

IN THE SUPREME COURT OF THE STATE OF NEVADA

KRISEYA J. LABASTIDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43328

FILED

APR 04 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Kriseya Labastida was charged with child abuse causing substantial bodily harm, child neglect or endangerment causing substantial bodily harm, and murder of her seven-week-old son, Thunder. Her boyfriend and the child's father, Michael Strawser, was also charged with these offenses. Labastida was convicted of felony child neglect and second-degree murder. She appealed her conviction, and this court affirmed.¹ On rehearing, however, this court reversed her murder conviction but affirmed her child neglect conviction.²

Labastida filed a timely post-conviction habeas petition, which the district court denied after conducting an evidentiary hearing. This appeal followed.

¹Labastida v. State, 112 Nev. 1502, 931 P.2d 1334 (1996).

²Labastida v. State, 115 Nev. 298, 301, 986 P.2d 443, 445 (1999) (concluding that "the evidence and the applicable law do not support a finding that Labastida directly committed acts or aided and abetted Strawser in the commission of acts so as to warrant her conviction of second degree murder").

Labastida argues that her trial attorneys were ineffective for several reasons and that the district court erred in concluding otherwise. 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.³ 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.⁴ "Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy."⁵ An ineffective assistance of counsel claim presents a mixed question of law and fact, subject to this court's independent review.⁶ "However a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong."⁷

Labastida first contends that her attorneys were ineffective for failing to spend sufficient time with her. However, she neglects to explain how additional time with them would have impacted her case or how she was prejudiced by what she alleges was inadequate communication. Accordingly, we conclude that the district court did not err in denying this claim.

³Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

⁴Id. at 694.

⁵Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

⁶See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁷Lader v. Warden, 121 Nev. ___, ___, 120 P.3d 1164, 1166 (2005).

Labastida next argues that her attorneys were ineffective for failing to "spend adequate time interviewing" Strawser. Labastida argues that had counsel adequately prepared Strawser for her trial, he would have testified that under the influence of alcohol and LSD he inflicted most of the obvious and most serious injuries to Thunder the night before he died and that this testimony would have created a reasonable doubt that she was guilty of child neglect. However, even assuming that Strawser's post-conviction admissions are credible and counsel should have discovered and presented this evidence at trial, Labastida fails to demonstrate how the absence of this evidence prejudiced her. Strawser's latest admissions are not material in light of the evidence that Thunder suffered a history of abuse, not just one occurrence, and the overwhelming expert testimony refuting Labastida's claim of ignorance concerning the abuse. Accordingly, we conclude that the district court did not err in denying this claim.

Labastida further claims that her counsel were ineffective for failing to call Dr. Earl Nielsen to testify on her behalf. She argues that his testimony would have corroborated Strawser's testimony that she knew nothing of the abuse against Thunder and would have created a reasonable doubt that Labastida committed the crime of child neglect. Dr. Nielsen's evidentiary hearing testimony revealed that Labastida understood the difference between right and wrong and, although naïve and easily manipulated, she was capable of ignoring reality. Even if he had testified at trial, significant evidence developed at trial cast grave doubt respecting Labastida's claim that she was ignorant of the physical abuse Strawser inflicted on Thunder in the weeks before the baby's death. Therefore, even assuming her attorneys should have called Dr. Nielsen at

trial, Labastida has not demonstrated prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Labastida next argues that her attorneys were ineffective for failing to call Kevin Hughes to testify at trial. During the evidentiary hearing, Hughes testified that he lived with Labastida and Strawser for approximately two weeks before Thunder's death, that Labastida was a loving mother, and that Strawser was controlling, manipulative, and verbally cruel toward Labastida. The evidence also reveals that Strawser took care of Thunder while Labastida worked in the apartment for a psychic hotline. Hughes also testified that he changed Thunder's diaper a day or two before the baby's death and did not notice any visible injuries. Labastida argues that counsel's failure to call Hughes at trial prejudiced her because his testimony would have explained why she was unaware of the physical abuse Strawser inflicted on Thunder.

The district court found Hughes's testimony unpersuasive, concluding that "his testimony that no injuries were apparent to him was no more believable than the suggestion that no injuries were apparent to Labastida." As noted above, the record was replete with expert testimony that Thunder's injuries, both old and recent, would have been readily apparent to anyone who saw the baby's body. The district court's conclusion that counsel exercised a reasonable tactical decision in declining to call Hughes is supported by substantial evidence.⁸ Accordingly, we conclude that the district court did not err in denying this claim.

⁸See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) ("A strategy decision, such as who should be called as a witness, is a tactical decision that is virtually unchallengeable absent extraordinary circumstances." (internal quotations omitted)).

Labastida also argues that her attorneys were ineffective for failing to request and obtain from the State an alleged audiotape from the prosecutor's interview with Hughes prior to trial. However, she fails to explain what information on the audiotape was helpful to her defense or how her lack of access to it prejudiced her. Consequently, we conclude that the district court did not err in denying this claim.⁹

Labastida further claims that her attorneys were ineffective for failing to introduce available photographs of Thunder that showed no visible injuries on the baby. At the evidentiary hearing, Labastida introduced seven photographs of Thunder, purportedly taken one to two weeks prior to the baby's death and showing no visible injuries. However, the quality of the photographs and precisely what they show, other than the identity of those pictured, are unknown. In light of the overwhelming evidence that the horrific injuries Thunder suffered, both old and recent, were clearly visible, we conclude that Labastida fails to demonstrate prejudice regardless of whether her attorneys should have introduced these particular photographs. Consequently, we conclude that the district court did not err in denying this claim.

Finally, Labastida complains that the district court erred when it did not allow an expert witness to testify at the evidentiary hearing. The expert was prepared to testify that he would have called Hughes to testify at Labastida's trial. The district court concluded that

⁹Labastida also contends that the State was required to provide her the audiotape pursuant to Brady v. Maryland, 373 U.S. 83 (1963). However, we conclude that Labastida fails to demonstrate that the purported audiotape constituted Brady material or that not having access to it prejudiced her. Therefore, this claim is procedurally barred. See NRS 34.810.

the expert had acted as Labastida's advocate and thus was precluded from being a witness in the case.

We conclude that whether or not the district court should have allowed the expert to testify, Labastida fails to show any prejudice. Hughes testified at the evidentiary hearing, and the district court found his testimony incredible. Therefore, the expert's testimony that counsel should have called Hughes to testify at trial would have carried little, if any, weight with the district court. Consequently, we conclude that Labastida is not entitled to relief on this claim.

Having reviewed the record and Labastida's assignments of error, we conclude that the district court did not err in denying her post-conviction petition for a writ of habeas corpus, and we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Carter R. King
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk