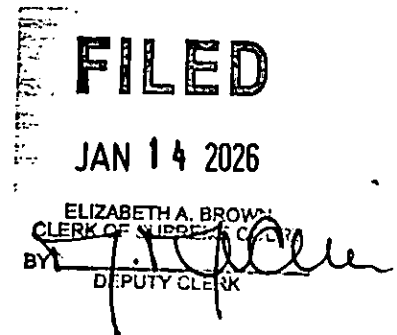


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR CAMPOS,
Appellant,
vs.
CLARK COUNTY DISTRICT
ATTORNEY AND THE STATE OF
NEVADA,
Respondents.

No. 90734-COA



ORDER OF AFFIRMANCE

Oscar Campos appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on May 20, 2024. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Campos argues the district court erred by denying his claims of ineffective assistance of trial and appellate counsel. 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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). 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, Campos claimed trial counsel was ineffective for failing to object to prosecutorial misconduct. In particular, Campos contended the State elicited irrelevant and prejudicial testimony concerning his infidelity, his drug dealing, and his participation in robberies. Campos did not specify the exact testimony challenged or why any such testimony was prejudicial.¹ Moreover, the district court found that (1) counsel strategically decided not to object to testimony regarding Campos's infidelity because this evidence supported Campos's defense theory that the victim had fabricated her allegations against him out of jealousy and revenge; and (2) testimony regarding Campos's drug activity and uncharged robberies was introduced

¹Campos asserted only that testimony regarding his infidelity "painted [him] in a bad light" and "suggest[ed] he [was] dishonest."

through defense counsel's cross-examination of the victim to support the defense theory that another individual was responsible for the victim's injuries and that the victim was involved in criminal activity related to gang affiliations.

The district court's findings are supported by the record, and Campos failed to demonstrate extraordinary circumstances that would warrant challenging counsel's strategic decisions. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Therefore, Campos did not allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim.

Second, Campos claimed trial counsel was ineffective for failing to object to the district court's failure to hold a hearing, or to admonish the jury, regarding the aforementioned other act evidence. Campos did not demonstrate that any such evidence would have been precluded had the trial court held a hearing on the matter. *See Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012) (stating prior bad act evidence is admissible if "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice"). Moreover, the jury was admonished on multiple occasions and instructed that it was not to infer any witness or the defendant was a person of bad character or a person who commits crimes based on the references to gangs or gang subculture introduced at trial, and Campos failed to demonstrate

that he was prejudiced by the lack of additional limiting instructions.² Therefore, Campos did not allege specific facts indicating counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim.

Third, Campos claimed trial counsel was ineffective for failing to object to duplicitous charges that violated his right against double jeopardy. In particular, Campos contended that counts 8 through 47 alleged the same act—burning the victim with a knife—and that these acts “occurred during the same course of conduct” and thus could only support a single battery charge. As an initial matter, we conclude Campos does not demonstrate the district court erroneously construed his claim as raising a unit-of-prosecution claim and not a double jeopardy claim. *See Wilson v. State*, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005) (“While often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct.”); *see also Jackson v. State*, 128 Nev. 598,

²We note that, in affirming Campos's judgment of conviction on direct appeal, this court concluded that the district court's failure to issue a limiting instruction following the admission of evidence regarding Campos's infidelity did not have a substantial or injurious influence on the jury's verdict as Campos's infidelity “was central to [his] theory of defense.” *Campos v. State*, No. 85473-COA, 2024 WL 227349, at *3 (Nev. Ct. App. Jan. 19, 2024) (Order of Affirmance).

604-05, 612, 291 P.3d 1274, 1277-79, 1283 (2012) (discussing double jeopardy and Nevada's unit-of-prosecution cases).

A battery is defined as "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). The evidence at trial indicated Campos physically abused the victim over multiple days, which included burning the victim on multiple parts of her body with a heated knife. Notably, the victim testified that Campos reheated the knife in between the burnings and that there were moments between the burnings in which Campos "was sitting down, and [she] was just sitting there crying." Given the particular facts presented, Campos failed to demonstrate that the separate burnings constituted a single act that could only support one charge of battery or that the challenged convictions violated his right against double jeopardy. *Cf. Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (stating "a hypertechnical division of what was essentially a single act is not sustainable" and concluding the defendant's act of lubricating the victim's vagina, removing his hand to apply more lubricant to his finger, and then digitally penetrating the victim was a single act of sexual assault); *see also Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990) (concluding a defendant's double jeopardy rights were not violated where the "facts support[ed] separate convictions for separate acts, even though the acts were the result of a single encounter and all occurred within a relatively short time"). Therefore, Campos failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's errors. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need

not lodge futile objections to avoid ineffective assistance of counsel claims.”). Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Campos claimed trial counsel was ineffective for failing to object to expert witness testimony. In particular, Campos contended that Jeri Dermanelian, a registered nurse, testified “regarding the sexual assault nurse exam and how a ‘victim’ might or might not behave,” and that this testimony was irrelevant and constituted impermissible vouching.

Campos was charged with sexual assault with the use of a deadly weapon. The victim testified that Campos forced her to use a dildo on herself and that he used the dildo on her, and that although she did not want to engage in these acts, her body responded and she became aroused. Dermanelian testified to her knowledge and experience conducting sexual assault nurse examinations. She further testified that a victim of sexual assault can become aroused and that their body “will go through its normal [physiological] process” regardless of whether there is consent. This testimony was relevant to the issue of consent and did not vouch for the victim. *See Carter v. State*, 121 Nev. 759, 766, 121 P.3d 592, 596 (2005) (recognizing a “perpetrator’s knowledge of lack of consent is an element of sexual assault”); *see also Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (“[V]ouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness’s veracity.” (cleaned up)). Therefore, Campos did not allege specific facts indicating counsel’s performance was deficient or a reasonable probability of a different outcome but for counsel’s errors. Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Campos claimed trial counsel was ineffective for failing to object to hearsay or violations of his confrontation rights. In particular, Campos contended that Facebook messages between the victim and another woman were discussed at trial and that they “concerned [his] relationships with both women.” He also contended that he had no opportunity to cross-examine the other woman.

Campos did not specify what the challenged messages stated. Regardless, the district court determined that the challenged messages were not offered for the truth of the matter asserted, and Campos does not challenge that determination on appeal.³ Moreover, Campos did not allege that any specific statements were testimonial in nature so as to implicate his confrontation right. *See, e.g., Harkins v. State*, 122 Nev. 974, 979, 143 P.3d 706, 709 (2006) (concluding a statement was not testimonial and thus did not violate the defendant’s Sixth Amendment confrontation right). And as previously discussed, evidence of Campos’s infidelity supported the defense theory that the victim fabricated the allegations against him due to his infidelity. Therefore, Campos did not allege specific facts indicating counsel’s performance was deficient or a reasonable probability of a different outcome but for counsel’s errors. Accordingly, we conclude the district court did not err by denying this claim.

³Rather, Campos appears to argue on appeal that counsel did not object to the district court’s failure to instruct the jury that the messages could not be considered for the truth of the matter asserted. Campos did not raise this claim in his petition below, and we decline to consider it on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

Sixth, Campos claimed appellate counsel was ineffective for failing to argue plain-error review on direct appeal. In particular, Campos contended that counsel raised the aforementioned substantive claims on direct appeal but failed to recognize the issues were not preserved or argue plain error, which resulted in his claims being forfeited. *See Campos v. State*, No. 85473-COA, 2024 WL 227349, at *2 (Nev. Ct. App. Jan. 19, 2024) (Order of Affirmance). Campos accordingly asserted that, had counsel properly argued that the aforementioned underlying issues amounted to plain error, there is a reasonable probability that he would have been successful on direct appeal.

However, as we have discussed previously, Campos failed to demonstrate that the aforementioned underlying issues had merit or that the alleged errors had a reasonable probability of affecting the jury's verdict had counsel objected on those grounds. As a result, he likewise did not demonstrate a reasonable probability of success on direct appeal but for appellate counsel's errors, as he failed to demonstrate any of the aforementioned issues amounted to error affecting his substantial rights. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (stating the plain error standard of review).⁴ Accordingly, we conclude the district court did not err by denying this claim.

⁴To the extent Campos contended that he would have secured a more favorable standard of review on direct appeal had trial counsel objected to the aforementioned errors, we conclude trial counsel was not ineffective for the reasons previously discussed.

Seventh, Campos claimed trial counsel was ineffective for failing to investigate or present evidence of jail calls between the victim and his mother. Campos contended these calls revealed an “amicable relationship” between the two that was inconsistent with the victim’s trial testimony, and that they indicated the victim loved him, did not fear him, and had falsely accused him of the crimes because of his infidelity.

The district court held an evidentiary hearing on this claim and found that counsel’s decision not to introduce these phone calls was a matter of sound trial strategy. The district court’s finding is supported by the record. Trial counsel testified that he was aware of these phone calls but did not want to introduce them because (1) the calls supported an inference that Campos was “pulling strings through his mother” and communicating directly with the victim; and (2) the best evidence regarding the victim’s recantation was the victim’s interview with an investigator, as the victim’s story to the investigator was more specific, clear, and believable. The district court implicitly found counsel’s testimony credible, and this court will not “evaluate the credibility of witnesses because that is the responsibility of the trier of fact.” *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Campos failed to demonstrate extraordinary circumstances that would warrant challenging counsel’s strategic decisions. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Therefore, Campos failed to demonstrate counsel’s performance was deficient or a reasonable probability of a different outcome but for counsel’s errors. Accordingly, we conclude the district court did not err by denying this claim.

Eighth, Campos claimed trial counsel was ineffective for failing to exercise independent judgment as to trial strategy and for opening the door to other bad acts. In particular, Campos contended that (1) counsel cross-examined the victim about robbing \$60,000 from a drug-dealer to appease him, and that this opened the door to the State eliciting information that Campos actually planned and participated in that robbery; and (2) counsel cross-examined the victim's father, at Campos's request, about an incident wherein he and his son threatened Campos with a shotgun at a birthday party, and that this opened the door to Campos's prior abuse and domestic violence involving the victim.

The district court found that Campos requested counsel to pose questions concerning the aforementioned issues, counsel discussed the risks with Campos, counsel did not fail to exercise independent judgment by taking Campos's input into account, and that counsel's decisions regarding witness examination and the presentation of evidence were strategic. The district court's findings are supported by the record. On the fourth day of trial, the trial court held a hearing outside the presence of the jury wherein counsel relayed that he and Campos had a disagreement on whether to cross-examine the victim regarding the aforementioned robbery when doing so would open the door to prior bad acts. At that hearing, counsel stated the following:

Now I've spoken with my client about it. I've expressed my fear about this. This is not the first time we've had this conversation, right Oscar? And as a result I have concerns that if I do it this way that it does blow open this idea of other uncharged prior bad acts And so as a result Mr. Campos

and I had a very active conversation here at the table as well back in the room about this issue. And I told Mr. Campos that we would lay a record.

Counsel stated that he would ask the victim questions about the robbery because Campos wanted him to and that he was giving Campos "a lot of leeway" because Campos had an opportunity to represent himself previously. Counsel further stated that "it was clear that [Campos] understood the ramifications, the possible danger of getting into that," and Campos confirmed with the trial court that he was aware that the victim might bring up prior bad acts and that, if she did, it would be her word against his.⁵

On the fifth day of trial, a bench conference was held in which counsel acknowledged that questioning the victim's father about the birthday party incident could open the door to other bad acts but that he was asking questions on Campos's request. The trial court asked counsel if it was "part of [his] trial strategy, knowing that it could open a door," and counsel stated, "we're going to have a difference of opinion as to what trial strategy is, but, yes, absolutely." Counsel again stated he was giving Campos "a lot more leeway than most of [his] clients because of the fact that he has been approved before to represent himself" but reaffirmed that the questioning was still part of his trial strategy.

On the sixth day of trial, the trial court held another hearing outside the presence of the jury, in which counsel reiterated that he had given Campos "a lot of deference" regarding the questions to be asked

⁵We note that Campos elected to testify at trial.

because Campos “was certified at some point . . . to represent himself,” but stated that “[a]t the end of the day it’s my choice on how to run this particular trial.” The trial court stated that counsel had been employing a trial strategy that was a “hybrid” of his own and Campos’s and that counsel had been doing an “effective job” given the facts of the case.

Finally, at the evidentiary hearing on Campos’s petition, counsel testified that he was “very cautious about [his] representation of [Campos]” because he was the seventh attorney on the case and “[e]very attorney before had issues with him.” He further testified that, although he had elicited some information at trial because Campos wanted him to, he does not typically defer to his clients and did not introduce the aforementioned jail calls because he “had a strategy as to how [he] wanted this case to be presented to the jury.”

In light of the foregoing, Campos failed to demonstrate extraordinary circumstances that would warrant challenging counsel’s strategic decisions. *See id.* Therefore, Campos failed to demonstrate counsel’s performance was deficient or a reasonable probability of a different outcome but for counsel’s errors. Accordingly, we conclude the district court did not err by denying this claim.⁶

⁶Campos also contended a witness testified that he had heard Campos threaten to kill the victim, that this witness could not identify him on direct examination, and that this witness identified him on cross-examination after counsel “unwisely” inquired into his identification again. Campos failed to allege specific facts indicating counsel’s inquiry was objectively unreasonable, *see Rippo v. State*, 134 Nev. 411, 438, 423 P.3d 1084, 1108 (2018) (stating “the reasonableness of counsel’s performance is evaluated

Ninth, Campos claimed trial counsel was ineffective for failing to object to gang affiliation and gang culture evidence. Campos failed to demonstrate that this evidence, which was relevant to show Campos and the victim's relationship and to explain the victim's recantation, would have been precluded had counsel objected. *See Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004) ("The decision to admit gang-affiliation evidence rests within the discretion of the trial court."); *see also Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Moreover, as previously discussed, the jury was instructed that it was not to "infer any witness or defendant is a person of bad character or a person who commits crime" and that this information was "to be used solely for the purposes of understanding gang subculture, in the context of this case, and the relationships between the parties." We presume the jury followed the trial court's instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, Campos failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim.

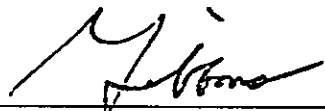
Finally, Campos claimed counsel's multiple deficiencies, considered cumulatively, resulted in prejudice. Even assuming any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 & n.17,

from counsel's perspective at the time, without the distorting effects of hindsight" (internal quotation marks omitted)), or that there was a reasonable probability of a different outcome had counsel not so inquired. Therefore, we conclude the district court did not err by denying this claim.

212 P.3d 307, 318 & n.17 (2009), Campos failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require “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. Jessica K. Peterson, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk