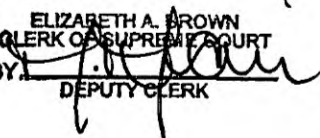


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTURO RIVERA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85972-COA

FILED
MAR 13 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Arturo Rivera, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 14, 2015, and a supplemental petition filed on July 29, 2019. Eighth Judicial District Court, Clark County; Michael A. Cherry, Senior Judge.

Rivera argues the district court erred by denying his claims of ineffective assistance of trial 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*). 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).

Rivera claimed that counsel failed to object to multiple instances of prosecutorial misconduct during the State's closing argument. Statements alleged to be prosecutorial misconduct "should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014) (internal quotation marks omitted) (quoting *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). A "prosecutor may argue inferences from the evidence and offer conclusions on contested issues." *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted). "The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); *see also Taylor v. State*, 132 Nev. 309, 324, 371 P.3d 1036, 1046 (2016) (stating that a prosecutor's comments expressing opinions or beliefs are not improper when they are reasonable conclusions or fair comments based on the presented evidence). Rebuttal arguments may permissibly respond to issues raised by the defense's closing, and "[t]he strongest factor against reversal on the grounds that the prosecutor made an objectionable remark is that it was provoked by defense counsel." *Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

First, Rivera claimed counsel should have objected when the State improperly argued that he intended to sexually assault or batter R.D. in the same way he had F.Z. despite a lack of evidence of his intent toward R.D. The State charged Rivera with kidnapping and sexually assaulting F.Z. and with kidnapping R.D. with the intent to sexually assault or to

batter her causing substantial bodily harm. Rivera alleged the State's argument amounted to improper propensity argument as the jury could find him guilty of first-degree kidnapping of R.D. merely because the circumstances of the crime were similar to those alleged by F.Z. The Nevada Supreme Court previously concluded that sufficient evidence supported Rivera's conviction for the first-degree kidnapping of R.D. based on the State's theory that Rivera did so for the purpose of committing sexual assault or a battery causing substantial bodily harm. *Rivera v. State*, No. 65090, 2015 WL 223956 (Nev. Jan 14, 2015) (Order of Affirmance). This determination is the law of the case. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Because there existed sufficient evidence of Rivera's intent to kidnap R.D. for the purpose of committing sexual assault or battery causing substantial bodily harm, the State was allowed to argue inferences from that evidence and offer conclusions on the contested issue of Rivera's intent.¹ Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.²

¹Rivera argues that the State did not need to argue Rivera's intent to commit sexual assault or battery causing substantial bodily harm because such intent was not required to find him guilty of first-degree kidnapping. First-degree kidnapping is kidnapping committed with the intent to commit any of several enumerated acts, including committing sexual assault or inflicting substantial bodily harm. *See NRS 200.310(1)*. Accordingly, we conclude Rivera is not entitled to relief based on this argument.

²Rivera also claimed that counsel was ineffective for failing to request a curative instruction. Rivera's bare claim did not allege what instruction counsel should have requested or how it would have affected the outcome at

Second, Rivera claimed counsel should have objected when the State improperly mischaracterized R.D.'s testimony regarding Rivera's tattoos in order to bolster R.D.'s credibility. Photos of Rivera's tattoos were admitted into evidence, and the jury was instructed to determine guilt from the evidence in the case and that the statements, arguments, and opinions of counsel are not evidence. Jurors are presumed to follow district court orders and instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Accordingly, Rivera failed to demonstrate a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Third, Rivera claimed counsel should have objected when the State disparaged him by repeatedly characterizing him as "abysmally stupid." During his closing argument, defense counsel argued it would be abysmally stupid to sexually assault someone without a condom despite knowing about DNA identification technology. In rebuttal, the State highlighted evidence tending to demonstrate that Rivera's actions were not intelligent. The district court found that the State was properly responding to defense counsel's argument and the examples offered by the State were supported by evidence in the record. These findings are supported by the record. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

trial. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Rivera claimed counsel should have objected when the State disparaged his theory of defense by arguing it was ridiculous for the jury to believe that R.D., an experienced prostitute, would falsely accuse Rivera of kidnapping her over \$20, would get into his car without seeing the money, and would leave the immediate vicinity to go to an abandoned house to commit a sex act. Here, the State was rebutting, not disparaging, Rivera's theory of defense that this was an act of prostitution. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Rivera claimed counsel should have objected when the State disparaged counsel by objecting to counsel's characterization of a witness's testimony and stating that that was not what the witness's testimony was. Rivera also contended that counsel should have sought a curative jury instruction. The State did not disparage the defense but merely expressed its disagreement with counsel's characterization of the testimony. Moreover, the district court overruled the State's objection and instructed the jurors to instead rely on their own recollection of the witness's testimony and that counsel's argument was not evidence. Jurors are presumed to follow district court orders and instructions. *See id.* Finally, Rivera failed to specify what curative instruction counsel should have sought.³ Accordingly, Rivera failed to demonstrate counsel's

³On appeal, Rivera argues that counsel should have requested a curative instruction directing the jury to not only disregard the State's initial objection but also the subsequent commentary that disparaged defense counsel's closing argument. Because Rivera did not make this

performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected or requested a curative jury instruction. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Rivera claimed counsel should have objected when the State disparaged the defense by ridiculing counsel's argument that F.Z. was not credible when she told police that she had not seen a lot of penises despite being a prostitute since age 12. Rivera argued during closing that these statements showed F.Z. was not credible and suggested she was lying. In rebuttal, the State argued that it was "silly" for the police to have asked a woman who had just been raped and was crying if she had seen a lot of penises. Thus, the State's argument did not disparage the defense but rather was made in response to Rivera's closing argument. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Rivera claimed counsel should have objected when the State disparaged the defense by arguing the sole defense witness was a liar. The district court found that the State did not call the witness a liar but was instead arguing his credibility. These findings are supported by the record.⁴ Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable

argument below, we decline to consider it on appeal in the first instance. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

⁴In his reply, Rivera concedes that the State did not explicitly call the witness a liar.

probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Rivera claimed counsel should have objected when the State improperly offered its personal opinion and thus vouched for R.D.'s credibility by arguing that a person who has prostituted before would know better than to get into a car to have sex with someone without first determining if the person had money. The State did not make a personal assurance regarding R.D.'s veracity and, thus, did not vouch for her credibility. *See Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (providing that "vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity" (internal quotation marks omitted)). Rather, as the district court found, the State's argument was in rebuttal to Rivera's argument regarding R.D.'s credibility and her motive to lie. This finding is supported by the record. Rivera challenged the credibility of the victims during his closing argument by arguing that it was reasonable to believe they were at the scene of the crimes to engage in drug use or prostitution. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Ninth, Rivera claimed counsel should have objected when the State improperly vouched for F.Z.'s credibility by arguing she would not have gotten into Rivera's vehicle if there was no gun, that the gun was "there," and that the reason we knew the gun was there was because F.Z. "told us so." The State did not make a personal assurance regarding F.Z.'s veracity and, thus, did not vouch for her credibility. *See id.* F.Z. testified

that Rivera threatened her with a gun, but no gun was recovered. The State's argument was a reasonable conclusion based on the evidence introduced at trial. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Tenth, Rivera claimed counsel should have objected when the State improperly invoked the jury's sympathy by arguing that F.Z. should be believed because of her demeanor on the witness stand and her troubled past. These comments did not improperly invoke sympathy for F.Z. Rather, Rivera challenged the credibility of the victims during his closing argument by arguing that it was reasonable to believe that the victims were fabricating their allegations because they were at the scene of the crimes to engage in drug use or prostitution. The State's comments were permissible rebuttal argument to the challenge to F.Z.'s credibility. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Rivera claimed counsel should have objected when the State improperly invoked the jury's sympathy by arguing that it should find F.Z.'s testimony credible because it was motivated by what she feared most—Rivera. Rivera also alleged the State improperly offered its personal opinion that Rivera was to be feared. The State's comments did not improperly invoke sympathy for F.Z. but rather were made in response to Rivera's closing argument challenging her motives. The State rebutted this challenge by arguing that F.Z.'s fear of her attacker was greater than her

fear of going to the police. This inference is supported by the evidence and was not an offer by the State as to its personal opinion. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Twelfth, Rivera claimed counsel should have objected when the State improperly vouched for F.Z.'s credibility and invoked sympathy for her by arguing its personal opinion that the reason she told police she had not seen a lot of penises was to hold on to some sense of pride. The State did not make a personal assurance regarding F.Z.'s credibility. And it was free to make fair comments or express its opinion about F.Z.'s motivations during police questioning. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Rivera claimed counsel should have objected when the State improperly made a golden rule argument regarding F.Z. by stating "imagine what she has seen" and commenting on her being asked if she was a prostitute when she reported the crime. The district court found that the State was not asking the jurors to put themselves in F.Z.'s shoes but rather was referencing F.Z.'s testimony about her background to rebut Rivera's argument that F.Z. fabricated her story. This finding is supported by the record. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Rivera claimed counsel should have objected when the State improperly mischaracterized a jury instruction regarding the credibility of witnesses by arguing the jury could use that instruction to disregard all of Rivera's police statement if it found he had lied about a material fact. The State generally referenced the instruction and then discussed inconsistencies in Rivera's police statement to argue that it was not credible. However, the State did not specifically ask the jury to disregard any of Rivera's statements to police. Instead, the State expressly asked the jury on multiple occasions to consider statements Rivera made. Further, the district court found that the jury was aware that Rivera was not a witness. This finding is supported by the record. The jury instruction plainly states that it applies to witnesses, and the jury is presumed to follow the instructions. *See Summers*, 122 Nev. at 1333, 148 P.3d at 783. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Fifteenth, Rivera claimed counsel should have objected when the State improperly stated that the jurors "took an oath to allow each person in this case to experience what they experienced individually based upon the lives that they have had." The jurors did not take any such oath, and the State misstated the jurors' oath when it said otherwise. *See NRS 16.070* (providing the oath or affirmation that jurors must undertake to be sworn in). However, because the jury was instructed that a witness's credibility should be determined, in part, by the reasonableness of that witness's statements and the witness's fears, motives, interests, or feelings, and because the State's argument touches upon this concept, Rivera failed

to demonstrate a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Rivera next claimed that the cumulative error of counsel failing to object to the above-described instances of prosecutorial misconduct warrants relief. Even if multiple instances of deficient performance may 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), we conclude that the cumulation of accused deficiencies would not warrant relief. *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014). Therefore, we conclude the district court did not err by denying this claim.

Rivera next claimed that counsel was ineffective for failing to obtain surveillance video to contradict F.Z.'s testimony about where Rivera dropped her off. The district court conducted an evidentiary hearing regarding this claim wherein counsel testified that within two weeks of Rivera's request for this investigation, the investigator attempted to obtain the video but either there was no video or it had been erased. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Rivera next claimed that counsel failed to conduct interviews of potential eyewitnesses to determine if anyone observed and could verify Rivera's interactions with the victims. The district court conducted an evidentiary hearing regarding this claim wherein counsel testified the investigator performed this investigation within two weeks of Rivera's request. Counsel explained that while discussing the plea offer with Rivera,

he told Rivera that the investigator had spoken with potential eyewitnesses and that they either would not talk with him or were unwilling to testify. In addition, Rivera offered no evidence regarding what the results of this investigation would have been. Accordingly, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. *See 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 affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim.

Rivera next claimed that counsel failed to (1) investigate R.D.'s husband, (2) obtain urinalysis results from Rivera's parole officer, (3) locate a witness known as "Sonny," and (4) investigate the victims' criminal histories. The district court conducted an evidentiary hearing regarding these claims wherein Rivera offered no evidence regarding what the results of these investigations would have been.⁵ Accordingly, Rivera failed to demonstrate a reasonable probability of a different outcome but for counsel's alleged errors. *See id.* Therefore, we conclude the district court did not err by denying these claims.

⁵Rivera argues on appeal that counsel was ineffective for failing to obtain his cellphone data. Rivera failed to raise this claim in his pleadings below or to properly present it to the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider this argument on appeal. *See McNelton*, 115 Nev. at 415-16, 990 P.2d at 1275-76.

Rivera next claimed he was improperly advised regarding the State's plea offer because counsel failed to provide him with discovery. Rivera alleged that but for counsel's error, he would have accepted the offer. Defendants are entitled to the effective assistance of counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To demonstrate prejudice concerning the plea negotiation process, "a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* at 163.

The district court's finding that counsel reviewed discovery with Rivera is supported by the record. Moreover, counsel testified at the evidentiary hearing regarding this claim that it is his standard practice to give his clients discovery. And while Rivera testified that counsel failed to provide him with certain discovery items, he failed to explain how those items affected his decision to reject the plea offer and proceed to trial. In light of these circumstances, Rivera failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Rivera next claimed he was improperly advised regarding the State's plea offer because counsel failed to adequately advise him about his sentencing exposure, including the deadly weapon enhancement. The district court conducted an evidentiary hearing regarding this claim wherein counsel testified that he and Rivera discussed the different possible sentences Rivera faced if he accepted the plea offer versus being convicted at trial, including the deadly weapon enhancement. The district court implicitly found counsel's testimony to be 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). In light of these circumstances, Rivera failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel’s alleged error. Therefore, we conclude the district court did not err by denying this claim.

Finally, Rivera claimed he was improperly advised regarding the State’s plea offer because counsel failed to adequately inform him regarding the status of the investigation. The district court conducted an evidentiary hearing regarding this claim wherein Rivera testified that counsel told him at calendar call that the investigation was still ongoing and that the investigator was going to testify at trial. Rivera explained he thought the investigator was going to testify about the video footage and the urinalysis results. Rivera testified he did not find out that the investigator was not going to testify until counsel announced at trial that the defense rested but counsel had not called the investigator. As discussed above, counsel explained the status of the eyewitness investigation to Rivera when they discussed the plea offer. The district court implicitly found counsel’s testimony to be credible.

Further, counsel was not asked at the evidentiary hearing, and he offered no testimony, about whether he told Rivera that the investigator was going to testify at trial. And Rivera failed to offer evidence regarding what the results of the investigations would have been, including the testimony of the investigator. In light of these circumstances, Rivera failed to prove by a preponderance of the evidence that counsel failed to adequately inform him regarding the status of the investigation. Accordingly, Rivera failed to demonstrate that counsel’s performance fell

below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Hon. Michael A. Cherry, Senior Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk