

IN THE SUPREME COURT OF THE STATE OF NEVADA


RANDY LYNN RICHMOND,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43841

**FILED**

APR 20 2005

ORDER OF AFFIRMANCE

JANETTE M. FLOOM  
CLERK OF SUPREME COURT  
BY   
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; James W. Hardesty, Judge.

On August 1, 2001, the district court convicted appellant Randy Lynn Richmond, pursuant to a jury verdict, of lewdness with a child under the age of fourteen. The district court sentenced Richmond to serve a life term in the Nevada State Prison with parole eligibility after ten years. This court affirmed Richmond's conviction and sentence on direct appeal.<sup>1</sup>

On October 3, 2003, Richmond filed a proper person post-conviction petition for a writ of habeas corpus in the district court. After conducting an evidentiary hearing, the district court denied Richmond's petition on July 28, 2004. This appeal followed.

Richmond claims that his counsel was ineffective for several reasons. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Richmond must demonstrate that counsel's performance fell below an objective standard of reasonableness

---

<sup>1</sup>Richmond v. State, Docket No. 38408 (Order of Affirmance, September 10, 2002).

and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>2</sup> A court need not consider both prongs if the defendant makes an insufficient showing on either one.<sup>3</sup> Richmond further asserts that his appellate counsel was ineffective, but fails to explain how appellate counsel's performance was deficient or prejudiced him.

First, Richmond asserts that his counsel was ineffective for failing to introduce evidence of Richmond's erectile dysfunction. He claims that evidence of his erectile dysfunction would have established that the victim, A.A., had fabricated her allegation against him because he was unable to achieve an erection. Specifically, Richmond argues that his counsel should have conducted a more thorough direct examination of his physician. He further claims that counsel should have reviewed the medical records of his orthopedic doctor for evidence of his erectile dysfunction. However, the lewdness statute does not require penile penetration.<sup>4</sup> Moreover, Richmond was not charged with having penetrated A.A. with his penis. Thus, he fails to establish how the lack of additional cross-examination or a review of his medical records prejudiced him. Accordingly, we conclude Richmond's claim is without merit.

Second, Richmond claims that his counsel was ineffective for failing to request a trustworthiness hearing of A.A. to allow the district court to reassess A.A.'s credibility in light of various inconsistent statements she made during previous proceedings. However, "it is the jury's function, not that of the court, to assess the weight of the evidence

---

<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>See Strickland, 466 U.S. at 697.

<sup>4</sup>See NRS 201.230.

and determine the credibility of witnesses."<sup>5</sup> Moreover, the district court was not required to conduct a hearing pursuant to NRS 51.385 in light of A.A.'s age. Accordingly, we conclude that Richmond fails to substantiate this claim.

Third, Richmond argues that his counsel was ineffective for failing to vigorously cross-examine A.A. and that with a more effective cross-examination, the jury would have disbelieved her "limited, forgetful trial testimony." Richmond complains that his counsel failed to cross-examine A.A. regarding her previous allegations that two men, including her father, had molested her. However, A.A.'s mother testified at trial that A.A.'s father was in prison after having pleaded guilty to sexually molesting A.A. (when she was one or two years old) and her sister.

Further, at the post-conviction evidentiary hearing, counsel testified that at the time of Richmond's trial, a man named Calsbeak was awaiting trial on charges of sexually molesting A.A. Consequently, Calsbeak was unavailable to testify at Richmond's trial regarding the allegations. Counsel further testified that he learned after Richmond's trial that Calsbeak had pleaded guilty. Nothing in the record describes the nature of Calsbeak's crimes, when they occurred, or A.A.'s age at the time Calsbeak committed his offenses. Based on the record, we conclude that Richmond fails to demonstrate prejudice even assuming his counsel should have cross-examined A.A. as Richmond suggests.

Richmond also contends that his legs were discolored and mottled from diabetes and that counsel should have questioned A.A. about the appearance of his legs to dispel her claim that she saw Richmond naked. The record reveals that A.A. told a policewoman that she saw

---

<sup>5</sup>McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Richmond naked once when she came to his front door. Richmond asserts that if A.A. had indeed observed him naked she most assuredly would have noted the condition of his legs. However, counsel vigorously cross-examined A.A. about her inconsistent statements to police officers and others concerning the nature and extent of Richmond's sexual contact with her. Based on the record, we conclude that Richmond fails to demonstrate prejudice even assuming counsel should have questioned A.A. as he suggests.

Fourth, Richmond contends that his counsel was ineffective for failing to request a psychological examination of A.A. He argues that a psychological examination was necessary to challenge A.A.'s veracity in light of her accusations of sexual misconduct against three different men and her inconsistent statements to police officers and other individuals. Even assuming counsel should have requested a psychological examination of A.A., Richmond must demonstrate that counsel's omission prejudiced him. A defendant must establish a compelling need to require a victim to undergo a psychological examination.<sup>6</sup> Here, the record indicates that the two other men alleged to have sexually molested A.A. ultimately pleaded guilty to the allegations. Further, counsel vigorously cross-examined A.A. about the inconsistencies in her statements to others. Additionally, the State did not call or apparently obtain any benefit from an expert in psychology or psychiatry.<sup>7</sup> Richmond has not adequately explained what additional evidence a psychological examination of A.A. would have revealed that would have assisted his defense. Richmond also

---

<sup>6</sup>See Koerschner v. State, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000), holding modified by State v. Dist. Ct., 120 Nev. \_\_\_, 97 P.3d 594 (2004).

<sup>7</sup>See id.

argues that his counsel was ineffective for failing to request that A.A. undergo a physical examination. However, he fails to provide any factual or legal support for his claim. Accordingly, we conclude that Richmond has not demonstrated that his counsel was ineffective for not requesting psychological and physical examinations of A.A.

Fifth, Richmond claims that his counsel was ineffective for failing to object to repetitive hearsay testimony. Counsel actually elicited much of this testimony. Richmond's defense strategy at trial was to undermine A.A.'s credibility by revealing marked differences between her testimony at trial and her statements to others. To achieve this goal, counsel cross-examined several State witnesses concerning A.A.'s description of Richmond's sexual misconduct. Additionally, counsel introduced the testimony of A.A.'s counselor who stated that A.A. told her that a man raped her and kissed her all over her body. A.A. initially made similar rape allegations against Richmond to other witnesses. However, at trial, A.A. denied that Richmond raped her and testified that the sexual contact was limited to Richmond touching her vagina over her clothes with his fingers.

Tactical decisions are virtually unchallengeable absent extraordinary circumstances, and we will not second-guess matters relating to trial strategy.<sup>8</sup> Considering the entire record, we conclude that Richmond fails to demonstrate that his counsel was ineffective in this regard.

Sixth, Richmond asserts that his counsel was ineffective for failing to make a record of his decision not to testify on his behalf. Richmond concedes that he declined to testify at trial because he had

---

<sup>8</sup>See Strickland, 466 U.S. at 691; Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983).

recently been convicted of three counts of lewdness with a child under fourteen involving another female.<sup>9</sup> However, more than a year after the conclusion of Richmond's trial, we reversed this conviction. Richmond now claims that despite his previous convictions, he could have "explained many areas" of A.A.'s testimony if he had testified.

The record reveals that the district court advised Richmond of his constitutional right to testify on his own behalf. Richmond informed the district court that he had conferred with his counsel and did not want to testify. He raises no allegation of coercion or duress in making his decision. Moreover, he conceded at the evidentiary hearing that he chose not to testify. Richmond does not demonstrate how he was prejudiced by the absence of a record explaining his decision not to testify. Accordingly, we conclude that Richmond fails to establish that his counsel was ineffective in this regard.

Finally, Richmond contends that his counsel was ineffective for failing to object to instructions 15 and 26. Richmond asserts that instruction 15 contributed to an unfair verdict because it advised the jury that discrepancies in testimony "did not necessarily mean that the witness should be discredited." He further argues that instruction 15 allowed the jury to disregard A.A.'s numerous accusations of sexual intercourse as "something trivial" and thereby convict Richmond. However, Richmond provides no authority supporting his claim that this instruction is legally infirm.

Richmond argues that his counsel should have objected to instruction 26 because it was misleading and at a minimum should have been tailored to advise the jury that A.A. informed her school counselor

---


<sup>9</sup>See Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).


that Richmond had raped her, touched her breasts and crotch, and kissed her all over. Richmond contends that his proposed instruction was necessary to demonstrate A.A.'s lack of consistency. However, although not as specific as Richmond desires, the instruction given advised the jury that evidence of other crimes, wrongs, and acts could be used to assess A.A.'s credibility.


Even assuming counsel was deficient by not objecting to instructions 15 and 26, we conclude that Richmond fails to demonstrate prejudice.

Having considered Richmond's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Becker

  
\_\_\_\_\_, J.  
Rose

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

cc: Second Judicial District Court, Department 9  
Kay Ellen Armstrong  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk