

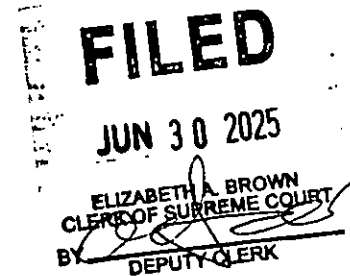
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NESTOR IVAN QUINTANA,  
Appellant,

vs.

CALVIN JOHNSON, WARDEN; HIGH  
DESERT STATE PRISON; CHARLES  
DANIELS, DIRECTOR OF THE  
NEVADA DEPARTMENT OF  
CORRECTIONS; NEVADA  
DEPARTMENT OF CORRECTIONS;  
AARON D. FORD, NEVADA  
ATTORNEY GENERAL; AND THE  
STATE OF NEVADA,  
Respondents.

No. 88749-COA



*ORDER OF AFFIRMANCE*

Nestor Ivan Quintana appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 5, 2022, and supplement. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Quintana argues the district court erred by denying his claims of ineffective assistance of counsel without conducting an evidentiary hearing. 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*). Both components of the inquiry must be shown. *Strickland*,

466 U.S. at 687. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). 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).

First, Quintana claimed counsel was ineffective for failing to call three noticed expert witnesses who were expected to testify regarding Quintana's post-traumatic stress disorder (PTSD). Quintana also contended counsel failed to call an expert witness to testify regarding the medications Quintana was using and how those medications could have impacted mental cognition and sleep patterns.

Quintana's bare claim failed to specify what these experts would have stated had they been called at trial.<sup>1</sup> Quintana also did not specify how any such testimony would have affected the outcome of the trial, particularly where counsel called an expert who testified that PTSD impairs a person's stress tolerance and cognition, making them more susceptible to providing a false confession. Therefore, Quintana failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. *Cf. Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have

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<sup>1</sup>We note that the parties stipulated that Quintana has PTSD.

affected the outcome of the proceedings). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Quintana claimed counsel was ineffective for failing to discuss a plea offer with him. Quintana contended the State offered a plea deal in which Quintana would have pleaded guilty to one count of child abuse and neglect and one count of open and gross lewdness and the State would have retained the right to argue but would not have opposed concurrent time. Quintana further contended that, had counsel discussed this offer with him, there is a reasonable probability he would have accepted it. Quintana's claim that counsel failed to discuss the plea offer with him is belied by the record. At a pretrial hearing, the State outlined the above offer and informed the trial court that Quintana had rejected the offer. The trial court asked defense counsel if this was correct, and counsel stated "I've gone over that with Mr. Quintana. He does not want to accept it, Judge." Thus, Quintana failed to allege specific facts not belied by the record that, if true, indicated counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Quintana claimed counsel was ineffective for failing to properly object to the use of the word "victim." Quintana contended his theory of the case was that the victim made up the allegations against him and that witnesses undermined his defense theory by continually referring to the victim as a "victim." Quintana's general claim that the term "victim" undermined his theory of defense is insufficient to demonstrate counsel's performance was objectively unreasonable. *See Chappell v. State*, 137 Nev.

780, 788, 501, P.3d 935, 950 (2021) (stating “a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently” but must instead “*specifically explain* how his attorney’s performance was objectively unreasonable” (quotation marks omitted)). Moreover, Quintana did not allege there was a reasonable probability of a different outcome at trial had counsel timely objected to the term “victim.” Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Quintana claimed counsel was ineffective for opening the door to other act evidence. Quintana contended counsel elicited testimony from his wife indicating he was “a very meek and humble man” who “avoided confrontation and was easily taken advantage of” and that this testimony allowed the State to question his wife about a prior incident of domestic violence.

In his petition, Quintana conceded that part of his defense theory was that he was “easily manipulated into making a false confession” due to his PTSD. Indeed, Quintana called an expert witness to testify regarding false confessions to support this defense, and counsel argued in closing that Quintana was “mentally fragile” and more susceptible to a false confession due to his severe PTSD. Given this defense, Quintana failed to demonstrate counsel was deficient for eliciting testimony regarding Quintana’s susceptibility to pressure. Moreover, Quintana did not allege there was a reasonable probability of a different outcome had counsel not elicited such testimony, and the trial court limited the State’s questioning to the fact that Quintana’s wife had previously called the police due to an

incident of domestic violence.<sup>2</sup> Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Quintana claimed counsel was ineffective for failing to timely disclose an expert's PowerPoint presentation. Quintana contended the expert was "relying" on this presentation and the inability to use it was detrimental to his defense. Even assuming counsel was deficient for failing to timely disclose this PowerPoint presentation, Quintana did not allege there was a reasonable probability of a different outcome at trial had counsel timely disclosed the presentation. Moreover, Quintana's expert still testified, and Quintana did not specify how the absence of the PowerPoint presentation affected the expert's testimony.<sup>3</sup> Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Quintana claimed counsel was ineffective for failing to object to instances of prosecutorial misconduct. In particular, Quintana contended the State (1) disparaged Quintana and counsel during closing argument by characterizing the defense theory as "ridiculous," "bizarre," and "absurd"; and (2) improperly made a golden rule argument<sup>4</sup> when it

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<sup>2</sup>The jury did not hear any details regarding the incident or learn of any arrests or convictions in the matter.

<sup>3</sup>Quintana's general assertion that "charts, diagrams and statistics" in the presentation would have aided the expert's testimony is insufficient to demonstrate any prejudice.

<sup>4</sup>A golden rule argument "is an argument asking jurors to place themselves in the position of one of the parties," and such "arguments are improper because they infect the jury's objectivity." *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008).

asked the jury “what do you think you would feel like if you had to look at photographs of your abuser all over the place you live in.”

The supreme court previously concluded that the former statements, when read in context, “were not improper as they were generally appropriate within the context of the argument, supported by the evidence, targeted to argue about witness credibility, or in response to Quintana’s closing arguments.” *Quintana v. State*, No. 80718, 2021 WL 1962894, at \*4 (Nev. May 14, 2021) (Order of Affirmance). Thus, Quintana failed to demonstrate counsel was deficient with regard to these statements. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (stating counsel is not deficient for failing to make futile objections); *see also Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (holding that “[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same” (quotation marks omitted)). As to the golden rule argument, although the supreme court concluded the argument was improper, it further determined that the argument “did not affect Quintana’s substantial rights or cause actual prejudice” because Quintana was only convicted of two of the nine charges and his confession supported the two convictions. *Quintana*, No. 80718, 2021 WL 1962894, at \*4. In light of this determination, Quintana failed to allege specific facts indicating a reasonable probability of a different outcome but for counsel’s errors.

Quintana also contended counsel failed to object to the State’s attempt to invoke the jury’s sympathy. In particular, Quintana contended the State “argu[ed] that essentially no one in her family believed her, she was yelled at by her family and her mother withheld affection from her. Therefore, [the victim] had no choice but to recant because she just wanted her life to go back to normal.”

In his petition, Quintana conceded that part of his defense theory centered around the fact that the victim had recanted her allegations of sexual abuse. At trial, the State argued the victim recanted not because the allegations were false but because of the effect the allegations had on her family. The State argued that everyone in the household believed she was lying, that her mother continued to speak with and support Quintana, and that her sister believed she was the reason her “daddy was taken away.” The State argued the victim recanted because “she just want[ed] everything to go back to normal.” This argument pertained to a central issue in the case—the credibility of the victim’s recantation—and was supported by the evidence. Thus, Quintana failed to allege specific facts indicating the State improperly invoked the jury’s sympathy, *see Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (stating the prosecution may not “appeal[ ] to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction”), or that counsel was deficient for failing to object to this argument, *see Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Quintana also did not allege there was a reasonable probability of a different outcome had counsel objected to this argument. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Quintana claimed counsel was ineffective for failing to file a sentencing memorandum or obtain letters of support from friends and family members. Quintana’s bare claim failed to specify what information should have been presented in a sentencing memorandum. *See Chappell*, 137 Nev. at 788, 501 P.3d at 950. Although Quintana claimed witnesses at trial would have written letters of support for him, Quintana failed to specify what any such letters would have stated beyond what was presented

at trial. Moreover, Quintana did not allege that there was a reasonable probability of a different outcome at sentencing had counsel filed a sentencing memorandum or obtained letters of support. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.


Lastly, Quintana claimed the cumulative effect of counsel's errors deprived him of his right to a fair trial. Even if multiple instances of deficient performance could be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Quintana failed to demonstrate counsel's alleged errors, considered cumulatively, would have entitled him to relief, *see Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating the relevant factors to consider in evaluating a claim of cumulative error). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Bulla

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook



cc: Hon. Michelle Leavitt, District Judge  
Waldo Law, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk