Nazaroff was brought into the courtroom. AA II 251. The Court proceeded to instruct her to answer counsel's questions and admonished her from discussing inadmissible evidence regarding the defendant including: "gang affiliation, any moniker, or nickname… drug use, probation, drug possession, parole, smoke and dope, the defendant was on probation or supervision." AA II 252–53. Further, the Court added, "[but] I can tell you I've had people violate my order and if you do you'll go to jail today and I'll have to get somebody to come get your child." AA II 252.

Appellant cites to Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351 (1972), and its progeny to support his argument that the Court acted inappropriately. However, Webb is distinguishable from the instant case. In Webb, the trial court, on its own initiative, admonished the defendant's only witness by explaining that he would not have to testify, but if he did and lied, the Court would "personally see that [his] case goes to the grand jury and [he would] be indicted for perjury." Id. at 95-96, 93 S.Ct. at 352–53. The trial court warned the witness that the likelihood of the witness being convicted in such scenario would be great based on the witness's criminal record and that the witness should know the "hazard" he was taking by testifying. Id. After defense counsel objected, defense counsel still asked the witness to take the stand at which point the trial court interrupted and stated, "[c]ounsel, you can state the facts, nobody is going to dispute it. Let him decline to testify." Id. at 96, 93 S. Ct. at 353 (internal citations omitted). The witness then decided not to testify. Id. The U.S. Supreme Court ultimately determined that the trial court's actions were inappropriate. Id. at 97–98, 93 S.Ct. at 353. In reaching this conclusion, the Court explained that the trial court's threats–specifically, "that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole"–were strong enough to cause duress to the witness regarding his voluntary choice on

whether to testify. Id. Further, the Court concluded that those specific threats ultimately drove the witness off the stand, which "deprived the [defendant] of due process of law under the Fourteenth Amendment." Id.

Here, while the Court explained to Nazaroff that she would be incarcerated if she perjured herself, the Court's threats did not reach the level of the trial court in Webb. Indeed, the Court did not show any indication that he believed Nazaroff was going to lie on the stand. The Court merely explained that if Nazaroff violated its order she would be incarcerated. Unlike the situation in Webb, such admonishment did not amount to threats which ultimately coerced Nazaroff not to testify. Further, the record does not indicate that the Court was attempting to convince Nazaroff not to testify.

Moreover, the Court's remarks in this case were within the authorized powers of NRS 50.115(1). Indeed, both trial counsel and the State alerted the Court that Nazaroff was uncooperative and that there was a legitimate concern that she might testify to inadmissible evidence in front of the jury. Contrary to Appellant's argument, the Court did not instruct Nazaroff to testify untruthfully, but instead told her that she could not bring up topics that were inadmissible evidence. Much of the Court's admonishment consisted of instructing Nazaroff not to mention matters that would be prejudicial to Petitioner, such as criminal activity and gang affiliation. Thus, to protect Appellant's rights to a fair trial, the Court appropriately admonished

Nazaroff who had proven to be an uncooperative witness to both parties. Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962) ("An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and prosecutor to see that he gets it") (*citing* State v. Haney, 222 Minn. 124, 23 N.W.2d 369). Thus, the Court did not err.

Accordingly, counsel was not ineffective for failing to object to the Court's admonishment, as any objection would have been futile. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Appellant merely speculates that the district court would have sustained any objection. Furthermore, there is no evidence to suggest that the witness would have given more favorable testimony significant enough to render a different verdict probable. Regardless, any error could not establish prejudice to waive the default or ineffective assistance of counsel because the Nevada Court of Appeals found overwhelming evidence of guilt on direct appeal. AA V 1034. Therefore, Appellant's claim should be denied.

II. THE DISTRICT COURT CORRECTLY FOUND THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO DETECTIVE JAEGER'S TESTIMONY

Appellant argues that Detective Jaeger offered inappropriate and unnoticed expert testimony regarding gunshot residue, cartridge casings, bulletproof vests, and bullet impacts.

A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. Indeed, "[t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience?" Burnside v. State, 131 Nev. 371, 383, 352 P.3d 627, 636 (2015).

Here, Detective Jaeger offered proper lay testimony based on his experience as a detective for each of the four subjects for which Appellant takes issue. First, Appellant complains that Detective Jaeger was unqualified to testify about gunshot residue. It is not expert testimony for an officer to explain their decision not to obtain certain evidence. See Robinson v. State, No. 76775, 2019 WL 6830820, at *2 (Nev. Dec. 12, 2019) (holding that a detective testifying "that he did not request a crime scene analyst because he did not believe the scene would yield fingerprints" was not expert opinion testimony). Jaeger testified that he had worked for the Las Vegas

Metropolitan Police Department (LVMPD) for seventeen years and was within the past two years appointed as a Detective for the Force Investigation Team. AA IV 753. His role in the investigation of Appellant's case was the project manager of the crime scene. AA IV 783. Accordingly, Jaeger described what he and the other investigating officers discovered during their search of the scene. AA IV 758–763. When asked whether there was an attempt to obtain gunshot residue from Appellant, he responded that there was not, as gunshot residue was not reliable. AA IV 763. Jaeger based his testimony on his seventeen years of law enforcement experience wherein he did not recall a single instance in which he had collected gunshot residue as it was his experience that it is not reliable. AA IV 763–74. Thus, Jaeger was not testifying that he received some specialized training or education that allowed him to testify, but instead was relying on his observations and experience as a detective to explain his investigation.

Second, Appellant alleges that Jaeger inappropriately testified about the characteristics and behaviors of cartridge casings. Continuing to discuss his investigation, Jaeger was asked "in [his] experience, where can the casings end up?" AA IV 767. Relying on not only his experience, but also common knowledge, he responded that "casings are really unpredictable" and proceeded to discuss what happens when a person fires a gun a particular way. AA IV 767–68. Similarly, his testimony regarding his search for casings and how they can get stuck in particular

places was based not only on common knowledge but based also on his experience as an officer. AA IV 781. Accordingly, the State did not inappropriately rely on Jaeger's testimony and argue that "common sense" dictated the trajectory of the casings. AA IV 844–45.

Third, Appellant claims that Jaeger provided expert testimony on bulletproof vests. When asked if Jaeger was familiar with the bullet proof vest that was found at the scene, he used his years of experience as a detective for LVMPD to explain the rating system for bulletproof vests. AA IV 772. Thus, Jaeger's response to the State's question here was also not specialized testimony that only an expert could provide.

Fourth, Appellant complains about Jaeger's testimony regarding bullet impacts. Indeed, Jaeger used not only common knowledge, but also his experience as an officer to use a tennis ball analogy to explain the trajectory of bullets. AA IV 775. Such testimony therefore did not require specialized knowledge.

In sum, Jaeger's testimony amounted to lay testimony based on not only his many years of experience as an officer, but also common knowledge. As such, counsel was not ineffective for failing to object to Jaeger's responses as any objection would have been futile and unnecessary. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Further, any error could not establish prejudice to waive the default or ineffective assistance of counsel since the Nevada Court of Appeals found

overwhelming evidence of guilt on direct appeal. AA V 1034. Therefore, Appellant's claims should be denied.

III. THE DISTRICT COURT CORRECTLY FOUND THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING

Appellant alleges that counsel failed to object to an inappropriate argument quantifying reasonable doubt.

In resolving claims of prosecutorial misconduct, the Nevada Supreme Court has provided a two-step analysis: (1) determining whether the comments were improper and (2) deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Indeed, the Court considers a prosecutor's comments in context, and will not lightly overturn a criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (*citing* United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-

error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986). When the misconduct is of constitutional dimension, the Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, the Court "will reverse only if the error substantially affects the jury's verdict." Id.

NRS 175.211(1) provides the definition of "reasonable doubt":

> A reasonable doubt is one based on reason. It is not mere possible doubt . . . Doubt to be reasonable must be actual, not mere possibility or speculation.

"The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1159 (1983). The Court further cautioned against an attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard, explaining that when combined with the use of a disapproved reasonable doubt instruction, this may constitute reversible error. Holmes v. State, 114 Nev. 1357, 1365–66, 972 P.2d 337, 342–43 (1998). During the State's Closing Argument, the State argued that

> If he's guilty of one, he's guilty of all in the sense of proof that it is him in identity; not saying that we have necessarily met all of the elements. We're going to discuss that separately – consider each of the charge separately. But, if we've proven beyond a reasonable doubt that he committed one of them then it must be his identity as to all of them.

AA IV 824.

Despite Appellant's argument to the contrary, the State's comment on reasonable doubt was not improper or prejudicial. Indeed, the jury was properly instructed on reasonable doubt. AA IV 812–13. It is presumed that jurors follow these instructions. Newman v. State, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013). Further, the State was not quantifying reasonable doubt, but instead was using the evidence presented to argue that the element of identification as to who committed the crimes was established. In other words, the State did not modify the standard of reasonable doubt. Because the comment was not improper, there would be no need to evaluate the second prong of the prosecutorial misconduct analysis.

Accordingly, counsel was not ineffective as any objection would have been futile. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Regardless, any error cannot establish prejudice to waive the default or ineffective assistance of counsel because the Nevada Court of Appeals found overwhelming evidence of guilt on direct appeal. AA V 1034. Therefore, Appellant's claim should be denied.

/ / /

IV. APPELLANT FAILS TO PROVIDE ANY LEGAL OR FACTUAL SUPPORT FOR THE CLAIMS RAISED IN HIS PRO PER PETITION

Appellant brings forth various arguments raised in his pro per petition. Opening Brief, at 39-40 (claims 4i-iv). However, for each claim, Appellant merely states the claim, contends he was prejudiced, and ends with a conclusory assertion that his conviction must be reversed. This is insufficient to receive appellate review. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); Randall v. Salvation Army, 100 Nev. 466, 470–71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980) (mere citation to legal encyclopedia does not fulfill the obligation to cite to relevant legal precedent); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below). Thus, given Appellant's inadequate briefing of these claims, they must be denied.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Petition.

Dated this 13th day of October, 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 page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,407 words and does not exceed 30 pages.
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 October 13, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 13, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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