

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN KOERSCHNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43313

FILED

JUL 25 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. F. [Signature]*
CHIEF DEPUTY CLERK

This is an order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Allen Koerschner was convicted, pursuant to a jury verdict, of two counts of sexual assault of a minor and was sentenced to two consecutive terms of life in prison with the possibility of parole.¹ He appealed, and we affirmed his judgment of conviction.² The district court denied Koerschner's post-conviction petition for a writ of habeas corpus without conducting an evidentiary hearing. This appeal followed.

Koerschner contends that the district court erred in denying his petition without conducting an evidentiary hearing on his numerous

¹Initially, Koerschner pleaded guilty to one count of sexual assault of a minor and was sentenced to life in prison with the possibility of parole after five years. The district court denied Koerschner's post-conviction habeas petition. On appeal, this court reversed his conviction and remanded the case to allow him to withdraw his guilty plea. Koerschner v. State, 111 Nev. 384, 892 P.2d 942 (1995), overruled by State v. Freese, 116 Nev. 337, 997 P.2d 122 (2000).

²Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), modified by State v. Dist. Ct. (Romano), 120 Nev. 613, 97 P.3d 594 (2004).

ineffective-assistance-of-counsel claims. He is entitled to an evidentiary hearing if he "asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."³ A claim is belied by the record "when it is contradicted or proven to be false by the record as it existed at the time the claim was made."⁴

To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.⁵ To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.⁶

Koerschner first argues that his counsel was ineffective for failing to present sufficient evidence to the trial court to secure a psychological examination of the victim. He asserts that the State sent the child to a counselor but claimed no records existed and that counsel should have "used the missing discovery and unknown counseling to compel the [trial] court to grant an independent examination." He did not include in the appendix a copy of his pretrial request for a psychological examination; therefore, what counsel argued on this matter is unknown. According to an excerpt of the trial record in Koerschner's appendix, the State indicated that it contacted the unnamed counselor and that she

³See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (citing Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984)).

⁴Id.

⁵Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

⁶Id. at 694.

barely remembered the victim and did not have any records concerning the child. In an affidavit, Koerschner stated that the missing information was important because the victim had a habit of lying, that he believed the victim told the counselor the truth, and that the State prevented him from obtaining this information by "losing his file."

We conclude that Koerschner's speculative assertion that the victim told her counselor the truth and unsupported claim that the State intentionally concealed the missing information are insufficient to warrant an evidentiary hearing. Furthermore, even if counsel had argued that the missing records provided a basis to compel a psychological examination, Koerschner fails to show a reasonable probability that it would have altered the trial court's decision. We conclude that the district court did not err in summarily denying this claim.

Koerschner also contends that in addition to filing a motion for discovery, which the trial court granted, his counsel should have filed a motion to dismiss based on the State's failure to release information concerning the victim's psychiatric treatment. We conclude, however, that he also fails to demonstrate that he was entitled to a hearing on this claim, and thus the district court did not err in summarily dismissing it.

Koerschner further complains that his counsel was ineffective for failing to file a motion to dismiss because he allegedly did not appear before a magistrate within 48 hours of his arrest and was in custody for 15 days prior to charges being filed against him. Additionally, Koerschner filed a proper person motion on this matter, which the trial court denied, and he contends that counsel should have supplemented and argued the motion instead of relying on his proper person pleading. In County of Riverside v. McLaughlin, the United States Supreme Court held that

"judicial determinations of probable cause within 48 hours of arrest will, as a general matter," pass constitutional muster.⁷ However, violation of the 48-hour rule does not automatically warrant relief. "Where an arrested individual does not receive a probable cause determination within 48 hours . . . the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance."⁸

Here, Koerschner provides no record or account whatsoever regarding the circumstances of his arrest or the basis of the trial court's denial of his motion challenging the State's purported failure to comply with the 48-hour rule. Moreover, he fails to explain what additional argument he desired his counsel to convey to the trial court. We conclude that the district court did not err in summarily dismissing this claim.⁹

Koerschner also argues that an evidentiary hearing should have been held to ascertain whether his counsel was ineffective for failing to file a motion to dismiss based on the State's purported failure to file charges within 15 days of his arrest. He does not cite to any specific statute or other relevant authority to support his contention. Therefore, its basis is unclear. Koerschner's failure to identify the precise nature of his complaint and provide specific factual allegations to support it show that he was not entitled to an evidentiary hearing and that the district court did not err in summarily dismissing this claim.¹⁰

⁷500 U.S. 44, 56 (1991).

⁸Id. at 57.

⁹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁰See id.

Koerschner next contends that his counsel was ineffective for failing to object to the introduction of prior consistent statements by the victim. In particular, he points to the State's questioning of Ellen Susak in which she testified that the victim discussed the sexual assault with her. Koerschner quoted only a short excerpt of Susak's testimony in his opening brief and did not provide any relevant transcripts placing her testimony in context or sufficient specific factual allegations demonstrating that the challenged testimony was objectionable. Thus, we conclude that the district court did not err in dismissing this claim.

Koerschner further argues that his counsel was ineffective for failing to file a motion to strike count two of the amended information. He did not include a copy of the amended information in his appendix; therefore, to which charge he is referring is unclear. The criminal complaint contained three allegations of sexual assault, occurring in 1990, 1991, and 1992. Koerschner argues that "there was no accusation by the victim that supported the filing of an amended information to include [count two]." However, this court noted in its direct appeal decision that the victim "described acts of sexual intercourse commencing in September of 1990, shortly after she moved into the Koerschner home, and further acts that occurred over time during 1991 and 1992."¹¹ Koerschner does not provide a transcript of the victim's testimony or any other material relevant to discerning the scope of her accusations. Therefore, we conclude that the district court did not err in summarily denying this claim.

¹¹Koerschner, 116 Nev. at 1114, 13 P.3d at 453.

Koerschner further contends that he was entitled to an evidentiary hearing on his claim that counsel should have called several witnesses to testify. He argues that Stephanie McCarroll would have provided exculpatory evidence, namely that the victim's mother revealed to McCarroll that the victim was sexually molested in California. However, even assuming this allegation is true, he fails to explain how this evidence was exculpatory. Koerschner makes no argument at all regarding the other alleged potential witnesses. We conclude that the district court did not err in summarily dismissing this claim.

Koerschner next contends that his counsel was ineffective for failing to request a hearing pursuant to NRS 51.385, which requires the trial court to determine the trustworthiness of any hearsay statements describing any act of sexual conduct made by a child victim under the age of ten. He argues that the victim was nine years old when she made certain statements that were introduced at trial. However, Koerschner does not describe the statements to which he refers. As he fails to adequately support this claim, we conclude that the district court did not err in summarily denying it.

Koerschner further asserts that his counsel was ineffective for not objecting to the State's cross-examination of him regarding statements made to an officer with the Division of Parole and Probation that were made without a rights advisement and that the State impermissibly referred to facts gleaned from this interview. He refers to the State's cross-examination wherein the State questioned him regarding his work history and statements he made to his probation officer about when he began employment with a particular trucking company. However, he neglects to explain the significance of this testimony or why the State's

cross-examination was improper. Accordingly, we conclude that the district court did not err in summarily dismissing this claim.

Koerschner next complains that his counsel was ineffective for failing to object to prosecutorial misconduct committed during his cross-examination and that the alleged misconduct warranted a mistrial. He refers to two instances during his cross-examination where the trial court warned the prosecutor to refrain from being antagonistic and sarcastic. However, even if counsel had objected to the prosecutor's tone, we conclude that Koerschner fails to demonstrate that these rather innocuous occurrences would have supported a motion for mistrial or any other relief other than the trial court's admonishments. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Koerschner further argues that his counsel was ineffective for not objecting to several instances of alleged improper argument by the State during closing argument. He did not include a transcript of the State's entire closing argument; thus we are unable to review the challenged comments in context. In reviewing the brief excerpts Koerschner quotes, we conclude that he fails to show that his counsel was ineffective or, even if the comments were improper, that he was prejudiced in light of the overwhelming evidence of his guilt.¹² Thus, we conclude that the district court did not err in summarily denying this claim.

Koerschner next argues that the district court erred in not conducting an evidentiary hearing because he sent appellate counsel a letter identifying which claims he desired counsel to raise and that he did not give counsel permission to omit these matters on appeal. Claims of

¹²See Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).

ineffective assistance of appellate counsel are reviewed under the Strickland test.¹³ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹⁴ "Appellate counsel is not required to raise every non-frivolous or meritless issue to provide effective assistance."¹⁵

Koerschner lists of number of claims he contends that his appellate counsel should have raised but offers no explanation of them. To the extent the omitted claims relate to matters discussed above, we conclude that he fails to demonstrate that he was entitled to an evidentiary hearing. To the extent that the omitted claims concern other matters, he fails to present specific factual allegations demonstrating that he was entitled to relief. Consequently, we conclude that the district court did not err in summarily denying this claim.

Koerschner further complains that appellate counsel was ineffective for failing to argue that the cumulative effect of the errors alleged warranted reversal of his conviction. Insofar as he failed to adequately support many of his ineffective-assistance-of-counsel claims or otherwise show error, we conclude that he did not demonstrate cumulative error. Therefore, the district court did not err in denying this claim.

Koerschner next claims that he requested counsel to petition for a rehearing of this court's direct appeal decision because it contained erroneous information, *i.e.*, that the victim spent three days in the hospital

¹³Foster v. State, 121 Nev. ___, ___, 111 P.3d 1083, 1087 (2005).

¹⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹⁵Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004).

"due to injuries sustained in this case." He asserts that he informed appellate counsel that the victim's stay in hospital was "due to parental issues," not as a result of injuries he inflicted. Koerschner does not define the alleged "parental issues" and fails to explain how the alleged misinformation was material support for a rehearing petition.¹⁶

Koerschner argues that appellate counsel was ineffective for failing to seek leave to submit additional briefing in light of the United States Supreme Court's decision in Apprendi v. New Jersey.¹⁷ Apprendi holds that a defendant's constitutional rights are violated when the prescribed statutory maximum penalties are increased by any fact, other than a prior conviction, that a jury does not find beyond a reasonable doubt.¹⁸ Koerschner asserts that had appellate counsel argued Apprendi, this court would have deemed inadmissible the nurse's testimony respecting the victim's statements that Koerschner sexually assaulted her. We conclude that Apprendi is inapposite and provides no basis for relief.

Finally, Koerschner urges this court to reconsider its direct appeal decision in light of Crawford v. Washington.¹⁹ He argues that under Crawford, the State would have only been allowed to introduce the nurse's testimony regarding statements by the victim if it showed that the victim was unavailable at trial and that he had a prior opportunity to cross-examine her. Crawford held that if a witness is unavailable to

¹⁶See NRAP 40(c)(2)(i).

¹⁷530 U.S. 466 (2000).

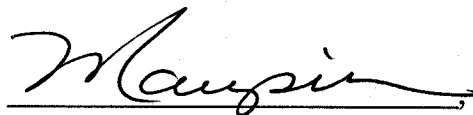
¹⁸Id. at 490.

¹⁹541 U.S. 36 (2004).

testify at trial and the out-of-court statements sought to be admitted are testimonial in nature, the Confrontation Clause requires actual confrontation, i.e., cross-examination.²⁰ Without deciding whether Crawford is retroactive, we conclude that Koerschner's argument is unpersuasive. In our view, the victim's statements to a nurse during the course of medical treatment were not testimonial in nature, and thus Crawford is inapposite. Moreover, even assuming such statements were testimonial, the mandate of Crawford comes into play when the declarant is unavailable. Here, the victim testified at trial and was subject to cross-examination. Therefore, we decline to reconsider our prior decision.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that the district court did not err in summarily denying Koerschner's petition. Accordingly, we

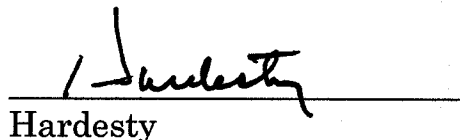
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

²⁰Id. at 68.

cc: Hon. Lee A. Gates, District Judge
Law Offices of Cristina Hinds, Esq.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk