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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY M. SEVERSON,	)	
	)	**No. 45780**
Petitioner-Appellant,	)	
	)	**Elmore County Case No.**
v.	)	**CV-2009-1408**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

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STATEMENT OF THE CASE

Nature Of The Case

Larry M. Severson appeals from the judgment denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

A jury convicted Severson of first-degree murder for killing his wife and poisoning food or medicine for poisoning her diet pills, and his convictions were affirmed on appeal. State v. Severson, 147 Idaho 694, 701, 215 P.3d 414, 421 (2009). The Idaho Supreme Court rejected claims of prosecutorial misconduct in closing arguments, both preserved by objection and first raised on appeal. Id. at 718-21, 215 P.3d at 438-41.

Severson filed a petition for post-conviction relief raising several claims of ineffective assistance of counsel, including that his trial counsel was ineffective for not objecting to improper arguments by the prosecutor, which the district court summarily dismissed. Severson v. State, 159 Idaho 517, 519, 363 P.3d 358, 360 (2015). The Idaho Supreme Court affirmed in part and reversed in part, holding the claims were barred by *res judicata* if the argument had been challenged on direct appeal, but ineffective assistance of counsel claims based on arguments not challenged on direct appeal were not so barred. Id. at 521-22, 363 P.3d at 362-63. The Court "vacate[d] the district court's summary dismissal of Severson's claims for ineffective assistance of counsel relating to the allegedly improper statements that were not raised on direct appeal" and "remand[ed] for further proceedings" consistent with its opinion. Id. at 523, 363 P.3d at 364.

On remand Severson filed a third amended petition for post-conviction relief. (R., vol. III, pp. 510-12; vol. IV, pp. 514-37.) In the third amended petition Severson reasserted

his claim of ineffective assistance for failing to object to the prosecutor's arguments (R., vol. IV, pp. 524-29), raised a claim asserting the "cumulative effect" of deficient performance showed prejudice (R., vol. IV, pp. 529-30), and asserted two claims of ineffective assistance of appellate counsel (R., vol. IV, pp. 530-35). The state answered (R., vol. V, pp. 742-48) and the matter proceeded to an evidentiary hearing (R., vol. V, pp. 773-792).

The district court denied Severson's claims. (R., vol. V, pp. 832-72.) The district court entered judgment, from which Severson timely appealed. (R., vol. V, pp. 873-78.)

ISSUES

Severson states the issue on appeal as:

> Did the District Court Erred in Dismissing Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief [on Remand]* following an evidentiary hearing.

(Appellant's brief, p. 11 (verbatim).)

The state rephrases the issues as:

1. Has Severson failed to show error in the district court's determination that he failed to prove ineffective assistance of counsel for not objecting to allegedly improper arguments by the prosecutor?

2. Did the district court lack jurisdiction to consider the new claims of ineffective assistance of appellate counsel brought after remand in the third amended petition?

3. If the district court had jurisdiction to consider the claims of ineffective assistance of appellate counsel, has Severson failed to show the district court erred when it concluded Severson failed to prove those claims?

ARGUMENT

I.
Severson Has Failed To Show Error In The District Court's Determination That He Failed To Prove Ineffective Assistance Of Counsel For Not Objecting To Allegedly Improper Arguments By The Prosecutor

A. Introduction

The district court rejected claims of ineffective assistance of trial counsel for not objecting to 18 statements in the prosecutor's closing or rebuttal argument. (R., vol. V, pp. 835-63.) Severson claims the district court erred in relation to several of his ineffective assistance of counsel claims. (Appellant's brief, pp. 13-25.[1]) Application of the correct legal standards shows that the district court did not err when it concluded Severson had failed to prove ineffective assistance of counsel. Severson failed to demonstrate that several of the statements were actually objectionable; that lack of an objection was an objectively unreasonable tactical decision; and that he was prejudiced by the lack of an objection.

B. Standard Of Review

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the

[1] Severson makes no claim on appeal that the district court erred by rejecting his claims of ineffective assistance of counsel regarding statements 2A, 2B, 2G, 2I, [3]A, [3]C, or [3]D, as numbered by the district court in its opinion. (Compare R., vol. V, pp. 843-45, 849-50, 852-54, 858-62 with Appellant's brief, pp. 12-23.)

inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. Severson Failed To Prove His Claims Of Ineffective Assistance Of Counsel

In order to prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must prove both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999). Review shows that the district court properly concluded that Severson had failed to prove either or both prongs of his ineffective assistance of counsel claims.

1. Where The Prosecutor's Argument Was Proper, Counsel Was Not Ineffective

The conclusion that an unmade objection or motion is not meritorious "is generally determinative of both prongs of the *Strickland* test." State v. Abdullah, 158 Idaho 386,

487, 348 P.3d 1, 102 (2015) (internal quotation and brackets omitted). The district court concluded that some of the objections trial counsel was allegedly ineffective for not making were not well founded and would not have been sustained. (R., vol. V, pp. 843-46 (statements 2A, 2B, and 2C), 852-54 (statement 2I), 856-61 (statements 2L, [3]A, [3]B), 861-62 (statement [3]D), 862-63 (statement [3]E in part)). See also R., vol. V, p. 864 n.54 ("The Court did not find prosecutorial misconduct in sections I(1)(A), I(2)(B), I(2)(C), I(2)(F), I(2)(I), I(3)(A), I(3)(B) and I(3)(D).").) On appeal Severson does not challenge the court's ruling on statements 2A, 2B, 2I, 2L, [3]A, [3]B, or [3]D, but does claim error in relation to statements 2C and 3E. (Appellant's brief, pp. 20-23.) Because Severson has not challenged the district court's holding that statements 2A, 2B, 2I, 2L, [3]A, [3]B, and [3]D were not subject to sustainable objection, the Court must affirm. State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where appellant does not challenge "an independent, alternative basis" for the holding, the holding will be affirmed on the unchallenged basis).

As to the rulings challenged by Severson, statements 2C, and 3E, he has failed to show that the district court erred. "It is well settled that both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." State v. Eldred, 148 Idaho 317, 323, 222 P.3d 1011, 1017 (Ct. App. 2009). Neither of the statements challenged by Severson on appeal rise to this level.

In statement 2C the prosecutor argued that Nora Law told dispatch that the victim "is not breathing, she is not moving, 'Come back to us Mary, come back to us.'" (R., vol. V, p. 845.) The actual quote on the recording of the dispatch call was, "Oh, Mary, come

on, Mary. Breathe, Mary." (Id.) The district court found that even though the quote[2] "was not identical" to the recording, it was "not of a nature supporting a claim for prosecutorial misconduct" and was "harmless." (R., vol. V, pp. 845-46.) The district court's holding is supported by the relevant legal standard. "It is plainly improper for a prosecutor to mischaracterize the evidence adduced at trial." State v. Adamcik, 152 Idaho 445, 481, 272 P.3d 417, 453 (2012). Although there is evidence that the prosecutor got the exact quote wrong, the court was within its discretion to determine that the misquote did not "mischaracterize the evidence." Moreover, the differences between the actual quote and the prosecutor's argument did not change the substance, the meaning or the significance of the evidence, so the argument, especially in light of instructions that the prosecutor's comments were not evidence, was correctly found by the district court to be harmless.

In statement 3E the district court found the part of the argument referring to the family in the courtroom improper, but the part arguing that the victim was not merely a "body" or a "picture of bruises" was not improper because the jury heard evidence about Mary's life. (R., vol. V, pp. 862-63.) On appeal Severson argues this was error, but does not say how the comment that Mary was not merely a "body" or a "picture of bruises" was not a proper comment on the evidence. (Appellant's brief, pp. 20-21.) In fact, Severson claims only that the prosecutor "'trespass[ed] on the verge of error.'" (Id. (quoting State v. Lankford, 162 Idaho 477, 494 399 P.3d 804, 821 (2017).) The state submits that had defense counsel objected that the prosecutor was "trespassing on the verge of error," the

[2] It should be noted that the quotation marks were added by the court reporter. The prosecutor never stated that the language he used was an actual quote of what Nora Law said.

district court would have been within its discretion to overrule that objection. Severson has shown no error by the district court.

Finally, "[w]here the lower court reaches the correct result on an incorrect theory, this Court will affirm the order on the correct theory." Gearhart v. Mut. of Enumclaw Ins. Co., 160 Idaho 664, 669 n.3, 378 P.3d 454, 459 n.3 (2016) (citing Markel Int'l. Ins. Co. Ltd. v. Erekson, 153 Idaho 107, 113, 279 P.3d 93, 99 (2012)). Although the district court found eight of the challenged statements unobjectionable, and one only partly objectionable, other arguments were not improper and thus there was no ineffective assistance of counsel for not objecting. Specifically, statements 1, 2E, 2F, 2J, 2K, 2L, and 3C were not objectionable.

Statement 1: Responding to an argument that experts testified that the bruising on Mary's mouth could theoretically have been caused by resuscitation efforts, the prosecutor argued that "[n]o one else" that "testified in front of you, that was there," testified that they caused the bruising. (R., vol. V, pp. 842-43.) Severson argued this was an objectionable comment on his silence, but that claim does not withstand analysis. It is "erroneous for a prosecutor to comment to the jury on the defendant's failure to testify at trial." State v. Hodges, 105 Idaho 588, 591, 671 P.2d 1051, 1054 (1983). "[I]n determining whether a prosecutor's comment violated the Fifth Amendment, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." State v. Severson, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009) (internal quotation omitted). Rather, the question is "whether the language used was manifestly intended or was of such character that the jury would *naturally and*

necessarily take it to be a comment on the failure of the accused to testify." State v. McMurry, 143 Idaho 312, 315, 143 P.3d 400, 403 (Ct. App. 2006) (emphasis original, internal citations omitted). Thus, a claim that evidence is "uncontradicted," without more, is not such a prohibited comment. Hodges, 105 Idaho at 591, 671 P.2d at 1054.

On its face, the prosecutor's argument neither explicitly nor naturally and necessarily invited the jury to consider Severson's silence as evidence of guilt. Rather, the argument was apparently that the testimony of the persons who tried to resuscitate Mary rebutted the theoretical possibility that they had bruised Mary's mouth. The argument was, at most, ambiguous. Compare Severson, 147 Idaho at 719, 215 P.3d at 439. Severson failed to show that this argument was prosecutorial misconduct.

Statement 2E: Based on evidence presented at trial that Severson was having an extra-marital affair with a 21-year-old woman, the prosecutor argued that Severson was "screwing some 21-year-old." (R., vol. V, p. 847.) Although phrased crudely, this argument, which was based on the evidence, did not make it more likely that the jury would convict based on passion or prejudice than if the prosecutor had, unobjectionably, argued that Severson had engaged in extra-marital coitus with a young woman not his wife.

Statement 2F: In responding to the defense theory that someone else could have poisoned Mary's diet pills, the prosecutor argued that the likelihood that happened was analogous to "little green aliens" coming to Earth from Mars. (R., vol. V, p. 847.) Such hyperbole was within the scope of allowable argument.

Statements 2J and 2K: During closing argument Severson's counsel asserted that the prosecution had stated three times in opening statements that Severson's 21-year-old paramour was a teenager, and argued this demonstrated that the prosecution was

overlooking facts that did not support the state's theory or even bending them to fit that theory. (Exhibits, vol. 2, pp. 124-25 (Trial Tr., p. 4109, L. 4 – p. 4110, L. 19).) The prosecutor countered in rebuttal that the jury should not hold the misstatement of her age against the state, pointing out that she "looks like she is about 19" (R., vol. V, p. 854 (statement 2J)) and that witnesses had also thought she was 18 or 19 and assumed she was Severson's daughter (R., vol. V, p. 855 (Statement 2K)). (See Exhibits, vol. 2, p. 127 (Tr., p. 4119, L. 9 – p. 4120, L. 3.).) This was proper rebuttal.

Statement 2L: The prosecutor argued that the state had overcome the presumption of innocence and proved Severson guilty, that there was "no innocence in this courtroom except the innocence" of the victim, and that Severson's motive for murder was "lust and greed" and desire to "pursue his other women, not this fat woman that he saw in front of him who refused to give him the divorce." (R., vol. V, p. 856.) It was not improper to argue that the state had met its burden of proof, that the victim had done nothing to contribute to her own death, and that Severson murdered her because he found her unattractive and he wished to pursue other relationships without having to go through a divorce that would have cost him financially, all of which was supported by the evidence.

Statement 3C: The prosecutor argued that the "house," the "business," the diet pills, and "Mary" all told how and why Mary died. (R., vol. V, p. 861.) This was a circumstantial case, and evidence from the house, regarding the business, showing the contamination of the diet pills, and physical and forensic evidence from examining Mary's body were a large part of that circumstantial evidence that Mary was murdered and that Severson was the murderer. This argument, based on the evidence presented, was proper.

2. Severson Failed To Present Evidence Of Any Objective Shortcoming By Counsel

Whether to object to the prosecutor's closing arguments is a strategic decision. State v. Hall, 163 Idaho 744, 419 P.3d 1042, 1124 (2018); State v. Payne, 146 Idaho 548, 566 n.8, 199 P.3d 123, 141 n.8 (2008) ("decisions to object during closing arguments are tactical, and will not be second-guessed by this Court"). "Tactical and strategic decisions by trial counsel will not be second-guessed and cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review." State v. Abdullah, 158 Idaho 386, 488, 348 P.3d 1, 103 (2015) (internal quotation omitted). "In the absence of evidence that a strategic decision was 'the product of inadequate preparation or ignorance of the relevant law,' this Court will not find deficient performance." Id. (quoting Johnson v. State, 156 Idaho 7, 11, 319 P.3d 491, 495 (2014)).

Here there was no evidence presented indicating that any lack of objection to any of the statements not addressed on the first appeal was the result of objective shortcoming. (See, e.g., R., vol. V, pp. 838-41.) The district court found no deficient performance in relation to statements 2F, 2G, 2H, 2J, 2K, part of 2L, and [3]C. (R., vol. V, pp. 847-52, 854-58, 861.) Severson argues the district court erred because failure to object was not reasonable. (Appellant's brief, pp. 13-14.) His argument, that counsel's decision should have been found subjectively unreasonable based solely on the prosecutor's argument itself, is without merit.

Statement 2F. The prosecutor argued that the possibility that someone other than Severson poisoned Mary's diet pills was as possible as the poisoning having been done by "little green aliens." (R., vol. V, p. 847.) The district court found that Severson did not

meet his burden of proving ineffective assistance of trial counsel for not objecting. (R., vol. V, p. 848.) Severson claims he did meet his burden of proof, but does not articulate how. (Appellant's brief, pp. 22-23.) An objection to the prosecutor's hyperbole, even if sustained, would not have changed the thrust of the prosecutor's argument that no one other than Severson had been in a position to poison Mary's diet pills. With little or nothing to gain, and at the risk of calling attention to the argument, Severson failed to show that the decision to not object was objectively unreasonable.

Statement 2G. In rebuttal argument, the prosecutor noted that neither he nor anybody else could ask Mary questions about the events preceding her death. (R., vol. V, p. 849.) He prefaced the argument by noting that defense counsel had argued that "'we don't know'" about a lot of things that happened on the day of the murder. (Exhibits, vol. 2, p. 128 (Tr., p. 4125, Ls. 4-6).) Thus, in context, the prosecutor's argument addressed why there was a lack of evidence regarding certain facts leading up to Mary's murder. Severson presents no argument on appeal addressing the district court's determination that he had not proved deficient performance on this claim. (See Appellant's brief, pp. 12-25.) Severson has therefore failed to show error.

Statement 2H. In talking about the testimony of Dr. Dawson, the state's medical expert, the prosecutor stated, "I think a very credible individual, with nothing to lose in this matter." (R., vol. V, p. 850.) Severson addresses this argument (Appellant's brief, pp. 16-19), but makes no argument why counsel's choice to not object was objectively unreasonable (see Appellant's brief, pp. 12-25). An objection, if sustained, would have resulted in the same argument without the "I think" language. Severson has failed to show that the decision to not object to this argument was objectively unreasonable.

Statements 2J and 2K. As noted above (*supra* pp. 9-10) the prosecutor's argument that the jury should not hold the opening statement misstatement—that Severson's paramour was 19, instead of her true age of 21—against the state was proper argument. Severson argues the statement in closing argument misrepresented the evidence and was inflammatory. (Appellant's brief, pp. 16-19.) He makes no argument about how the decision to not object was objectively unreasonable. Having argued that the prosecutor's misstatement demonstrated bias, counsel's non-objection to the prosecutor's response was certainly strategic. Severson has failed to show otherwise.

Statement 2L. As set forth above, the prosecutor's argument that the state had overcome the presumption of innocence with proof, that Mary was innocent in her own murder, and that Severson was motivated by "lust and greed" and because he wanted to pursue women other than Mary, whom he considered "fat," was not improper. (*Supra*, p. 10.) Severson argues generally that it was improperly inflammatory to argue that Mary was innocent and that he was motivated by lust, greed, and a desire to pursue thinner women. (Appellant's brief, pp. 16-19.) However, the underlying arguments here were proper, and thus the only objection was to the way they were phrased. (R., vol. V, pp. 856-58.) An objection to secure a phrasing of a proper argument that was somehow less "inflammatory" was within the scope of trial counsel's strategic and tactical decisions. Severson has failed to show error.

Statement [3]C. As stated above, the argument that the "house," the "business," the diet pills, and "Mary" all told how and why Mary died was not improper. (*Supra*, p. 10.) Severson makes no mention of this statement in his brief, and therefore has failed to show error in the denial of his claim trial counsel was ineffective for not objecting to it.

In addition, as stated above, this Court may affirm the district court on a correct theory. Severson has failed to show any objective shortcoming in the lack of objection to any of the statements he complains of. Even the most obnoxious of the prosecutor's statements, calling Severson's paramour a "tramp," was not outside the scope of counsel's discretion to decline an objection. Simply stated, the prosecutor's disparagement of the character of the paramour, who was a witness for the prosecution, had at least some tendency to minimize Severson's mendacity by shifting blame for the affair to the young woman.[3] Counsel could easily have concluded that letting that comment go to the jury would harm the prosecution as much or more than the defense. Ultimately, showing that an objection was possible was not enough to show that there was no tactical choice. Severson failed to prove that the lack of objections was the result of constitutionally deficient performance.

3. Severson Failed To Show Prejudice

"Under the second prong of *Strickland,* the defendant must show a reasonable probability that the outcome of trial would be different but for counsel's deficient performance." State v. Abdullah, 158 Idaho 386, 480, 348 P.3d 1, 95 (2015). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Dunlap, 155 Idaho 345, 383, 313 P.3d 1, 39 (2013) (internal quotations omitted). "To undermine confidence in the outcome requires a 'substantial,' not just 'conceivable,' likelihood of a different result." Murray v. State, 156 Idaho 159, 164, 321 P.3d 709, 714

[3] Severson did not present a trial transcript at the evidentiary hearing. (R., vol. V, pp. 838-39.) The paramour's role in the case is set forth, however, in the briefing that was submitted to the district court. (Exhibits, vol. 2, pp. 269-71.)

(2014) (internal quotations omitted). Severson had the burden of proving prejudice by a preponderance of the evidence. Cook v. State, 157 Idaho 775, 777, 339 P.3d 1179, 1181 (Ct. App. 2014).

Severson claimed his trial counsel was ineffective because he did not object to 18 different statements in closing arguments. As set forth above, a substantial number of those statements were not objectionable. None of them are outside the scope of trial counsel's tactical decisions because they were not proved to be the result of some objective shortcoming. Even if one or more of the statements had been shown to be both objectionable and the lack of an objection the result of an objective shortcoming, Severson failed to prove, by a preponderance of the evidence, a reasonable probability that the outcome of trial would have been different but for the lack of an objection to the prosecutor's closing argument.

In rejecting Severson's claims of fundamental error in the closing arguments on direct appeal, the Idaho Supreme Court relied on three things: First, that it would not give any ambiguous argument by the prosecutor "its most damaging reading," Severson, 147 Idaho at 719, 215 P.3d at 439; second, that the "weight of the evidence against Severson and the numerous limiting instructions issued by the judge" militated against finding prejudice, id. at 721, 215 P.3d at 441; and, third, that otherwise proper arguments made with "crude words" are less prejudicial than other types of improper arguments, id. Although certainly not setting forth a legal standard for evaluating the prejudice prong of an ineffective assistance of counsel claim (which was not then before the Court) these factors are useful for evaluating Severson's proof, or the lack thereof.

These same three factors that showed no fundamental error show no prejudice under the facts of this case. First, many of the statements complained of are, at best, ambiguous in terms of causing prejudice. Indeed, most are proper arguments merely expressed ambiguously or with crude terms. The jury was certainly capable of separating hyperbole and unflattering descriptions from fact.

Second, the jury was assisted in separating argument from evidence by the court's instructions, and the weight of the evidence. Severson failed to present a transcript of the evidentiary portion of the trial to the district court (R., vol. V, pp. 838-39), which shows he did not meet his burden of demonstrating that the weight of the evidence would not have led to the same result at trial despite any objections raised in closing argument. Certainly the synopsis of the evidence in the state's appellate brief (Exhibits, vol. 2, pp. 183-93), supports the Court's determination that the weight of the evidence is contrary to Severson's claim of prejudice.

Finally, the use of crude words that tended to be inflammatory in otherwise proper arguments is minimally prejudicial. Replacing the allegedly inflammatory words with less inflammatory descriptions would not have likely changed the outcome of this trial. The only argument which could not have been corrected merely by choosing better phrasing was the prosecutor's alleged inference of guilt from Severson not testifying. But, as stated above, Severson failed to show that the prosecutor in fact argued for such an inference, much less that the jury likely applied such an inference. Again, the ambiguity of the argument and the instructions of the court made such an inference unlikely. Severson failed to show prejudice from any failure to object to the prosecutor's closing arguments.

D. "Cumulative" Ineffective Assistance Of Counsel

Severson argues that his counsel was ineffective for failing to object under the "cumulative error doctrine." (Appellant's brief, p. 23.) He has failed to show how that appellate standard could, or should have, been invoked by trial counsel. Because his argument is lacking in authority for the proposition that "cumulative error" is a proper trial objection, his claim fails. Murray v. State, 156 Idaho 159, 168, 321 P.3d 709, 718 (2014) ("'A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.'" (quoting State v. Wood, 132 Idaho 88, 94, 967 P.2d 702, 708 (1998))).

To the extent that Severson is arguing that a series of objectionable arguments, each of themselves tactically ignorable and not prejudicial, could, at some point, require an objection, he has failed to articulate (much less show) what that point was. Indeed, it appears that he is merely arguing that counsel's performance should be reviewed in hindsight, a standard that has been specifically disavowed. State v. Abdullah, 158 Idaho 386, 417-418, 348 P.3d 1, 32-33 (2015) (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

To the extent he is arguing that multiple acts of deficient performance, each alone not prejudicial, could cumulatively have called the fairness of the trial into doubt, he has presented no cogent argument. For example, he claims the prosecutor made arguments that could have led to the jury considering his not testifying as evidence of guilt and also made inflammatory arguments regarding Severson's paramour. However, the inflammatory remarks about the paramour did not make it more likely that the jury considered Severson's silence, and the comments allegedly about Severson's silence did

not inflame the jury regarding the paramour. The prosecutor's arguments, under Severson's own theories, would have been objectionable on different grounds for different reasons. Severson has failed to articulate, much less show, how the different prejudices that theoretically would have flowed from the different grounds would have cumulated.

Severson's claim of cumulative error should be rejected because it is lacking in authority and cogent argument. If considered on the merits it must be rejected because Severson has failed to show multiple acts of deficient performance or how those alleged deficiencies would have cumulatively prejudiced the trial.

II.
The District Court Lacked Jurisdiction To Consider The New Claims Of Ineffective Assistance Of Appellate Counsel Brought After Remand In The Third Amended Petition

After the district court summarily dismissed some claims and denied others following an evidentiary hearing in this case, Severson appealed. Severson v. State, 159 Idaho 517, 519-20, 363 P.3d 358, 360-61 (2015). The Court reversed some of the summarily dismissed claims of ineffective assistance of counsel, affirmed the summary dismissal of others, and remanded. Id. at 521-23, 363 P.3d at 362-64. After remand, Severson filed a third amended petition for post-conviction relief asserting new claims of "cumulative effect" and ineffective assistance of appellate counsel. (R., vol. III, pp. 510-12; vol. IV, pp. 514-36.)

"The general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." State v. Hosey, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000). Here the case was finally concluded, following an evidentiary hearing, before the first appeal. All of Severson's claims were addressed on appeal, the denial or dismissal of most of them

affirmed, and the district court reversed as to a small number of them, which were remanded to the district court for further proceedings. The district court lacked jurisdiction to consider new claims of ineffective assistance of appellate counsel, raised for the first time after final judgment and after reversal and remand on an appeal of that judgment.

III.
Severson Failed To Show Error In The Denial Of His Claims Of Ineffective Assistance Of Appellate Counsel

A. Introduction

The district court concluded that it was deficient performance by appellate counsel to not raise or include claims of fundamental error—related to (1) the prosecutor's statements that he thought Dr. Dawson was credible, (2) that the paramour was "the ripe old age of 21," and (3) that witnesses thought Severson's paramour looked young enough to be Severson's daughter—but that Severson had demonstrated no prejudice. (R., vol. V, pp. 866-68.) The district court also found deficient performance but no prejudice in appellate counsel's failure to support some arguments with authority. (R., vol. V, pp. 868-69.) Severson contends the district court erred. (Appellant's brief, pp. 25-26.) Application of the relevant legal standards shows this argument to be without merit.

B. Standard Of Review

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the

inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. The District Court Correctly Rejected Severson's Claim Of Ineffective Assistance Of Appellate Counsel For Not Raising Additional Claims Of Fundamental Error

The two-prong Strickland test for ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel, a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 729 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). As explained by the United States Supreme Court, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 752. The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000);

Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)).

The district court concluded that three statements by the prosecutor were objectionable but not raised as claims of fundamental error on appeal: the statement "I think" Dr. Dawson was "a very credible individual, with nothing to lose in this matter"; asking the jury to not hold the statement in opening argument that the paramour was 19 (rather than 21) against the state; and commenting that people who saw Severson with his paramour mistakenly assumed she was his daughter. (R., vol. V, p. 867.) For the reasons stated above (*supra*, pp. 9-10), these arguments were not fundamental error, and therefore Severson's claims fail on both prongs of the *Strickland* test.[4]

D. The District Court Correctly Rejected Severson's Claim Of Ineffective Assistance Of Counsel For Not Citing Authority On Certain Arguments

The district court found deficient performance, but not prejudice, in appellate counsel's failure to cite authority in favor of the argument that the prosecutor's statement that Mary Severson, the victim, was innocent and did not have to die, and that Severson was motivated by lust and greed and believed Mary was fat. (R., vol. V, pp. 868-69.) For the reasons stated above (*supra* pp. 10, 13) Severson has failed to show prejudice.

[4] The district court rejected Severson's claim on the prejudice prong only. (R., vol. V, pp. 867-68.) As set forth above, this Court may affirm on the correct application of the law to the facts to the deficient performance prong.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order and judgment.

DATED this 27th day of November, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd