

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL EDWARD HERROD,  
Appellant,  
vs.  
WILLIAM GITTERE, IN HIS OFFICIAL  
CAPACITY AS WARDEN OF ELY  
STATE PRISON; BRIAN WILLIAMS, IN  
HIS OFFICIAL CAPACITY AS  
WARDEN OF HIGH DESERT STATE  
PRISON; JEREMY BEAN, IN HIS  
OFFICIAL CAPACITY AS WARDEN OF  
HIGH DESERT STATE PRISON; AND  
THE STATE OF NEVADA,  
Respondents.

No. 90098-COA

**FILED**

**FEB 27 2026**

ENZABETHA BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Michael Edward Herrod appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 26, 2020, and a supplemental petition filed on June 23, 2023. Eighth Judicial District Court, Clark County; Bitu Yeager, Judge.

Herrod and his girlfriend got into an altercation. A few days later, the two were in Herrod's car, and he poured a substance over her head, told her he was going to light her on fire, and flicked a lighter. He also tried to push her out of the moving vehicle. When he was arrested, Herrod had a large amount of controlled substances in his vehicle. Herrod was convicted, pursuant to a jury verdict, of first-degree kidnapping resulting in substantial bodily harm, battery resulting in substantial bodily harm constituting domestic violence, trafficking in a controlled substance, and two counts each of attempted murder and preventing or dissuading a witness from testifying or producing evidence.

Herrod argues the district court erred by denying his claims that trial counsel was ineffective after holding an evidentiary hearing on some of those claims. 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, 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). 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, Herrod claimed counsel was ineffective for conceding his guilt to the dissuading counts without his permission. "A concession of guilt is simply a trial strategy—no different than any other strategy the defense might employ at trial. As such, there is no reason to conduct a mid-trial canvass to determine a defendant's knowledge of or consent to that particular strategy." *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). The district court found counsel's decision to concede was

a reasonable strategic decision. The record supports the decision of the district court.

The district court held an evidentiary hearing on this claim, at which counsel testified that he conceded these two charges during closing argument because there was sufficient evidence of the dissuading and he wanted to gain credibility with the jury.<sup>1</sup> Counsel testified that, if he fought or argued against the charges, he would lose credibility. Strategic decisions of counsel are virtually unchallengeable absent extraordinary circumstances, which are not present here. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Therefore, we conclude Herrod failed to demonstrate counsel's performance was deficient. Further, Herrod failed to demonstrate a reasonable probability of a different outcome at trial had counsel not conceded the charges. There was overwhelming evidence presented at trial that Herrod attempted to prevent the victim from testifying based on recorded phone calls he made from the jail. Therefore, we conclude the district court did not err by denying this claim.

Second, Herrod claimed his right to the effective assistance of counsel was infringed because he was forced to choose between that right and his right to a speedy trial. Specifically, he claimed that to ensure his right to a speedy trial, he was forced to go to trial with counsel who was unprepared and thus ineffective. The district court held an evidentiary hearing on this claim, at which counsel testified that he was ready for trial and that he worked weekends and nights, reviewed discovery, and prepared for opening, cross-examination, and voir dire. He also testified he

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<sup>1</sup>Counsel testified he made this decision just prior to closing arguments. We note that Herrod refused to attend the trial proceedings after the first day of trial.

conducted a file review with the State and reviewed the report prepared by the State's expert. Counsel informed Herrod that, if he wanted a defense expert to testify at trial, a continuance was necessary; however, Herrod refused any continuance. Given this testimony, Herrod failed to demonstrate that he was "compelled to forfeit his right to the effective assistance of counsel to satisfy either the deficient performance prong or the prejudice prong of *Strickland*." See *Stuard v. Stewart*, 401 F.3d 1064, 1067 (9th Cir. 2005). Further, Herrod failed to demonstrate that, had a continuance been granted, his constitutional right to a speedy trial would have been violated as he failed to demonstrate a continuance of a few weeks or months would have been an "uncommonly long" delay under *Barker v. Wingo*, 407 U.S. 514, 521 (1972), *Doggett v. United States*, 505 U.S. 647, 651 (1992), or *Sunseri v. State*, 137 Nev. 562, 564, 495 P.3d 127, 131 (2021). See *Stuard*, 401 F.3d at 1068-69 ("A compulsion to choose between two advantages, where the compulsion does not force a defendant to forfeit any constitutional entitlements, is not contrary to [United States Supreme Court precedent]."). Therefore, we conclude the district court did not err by denying this claim.

Third, Herrod claimed counsel was ineffective for failing to hire an expert to test the chemicals on the victim's clothing and the seat of the car. The district court held an evidentiary hearing on this claim; however, Herrod failed to present testimony or evidence to support this claim at the hearing. Notably, he did not present an expert to demonstrate what could have been discovered had counsel hired an expert to do the testing. Thus, he failed to prove this claim by a preponderance of the evidence. Accordingly, he failed to demonstrate counsel's performance was deficient

or a reasonable probability of a different outcome at trial. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Herrod claimed counsel was ineffective for failing to investigate. Specifically, he contended counsel failed to attempt any testing of the victim's clothing or the seat of the car and failed to analyze the text messages between Herrod and the victim. The district court held an evidentiary hearing on this claim. As concluded above, Herrod failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had the testing been conducted. As to the text messages, Herrod failed to provide any testimony or evidence at the evidentiary hearing regarding the text messages. Further, the petition and supplement were devoid of any information as to what the text messages were or how they would have made a difference in the outcome at trial. Thus, Herrod failed to prove this claim by a preponderance of the evidence. Accordingly, he failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel done further investigation. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Herrod claimed counsel was ineffective for failing to file a motion to sever the dissuading counts from the rest of the counts. Herrod argued the two dissuading counts were not part of a common scheme or plan and were more prejudicial than probative. "Two or more offenses may be charged in the same . . . information in a separate count for each offense if the offenses charged" are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." NRS 173.115(1)(b). Charges are "connected together" if "evidence of either charge would be admissible for a relevant, nonpropensity purpose in a

separate trial for the other charge.” *Rimer v. State*, 131 Nev. 307, 322, 351 P.3d 697, 708-09 (2015).

The district court held an evidentiary hearing on this claim, and counsel testified he did not file a motion to sever because he did not believe it would be successful. The district court concluded the crimes were connected together in that evidence of the dissuading crimes would be admissible in a separate trial regarding the other crimes and vice versa. The evidence of dissuading a witness was relevant to the other charged crimes for the nonpropensity purpose of showing Herrod’s consciousness of guilt. Further, the other charged crimes were relevant for the nonpropensity purpose of showing Herrod’s motive for dissuading a witness. Thus, the evidence of the charges would be cross-admissible for relevant, nonpropensity purposes in separate trials. Therefore, the district court found that counsel’s performance was not deficient and that there was no reasonable probability of a different outcome at trial had counsel filed a motion to sever. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Sixth, Herrod claimed counsel was ineffective for failing to object to false testimony. The district court did not grant an evidentiary hearing on this claim because Herrod failed to support this claim with specific facts not belied by the record that, if true, would entitle him to relief. The record supports the decision of the district court. Herrod failed to identify any false testimony in his petition or supplemental petition. Thus, Herrod failed to demonstrate counsel’s performance was deficient or a reasonable probability of a different outcome had counsel objected.

Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.<sup>2</sup>

Seventh, Herrod claimed counsel was ineffective for failing to impeach the victim at trial when she admitted to being under the influence of controlled substances at the time of the crimes. The district court declined to grant an evidentiary hearing on this claim because Herrod failed to allege specific facts not belied by the record that, if true, would entitle him to relief. The district court found that Herrod failed to demonstrate counsel's performance was deficient as the information was presented to the jury and as counsel argued that the victim's drug use affected her credibility during closing arguments. Further, the district court found Herrod failed to demonstrate a reasonable probability of a different outcome at trial as the victim's use of controlled substances was presented to the jury. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eighth, Herrod claimed counsel was ineffective for stating during opening statements that "only gas smells like gas." The district court conducted an evidentiary hearing on this claim, at which counsel testified he made this statement to undermine the State's argument that the substance poured over the victim was flammable. The victim testified the substance smelled like gas but was not gas because it was thicker than gas; other witnesses corroborated that the victim smelled like gas. The

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<sup>2</sup>On appeal, Herrod adds additional facts to this claim. However, because Herrod failed to argue those additional facts below, we decline to consider them for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

State's expert testified he tested the seat of the car and the victim's clothes and did not find any flammable substances. The expert did find cleaning compounds. Counsel argued Herrod dumped non-flammable cleaning products on the victim rather than a flammable substance. Counsel's decision to state "gas smells like gas" was a reasonable trial strategy, and strategic decisions of counsel are virtually unchallengeable absent extraordinary circumstances, which are not present here. *See Lara*, 120 Nev. at 180, 87 P.3d at 530. Thus, Herrod failed to demonstrate counsel's performance was deficient. Further, Herrod failed to demonstrate a reasonable probability of a different outcome at trial because the jury was instructed that statements of the attorneys during opening arguments were not evidence. And juries are presumed to follow their instructions. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, we conclude the district court did not err by denying this claim.

Ninth, Herrod claimed counsel was ineffective for failing to file a *Brady*<sup>3</sup> motion or any other motion, including a motion to suppress. The district court conducted an evidentiary hearing on this claim. Herrod failed to present any testimony or information as to what evidence was withheld, what grounds counsel could have raised in a motion to suppress, or what other motions counsel could have filed. Thus, he failed to prove this claim by a preponderance of the evidence. Accordingly, Herrod failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome at trial had counsel filed the motions. Therefore, we conclude the district court did not err by denying this claim.

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<sup>3</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

Tenth, Herrod claimed counsel was ineffective for failing to inform him of his habitual criminal status. The district court found this claim was insufficiently pleaded because the claim in the petition was "that the record does not indicate that the State's 'notice was communicated . . . to [Herrod].'" While the district court did not specifically hold an evidentiary hearing on this claim, counsel was asked questions about this at the evidentiary hearing. The district court found Herrod failed to show that counsel did not inform him of the State's notice. This finding is supported by the fact that Herrod did not testify at the evidentiary hearing. Thus, he failed to prove, by a preponderance of the evidence, that he was not informed of his habitual criminal status. Therefore, he failed to demonstrate counsel's performance was deficient. Further, Herrod failed to show prejudice as he failed to allege the result of any proceeding would have been different had counsel informed him of his habitual criminal status. Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Herrod claimed counsel was ineffective for failing to rebut the State's attempted murder theories when there was insufficient evidence to support them. The district court declined to grant an evidentiary hearing on this claim because Herrod failed to allege specific facts not belied by the record that, if true, would entitle him to relief. The record supports the decision of the district court. On appeal from Herrod's judgment of conviction, the Nevada Supreme Court found there was sufficient evidence presented of Herrod's guilt on the attempted murder counts, and Herrod failed to allege what counsel should have further done to rebut the State's evidence. Thus, he failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome

at trial. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Herrod claimed appellate counsel was ineffective for failing to argue the above grounds or any other “good grounds” on appeal. 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). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

The district court granted an evidentiary hearing as to this claim. Herrod failed to demonstrate that any of the above claims could have been raised and considered on appeal because they are claims of ineffective assistance of counsel, which are generally not appropriate to be raised on direct appeal. *See Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001) (“[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary.”), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Further, Herrod failed to present testimony or evidence as to what other “good grounds” counsel could have raised on appeal. Thus, he failed to prove this claim by a preponderance of the evidence. Accordingly, he failed to demonstrate that counsel’s performance was deficient or that these claims had a reasonable probability of success

on appeal. Therefore, we conclude the district court did not err by denying this claim.

Having concluded Herrod is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Bitá Yeager, District Judge  
Oronoz & Ericsson, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk