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Elizabeth A. Brown
Clerk of Supreme Court

KARLA K. BUTKO, ESQ.
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Attorney for Petitioner/
Appellant

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

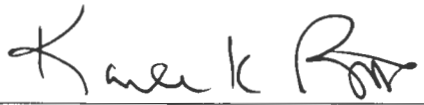
STEVEN DIXON,
Petitioner/Appellant,

vs. Case No. CV0023141
WILLIAM REUBART, Warden, &
THE STATE OF NEVADA, Dept. No. 1
Respondents.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that STEVEN DIXON, the
Petitioner/Appellant above-named, by and through his counsel,
KARLA K. BUTKO, ESQ., hereby appeals to the Supreme Court of
Nevada, from the Order Denying Petition for Writ of Habeas Corpus
(post-conviction) dated July 21, 2023, with Notice of Entry of
Order dated July 21, 2023.

DATED this 3rd day of August, 2023.



KARLA K. BUTKO
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Appellant
State Bar No. 3307

CERTIFICATE OF SERVICE


I, KARLA K. BUTKO, hereby certify that I am an employee of KARLA K. BUTKO, LTD., and that on this date I deposited for mailing, the foregoing document, addressed to the following:

STEVEN DIXON
3465 Ivan Drive
Winnemucca, NV 89445

Anthony Gordon, ESQ.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

DATED this 3 day of August, 2023.


KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document DOES NOT CONTAIN the Social Security Number of any person.

DATED this 3 day of August, 2023.


KARLA K. BUTKO

Case No. CV 0023141

Dept No. 2

The undersigned hereby affirms
this document does not contain
a Social Security Number

FILED
2023 AUG -4 PM 12:15
JAMES E. SPILAO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

STEVEN DIXON,

Petitioner/Appellant,

CASE APPEAL STATEMENT

v.

THE STATE OF NEVADA,

Respondent

Case Appeal Statement:

1. Name of appellant filing this case appeal statement:

STEVEN DIXON.

2. Identify the judge issuing the decision, judgment, or order appealed from: The

Honorable MICHAEL MONTERO.

3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited): Kevin Pasquale, Humboldt County District Attorney for the State of Nevada, by Anthony Gordon, Deputy District Attorney; Matt Stermitz, Humboldt County Public Defender, represented Mr. Dixon at the District Court proceedings for the trial stages and on direct appeal in Docket 77535; and Karla K. Butko was court appointed counsel on the post-

conviction and remains counsel on the appeal from denial of postconviction relief.

4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited): Kevin Pasquale & Anthony Gordon, Esq. Humboldt County Deputy District Attorney for the State of Nevada; Karla K. Butko, Esq., for Appellant STEVEN DIXON.

5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the party or parties whom they represent: Anthony Gordon, Humboldt County Deputy District Attorney for the State of Nevada, 501 Bridge Street, P. O. Box 909, Winnemucca, NV 89446, (775) 623-6363 for Respondent; Karla K. Butko, Esq., for Appellant STEVEN DIXON, P. O. Box 1249, Verdi, NV 89439, (775) 786-7118.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: Appellant was represented by court appointed counsel in the District Court at postconviction.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal: Appellant is represented by court appointed counsel on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: N/A.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): The Petition for Writ of Habeas Corpus (Post-Conviction) was filed July 11, 2022.

10. Brief description of case:

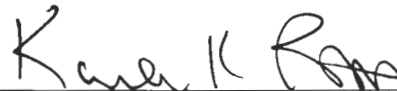
This case proceeded to jury trial on One count of Arson, Fourth Degree, a Category D

1 felony violation of NRS 205.025. The jury convicted Mr. Dixon of the single charge. He was
2 sentenced to a term in prison of thirty-four months in prison. Mr. Dixon appealed in Docket
3 77535, but the Court of Appeals for Nevada affirmed his conviction. Mr. Dixon filed a Petition
4 for Writ of Habeas Corpus (postconviction). Counsel was appointed and the petition was
5 supplemented on December 22, 2022. The State failed to respond to the supplemental pleading
6 or the initial petition and the matter was submitted for decision or the granting of an evidentiary
7 hearing on April 27, 2023. On July 21, 2023, the district court denied the postconviction action
8 and refused to grant an evidentiary hearing. This appeal follows.
9

11 11. This case was the subject of direct appeal in Docket 77535, with an Order of
12 Affirmance occurring on May 16, 2021. .

13
14 12. & 13: N/A

15 DATED this 3rd day of August, 2023.
16
17

18
19 

20 KARLA K. BUTKO
21 P. O. Box 1249
22 Verdi, NV 89439
23 (775) 786-7118
24 State Bar No. 3307
25 Attorney for Petitioner/Appellant
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X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

DATED this 3rd day of August, 2023.

Karla K. Butko

Sixth Judicial District Court - Humboldt County

Run: 08/04/2023
12:23:00

Case Summary

Page 1

Case #: CV0023141

Judge: MONTERO, MICHAEL R.

Date Filed: 07/12/2022 Department:

Case Type: HABEAS CORP/WRIT

Petitioner(s)

DIXON, STEVEN LAWRENCE

Attorney(s)

BUTKO, KARLA

Respondent(s)

REUBART, WILLIAM

Attorney(s)

No *Attorney 1* Listed

Respondent(s)

NEVADA, STATE OF

Attorney(s)

No *Attorney 1* Listed

Filings:

Date	Filing
07/11/2022	JUDGE MONTERO, MICHAEL R.: ASSIGNED
07/11/2022	NEW CASE OPENED AT DIRECTION OF COURT DUE TO PREVIOUS WRIT BEING DENIED; PETITIONER CONTINUES TO TRY TO FILE
07/11/2022	PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
07/11/2022	EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING
07/12/2022	ORDER TO RESPOND
07/20/2022	ORDER APPOINTING COUNSEL PURSUANT COUNSEL PURSUANT TO NRS 34.750(1)
08/31/2022	STIPULATION AND ORDER FOR EXTENSION OF TIME RE: PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)
09/12/2022	ORDER GRANTING EXTENSION OF TIME RE: PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
09/12/2022	EMAIL SENT TO REGARDING SERVICE OF COURT DOCUMENT - CV0023141, DIXON, STEVEN LAWRENCE VS. REUBART, WILLIAM WITH 1 ATTACHMENTS FROM DOCKETS FREETYPE-9/12/2022 - COPY TO BUTKO & GORDON
12/22/2022	SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
04/27/2023	REQUEST FOR SUBMISSION: REQUEST FOR EVIDENTIARY HEARING ON PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
05/15/2023	***SEE NOTES REGARDING STATUS OF SUBMISSION***
06/12/2023	EMAIL SENT TO BUTKO, KARLA REGARDING SERVICE OF COURT DOCUMENT - CV0023141, DIXON, STEVEN LAWRENCE VS. REUBART, WILLIAM WITH 1 ATTACHMENTS FROM DOCKETS FREETYPE-4/27/2023
07/21/2023	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)
07/21/2023	NOTICE OF ENTRY OF ORDER
08/04/2023	NOTICE OF APPEAL
08/04/2023	CASE APPEAL STATEMENT

CASE NO. CV0023141

DEPT. NO. II

FILED

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TAMI RAE SPERO
DIST. COURT CLERK

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

-o0o-

STEVEN DIXON,

Petitioner,

vs.

WILLIAM REUBART, Warden; and
THE STATE OF NEVADA,

Respondents.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS
(POSTCONVICTION)**

BEFORE THIS COURT is Petitioner, Steven Dixon, by and through his counsel of record, Karla K. Butko, Esq., and his *Petition for Writ of Habeas Corpus (Post-Conviction)* filed on July 11, 2022. Petitioner also filed an *Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing* on July 11, 2022.

On July 12, 2022, the Court entered an *Order to Respond* directing the Humboldt County District Attorney to answer or otherwise respond to the Petition within forty-five (45) days.

On July 20, 2022, the Court entered an *Order Appointing Counsel Pursuant to NRS 34.750(1)* appointing Karla K. Butko, Esq. as counsel for Petitioner in these proceedings.

On August 31, 2022, a *Stipulation and Order for Extension of Time re: Petitioner's*

1 *Supplemental Petition for Writ of Habeas Corpus (Postconviction)* was filed by the parties.
2 On September 12, 2022, the Court entered an *Order Granting Extension of Time re:*
3 *Petitioner's Supplemental Petition for Writ of Habeas Corpus (Postconviction)* allowing
4 Petitioner ninety (90) days from October 28, 2022 to file a supplemental petition. The State
5 was to file a responsive pleading within forty-five (45) days after the filing of the
6 supplemental petition.

7 On December 22, 2022, Petitioner timely filed his *Supplemental Petition for Writ of*
8 *Habeas Corpus (Postconviction)*. The State failed to file a responsive pleading.

9 On April 27, 2023, this matter was submitted to the Court for decision. Petitioner
10 requests an evidentiary hearing.

11 **APPLICABLE LAW**

12 The Sixth Amendment guarantees a criminal defendant the right to effective
13 assistance of counsel at trial. U.S. Const. Amend. VI. The U.S. Supreme Court has held that,
14 to show ineffective assistance of counsel, first, a petitioner must show that counsel's
15 performance was so deficient that it "fell below an objective standard of reasonableness" and
16 second, that but for such deficient performance, a different result would have been had at
17 trial. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984). The
18 petitioner must demonstrate the underlying facts by a preponderance of the evidence. *Means*
19 *v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

20 "The proper measure of attorney performance remains simply reasonableness under
21 prevailing professional norms." *Id.* at 688, 2065. Significantly, "Effective counsel does not
22 mean errorless counsel, but rather counsel whose assistance is '(w)ithin the range of
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competence demanded of attorneys in criminal cases.” *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). Trial counsel must “make a sufficient inquiry into the information that is pertinent to his client’s case” and “make a reasonable strategy decision on how to proceed with his client’s defense.” *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Strategic decisions are “virtually unchallengeable absent extraordinary circumstances.” *Id.* (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (citing *Strickland, supra*, at 691, 2066-67)).

If a petitioner shows deficient performance, (s)he must then establish prejudice, which requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome” *Strickland, supra*, at 694, 2068.

ANALYSIS

I. Whether trial counsel was ineffective at the jury instruction stage by failing to ensure that the jury was adequately instructed on voluntary intoxication to negate specific intent element of malice, and the lesser included offense of destruction of property under NRS 206.310.

A. Voluntary Intoxication Instruction

Petitioner first contends that trial counsel was ineffective at the jury instruction stage by failing to include a voluntary intoxication instruction that would negate the specific intent element of malice for COUNT I – FOURTH DEGREE ARSON, a Category D felony, as

1 defined by NRS 205.025.¹

2
3 Petitioner argues that

4 Every witness testified that Mr. Dixon had been drinking alcohol ...
5 [and] [h]is conduct after starting the mirror on fire was to assume it
6 would go out and he sat on the couch. He was drunk. This negates the
7 specific intent of malicious behavior. The jury should have been
8 instructed on voluntary intoxication. A new trial is warranted.
9 Supplemental Petition, *Dixon v. Reubart*, Case No. CV0023141
10 (December 22, 2022).

11 First, trial counsel's failure to include a voluntary intoxication instruction fell below
12 an objective standard of reasonableness. It is unreasonable under prevailing professional
13 norms in a criminal case to ignore the fact that Petitioner was intoxicated at the time of the
14 crime, and to not include an instruction that would negate malicious intent. Multiple
15 witnesses testified that Petitioner was intoxicated at the time of the crime. Thus, trial
16 counsel's performance was so deficient that it fell below an objective standard of
17 reasonableness, and the first prong of *Strickland* is met.

18 Nevertheless, Petitioner fails to show that but for trial counsel's deficient
19 performance, a different result would have occurred at trial. Petitioner contends that a
20 voluntary intoxication instruction would have negated the malicious intent element of fourth
21 degree arson, which would have prevented the State from meeting its burden, and produced
22 a different result at trial. Supplemental Petition, *supra*, at 9 (December 22, 2022).

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¹ **NRS 205.025 Fourth degree.**

1. A person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in NRS 205.010, 205.015 and 205.020, or who commits any act preliminary thereto or in furtherance thereof, is guilty of arson in the fourth degree which is a category D felony and shall be punished as provided in NRS 193.130, and may be further punished by a fine of not more than \$5,000.

1 However, the Court is unconvinced that a voluntary intoxication instruction would
2 have produced a different result. Significantly, Petitioner's rendition of facts in his
3 *Supplemental Petition* are limited. Supplemental Petition, *supra*, at 5-6 (December 22,
4 2022). It appears that Petitioner had been arguing with his wife, drank several alcoholic
5 beverages, set fire to a plastic mirror on the wall in his home, and then sat on the couch
6 expecting the fire to extinguish. *Id.* at 9. Petitioner contends that the damage to the mirror
7 was minor, but the mirror was not collected as evidence. *Id.* at 6. Petitioner admits that he
8 intended to harm his wife's property, but not to burn down the house. *Id.* at 8.

9 To prove fourth degree arson, the State must show beyond a reasonable doubt that
10 Petitioner willfully and maliciously attempted to set fire to, or attempted to burn or to aid,
11 counsel, or procure the burning of any of the buildings or property mentioned in NRS
12 205.010, 205.015 and 205.020, or who commits any act preliminary thereto or in furtherance
13 of. NRS 205.025.

14 Malicious intent "import[s] an evil intent, wish or design to vex, annoy o injure
15 another person. Malice may be inferred from an act done in willful disregard of the rights of
16 another, or an act done without just cause or excuse, or an act or omission of duty betraying
17 a willful disregard of social duty." NRS 193.0175.

18 Although it was deficient performance for counsel to not include a voluntary
19 intoxication instruction, the Court is unconvinced that the presence of such an instruction
20 would have produced a different result at trial. It is clear that Petitioner set fire to a mirror
21 hanging on the wall in Petitioner's home, and that Petitioner was intoxicated at the time. Had
22 trial counsel introduced an involuntary intoxication instruction, the jury would have been
23
24

1 able to consider Petitioner's intoxication in its deliberation of malicious intent.

2 NRS 193.220 states that

3 **No act committed by a person while in a state of voluntary**
4 **intoxication shall be deemed less criminal by reason of his**
5 **condition**, but whenever the actual existence of any particular purpose,
6 **the fact of his intoxication may be taken into**
7 **consideration in determining the purpose, motive or intent.**
(emphasis added).

8 A plain reading of NRS 193.220 shows that voluntary intoxication does not *negate*
9 the malicious intent element as Petitioner suggests. Supplemental Petition, *supra*, at 9
10 (December 22, 2022). Instead, the jury *may* have considered Petitioner's intoxication in
11 determining malicious intent. The jury was not required to consider it. There was evidence
12 presented showing that Petitioner was intoxicated at the time of the crime. The jury was
13 therefore fully aware of Petitioner's condition when he set fire to the mirror, and still found
14 malicious intent. Petitioner thus fails to show that the inclusion of a voluntary intoxication
15 instruction would have changed the result at trial.

16 Based on the foregoing, Petitioner fails to meet the second prong of *Strickland*, and
17 Petitioner's claim regarding voluntary intoxication must fail.

18 *B. Lesser-Included Offense of Destruction of Property*

19 Petitioner next contends that trial counsel was ineffective by failing to include a
20 lesser-included offense instruction on destruction of property under NRS 206.310, and that
21 Petitioner suffered prejudice because he could have been convicted of a misdemeanor rather
22 than a felony. Supplemental Petition, *supra*, at 9 (December 22, 2022).

23 First, the Court finds trial counsel's failure to include a lesser-included offense
24

1 instruction to fall below an objective standard of reasonableness. It is within prevailing
2 professional norms for the defense in a criminal case to include lesser-included offense
3 instructions for the jury to consider. Although effective counsel is not errorless counsel, the
4 inclusion of a lesser-included offense instruction is especially reasonable when Petitioner
5 claims that he did not possess the necessary malicious intent to burn down the house, and
6 only intended to destroy his wife's property.² Thus, trial counsel's performance fell below
7 an objective standard of reasonableness, and Petitioner meets the first prong of *Strickland*.

8 Nevertheless, Petitioner fails to show that but for trial counsel's deficient
9 performance, a different result would have occurred at trial. The Court previously found that
10 Petitioner's intoxication was known to the jury and may have been considered in its
11 deliberation regarding malicious intent. The jury rendered a verdict of guilty on fourth degree
12 arson, which requires a willful and malicious attempt to set fire to any dwelling house. Injury
13 to other property under NRS 206.310 only requires that a person willfully or malicious
14 destroy or injure any personal property of another.

15 Here, Petitioner fails to present any evidence on the damage that occurred to the house
16 or what efforts Petitioner made to extinguish the fire. *See* Supplemental Petition, *supra*, at
17 8-9 (December 22, 2022). Nor does Petitioner mention what evidence the State presented to
18 establish that Petitioner's intent to set fire to the house. *Id.* Petitioner thus fails to show the
19 underlying facts of his claim by a preponderance of the evidence, and the Court is without
20

21 ² **NRS 206.310 Injury to other property.**

22 1. Every person who shall willfully or maliciously destroy or injure any real or personal property of another, for
23 the destruction or injury of which no special punishment is otherwise specially prescribed, shall be guilty of a public
24 offense proportionate to the value of the property affected or the loss resulting from such offense.

1 sufficient evidence to determine whether the inclusion of a lesser-included offense
2 instruction would have produced a different result at trial. Petitioner thus fails to meet the
3 second prong of *Strickland*, and his ineffective assistance claim must be denied in this regard.

4 **II. Whether trial counsel was ineffective by failing to object to prior bad act**
5 **evidence and by failing to ask for a limiting instruction on the proper use of prior bad**
6 **act evidence under NRS 48.045, and whether appellate counsel was ineffective by**
7 **failing to raise the prior bad act evidence issue on appeal.**

8 *a. Failing to Object to Prior Bad Act Evidence at Trial*

9 First, Petitioner contends that trial counsel was ineffective by failing to object to the
10 following evidence: (1) that Petitioner was facing charges for physically harming his son,
11 (2) Petitioner's wife's testimony that she ran from Petitioner because of past experiences, (3)
12 that Petitioner did not buy his wife's interest in the house post-incident, (4) Petitioner's
13 extramarital affair with another woman, and (5) alleged threats made by Petitioner after the
14 incident. Supplemental Petition, *supra*, at 11 (December 22, 2022). Petitioner argues that he
15 simply lost a "popularity contest" with the jury and was convicted for his lifestyle and
16 propensity to commit the crime rather than for actually committing the crime itself. *See id.*

17 Considerably, effective counsel does not mean errorless counsel. *Jackson, supra*. In
18 order to be ineffective, trial counsel's failure to object to the prior bad act evidence listed
19 herein must fall outside the range of competence demanded of attorneys in criminal cases.
20 *Id.*

21 Here, Petitioner fails to show that trial counsel not objecting to the prior bad act
22 evidence was not a strategic decision that is virtually unchallengeable under *Doleman, supra*.
23

1 NRS 48.045(2) states that “Evidence of other crimes, wrongs or acts is not admissible to
2 prove the character of a person in order to show that the person acted in conformity therewith.

3 **It may, however, be admissible for other purposes, such as proof of motive,**
4 **opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or**
5 **accident.”** (emphasis added). It is highly plausible that the State elicited the prior bad act
6 evidence to show Petitioner’s motive, opportunity, or intent, and trial counsel’s failure to
7 object was based on knowledge of its admissibility under NRS 48.045(2).

8
9 Nevertheless, even if this Court found that trial counsel’s failure to object fell below
10 an objective standard of reasonableness, Petitioner cannot meet the second prong of
11 *Strickland*, because Petitioner cannot show that a different result would have occurred but
12 for the admission of the prior bad act evidence.

13 In *Ledbetter v. State*, the Nevada Supreme Court held that “the nature and quantity of
14 the evidence supporting the defendant’s conviction beyond the prior act evidence itself” is
15 paramount to a decision whether admittance of prior bad act evidence is prejudicial. 122
16 Nev. 252, 262 n. 16, 129 P.3d 671, 678 (2006). “Given the overall strength of the State’s
17 case against Ledbetter, we conclude that the danger that the admission of this evidence was
18 unfairly prejudicial was minimal.” *Id.* at 263, 679.

19 In this case, any prejudice resulting from admission of Petitioner’s other criminal
20 proceeding, any domestic violence, infidelity, or threats after the incident is minimal in light
21 of the nature and quantity of the evidence supporting Petitioner’s conviction. Petitioner and
22 his wife had been arguing, Petitioner became intoxicated, set a mirror aflame in the home,
23 and sat on the couch without intending to extinguish it. The evidence presented was enough
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1 for the jury to find Petitioner guilty of fourth degree arson under the elements in NRS
2 205.025.

3 Based on the foregoing, the Court finds that the prior bad act evidence was minimal
4 in light of the evidence supporting the conviction. Thus, Petitioner fails to show that the prior
5 bad act evidence was prejudicial, and that a different result would have occurred at trial.
6 Petitioner therefore fails to meet the second prong of *Strickland*, and his ineffective
7 assistance claim must fail in this regard.

8 *b. Failing to Ask for a Limiting Instruction*

9 Similar to the analysis above, Petitioner fails to show that trial counsel's failure to ask
10 for a limiting instruction was not a strategic decision that is virtually unchallengeable.
11 *Doleman, supra*. It is plausible that trial counsel believed that the prior bad act evidence was
12 admissible under NRS 48.045 as evidence of motive, opportunity, or intent, and any
13 objection or request for a limiting instruction would be futile or unnecessary. Even if this
14 Court found that trial counsel's failure to request a limiting instruction fell below an objective
15 standard of reasonableness, Petitioner cannot show that prejudice resulted because the prior
16 bad act evidence was minimal in light of the evidence supporting the conviction. *Ledbetter,*
17 *supra*. Therefore, Petitioner fails to meet the *Strickland* standard, and his ineffective
18 assistance claim must be denied in this regard.

19 *c. Appellate Counsel's Failure to Raise the Prior Bad Act Evidence Issue on Appeal*

20 Next, Petitioner claims that appellate counsel was ineffective by failing to raise the
21 improper admission of prior bad act evidence on appeal. Supplemental Petition, *supra*, at 9-
22 10 (December 22, 2022).

1 In *Kirksey v. State*, the Nevada Supreme Court held that

2
3 The constitutional right to effective assistance of counsel extends to
4 direct appeal. A claim of ineffective assistance of appellate counsel is
5 reviewed under the ‘reasonably effective assistance’ test set forth in
6 *Strickland v. Washington* ... Effective assistance of appellate counsel
7 does not mean that appellate counsel must raise every non-frivolous
8 issue. An attorney’s decision not to raise meritless issues on appeal is
9 not ineffective assistance of counsel. **To establish prejudice based
10 on the deficient assistance of appellate counsel, the defendant
11 must show that the omitted issue would have a reasonable
12 probability of success on appeal.** 112 Nev. 980, 998, 923 P.2d 1102,
13 1113-14 (1996) (emphasis added).

14 Here, the Court is uncertain what issues were raised on appeal. Petitioner does not
15 assert which issues were raised, nor does he provide a copy of the appeal. *See* Supplemental
16 Petition, *supra* (December 22, 2022). Considerably, appellate counsel may have chosen not
17 to appeal the prior bad act issue because it was meritless under the provisions of NRS
18 48.045—prior bad acts may be introduced as evidence of motive, opportunity, or intent.
19 Appellate counsel’s decision not to raise a meritless issue on appeal does not amount to
20 ineffective assistance. *Kirksey, supra*.

21 Furthermore, Petitioner fails to show that the omitted issue would have a reasonable
22 probability of success on appeal. Pursuant to NRS 178.598, “Any error, defect, irregularity
23 or variance which does not affect substantial rights shall be disregarded.”

24 In deciding whether error is harmless or prejudicial, appellate court
must consider such factors as whether the issue of innocence or guilty
is close, the quantity and character of the error, and the gravity of the
crime charged. *Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276
(1999). This court must determine that any errors are harmless beyond
a reasonable doubt. **Evidence against the defendant must be
substantial enough to convict him in an otherwise fair trial, and it
must be said without reservation that the verdict would have been
the same in the absence of error.** *Id.* (emphasis added).

Even if a court's error is a constitutional violation, the guilty conviction may still stand if the error was harmless beyond a reasonable doubt; to be harmless beyond a reasonable doubt, an error of constitutional dimension cannot have contributed to the verdict. *Guitron v. State*, 131 Nev. 215, 350 P.3d 93 (2015).

Trial error is not presumed to have prejudiced a defendant. NRS 178.598; *Phenix v. State*, 114 Nev. 116, 954 P.2d 739 (1998). Instead, a [d]efendant claiming trial error has burden to show **substantial** prejudice. *Id.* (emphasis added).

First, the issue of guilt or innocence was likely not close—Defendant had been arguing with his wife, became intoxicated, and set fire to a mirror in the home without the intent to extinguish it. This does not suggest that Defendant was innocent of willfully and malicious attempting to set fire to the home.

Next, the quantity and character of the alleged error was likely insubstantial. Petitioner's wife stating that she ran from Petitioner based on previous experiences, that she thought Petitioner had attacked her son, and that Petitioner had criminal charges for child abuse do not affect whether Petitioner willfully and maliciously attempted to set fire to the house. Notably, Petitioner was also on trial for child abuse, neglect or endangerment, for which he was acquitted. All of these statements are likely admissible character evidence under NRS 48.045(2). Petitioner's threats to his wife after-the-fact are also likely admissible under NRS 51.035(3) as opposing party statements and under NRS 48.045(2).

Moreover, Wife's statements that Petitioner was having an extramarital affair and that Petitioner did not buy her out of the home were likely admissible under NRS 48.045(2) as evidence of motive or intent. Thus, it appears that little error occurred, and the quantity and character of the error was likely insubstantial and had no effect on the verdict.

1 Lastly, the gravity of the crime charged was a category D felony, which carries a
2 minimum penalty of one (1) year and a maximum penalty of four (4) years in the Nevada
3 state prison. NRS 193.130(2)(d). The gravity of this crime is not low, but is considerably
4 less than that of a category A or B felony, which respectively carry a penalty of death or
5 imprisonment for life with or without the possibility of parole, or one (1) to twenty (20) years
6 in the Nevada state prison. NRS 193.130(2)(a)-(b).

7 Based on the foregoing, the evidence against Petitioner was likely substantial enough
8 to convict him in an otherwise fair trial, and it can likely be said without reservation that the
9 verdict would have been the same in the absence of error. Thus, the admission of the prior
10 bad act evidence at issue³ is likely harmless error. Defendant provides no evidence that the
11 prior bad acts contributed to the verdict of fourth degree arson. Defendant thus fails to show
12 substantial prejudice and any error was likely harmless.

13 Ultimately, Petitioner fails to show that the omitted prior bad acts issue would have a
14 reasonable probability of success on appeal. Appellate counsel was therefore not ineffective,
15 and Defendant's claim must fail in this regard.

16
17 **III. Whether appellate counsel was ineffective by failing to raise issues on**
18 **appeal, including the improper admission of bad act evidence, failure to instruct on**
19 **lesser-included offenses, destruction of evidence, admission of the inadmissible**
20 **evidence (the mirror), and insufficient evidence to convict.**

21
22 ³ Wife's testimony that (1) she ran from Petitioner based on previous experiences, (2) that she thought Petitioner had
23 attacked her son, (3) that Petitioner threatened her on the phone post-incident, (4) that Petitioner was having an
24 extramarital affair, (5) that Petitioner did not buy her out of the home, and (6) that Petitioner had criminal charges for
physically abusing his son. Supplemental Petition, *supra*, at 5 (December 22, 2022).

1 First, the Court has already addressed whether appellate counsel was ineffective for
2 failing to raise the admissibility of prior bad acts issue on appeal, and declines to consider it
3 here. The Court addresses the remaining claims in kind.

4 *a. Failure to Raise Lesser-Included Offense Instruction Issue on Appeal*

5 Petitioner now contends that appellate counsel was ineffective by failing to appeal the
6 lack of a lesser-included offense instruction at trial. Supplemental Petition, *supra*, at 11-12
7 (December 22, 2022). It is well-established that “Contentions unsupported by specific
8 argument or authority should be summarily rejected on appeal.” *Rhyne v. State*, 118 Nev. 1,
9 13, 38 P.3d 163, 171 (2002).

10 Here, Petitioner provides little to no argument and cites to no authority on this issue.
11 Supplemental Petition, *supra*, at 11-12 (December 22, 2022). Petitioner only states that “This
12 record has scant evidence to support the allegation that Steven acted maliciously. The record
13 may suffice for a destruction of property conviction but no value was ever proven on the
14 mirror. Appellate counsel should have attacked the insufficiency of the evidence.” *Id.* at 12.

15 Petitioner thus fails to show that the omitted lesser-included instruction issue would
16 have a reasonable probability of success on appeal, and this ineffective assistance claim must
17 be denied.

18 *b. Failure to Raise Destruction of Evidence (Mirror) Issue on Appeal*

19 Next, Petitioner contends that appellate counsel was ineffective by failing to appeal
20 the admission of a substituted mirror that was not the mirror on the wall of the house on the
21 date of the fire. Supplemental Petition, *supra*, at 12 (December 22, 2022). Petitioner claims
22 that there was no chain of custody and the admission of the mirror should have been objected
23

1 to at trial. *Id.* at 12-13.

2 Here, the Court is without sufficient evidence to conclude whether appellate counsel
3 was ineffective by failing to appeal the admission of the substituted mirror. There is no
4 attached transcript of the proceedings that would allow the Court to examine the foundation
5 laid for the mirror at trial, or whether Petitioner's purported facts are true. *See* Supplemental
6 Petition, *supra* (December 22, 2022). Thus, Petitioner fails to demonstrate the underlying
7 facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
8 33 (2004).

9 Even if this Court found that Petitioner established the underlying facts by a
10 preponderance of the evidence, Petitioner cannot show that appellate counsel was ineffective
11 by failing to raise the mirror issue on appeal. The Nevada Supreme Court has held that
12 "Appellate counsel must not raise every non-frivolous issue on appeal ... To establish
13 prejudice based on the deficient assistance of appellate counsel, the defendant must show
14 that the omitted issue would have a reasonable probability of success on appeal." *Kirksey*,
15 *supra*.

16 In this case, the introduction of the substituted mirror would likely constitute harmless
17 error because it did not substantially prejudice Petitioner. *Phenix, supra*. Petitioner contends
18 that the substituted mirror was prejudicial because the real mirror had only slight damage,
19 which would have substantiated his defense that there was no damage and no arson.
20 Supplemental Petition, *supra*, at 13 (December 22, 2022).

21 However, there is no element in NRS 205.025 for fourth degree arson that requires
22 damage to property. The State must have only shown that Petitioner willfully and maliciously
23

1 attempted to set fire to or attempted to burn a dwelling. NRS 205.025. The Court is
2 unconvinced that the introduction of a mirror with more or less damage would have affected
3 the verdict, or that the introduction of the real mirror would have produced a different result.

4 Based on the foregoing, Petitioner fails to show that the mirror issue has a reasonable
5 probability of success on appeal. Thus, Petitioner's claim for ineffective assistance of
6 counsel must be denied in this regard.

7 *c. Failure to Raise Insufficient Evidence to Convict Issue on Appeal*

8 Lastly, Petitioner contends that appellate counsel was ineffective by failing to appeal
9 the lack of evidence to convict. Supplemental Petition, *supra*, at 12 (December 22, 2022).
10 Petitioner argues that the record is devoid of evidence to support the allegation that Petitioner
11 acted maliciously pursuant to NRS 205.025. *Id.* Petitioner offers that the record only suffices
12 for a destruction of property conviction, and not fourth degree arson. *Id.*

13 Again, the Court is without sufficient evidence to conclude whether appellate counsel
14 was ineffective by failing to appeal the insufficiency of evidence. There is no attached
15 transcript of the proceedings that would allow the Court to examine the evidence presented
16 at trial. *See* Supplemental Petition, *supra* (December 22, 2022). Thus, Petitioner fails to
17 demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120
18 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

19 Even if this Court found that Petitioner established the underlying facts by a
20 preponderance of the evidence, Petitioner cannot show that appellate counsel was ineffective
21 by failing to raise the insufficiency of evidence issue on appeal. The Nevada Supreme Court
22 has held that "Appellate counsel must not raise every non-frivolous issue on appeal ... To
23

1 establish prejudice based on the deficient assistance of appellate counsel, the defendant must
2 show that the omitted issue would have a reasonable probability of success on appeal.”
3 *Kirksey, supra.*

4 Here, Petitioner fails to show a reasonable probability of success on appeal. NRS
5 205.025 provides, in relevant part, that any “person who willfully and maliciously attempts
6 to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the
7 buildings or property mentioned in NRS 205.010, 205.015 and 205.020, or who commits any
8 act preliminary thereto or in furtherance thereof, is guilty of arson in the fourth degree.”
9 Without a transcript of the trial, the Court is unable to determine whether there was sufficient
10 evidence presented at trial to convict. Supplemental Petition, *supra* (December 22, 2022).

11 Nevertheless, the known facts of this case likely constitute circumstantial evidence
12 sufficient to convict Petitioner of fourth degree arson. Petitioner had been arguing with his
13 wife, drank several alcoholic beverages, set fire to a plastic mirror on the wall in his home,
14 and sat on the couch doing nothing to extinguish the fire. Supplemental Petition, *supra*, at 5-
15 6 (December 22, 2022). Petitioner admits that he intended to harm his wife’s property. *Id.* at
16 8. The fact that Petitioner had been arguing with his wife, was intoxicated, intended to harm
17 his wife’s property, and lit a mirror on fire in the home without planning to extinguish it
18 likely constitutes sufficient evidence that Petitioner willfully and maliciously attempted to
19 set fire to or attempted to burn the home. Such evidence is sufficient to convict Petitioner of
20 fourth degree arson.

21 Based on the foregoing, Petitioner fails to show that the insufficient evidence claim
22 has reasonable probability of success on appeal. Thus, Petitioner’s claim for ineffective
23

1 assistance of counsel must fail in this regard.

2 **IV. Whether trial counsel was ineffective by failing to preclude the**
3 **admission of the mirror under *Crockett, Sorce*, and their progeny, and whether trial**
4 **counsel was ineffective by failing to object to the introduction of the mirror based on**
5 **no chain of custody.**

6 Lastly, trial counsel was not ineffective by failing to preclude the admission of the
7 mirror, nor was trial counsel ineffective by failing to object to the introduction of the mirror
8 based on a chain of custody issue.

9 To show ineffective assistance of counsel, a petitioner must show that counsel's
10 performance was so deficient that it "fell below an objective standard of reasonableness" and
11 that but for such deficient performance, a different result would have been had at trial.
12 *Strickland, supra*. The petitioner must demonstrate the underlying facts by a preponderance
13 of the evidence. *Means, supra*.

14 Here, Petitioner contends that the State lost the real mirror that Petitioner set on fire.
15 Supplemental Petition, *supra*, at 13 (December 22, 2022). Petitioner states that he told trial
16 counsel of the loss, and trial counsel failed to object, resulting in the substituted mirror being
17 admitted into evidence. *Id.* Petitioner argues that the real mirror would have bolstered his
18 defense because it only had slight damage. *Id.* Thus, Petitioner argues that the introduction
19 of the substituted mirror resulted in prejudice. *Id.*

20 Ultimately, the Court is unconvinced by Petitioner's argument. First, Petitioner fails
21 to show the underlying facts by a preponderance of the evidence—that it is more likely than
22 not that the State lost the real mirror and introduced a substituted the mirror at trial. Petitioner
23

1 has access to the chain of custody records, but failed to submit said records to the Court for
2 review. *See* Supplemental Petition, *supra*, at 13 (December 22, 2022). Nor does Petitioner
3 cite to any records showing a defect in the mirror's chain of custody. *Id.* Petitioner thus fails
4 to show that the State lost the real mirror or that the mirror introduced at trial was not the
5 real mirror. *Id.* Petitioner also fails to provide a transcript of the trial to the Court showing
6 the foundation laid for the mirror. *Id.* The Court is thus left without sufficient evidence to
7 make a determination on whether the mirror introduced at trial was substituted.

8
9 Second, Petitioner fails to show deficient performance by trial counsel. Trial
10 counsel's failure to preclude the mirror under *Crockett*⁴ or *Sorce*⁵, or to object to its
11 introduction at trial did not fall below an objective standard of reasonableness. *Strickland*,
12 *supra*. Trial counsel's assistance did not fall outside the range of competence demanded of
13 attorneys in criminal cases. *Jackson, supra*. Instead, trial counsel's decision not to the
14 challenge the integrity of the mirror likely constitutes a strategic decision that is virtually
15 unchallengeable since it was unlikely he could meet the requirements of *Crockett*—(1) bad
16 faith or connivance on behalf of the government or (2) prejudice from the loss of the real
17 mirror. *Doleman, supra*.

18 In addition, trial counsel's decision not to challenge the mirror under *Sorce* also likely
19 constituted a strategic decision that is virtually unchallengeable because trial counsel could

20
21 ⁴ “[W]hen evidence is lost as a result of inadequate government handling, a conviction may be reversed ... [T]he test for
22 reversal on the basis of lost evidence requires appellant to show either 1) bad faith or connivance on the part of the
23 government, or 2) prejudice from its loss.” *Crockett v. State*, 95 Nev. 859, 865, 603 P.2d 1078 (1979).

24 ⁵ “It is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by
placing each custodian upon the stand; it is sufficient to establish only that it is reasonably certain that no tampering or
substitution took place, and the doubt, if any, goes to the weight of the evidence.” *Sorce v. State*, 88 Nev. 350, 352-53,
497 P.2d 902, 903 (1972).

1 not establish that any tampering or substitution of the mirror took place. *Id.* Based on the
2 foregoing, Petitioner fails to show that trial counsel's performance was deficient.

3
4 Third, Petitioner fails to show prejudice because fourth degree arson does not require
5 a showing of damage, it only requires the State to show that Petitioner willfully and
6 maliciously attempted to set fire to or attempted to burn or to aid, counsel, or procure the
7 burning of any building or property. NRS 205.025. Even a mirror with slight damage could
8 meet these elements. Thus, Petitioner fails to show that but for any unprofessional error, the
9 result of the proceeding would have been different. *Strickland, supra.*

10 Based on the foregoing, Petitioner fails to show that trial counsel was ineffective by
11 failing to object to the substituted mirror. Therefore, Petitioner's ineffective assistance claim
12 must fail in this regard.

13 CONCLUSION

14 In conclusion, Petitioner fails to show that defense counsel's performance was so
15 deficient that a different result would have occurred either at trial, or that any of the omitted
16 issues on appeal have a reasonable probability of success on appeal. Thus, Petitioner fails to
17 meet the *Strickland* standard, and his postconviction petition for writ of habeas corpus must
18 be **DENIED** in its entirety.

19 **IT IS SO ORDERED.**

20 DATED this 21ST day of July, 2023.

21
22 


23 HONORABLE MICHAEL R. MONTERO
24 DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Honorable Michael R. Montero, District Court Judge, Sixth Judicial District Court and am not a party to, nor interested in, this action; and that on this 21st day of July, 2023, I caused to be served a true and correct copy of the enclosed **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)** upon the following parties:

Anthony R. Gordon, Esq.
Humboldt County Deputy District Attorney
P.O. Box 909
Winnemucca, NV 89445
Hand-delivered to Humboldt County Courthouse, DCT Box

Karla K. Butko, Esq.
P.O. Box 1249
Verdi, NV 89439
Via US Mail


TAYLOR M. STOKES, ESQ.
STAFF ATTORNEY
SIXTH JUDICIAL DISTRICT COURT

Case No. CV0023141

Dept. No. 2

FILED

2023 JUL 21 PM 12:52

TAMI RAE SPERO
DIST. COURT CLERK

M. Diaz

IN THE SIXTH JUDICIAL DISTRICT COURT OF

STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT

STEVEN DIXON,

Petitioner,

vs.

WILLIAM REUBART, Warden; and
THE STATE OF NEVADA

Respondent./

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on July 21, 2023, the Court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this Court. If you wish to appeal, you must file a Notice of Appeal with the Clerk of this Court within 33 days after the date this notice is mailed to you. This notice was mailed on July 21, 2023.

DATED July 21, 2023

TAMI RAE SPERO, CLERK OF THE COURT

(SEAL)

By

M. Diaz

Deputy Clerk

CASE NO. CV0023141

DEPT. NO. II

FILED

2023 JUL 21 AM 11:32

TAMI PAE SPERG
DIST. COURT CLERK

MD(a2)

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

-o0o-

STEVEN DIXON,

Petitioner,

vs.

WILLIAM REUBART, Warden; and
THE STATE OF NEVADA,

Respondents.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS
(POSTCONVICTION)**

BEFORE THIS COURT is Petitioner, Steven Dixon, by and through his counsel of record, Karla K. Butko, Esq., and his *Petition for Writ of Habeas Corpus (Post-Conviction)* filed on July 11, 2022. Petitioner also filed an *Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing* on July 11, 2022.

On July 12, 2022, the Court entered an *Order to Respond* directing the Humboldt County District Attorney to answer or otherwise respond to the Petition within forty-five (45) days.

On July 20, 2022, the Court entered an *Order Appointing Counsel Pursuant to NRS 34.750(1)* appointing Karla K. Butko, Esq. as counsel for Petitioner in these proceedings.

On August 31, 2022, a *Stipulation and Order for Extension of Time re: Petitioner's*

1 *Supplemental Petition for Writ of Habeas Corpus (Postconviction)* was filed by the parties.
2 On September 12, 2022, the Court entered an *Order Granting Extension of Time re:*
3 *Petitioner's Supplemental Petition for Writ of Habeas Corpus (Postconviction)* allowing
4 Petitioner ninety (90) days from October 28, 2022 to file a supplemental petition. The State
5 was to file a responsive pleading within forty-five (45) days after the filing of the
6 supplemental petition.

7 On December 22, 2022, Petitioner timely filed his *Supplemental Petition for Writ of*
8 *Habeas Corpus (Postconviction)*. The State failed to file a responsive pleading.

9 On April 27, 2023, this matter was submitted to the Court for decision. Petitioner
10 requests an evidentiary hearing.

11 APPLICABLE LAW

12 The Sixth Amendment guarantees a criminal defendant the right to effective
13 assistance of counsel at trial. U.S. Const. Amend. VI. The U.S. Supreme Court has held that,
14 to show ineffective assistance of counsel, first, a petitioner must show that counsel's
15 performance was so deficient that it "fell below an objective standard of reasonableness" and
16 second, that but for such deficient performance, a different result would have been had at
17 trial. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984). The
18 petitioner must demonstrate the underlying facts by a preponderance of the evidence. *Means*
19 *v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

20 "The proper measure of attorney performance remains simply reasonableness under
21 prevailing professional norms." *Id.* at 688, 2065. Significantly, "Effective counsel does not
22 mean errorless counsel, but rather counsel whose assistance is '(w)ithin the range of
23

competence demanded of attorneys in criminal cases.” *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). Trial counsel must “make a sufficient inquiry into the information that is pertinent to his client’s case” and “make a reasonable strategy decision on how to proceed with his client’s defense.” *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Strategic decisions are “virtually unchallengeable absent extraordinary circumstances.” *Id.* (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (citing *Strickland, supra*, at 691, 2066-67)).

If a petitioner shows deficient performance, (s)he must then establish prejudice, which requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome” *Strickland, supra*, at 694, 2068.

ANALYSIS

I. Whether trial counsel was ineffective at the jury instruction stage by failing to ensure that the jury was adequately instructed on voluntary intoxication to negate specific intent element of malice, and the lesser included offense of destruction of property under NRS 206.310.

A. Voluntary Intoxication Instruction

Petitioner first contends that trial counsel was ineffective at the jury instruction stage by failing to include a voluntary intoxication instruction that would negate the specific intent element of malice for COUNT I – FOURTH DEGREE ARSON, a Category D felony, as

1 defined by NRS 205.025.¹

2 Petitioner argues that

3 Every witness testified that Mr. Dixon had been drinking alcohol ...
4 [and] [h]is conduct after starting the mirror on fire was to assume it
5 would go out and he sat on the couch. He was drunk. This negates the
6 specific intent of malicious behavior. The jury should have been
7 instructed on voluntary intoxication. A new trial is warranted.
8 Supplemental Petition, *Dixon v. Reubart*, Case No. CV0023141
9 (December 22, 2022).

10 First, trial counsel's failure to include a voluntary intoxication instruction fell below
11 an objective standard of reasonableness. It is unreasonable under prevailing professional
12 norms in a criminal case to ignore the fact that Petitioner was intoxicated at the time of the
13 crime, and to not include an instruction that would negate malicious intent. Multiple
14 witnesses testified that Petitioner was intoxicated at the time of the crime. Thus, trial
15 counsel's performance was so deficient that it fell below an objective standard of
16 reasonableness, and the first prong of *Strickland* is met.

17 Nevertheless, Petitioner fails to show that but for trial counsel's deficient
18 performance, a different result would have occurred at trial. Petitioner contends that a
19 voluntary intoxication instruction would have negated the malicious intent element of fourth
20 degree arson, which would have prevented the State from meeting its burden, and produced
21 a different result at trial. Supplemental Petition, *supra*, at 9 (December 22, 2022).

22 ¹ NRS 205.025 Fourth degree.

23 1. A person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure
24 the burning of any of the buildings or property mentioned in NRS 205.010, 205.015 and 205.020, or who commits any
act preliminary thereto or in furtherance thereof, is guilty of arson in the fourth degree which is a category D felony and
shall be punished as provided in NRS 193.130, and may be further punished by a fine of not more than \$5,000.

1 However, the Court is unconvinced that a voluntary intoxication instruction would
2 have produced a different result. Significantly, Petitioner's rendition of facts in his
3 *Supplemental Petition* are limited. Supplemental Petition, *supra*, at 5-6 (December 22,
4 2022). It appears that Petitioner had been arguing with his wife, drank several alcoholic
5 beverages, set fire to a plastic mirror on the wall in his home, and then sat on the couch
6 expecting the fire to extinguish. *Id.* at 9. Petitioner contends that the damage to the mirror
7 was minor, but the mirror was not collected as evidence. *Id.* at 6. Petitioner admits that he
8 intended to harm his wife's property, but not to burn down the house. *Id.* at 8.

9 To prove fourth degree arson, the State must show beyond a reasonable doubt that
10 Petitioner willfully and maliciously attempted to set fire to, or attempted to burn or to aid,
11 counsel, or procure the burning of any of the buildings or property mentioned in NRS
12 205.010, 205.015 and 205.020, or who commits any act preliminary thereto or in furtherance
13 of. NRS 205.025.

14 Malicious intent "import[s] an evil intent, wish or design to vex, annoy o injure
15 another person. Malice may be inferred from an act done in willful disregard of the rights of
16 another, or an act done without just cause or excuse, or an act or omission of duty betraying
17 a willful disregard of social duty." NRS 193.0175.

18 Although it was deficient performance for counsel to not include a voluntary
19 intoxication instruction, the Court is unconvinced that the presence of such an instruction
20 would have produced a different result at trial. It is clear that Petitioner set fire to a mirror
21 hanging on the wall in Petitioner's home, and that Petitioner was intoxicated at the time. Had
22 trial counsel introduced an involuntary intoxication instruction, the jury would have been
23
24

1 able to consider Petitioner's intoxication in its deliberation of malicious intent.

2 NRS 193.220 states that

3 **No act committed by a person while in a state of voluntary**
4 **intoxication shall be deemed less criminal by reason of his**
5 **condition**, but whenever the actual existence of any particular purpose,
6 **motive or intent is a necessary element to constitute a particular species**
7 **or degree of crime, the fact of his intoxication may be taken into**
8 **consideration in determining the purpose, motive or intent.**
9 (emphasis added).

10 A plain reading of NRS 193.220 shows that voluntary intoxication does not *negate*
11 the malicious intent element as Petitioner suggests. Supplemental Petition, *supra*, at 9
12 (December 22, 2022). Instead, the jury *may* have considered Petitioner's intoxication in
13 determining malicious intent. The jury was not required to consider it. There was evidence
14 presented showing that Petitioner was intoxicated at the time of the crime. The jury was
15 therefore fully aware of Petitioner's condition when he set fire to the mirror, and still found
16 malicious intent. Petitioner thus fails to show that the inclusion of a voluntary intoxication
17 instruction would have changed the result at trial.

18 Based on the foregoing, Petitioner fails to meet the second prong of *Strickland*, and
19 Petitioner's claim regarding voluntary intoxication must fail.

20 *B. Lesser-Included Offense of Destruction of Property*

21 Petitioner next contends that trial counsel was ineffective by failing to include a
22 lesser-included offense instruction on destruction of property under NRS 206.310, and that
23 Petitioner suffered prejudice because he could have been convicted of a misdemeanor rather
24 than a felony. Supplemental Petition, *supra*, at 9 (December 22, 2022).

First, the Court finds trial counsel's failure to include a lesser-included offense

1 instruction to fall below an objective standard of reasonableness. It is within prevailing
2 professional norms for the defense in a criminal case to include lesser-included offense
3 instructions for the jury to consider. Although effective counsel is not errorless counsel, the
4 inclusion of a lesser-included offense instruction is especially reasonable when Petitioner
5 claims that he did not possess the necessary malicious intent to burn down the house, and
6 only intended to destroy his wife's property.² Thus, trial counsel's performance fell below
7 an objective standard of reasonableness, and Petitioner meets the first prong of *Strickland*.

8 Nevertheless, Petitioner fails to show that but for trial counsel's deficient
9 performance, a different result would have occurred at trial. The Court previously found that
10 Petitioner's intoxication was known to the jury and may have been considered in its
11 deliberation regarding malicious intent. The jury rendered a verdict of guilty on fourth degree
12 arson, which requires a willful and malicious attempt to set fire to any dwelling house. Injury
13 to other property under NRS 206.310 only requires that a person willfully or malicious
14 destroy or injure any personal property of another.

15 Here, Petitioner fails to present any evidence on the damage that occurred to the house
16 or what efforts Petitioner made to extinguish the fire. *See* Supplemental Petition, *supra*, at
17 8-9 (December 22, 2022). Nor does Petitioner mention what evidence the State presented to
18 establish that Petitioner's intent to set fire to the house. *Id.* Petitioner thus fails to show the
19 underlying facts of his claim by a preponderance of the evidence, and the Court is without
20

21 ² NRS 206.310 Injury to other property.

22 1. Every person who shall willfully or maliciously destroy or injure any real or personal property of another, for
23 the destruction or injury of which no special punishment is otherwise specially prescribed, shall be guilty of a public
24 offense proportionate to the value of the property affected or the loss resulting from such offense.

1 sufficient evidence to determine whether the inclusion of a lesser-included offense
2 instruction would have produced a different result at trial. Petitioner thus fails to meet the
3 second prong of *Strickland*, and his ineffective assistance claim must be denied in this regard.

4 **II. Whether trial counsel was ineffective by failing to object to prior bad act**
5 **evidence and by failing to ask for a limiting instruction on the proper use of prior bad**
6 **act evidence under NRS 48.045, and whether appellate counsel was ineffective by**
7 **failing to raise the prior bad act evidence issue on appeal.**

8 *a. Failing to Object to Prior Bad Act Evidence at Trial*

9 First, Petitioner contends that trial counsel was ineffective by failing to object to the
10 following evidence: (1) that Petitioner was facing charges for physically harming his son,
11 (2) Petitioner's wife's testimony that she ran from Petitioner because of past experiences, (3)
12 that Petitioner did not buy his wife's interest in the house post-incident, (4) Petitioner's
13 extramarital affair with another woman, and (5) alleged threats made by Petitioner after the
14 incident. Supplemental Petition, *supra*, at 11 (December 22, 2022). Petitioner argues that he
15 simply lost a "popularity contest" with the jury and was convicted for his lifestyle and
16 propensity to commit the crime rather than for actually committing the crime itself. *See id.*

17 Considerably, effective counsel does not mean errorless counsel. *Jackson, supra*. In
18 order to be ineffective, trial counsel's failure to object to the prior bad act evidence listed
19 herein must fall outside the range of competence demanded of attorneys in criminal cases.
20 *Id.*

21 Here, Petitioner fails to show that trial counsel not objecting to the prior bad act
22 evidence was not a strategic decision that is virtually unchallengeable under *Doleman, supra*.
23

1 NRS 48.045(2) states that "Evidence of other crimes, wrongs or acts is not admissible to
2 prove the character of a person in order to show that the person acted in conformity therewith.

3 **It may, however, be admissible for other purposes, such as proof of motive,**
4 **opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or**
5 **accident."** (emphasis added). It is highly plausible that the State elicited the prior bad act
6 evidence to show Petitioner's motive, opportunity, or intent, and trial counsel's failure to
7 object was based on knowledge of its admissibility under NRS 48.045(2).

8 Nevertheless, even if this Court found that trial counsel's failure to object fell below
9 an objective standard of reasonableness, Petitioner cannot meet the second prong of
10 *Strickland*, because Petitioner cannot show that a different result would have occurred but
11 for the admission of the prior bad act evidence.

12 In *Ledbetter v. State*, the Nevada Supreme Court held that "the nature and quantity of
13 the evidence supporting the defendant's conviction beyond the prior act evidence itself" is
14 paramount to a decision whether admittance of prior bad act evidence is prejudicial. 122
15 Nev. 252, 262 n. 16, 129 P.3d 671, 678 (2006). "Given the overall strength of the State's
16 case against Ledbetter, we conclude that the danger that the admission of this evidence was
17 unfairly prejudicial was minimal." *Id.* at 263, 679.

18 In this case, any prejudice resulting from admission of Petitioner's other criminal
19 proceeding, any domestic violence, infidelity, or threats after the incident is minimal in light
20 of the nature and quantity of the evidence supporting Petitioner's conviction. Petitioner and
21 his wife had been arguing, Petitioner became intoxicated, set a mirror aflame in the home,
22 and sat on the couch without intending to extinguish it. The evidence presented was enough
23
24

1 for the jury to find Petitioner guilty of fourth degree arson under the elements in NRS
2 205.025.

3 Based on the foregoing, the Court finds that the prior bad act evidence was minimal
4 in light of the evidence supporting the conviction. Thus, Petitioner fails to show that the prior
5 bad act evidence was prejudicial, and that a different result would have occurred at trial.
6 Petitioner therefore fails to meet the second prong of *Strickland*, and his ineffective
7 assistance claim must fail in this regard.

8 *b. Failing to Ask for a Limiting Instruction*

9 Similar to the analysis above, Petitioner fails to show that trial counsel's failure to ask
10 for a limiting instruction was not a strategic decision that is virtually unchallengeable.
11 *Doleman, supra*. It is plausible that trial counsel believed that the prior bad act evidence was
12 admissible under NRS 48.045 as evidence of motive, opportunity, or intent, and any
13 objection or request for a limiting instruction would be futile or unnecessary. Even if this
14 Court found that trial counsel's failure to request a limiting instruction fell below an objective
15 standard of reasonableness, Petitioner cannot show that prejudice resulted because the prior
16 bad act evidence was minimal in light of the evidence supporting the conviction. *Ledbetter,*
17 *supra*. Therefore, Petitioner fails to meet the *Strickland* standard, and his ineffective
18 assistance claim must be denied in this regard.

19 *c. Appellate Counsel's Failure to Raise the Prior Bad Act Evidence Issue on Appeal*

20 Next, Petitioner claims that appellate counsel was ineffective by failing to raise the
21 improper admission of prior bad act evidence on appeal. Supplemental Petition, *supra*, at 9-
22 10 (December 22, 2022).

1 In *Kirksey v. State*, the Nevada Supreme Court held that

2 The constitutional right to effective assistance of counsel extends to
3 direct appeal. A claim of ineffective assistance of appellate counsel is
4 reviewed under the ‘reasonably effective assistance’ test set forth in
5 *Strickland v. Washington* ... Effective assistance of appellate counsel
6 does not mean that appellate counsel must raise every non-frivolous
7 issue. An attorney’s decision not to raise meritless issues on appeal is
8 not ineffective assistance of counsel. **To establish prejudice based
9 on the deficient assistance of appellate counsel, the defendant
10 must show that the omitted issue would have a reasonable
11 probability of success on appeal.** 112 Nev. 980, 998, 923 P.2d 1102,
12 1113-14 (1996) (emphasis added).

13 Here, the Court is uncertain what issues were raised on appeal. Petitioner does not
14 assert which issues were raised, nor does he provide a copy of the appeal. *See* Supplemental
15 Petition, *supra* (December 22, 2022). Considerably, appellate counsel may have chosen not
16 to appeal the prior bad act issue because it was meritless under the provisions of NRS
17 48.045—prior bad acts may be introduced as evidence of motive, opportunity, or intent.
18 Appellate counsel’s decision not to raise a meritless issue on appeal does not amount to
19 ineffective assistance. *Kirksey, supra*.

20 Furthermore, Petitioner fails to show that the omitted issue would have a reasonable
21 probability of success on appeal. Pursuant to NRS 178.598, “Any error, defect, irregularity
22 or variance which does not affect substantial rights shall be disregarded.”

23 In deciding whether error is harmless or prejudicial, appellate court
24 must consider such factors as whether the issue of innocence or guilty
is close, the quantity and character of the error, and the gravity of the
crime charged. *Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276
(1999). This court must determine that any errors are harmless beyond
a reasonable doubt. **Evidence against the defendant must be
substantial enough to convict him in an otherwise fair trial, and it
must be said without reservation that the verdict would have been
the same in the absence of error.** *Id.* (emphasis added).

1
2 Even if a court's error is a constitutional violation, the guilty conviction
3 may still stand if the error was harmless beyond a reasonable doubt; to
4 be harmless beyond a reasonable doubt, an error of constitutional
dimension cannot have contributed to the verdict. *Guitron v. State*, 131
Nev. 215, 350 P.3d 93 (2015).

5 Trial error is not presumed to have prejudiced a defendant. NRS
6 178.598; *Phenix v. State*, 114 Nev. 116, 954 P.2d 739 (1998). Instead,
a [d]efendant claiming trial error has burden to show **substantial**
prejudice. *Id.* (emphasis added).

7 First, the issue of guilt or innocence was likely not close—Defendant had been
8 arguing with his wife, became intoxicated, and set fire to a mirror in the home without the
9 intent to extinguish it. This does not suggest that Defendant was innocent of willfully and
10 malicious attempting to set fire to the home.

11 Next, the quantity and character of the alleged error was likely insubstantial.
12 Petitioner's wife stating that she ran from Petitioner based on previous experiences, that she
13 thought Petitioner had attacked her son, and that Petitioner had criminal charges for child
14 abuse do not affect whether Petitioner willfully and maliciously attempted to set fire to the
15 house. Notably, Petitioner was also on trial for child abuse, neglect or endangerment, for
16 which he was acquitted. All of these statements are likely admissible character evidence
17 under NRS 48.045(2). Petitioner's threats to his wife after-the-fact are also likely admissible
18 under NRS 51.035(3) as opposing party statements and under NRS 48.045(2).

19 Moreover, Wife's statements that Petitioner was having an extramarital affair and that
20 Petitioner did not buy her out of the home were likely admissible under NRS 48.045(2) as
21 evidence of motive or intent. Thus, it appears that little error occurred, and the quantity and
22 character of the error was likely insubstantial and had no effect on the verdict.
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Lastly, the gravity of the crime charged was a category D felony, which carries a minimum penalty of one (1) year and a maximum penalty of four (4) years in the Nevada state prison. NRS 193.130(2)(d). The gravity of this crime is not low, but is considerably less than that of a category A or B felony, which respectively carry a penalty of death or imprisonment for life with or without the possibility of parole, or one (1) to twenty (20) years in the Nevada state prison. NRS 193.130(2)(a)-(b).

Based on the foregoing, the evidence against Petitioner was likely substantial enough to convict him in an otherwise fair trial, and it can likely be said without reservation that the verdict would have been the same in the absence of error. Thus, the admission of the prior bad act evidence at issue³ is likely harmless error. Defendant provides no evidence that the prior bad acts contributed to the verdict of fourth degree arson. Defendant thus fails to show substantial prejudice and any error was likely harmless.

Ultimately, Petitioner fails to show that the omitted prior bad acts issue would have a reasonable probability of success on appeal. Appellate counsel was therefore not ineffective, and Defendant's claim must fail in this regard.

III. Whether appellate counsel was ineffective by failing to raise issues on appeal, including the improper admission of bad act evidence, failure to instruct on lesser-included offenses, destruction of evidence, admission of the inadmissible evidence (the mirror), and insufficient evidence to convict.

³ Wife's testimony that (1) she ran from Petitioner based on previous experiences, (2) that she thought Petitioner had attacked her son, (3) that Petitioner threatened her on the phone post-incident, (4) that Petitioner was having an extramarital affair, (5) that Petitioner did not buy her out of the home, and (6) that Petitioner had criminal charges for physically abusing his son. Supplemental Petition, *supra*, at 5 (December 22, 2022).

1 First, the Court has already addressed whether appellate counsel was ineffective for
2 failing to raise the admissibility of prior bad acts issue on appeal, and declines to consider it
3 here. The Court addresses the remaining claims in kind.

4 *a. Failure to Raise Lesser-Included Offense Instruction Issue on Appeal*

5 Petitioner now contends that appellate counsel was ineffective by failing to appeal the
6 lack of a lesser-included offense instruction at trial. Supplemental Petition, *supra*, at 11-12
7 (December 22, 2022). It is well-established that “Contentions unsupported by specific
8 argument or authority should be summarily rejected on appeal.” *Rhyne v. State*, 118 Nev. 1,
9 13, 38 P.3d 163, 171 (2002).

10 Here, Petitioner provides little to no argument and cites to no authority on this issue.
11 Supplemental Petition, *supra*, at 11-12 (December 22, 2022). Petitioner only states that “This
12 record has scant evidence to support the allegation that Steven acted maliciously. The record
13 may suffice for a destruction of property conviction but no value was ever proven on the
14 mirror. Appellate counsel should have attacked the insufficiency of the evidence.” *Id.* at 12.

15 Petitioner thus fails to show that the omitted lesser-included instruction issue would
16 have a reasonable probability of success on appeal, and this ineffective assistance claim must
17 be denied.

18 *b. Failure to Raise Destruction of Evidence (Mirror) Issue on Appeal*

19 Next, Petitioner contends that appellate counsel was ineffective by failing to appeal
20 the admission of a substituted mirror that was not the mirror on the wall of the house on the
21 date of the fire. Supplemental Petition, *supra*, at 12 (December 22, 2022). Petitioner claims
22 that there was no chain of custody and the admission of the mirror should have been objected
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1 to at trial. *Id.* at 12-13.

2 Here, the Court is without sufficient evidence to conclude whether appellate counsel
3 was ineffective by failing to appeal the admission of the substituted mirror. There is no
4 attached transcript of the proceedings that would allow the Court to examine the foundation
5 laid for the mirror at trial, or whether Petitioner's purported facts are true. *See* Supplemental
6 Petition, *supra* (December 22, 2022). Thus, Petitioner fails to demonstrate the underlying
7 facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
8 33 (2004).

9 Even if this Court found that Petitioner established the underlying facts by a
10 preponderance of the evidence, Petitioner cannot show that appellate counsel was ineffective
11 by failing to raise the mirror issue on appeal. The Nevada Supreme Court has held that
12 "Appellate counsel must not raise every non-frivolous issue on appeal ... To establish
13 prejudice based on the deficient assistance of appellate counsel, the defendant must show
14 that the omitted issue would have a reasonable probability of success on appeal." *Kirksey*,
15 *supra*.

16 In this case, the introduction of the substituted mirror would likely constitute harmless
17 error because it did not substantially prejudice Petitioner. *Phenix, supra*. Petitioner contends
18 that the substituted mirror was prejudicial because the real mirror had only slight damage,
19 which would have substantiated his defense that there was no damage and no arson.
20 Supplemental Petition, *supra*, at 13 (December 22, 2022).

21 However, there is no element in NRS 205.025 for fourth degree arson that requires
22 damage to property. The State must have only shown that Petitioner willfully and maliciously
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1 attempted to set fire to or attempted to burn a dwelling. NRS 205.025. The Court is
2 unconvinced that the introduction of a mirror with more or less damage would have affected
3 the verdict, or that the introduction of the real mirror would have produced a different result.

4 Based on the foregoing, Petitioner fails to show that the mirror issue has a reasonable
5 probability of success on appeal. Thus, Petitioner's claim for ineffective assistance of
6 counsel must be denied in this regard.

7 *c. Failure to Raise Insufficient Evidence to Convict Issue on Appeal*

8 Lastly, Petitioner contends that appellate counsel was ineffective by failing to appeal
9 the lack of evidence to convict. Supplemental Petition, *supra*, at 12 (December 22, 2022).
10 Petitioner argues that the record is devoid of evidence to support the allegation that Petitioner
11 acted maliciously pursuant to NRS 205.025. *Id.* Petitioner offers that the record only suffices
12 for a destruction of property conviction, and not fourth degree arson. *Id.*

13 Again, the Court is without sufficient evidence to conclude whether appellate counsel
14 was ineffective by failing to appeal the insufficiency of evidence. There is no attached
15 transcript of the proceedings that would allow the Court to examine the evidence presented
16 at trial. *See* Supplemental Petition, *supra* (December 22, 2022). Thus, Petitioner fails to
17 demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120
18 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

19 Even if this Court found that Petitioner established the underlying facts by a
20 preponderance of the evidence, Petitioner cannot show that appellate counsel was ineffective
21 by failing to raise the insufficiency of evidence issue on appeal. The Nevada Supreme Court
22 has held that "Appellate counsel must not raise every non-frivolous issue on appeal ... To
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1 establish prejudice based on the deficient assistance of appellate counsel, the defendant must
2 show that the omitted issue would have a reasonable probability of success on appeal.”

3 *Kirksey, supra.*

4 Here, Petitioner fails to show a reasonable probability of success on appeal. NRS
5 205.025 provides, in relevant part, that any “person who willfully and maliciously attempts
6 to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the
7 buildings or property mentioned in NRS 205.010, 205.015 and 205.020, or who commits any
8 act preliminary thereto or in furtherance thereof, is guilty of arson in the fourth degree.”
9 Without a transcript of the trial, the Court is unable to determine whether there was sufficient
10 evidence presented at trial to convict. Supplemental Petition, *supra* (December 22, 2022).

11 Nevertheless, the known facts of this case likely constitute circumstantial evidence
12 sufficient to convict Petitioner of fourth degree arson. Petitioner had been arguing with his
13 wife, drank several alcoholic beverages, set fire to a plastic mirror on the wall in his home,
14 and sat on the couch doing nothing to extinguish the fire. Supplemental Petition, *supra*, at 5-
15 6 (December 22, 2022). Petitioner admits that he intended to harm his wife’s property. *Id.* at
16 8. The fact that Petitioner had been arguing with his wife, was intoxicated, intended to harm
17 his wife’s property, and lit a mirror on fire in the home without planning to extinguish it
18 likely constitutes sufficient evidence that Petitioner willfully and maliciously attempted to
19 set fire to or attempted to burn the home. Such evidence is sufficient to convict Petitioner of
20 fourth degree arson.

21 Based on the foregoing, Petitioner fails to show that the insufficient evidence claim
22 has reasonable probability of success on appeal. Thus, Petitioner’s claim for ineffective
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1 assistance of counsel must fail in this regard.

2 **IV. Whether trial counsel was ineffective by failing to preclude the**
3 **admission of the mirror under *Crockett, Sorce*, and their progeny, and whether trial**
4 **counsel was ineffective by failing to object to the introduction of the mirror based on**
5 **no chain of custody.**

6 Lastly, trial counsel was not ineffective by failing to preclude the admission of the
7 mirror, nor was trial counsel ineffective by failing to object to the introduction of the mirror
8 based on a chain of custody issue.

9 To show ineffective assistance of counsel, a petitioner must show that counsel's
10 performance was so deficient that it "fell below an objective standard of reasonableness" and
11 that but for such deficient performance, a different result would have been had at trial.
12 *Strickland, supra*. The petitioner must demonstrate the underlying facts by a preponderance
13 of the evidence. *Means, supra*.

14 Here, Petitioner contends that the State lost the real mirror that Petitioner set on fire.
15 Supplemental Petition, *supra*, at 13 (December 22, 2022). Petitioner states that he told trial
16 counsel of the loss, and trial counsel failed to object, resulting in the substituted mirror being
17 admitted into evidence. *Id.* Petitioner argues that the real mirror would have bolstered his
18 defense because it only had slight damage. *Id.* Thus, Petitioner argues that the introduction
19 of the substituted mirror resulted in prejudice. *Id.*

20 Ultimately, the Court is unconvinced by Petitioner's argument. First, Petitioner fails
21 to show the underlying facts by a preponderance of the evidence—that it is more likely than
22 not that the State lost the real mirror and introduced a substituted the mirror at trial. Petitioner
23

1 has access to the chain of custody records, but failed to submit said records to the Court for
2 review. *See* Supplemental Petition, *supra*, at 13 (December 22, 2022). Nor does Petitioner
3 cite to any records showing a defect in the mirror's chain of custody. *Id.* Petitioner thus fails
4 to show that the State lost the real mirror or that the mirror introduced at trial was not the
5 real mirror. *Id.* Petitioner also fails to provide a transcript of the trial to the Court showing
6 the foundation laid for the mirror. *Id.* The Court is thus left without sufficient evidence to
7 make a determination on whether the mirror introduced at trial was substituted.

8
9 Second, Petitioner fails to show deficient performance by trial counsel. Trial
10 counsel's failure to preclude the mirror under *Crockett*⁴ or *Sorce*⁵, or to object to its
11 introduction at trial did not fall below an objective standard of reasonableness. *Strickland*,
12 *supra*. Trial counsel's assistance did not fall outside the range of competence demanded of
13 attorneys in criminal cases. *Jackson, supra*. Instead, trial counsel's decision not to the
14 challenge the integrity of the mirror likely constitutes a strategic decision that is virtually
15 unchallengeable since it was unlikely he could meet the requirements of *Crockett*—(1) bad
16 faith or connivance on behalf of the government or (2) prejudice from the loss of the real
17 mirror. *Doleman, supra*.

18 In addition, trial counsel's decision not to challenge the mirror under *Sorce* also likely
19 constituted a strategic decision that is virtually unchallengeable because trial counsel could

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21 ⁴ “[W]hen evidence is lost as a result of inadequate government handling, a conviction may be reversed ... [T]he test for
22 reversal on the basis of lost evidence requires appellant to show either 1) bad faith or connivance on the part of the
23 government, or 2) prejudice from its loss.” *Crockett v. State*, 95 Nev. 859, 865, 603 P.2d 1078 (1979).

24 ⁵ “It is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by
placing each custodian upon the stand; it is sufficient to establish only that it is reasonably certain that no tampering or
substitution took place, and the doubt, if any, goes to the weight of the evidence.” *Sorce v. State*, 88 Nev. 350, 352-53,
497 P.2d 902, 903 (1972).

1 not establish that any tampering or substitution of the mirror took place. *Id.* Based on the
2 foregoing, Petitioner fails to show that trial counsel's performance was deficient.

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4 Third, Petitioner fails to show prejudice because fourth degree arson does not require
5 a showing of damage, it only requires the State to show that Petitioner willfully and
6 maliciously attempted to set fire to or attempted to burn or to aid, counsel, or procure the
7 burning of any building or property. NRS 205.025. Even a mirror with slight damage could
8 meet these elements. Thus, Petitioner fails to show that but for any unprofessional error, the
9 result of the proceeding would have been different. *Strickland, supra.*

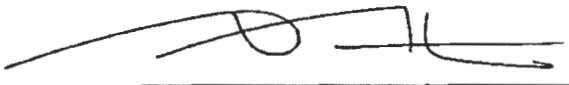
10 Based on the foregoing, Petitioner fails to show that trial counsel was ineffective by
11 failing to object to the substituted mirror. Therefore, Petitioner's ineffective assistance claim
12 must fail in this regard.

13 CONCLUSION

14 In conclusion, Petitioner fails to show that defense counsel's performance was so
15 deficient that a different result would have occurred either at trial, or that any of the omitted
16 issues on appeal have a reasonable probability of success on appeal. Thus, Petitioner fails to
17 meet the *Strickland* standard, and his postconviction petition for writ of habeas corpus must
18 be **DENIED** in its entirety.

19 **IT IS SO ORDERED.**

20 DATED this 21st day of July, 2023.

21
22 
23 HONORABLE MICHAEL R. MONTERO
24 DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Honorable Michael R. Montero, District Court Judge, Sixth Judicial District Court and am not a party to, nor interested in, this action; and that on this 21st day of July, 2023, I caused to be served a true and correct copy of the enclosed ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) upon the following parties:

Anthony R. Gordon, Esq.
Humboldt County Deputy District Attorney
P.O. Box 909
Winnemucca, NV 89445
Hand-delivered to Humboldt County Courthouse, DCT Box

Karla K. Butko, Esq.
P.O. Box 1249
Verdi, NV 89439
Via US Mail

Taylor
TAYLOR M. STOKES, ESQ.
STAFF ATTORNEY
SIXTH JUDICIAL DISTRICT COURT

1 Steven Dixon, Petitioner, vs. William Reubart, Warden & State of Nevada, Respondent.
2 Sixth Judicial District Court of Nevada, Case No. CV0023141
3

4 **DECLARATION OF SERVICE**

5
6 I am a citizen of the United States, over the age of 18 years, and not a party to or interested
7 in this action. I am an employee of the Humboldt County Clerk's Office, and my business address
8 is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following
9 document(s):

10 **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

11 X By placing in a sealed envelope, with postage fully prepaid, in the United States Post
12 Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's
13 practice whereby the mail, after being placed in a designated area, is given the appropriate postage
14 and is deposited in the designated area for pick up by the United States Postal Service.
15

16 X By personal delivery of a true copy to the person(s) set forth below by placement in the
17 designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative
18 of said person(s) set forth below.

19 Karla K. Butko, Esq.
20 PO Box 1249
Verdi, Nevada 89439

21 Anthony R. Gordon, Esq.
22 Humboldt County Deputy District Attorney
23 PO Box 909
Winnemucca, NV 89446

24
25 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
26 is true and correct.

27 Executed on July 21, 2023 at Winnemucca, Nevada.

28

Humboldt County Deputy Clerk

CERTIFICATION OF COPY

STATE OF NEVADA,
COUNTY OF HUMBOLDT,

I, TAMI RAE SPERO, the duly elected, qualifying and acting Clerk of Humboldt County, in the State of Nevada, and Ex-Officio Clerk of the District Court, do hereby certify that the foregoing is a true , full and correct copy of the original: Notice of Appeal; Case Appeal Statement; District Court Docket Entries; Order Denying Petition for Writ of Habeas Corpus (PostConviction); Notice of Entry of Order;

Steven Dixon,

Petitioner,

vs.


**William Reubart, Warden and
The State of Nevada,**

Respondents.

CASE NO. CV0023141

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto set my hand and affixed the seal of the Court at my office, Winnemucca, Nevada, this 4th day of August, 2023, A.D.


TAMI RAE SPERO, CLERK