

IN THE SUPREME COURT OF THE STATE OF IDAHO

ANTHONY WAYNE CONNER,)
) No. 46924-2019
 Petitioner-Appellant,)
) Ada County Case No.
 v.) CV01-18-717
)
 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 ADA**

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STATEMENT OF THE CASE

Nature Of The Case

Anthony Wayne Conner appeals from the district court's judgment summarily dismissing his petition for post-conviction relief. Conner argues that the district court erred when it found that Conner failed to sufficiently allege Strickland¹ prejudice.

Statement Of The Facts And Course Of The Proceedings

Anthony Wayne Conner called 911 to report having found his [REDACTED] father, Otis Conner ("Otis") dead in the garage of the home they shared. State v. Conner, 161 Idaho 502, 503, 387 P.3d 170, 171 (Ct. App. 2016). Conner reported that he found Otis's body next to a ladder. Id. After some in Conner's family expressed doubts that Otis died from an accident, the police executed a search warrant for Conner's home. Id. Among other things, detectives found Otis's blood "on a rug in the laundry room, on the east living room wall, in the carpeting under the heat register, in a carpet cleaning machine, on the underside of a chair in the living room, on the living room ceiling, on the garage floor, on one of the legs of the ladder, and on the claw of a hammer." Id. The state charged Conner with first degree murder, grand theft, forgery, and destruction, alteration, or concealment of evidence. Id.

Before trial, the district court entered an order prohibiting any witness from sharing his or her testimony with any other witness. (R., p.218.) The order did not have an exception for expert witnesses. (R., p.218.)

At trial, the state presented the jury its theory that "Conner hit Otis on the head with a hammer in the living room, dragged his body to the garage, and staged an accident using the

¹ Strickland v. Washington, 466 U.S. 668 (1984).

ladder.” Conner, 161 Idaho at 503, 387 P.3d at 171. The state enlisted three experts to support its case: Tom Bevel, a forensic scientist specializing in bloodstain pattern analysis, opined that the evidence showed Otis had not died in an accident but had been killed. (Tr., p.1230, L.23 – p.1323, L.5.²) Dr. Glen Groben, a forensic pathologist in the Ada County Coroner’s Office, testified that he initially concluded that Otis died from an accident but, upon receiving additional information, formed the opinion that Otis’s cause of death was homicide. (Tr., p.1433, L.14 – p.1465, L.4.) Dr. William Smock, a medical doctor, opined that Otis’s injuries were consistent with homicide and inconsistent with falling off of a ladder. (Tr., p.1549, L.3 – p.1590, L.12.)

Dr. Groben testified, among other things, that when he examined Otis’s body, he found blood coming out of Otis’s left ear. (Tr., p.1450, Ls.2-5.) He also testified that the blood in Otis’s left ear was consistent with a fracture along the base of the skull. (Tr., p.1449, L.13 – p.1450, L.1.) Dr. Groben’s report mentioned the blood in Otis’s left ear but had not mentioned the basilar skull fracture. (Tr., p.1495, L.22 – p.1496, L.14.)

Dr. Smock testified after Dr. Groben. (Tr., p.1549, Ls.3-7.) He addressed, among other things, the amount of force it would take to cause Otis’s injuries and, in doing so, referenced Dr. Groben’s testimony that blood in the left ear indicated a skull fracture at the bottom of the skull. (Tr., p.1578, L.11 – p.1579, L.11.) As relevant to this appeal, Dr. Smock also testified that (1) Otis had a “superficial abraded area” in addition to the three obvious lacerations on his head, (2) the perpendicular nature of two of the lacerations on his head was inconsistent with falling off of a ladder, (3) Otis had a laceration on his left hand consistent with a defensive wound, (4) the amount of blood found in the home was inconsistent with Conner’s story that Otis had previously

² All citations to the transcript refer to the consecutively paginated trial transcript in the underlying criminal proceeding, which transcript the district court reviewed before dismissing Conner’s petition. (R., p.229 & n.10.)

fallen in the home and tried to clean up his own blood, and (5) the evidence showing Otis's body had been moved indicated a staged scene. (Tr., p.1579, Ls.13-21, p.1581, L.16 – p.1582, L.9, p.1582, L.20 – p.1584, L.22, p.1585, L.17 – p.1586, L.13, p.1587, L.15 – p.1589, L.11.) On cross-examination, Dr. Smock said that he learned about Dr. Groben's testimony from the prosecutor. (Tr., p.1592, L.14 – p.1593, L.8, p.1607, Ls.5-23.) Dr. Smock finished testifying on a Friday. (Tr., p.1548, L.2, p.1614, Ls.11-18.)

The following Monday, Conner's counsel informed the district court that they were "in the process of formulating a motion to strike the testimony of Dr. [Smock]." (Tr., p.1762, Ls.1-10.) Specifically, they argued that the state had violated the district court's order on the exclusion of witnesses by telling Dr. Smock about Dr. Groben's testimony. (Tr., p.1762, L.11 – p.1764, L.4.) They also argued that Dr. Smock had offered opinions in his testimony that went beyond the scope of his report in violation of the expert disclosure requirements. (Tr., p.1762, L.11 – p.1764, L.4.) Conner subsequently filed a motion to strike Dr. Smock's testimony. (Tr., p.2203, Ls.11-19.)

The district court denied Conner's motion. (Tr., p.2231, L.19 – p.2234, L.16.) The district court found that Conner's counsel had filed the motion too late. (Tr., p.2232, Ls.6-23.) The district court also noted, with respect to the state informing Dr. Smock about Dr. Groben's testimony, that it was "not convinced on this record that anything that happened in that conversation, whatever it was, influenced [Dr. Smock's] testimony because he did clearly state that his opinions were his and based on his review of the forensic evidence." (Tr., p.2234, Ls.11-16.)

The jury convicted Conner of second-degree murder and destruction of evidence. (R., p.212.) The district court sentenced Conner to thirty years in prison, with eighteen years fixed, for second-degree murder and to a concurrent five years for the destruction of evidence. (R., p.65.)

Conner timely appealed from the judgment, and the Idaho Court of Appeals affirmed Conner's convictions. See Conner, 161 Idaho at 507, 387 P.3d at 175.

Conner timely filed a petition for post-conviction relief. (R., pp.6-10.) The district court appointed counsel, and Conner amended his petition twice. (R., pp.29, 35-44, 64-78.) As relevant to this appeal, Conner alleged that his trial counsel provided ineffective assistance by delaying their objections to Dr. Smock's testimony that the state had violated the district court's exclusion order and that Dr. Smock's testimony exceeded the scope of his report. (R., pp.67-74.) Conner alleged that, had his trial counsel raised these objections earlier, the district court would have struck Dr. Smock's testimony in its entirety and, without Dr. Smock's testimony, the jury would have acquitted Conner. (R., pp.67-74.)

The state moved the district court to summarily dismiss Conner's petition for post-conviction relief. (R., pp.94-126.) With respect to Conner's claim about Dr. Smock, the state argued that Conner had failed to sufficiently allege either deficient performance or prejudice as required under Strickland. (R., pp.99-120.)

The district court granted the state's motion for summary dismissal. (R., pp.212-32.) The district court recognized that "Conner's right to post-conviction relief depends in part on the merits of the late filed motion." (R., p.220.) The district court found that, had Conner's counsel timely filed the motion, the district court would have granted it in part. (R., pp.220-29.) The district court found that it would have struck Dr. Smock's testimony about the skull fracture because the state violated the order on the exclusion of witnesses. (R., p.223.) The district court also found that it would have struck Dr. Smock's testimony about the superficial abraded area and the defensive wounds on Otis's finger because those portions of Dr. Smock's testimony exceeded the scope of his report. (R., pp.224-26.) The district court found that it would have denied the rest of Conner's

motion. (R., pp.225-27.) Based on its findings of what it would have done had Conner filed a timely motion to strike Dr. Smock's testimony, the district court found that Conner had failed to sufficiently allege Strickland prejudice because, even without those portions of Dr. Smock's testimony, the result of the trial would have been the same. (R., p.229.) The district court summarily dismissed Conner's petition. (R., pp.232, 242.)

Conner timely appealed. (R., pp.244-47.)

ISSUE

Conner states the issue on appeal as:

Whether the court erred in summarily dismissing the petition for post-conviction relief based on ineffective assistance of counsel.

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Conner failed to show that the district court erred when it summarily dismissed his petition for post-conviction relief?

ARGUMENT

The District Court Did Not Err By Dismissing Conner's Petition For Post-Conviction Relief

A. Introduction

The district court properly dismissed Conner's petition for post-conviction relief. A petition for post-conviction relief is subject to dismissal if the petitioner fails to allege facts that justify relief as a matter of law. For claims of ineffective assistance of counsel, the petitioner must allege sufficient facts to satisfy both prongs of Strickland: deficient performance and prejudice. Here, Conner alleged that his counsel provided ineffective assistance by failing to timely object to six different parts of Dr. Smock's testimony. The district court found that it would have overruled three of those objections, and Conner has not challenged that portion of the district court's decision on appeal. Instead, Conner focuses on the three objections that the district court found it would have sustained—namely, objections to Dr. Smock's testimony about (1) Otis's basilar skull fracture, (2), the superficial abraded area on Otis's head, and (3) the defensive wound on Otis's finger. The district court properly dismissed the ineffective assistance claims based on these three objections because Conner failed to allege prejudice sufficient to satisfy Strickland.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

C. The District Court Properly Dismissed Conner’s Petition Because His Allegations Did Not Justify Relief Under *Strickland*

The district court properly dismissed Conner’s petition for post-conviction relief. An “applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based.” Charboneau, 144 Idaho at 903, 174 P.3d at 873. The application must “*specifically* set forth the grounds upon which the application is based.” I.C. § 19-4903 (emphasis added). “The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included.” Charboneau, 144 Idaho at 903, 174 P.3d at 873.

“Summary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact.” Id.; see I.C. § 19-4906(b), (c). “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” Charboneau, 144 Idaho at 903, 174 P.3d at 873. The district court may dismiss an application for post-conviction relief without holding an evidentiary hearing where the allegations “are clearly disproved by the record of the original proceeding” or “do not justify relief as a matter of law.” Id.

The two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), governs post-conviction claims for ineffective assistance of counsel. Dunlap v. State, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015). “To prevail on such a claim, the applicant for post-conviction relief must demonstrate (1) counsel’s performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel’s errors, the result would have been different.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). “[I]n order to survive a motion for summary dismissal, post-conviction relief claims based upon ineffective assistance of counsel must establish the existence of material issues of fact as to’ both *Strickland* prongs.”

Dunlap, 159 Idaho at 296, 360 P.3d at 305 (quoting State v. Dunlap, 155 Idaho 345, 383, 313 P.3d 1, 39 (2013)). Where, as here, “the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the test.” Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995).

“When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions 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.” Payne, 146 Idaho at 561, 199 P.3d at 136. “There is a strong presumption that counsel’s performance fell within the wide range of professional assistance.” Id. (quoting State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999)).

Here, the district court properly dismissed Conner’s claims related to Dr. Smock’s testimony. Conner alleged that his counsel should have timely challenged six different parts of Dr. Smock’s testimony, including testimony related to Otis’s basilar skull fracture, the superficial abraded area, the perpendicular nature of two of the wounds, the defensive wound on Otis’s hand, the amount of blood found at the crime scene, and the movement of the victim’s body. (R., pp.220-24.) The district court found that, even if Conner had filed a timely motion to strike Dr. Smock’s testimony, it would have denied the motion insofar as it related to the perpendicular nature of the two wounds, the amount of blood found at the crime scene, and the movement of the victim’s body. (R., pp.224-27.) The district court’s finding is “determinative of both [Strickland] prongs,” Sanchez, 127 Idaho at 713, 905 P.2d at 646, and Conner has not challenged the finding on appeal (see Appellant’s brief, pp.6-30).

That leaves Conner with the three parts of Dr. Smock's testimony that the district court found it would have struck had a timely motion been brought: (1) testimony related to Otis's basilar skull fracture, (2) testimony related to the superficial abraded area, and (3) testimony related to the defensive wound on Otis's hand. (R., pp.224-27.) The district court properly dismissed Conner's ineffective assistance claim as it related to these aspects of Dr. Smock's testimony.

1. The District Court Properly Dismissed Conner's Ineffective Assistance Claim Related To Dr. Smock's Testimony About Otis's Basilar Skull Fracture

The district court properly dismissed Conner's claim that his counsel should have timely objected to Dr. Smock's testimony about Otis's basilar skull fracture because Conner failed to sufficiently allege deficient performance or prejudice. As to deficient performance, Conner failed to allege facts sufficient to overcome the "strong presumption that counsel's performance fell within the wide range of professional assistance." Payne, 146 Idaho at 561, 199 P.3d at 136. It has long been the rule in Idaho that this Court will "not second-guess strategic and tactical decisions," which means a post-conviction petitioner must allege facts sufficient to show that the allegedly deficient performance either was not tactical or was tactical but "resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." Id. Conner has done neither.

First, Conner did not allege facts sufficient to show the decision to forego a contemporaneous objection to Dr. Smock's testimony about the basilar skull fracture was not tactical. "[C]ounsel's . . . lack of objections to testimony are considered tactical or strategic decisions." Grove v. State, 161 Idaho 840, 855, 392 P.3d 18, 33 (Ct. App. 2017) (affirming summary dismissal of claim that trial counsel provided ineffective assistance by failing to object to certain testimony). In fact, the record here shows that Conner's trial counsel made a strategic decision to forego an objection and instead use the prosecutor's relay of information to Dr. Smock

to attack Dr. Smock’s testimony and, at least implicitly, the prosecutor’s credibility. On cross-examination, Conner’s counsel asked Dr. Smock the following questions:

Q. Now, you mentioned Dr. Groben’s testimony. Were you here yesterday?

A. No, sir.

Q. How did you hear about that?

A. From talking with the prosecutor yesterday afternoon.

...

Q. When you were told about Dr. Groben, you were told that Dr. Groben testified that there was a skull fracture?

A. Yes, sir.

Q. And that wasn’t in your report; is that correct?

A. That is correct.

Q. Okay. So you’re relying on the information of others in your testimony here today very clearly, right?

A. Certainly photographs, descriptions.

Q. Okay. So your testimony or your opinion today is not exclusively based on your independent assessment?

A. No, my opinions are based on my assessment of the information provided as well as my education, experience, and training over the last 30 years.

(Tr., p.1592, Ls.14-19, p.1607, Ls.6-23.) Conner’s counsel would not have been able to pursue this line of attack on Dr. Smock’s testimony and, at least implicitly, the prosecutor’s credibility if he had stopped Dr. Smock from testifying about the basilar skull fracture during his direct examination. The decision to pursue this attack rather than defensively object was tactical.

The district court rejected the state’s argument that Conner’s counsel made a tactical decision to delay the objection on the basis that Conner’s trial counsel “ha[d] yet to be heard from” in the post-conviction proceedings. (R., p.228.) The district court had Strickland exactly backwards when it reasoned that, in the absence of trial counsel’s testimony that the decision was tactical, it had to assume trial counsel acted negligently. Strickland required the district court to presume that tactical reasons, rather than sheer neglect, animated defense counsel’s actions. See, e.g., State v. Hall, 163 Idaho 744, 820, 419 P.3d 1042, 1118 (2018) (“[T]here is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer

neglect.” (brackets in original) (quoting Yarborough v. Gentry, 540 U.S. 1, 8 (2003)). Given the Strickland presumption and the record in this case, the district court erred when it found Conner’s allegations sufficient to sustain a prima facie claim that counsel did not make a tactical decision to engage in cross-examination and thus delay the objection to Dr. Smock’s testimony about the basilar skull fracture.

Second, Conner did not even attempt to allege that his trial counsel’s decision to not make a contemporaneous objection “resulted from inadequate preparation, ignorance of the relevant law or other shortcoming capable of objective review,” Payne, 146 Idaho at 561, 199 P.3d at 136, and with good reason. The relevant law was Idaho Rule of Evidence 615, and Conner alleged in his petition that his trial counsel fully understood Rule 615 at the time of a pre-trial hearing. (See R., p.67.) In short, Conner’s counsel delayed the objection until Monday in an effort to have his cake and eat it too: if the district court struck that portion of Dr. Smock’s testimony on Monday, Conner would have enjoyed the benefit of attacking Dr. Smock’s and the prosecutor’s credibility *and* excluding that portion of Dr. Smock’s testimony. Because Conner’s trial counsel made a tactical decision to not make a contemporaneous objection and Conner has not even tried to show that tactical decision was based on ignorance of the law or a lack of preparation, the district court should have dismissed this claim on the basis that Conner’s trial counsel made a tactical decision.

Even if the decision to delay objecting to Dr. Smock’s testimony about the basilar skull fracture were not tactical, however, the district court still properly dismissed this claim because Conner failed to sufficiently allege prejudice. See Payne, 146 Idaho at 561, 199 P.3d at 136 (observing that Strickland prejudice requires “a reasonable probability that, but for counsel’s errors, the result would have been different”). For starters, Dr. Smock’s testimony that Otis had a basilar skull fracture was duplicative of Dr. Groben’s testimony. See, e.g., State v. Johnson, 163

Idaho 412, 426-27, 414 P.3d 234, 248-49 (2017) (holding erroneous admission of testimony harmless because the same evidence was properly admitted later in the trial); State v. Sandoval-Tena, 138 Idaho 908, 912, 71 P.3d 1055, 1059 (2003) (holding erroneous admission of report harmless because “[t]he report was a duplicate of testimony under oath”); Lelifeld v. Johnson, 104 Idaho 357, 369-70, 659 P.2d 111, 123-24 (1983) (holding erroneous admission of evidence harmless because it “was largely duplicative of admissible and admitted evidence”). Dr. Groben testified at length about Otis’s basilar skull fracture, including how he could tell that Otis had a basilar skull fracture and that it was caused by blunt force trauma to the head. (Tr., p.1449, L.4 – p.1450, L.5, p.1491, L.14 – p.1492, L.9, p.1497, L.8 – p.1499, L.3, p.1506, L.14 – p.1508, L.3, p.1511, Ls.4-13.) Dr. Smock testified consistent with Dr. Groben that the injury on the back of the top of Otis’s head caused the basilar skull fracture and expressly informed the jury that he was relying on Dr. Groben’s testimony as to the basilar skull fracture. (Tr., p.1578, L.11 – p.1579, L.11 (“I believe [Dr. Groben] testified because of the blood in the right – in one of the ears, that was consistent with a basilar skull fracture.”).) Thus, the jury could not believe Dr. Smock’s testimony about the basilar skull fracture without first believing Dr. Groben’s nearly identical testimony about the basilar skull fracture. Thus, the admission of Dr. Smock’s testimony could not have affected the verdict.

Moreover, as the district court recognized, Dr. Smock's testimony about the basilar skull fracture was a relatively insignificant part of his testimony supporting the state's case.³ (R., p.229.) The more important and lengthy part of Dr. Smock's testimony was that the lacerations on Otis's head were all consistent with an attack from a hammer and inconsistent with falling off of a ladder. (Tr., p.1572, L.6 – p.1578, L.3, p.1580, L.5 – p.1582, L.19.) Because Dr. Smock's testimony about the basilar skull fracture was nearly identical to Dr. Groben's testimony and made up only a small part of Dr. Smock's testimony that supported the state, there is not a reasonable probability that, had Conner's counsel successfully objected to the admission of Dr. Smock's testimony about the basilar skull fracture, the result of the trial would have been different.

Conner argues that the district court's prejudice analysis should have considered the prejudice of Dr. Smock's entire testimony because, in Conner's view, the proper remedy for the prosecutor violating the district court's exclusion order would have been to exclude Dr. Smock's testimony in its entirety. (Appellant's brief, pp.24-30.) But, as the district court recognized, "[w]hether a violation of an exclusion order results in disallowing the witness to testify is a discretionary call by the trial judge." (R., p.222 (citing State v. Cardell, 132 Idaho 217, 221, 970 P.2d 10, 14 (1998).) And an appellate court will not question that decision unless "the appellant [can] demonstrate how the testimony may have been tainted by the witness's exposure . . . to other testimony." Cardell, 132 Idaho at 221, 970 P.2d at 14.

³ The physical evidence presented at trial diminished even further the importance of Dr. Smock's testimony about the basilar skull fracture. The detectives found Otis's blood "on a rug in the laundry room, on the east living room wall, in the carpeting under the heat register, in a carpet cleaning machine, on the underside of a chair in the living room, on the living room ceiling, on the garage floor, on one of the legs of the ladder, and on the claw of a hammer." Conner, 161 Idaho at 503, 387 P.3d at 171. Bevel testified that the blood on the living room ceiling indicated Otis had been struck multiple times in the living room with an object "extending from a person's hand with sufficient velocity that, with the castoff, it reaches the ceiling as opposed to just doing a parabolic arc and landing on the floor." (Tr., p.1313, Ls.6-17.)

Here, the district court found that it would *not* have excluded Dr. Smock’s entire testimony because it found Dr. Smock did not change his testimony based on the information he learned from the prosecutor about Dr. Groben’s testimony. (R., pp.222-23.) That decision is “determinative” as to the testimony that would have been excluded at trial had Conner’s counsel objected for purposes of Strickland prejudice. Sanchez, 127 Idaho at 713, 905 P.2d at 646.

Conner takes issue with the district court’s decision to exclude only part of Dr. Smock’s testimony and argues that he was prejudiced by the violation of the exclusion order because it allowed Dr. Smock to conform all of his testimony to Dr. Groben’s testimony. (Appellant’s brief, pp.24-30.) But, as the district court observed, if Dr. Smock was trying to conform his testimony to Dr. Groben’s testimony, he did a terrible job because “some of Dr. Smock’s testimony contradicted Dr. Groben’s testimony,” including Dr. Groben’s testimony “that one of the injuries was not, in his opinion, the result of a blow from the claw of a hammer, but from a flat surface.” (R., p.223.) In short, Conner has failed to point to any of Dr. Smock’s testimony—other than the testimony the district court said it would have excluded—that Dr. Smock changed from his report to conform to Dr. Groben’s testimony. Thus, the district court properly refused to consider the persuasive value of Dr. Smock’s testimony in its entirety to analyze prejudice under Strickland.

2. The District Court Properly Dismissed Conner’s Ineffective Assistance Claim Related To Dr. Smock’s Testimony About The Superficial Abraded Area

The district court properly dismissed Conner’s claim that his counsel should have timely objected to Dr. Smock’s testimony about the superficial abraded area on Otis’s head because Conner failed to sufficiently allege prejudice. See Payne, 146 Idaho at 561, 199 P.3d at 136 (observing that Strickland prejudice requires “a reasonable probability that, but for counsel’s errors, the result would have been different”). The superficial abraded area was a fourth injury on top of Otis’s head, with the other three injuries being the more obvious and more severe lacerations.

With respect to the superficial abraded area, Dr. Smock testified only that he could see it in the picture of Otis's head and that it was caused by blunt force trauma. (Tr., p.1579, L.13 – p.1580, L.4.) He did not opine on whether the superficial abraded area came from a hammer or a fall from a ladder. (See Tr., p.1579, L.13 – p.1580, L.4.) In fact, Dr. Smock's testimony that Otis died from blunt force trauma from the claw of a hammer was based on the three more obvious and more severe lacerations. (Tr., p.1580, Ls.8-24 (testifying that Otis died from "at least *three* blows" from a claw hammer) (emphasis added); Tr., p.1580, L.25 – p.1581, L.15 (explaining that Otis's injuries were inconsistent with falling from a ladder because "when you see *three* separate lacerations, that tells me there is *three* separate blows") (emphases added).) Dr. Smock did not rely on the superficial abraded area to reach his key conclusion that Otis died from a hammer attack and not from accidentally falling off a ladder, and thus Dr. Smock merely pointing out the superficial abraded area's existence could not have contributed to the verdict.⁴

Conner argues that the district court did not address the prejudice from his counsel's failure to object to Dr. Smock's testimony about the superficial abraded area. (Appellant's brief, pp.23-24.) He is correct that, in the section of the district court's order addressing prejudice, the district court listed only the basilar skull fracture testimony and the defensive wound testimony as excludable. (R., pp.228-29.) The state reads the omission of the superficial abraded area from the list of excludable testimony as a clerical error, not as an indication that the district court forgot to include the testimony in its prejudice analysis. (R., pp.228-29.) To the extent this Court disagrees with that reading, the district court's omission of the superficial abraded area is harmless because its reasoning as to why Conner failed to allege prejudice with respect to the other excludable testimony applies with even greater force to the superficial abraded area. (R., p.229 ("The

⁴ This is especially true given the physical evidence in the case. See supra note 3.

testimony of Dr. Smock may have been a bridge [between the state's other two experts], but the excluded testimony is not the deck or girders of the bridge.”.) The district court could not possibly have concluded that the superficial abraded area was more critical to Dr. Smock's opinions or the state's case than the basilar skull fracture or defensive wound, which both featured more prominently in Dr. Smock's testimony and were actually connected to the state's theory of the case that Conner killed Otis and Otis did not die by accidentally falling off of a ladder in the garage. (Compare Tr., p.1579, L.13 – p.1580, L.4, with Tr., p.1578, L.11 – p.1579, L.11 and Tr., p.1582, L.20 – p.1584, L.22.)

Moreover, Conner failed to allege in his petition or explain in his opening brief how Dr. Smock's testimony about the superficial abraded area prejudiced him. (R., pp.73-74; Appellant's brief, pp.23-30.) Instead, Conner focused on the prejudice from Dr. Smock's testimony in toto because Conner believes all of Dr. Smock's testimony would have been stricken if his counsel had timely objected to the prosecutor's violation of the witness exclusion order.⁵ (Appellant's brief, pp.23-30.) Dr. Smock's testimony about the superficial abraded area, however, had nothing to do with the exclusion order. Conner challenged the superficial abraded area only on the basis that it exceeded the scope of Dr. Smock's report (R., p.224), and Conner has not even alleged that the proper remedy for an expert testifying beyond the scope of his report is to strike all of the expert's testimony, cf. Jones v. Flowserve FCD Corp., 73 F. App'x 706, 709 (5th Cir. 2003) (affirming district court's exclusion of only those portions of expert testimony that went outside the scope of his report). Because Conner failed to allege how he was prejudiced by his counsel's failure to object to Dr. Smock's testimony about the superficial abraded area, the district court did not err when it dismissed Conner's claim on that basis. (R., p.212 (“Petitioner Conner has not

⁵ As explained above, that is incorrect. See supra Part C.1.

demonstrated that he was prejudiced by trial counsel's deficient performance.”.) And because Conner failed to argue in his opening brief that his counsel's failure to object to Dr. Smock's testimony about the superficial abraded area prejudiced him, he has waived that argument on appeal. See Bolognese v. Forte, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (“We will not consider assignments of error not supported by argument and authority in the opening brief.”).

3. The District Court Properly Dismissed Conner's Ineffective Assistance Claim Related To Dr. Smock's Testimony About The Defensive Wound On Otis's Hand

The district court properly dismissed Conner's claim that his counsel should have timely objected to Dr. Smock's testimony about the defensive wound on Otis's finger because Conner failed to sufficiently allege prejudice. See Payne, 146 Idaho at 561, 199 P.3d at 136 (observing that Strickland prejudice requires “a reasonable probability that, but for counsel's errors, the result would have been different”). To begin, Conner failed to allege in his petition or explain in his opening brief how Dr. Smock's testimony related to the defensive wound prejudiced him. (R., pp.73-74; Appellant's brief, pp.23-30.) Instead, he alleged and argued in his opening brief only that Dr. Smock's testimony in its entirety prejudiced him. (Appellant's brief, pp.23-30.) But, as with the testimony related to the superficial abraded area, Conner challenged Dr. Smock's testimony related to the defensive wound only on the basis that it exceeded the scope of his report (R., p.224), and Conner has failed even to allege that the district court should have struck Dr. Smock's testimony in its entirety if Conner's counsel had timely lodged the beyond-the-scope objection, cf. Jones, 73 F. App'x at 709 (affirming district court's exclusion of only those portions of expert testimony that went outside the scope of his report).

Furthermore, the record shows that Conner's counsel's failure to object to Dr. Smock's testimony about the defensive wound on Otis's finger could not have affected the verdict for at least three reasons. First, even if Conner's counsel had successfully excluded Dr. Smock's direct-

examination testimony related to the defensive wound, the jury still would have heard about the defensive wound during Dr. Smock's cross-examination. At Conner's counsel's insistence, Dr. Smock gave similar testimony about the defensive wound during cross-examination to explain why one of the wounds on Otis's head did not leave a pattern consistent with the two claws of a hammer. (Tr., p.1605, Ls.3-8.) Specifically, Dr. Smock testified that Otis could have been hit with only one claw because it "could be where Mr. Conner has his finger up there blocking the blow, and the reason we don't see two [marks] is because the other claw was blocked by the finger resulting in that laceration." (Tr., p.1605, Ls.3-8.) Conner could not have objected to testimony he elicited from Dr. Smock, see State v. Gleason, 123 Idaho 62, 66, 844 P.2d 691, 695 (1992) ("Appellant cannot now be heard to denounce testimony that he roused."), and he did not allege that his counsel provided ineffective assistance by probing Dr. Smock's opinion that the injury was consistent with being hit by the claws of a hammer (R., pp.64-75).

Second, even if Dr. Smock had not testified about the defensive wound at all, the jury still would have heard about the defensive wound from Bevel. See Johnson, 163 Idaho at 426-27, 414 P.3d at 248-49 (holding erroneous admission of testimony harmless because the same evidence was properly admitted later in the trial); Sandoval-Tena, 138 Idaho at 912, 71 P.3d at 1059 (holding erroneous admission of report harmless because "[t]he report was a duplicate of testimony under oath"); Liefeld, 104 Idaho at 369-70, 659 P.2d at 123-24 (holding erroneous admission of evidence harmless because it "was largely duplicative of admissible and admitted evidence"). Bevel testified at length about how "the three-quarter-inch cut on the tip of the [sic] Otis's left index finger was consistent with a defensive wound." (Tr., p.1364, Ls.11-15; see Tr., p.1272, L.18 – p.1273, L.15, p.1364, L.16 – p.1367, L.12.)

Third, as the district court found, Dr. Smock's statements about the defensive wound were relatively insignificant when compared to the rest of his testimony.⁶ (R., p.229.) The significant part of Dr. Smock's testimony was that the lacerations on Otis's head were all consistent with an attack from a hammer and inconsistent with falling off of a ladder. (Tr., p.1572, L.6 – p.1578, L.3, p.1580, L.5 – p.1582, L.19.) Because the challenged testimony was duplicative of Dr. Smock's cross-examination testimony and Bevel's testimony and made up only a small part of Dr. Smock's testimony supporting the state, there is not a reasonable probability that, had Conner's counsel successfully objected to the admission of Dr. Smock's testimony about the defensive wound, the result of the trial would have been different.

CONCLUSION

The state respectfully requests this Court affirm the judgment entered after the district court found that Conner failed to sufficiently allege Strickland prejudice.

DATED this 12th day of December, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

⁶ As with the rest of Dr. Smock's testimony that the district court found excludable, the significance of Dr. Smock's testimony about the defensive wound shrinks even further in light of the physical evidence presented at trial. See supra note 3.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12th day of December, 2019, 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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/s/ Jeff Nye
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