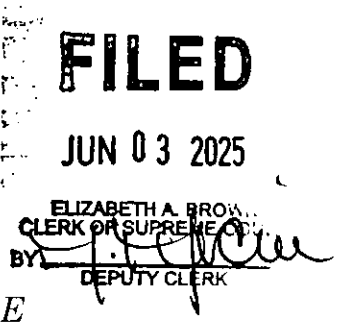
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH WILLIAM SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89591-COA



ORDER OF AFFIRMANCE

Keith William Sullivan appeals district court orders partially dismissing and partially denying a postconviction petition for a writ of habeas corpus filed on November 10, 2021, and a supplemental petition filed on November 6, 2023. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Sullivan argues the district court erred by denying his petition without conducting an evidentiary hearing. Sullivan's postconviction petition asserted that his trial and appellate counsel were ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on

appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Sullivan contends trial and appellate counsel were ineffective for not making a unit of prosecution challenge to the burglary charge and conviction. Sullivan was convicted of grand larceny of an automobile for taking a truck from a Reno dealership and burglary for entering that same truck *several days later* with the intent to possess a stolen vehicle.[1] Trial and appellate counsel challenged the burglary charge and conviction, arguing the State needed to prove a break in possession in order to show that Sullivan entered the truck with felonious intent different from the intent underlying the initial larceny. Sullivan now insists that had counsel pursued a unit of prosecution challenge, specifically relying on *Wilson v. State*, 121 Nev. 345, 114 P.3d 285 (2005); *Castaneda v. State*, 132 Nev. 434, 373 P.3d 108 (2016); *Ebeling v. State*, 120 Nev. 401, 91 P.3d 599 (2004); and *Firestone v. State*, 120 Nev. 13, 83 P.3d 279 (2004), both trial and appellate counsels' challenges to the burglary charge and conviction would have been successful.

"The unit of prosecution is the manner in which a criminal statute permits the defendant's conduct to be divided into discrete acts for

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[1]In Sullivan's opening brief, he misstates the charges by asserting he could not have formed the intent to steal the truck when he entered it days after stealing it. In his reply, he acknowledges the error but contends the felony underlying the burglary charge is immaterial to the unit of prosecution analysis.

prosecuting multiple offenses by establishing whether the conduct consists of one or more violations of a single statutory provision." 1 Crim. L. Def. § 68(d)(4) (2014); *see Ebeling*, 120 Nev. at 404, 91 P.3d at 601 (stating "[w]hether a particular course of conduct involves one or more distinct offenses under the statute depends on the legislative intent" (quotations omitted)). This analysis begins from a presumption that the "legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent." *Firestone*, 120 Nev. at 16, 83 P.3d at 281 (quotation marks omitted). "Determining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law." *Castaneda*, 132 Nev. at 437, 373 P.3d at 110 (quoting *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1278 (2012)).

Sullivan failed to demonstrate that counsel should have pursued this strategy and relied on these authorities or that such a strategy would have had a reasonable chance of affecting the outcome of his trial or direct appeal. The decisions upon which Sullivan now relies evaluate whether a particular course of conduct could constitute multiple violations *of a single statute*. *See Castaneda*, 132 Nev. at 444, 373 P.3d at 115 (limiting prosecution for possession of depictions of child sexual abuse to the instance of possession instead of per item possessed); *Wilson*, 121 Nev. at 357-58, 114 P.3d at 293-94 (concluding that unit of prosecution for the statute prohibiting use of a child in a sexual performance was limited to the performance itself and could not sustain additional charges based on recorded images of the performance); *Ebeling*, 120 Nev. at 405, 91 P.3d at 602 (limiting indecent exposure to the act of exposure and not per the number of witnesses to it); *Firestone*, 120 Nev. at 17-18, 83 P.3d at 282 (limiting to the act of leaving the scene of an accident and not the number

of victims affected by the accident). These cases do not address the facts of this case in which the convictions are based on violations of separate statutes, with the violations occurring days apart.

Here, Sullivan was convicted of grand larceny of an automobile which prohibits a person from intentionally stealing, taking or driving away a motor vehicle owned by another, NRS 205.228(1), and burglary for the unlawful entry of a motor vehicle with the intent to possess it knowing it was stolen, NRS 205.060(1)(c); NRS 205.273(1)(b). Although a defendant may not be convicted of both larceny and possession of stolen property for possessing the stolen property, *see Alvarez v. State*, 140 Nev., Adv. Op. 79, 561 P.3d 23, 26-28 (2024), Nevada law clearly permits punishment for both burglary and either theft or possession of stolen property, even when they occur in the same incident. *Stowe v. State*, 109 Nev. 743, 745, 857 P.2d 15, 17 (1991) (holding that burglary is not a theft offense and does not merge with any crime committed during it). The Nevada Supreme Court noted as much when it affirmed Sullivan's burglary conviction. *Sullivan v. State*, No. 78567, 2020 WL 6939643, at *1 (Nev. 2020) ("Burglary is complete upon unlawful entry with the intent to commit a felony, and the jury found that Sullivan unlawfully entered the vehicle with felonious intent (i.e., to possess stolen property)."). Burglary, even when supported with the intent to commit larceny or the intent to possess stolen property, is not a theft offense nor does it merge with any crime committed during the burglary. *Stowe*, 109 Nev. at 745-46, 857 P.2d at 17. Thus, Sullivan could have been convicted of burglary and larceny arising out of a single course of conduct. He has cited no authority suggesting that the Legislature did not intend to punish larceny of a motor vehicle and burglary when the offenses are committed several days apart.

Lastly, because a unit of prosecution analysis evaluates whether the Legislature intended to impose separate, additional penalties for multiple violations of the same statute, the analysis only speaks to the Legislature's intent to punish conduct. It does not address whether an offender can form the intent necessary for multiple violations. Thus, regardless of whether Sullivan could have been convicted of possession of stolen property several days after stealing that property, the State could still allege, and the jury could still find, that he had the intent to possess the stolen property at the time he entered the stolen truck. Therefore, the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Sullivan also contends that the cumulative errors of counsel warrant relief. Even assuming that multiple deficiencies in counsel's performance may be cumulated to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Sullivan failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Barry L. Breslow, District Judge
Michael Lasher LLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk