

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY LEE NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43865

FILED

MAY 19 2005

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 petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On March 31, 2000, the district court convicted appellant Jimmy Lee Nelson, pursuant to a jury verdict, of two counts of sexual assault and two counts of lewdness with a child under fourteen years of age. The district court sentenced Nelson to two consecutive life terms in the Nevada State Prison with the possibility of parole for the sexual assault offenses. Nelson was also sentenced to two concurrent four-year terms for the lewdness offenses. This court affirmed Nelson's judgment of conviction and sentence.¹ The remittitur issued on December 13, 2001.

On December 26, 2002, Nelson filed a post-conviction petition for a writ of habeas corpus in the district court, which dismissed the petition on August 10, 2004. This appeal followed.

Nelson filed his petition more than one year after this court issued the remittitur from his direct appeal. Thus, his petition was

¹Nelson v. State, Docket No. 36056 (Order of Affirmance, September 10, 2001).

untimely filed.² Nelson's petition was procedurally barred absent a demonstration that the delay was not his fault and that dismissal would unduly prejudice him.³ We conclude that the district court erred in considering Nelson's claims without first determining whether he had established good cause to overcome the procedural bar. Based on our review of the record, we further conclude that Nelson failed to demonstrate that the untimely filing of his petition was not his fault.

Moreover, Nelson fails to demonstrate prejudice to overcome the procedural bar. First, he argues that his counsel was ineffective for failing to object to the State expert's opinion that the victims had been sexually abused. Although in our prior order affirming Nelson's judgment of conviction we concluded that the expert improperly vouched for the credibility of the victims, based on the limited record before us, we discern no error in the expert's testimony.⁴ Moreover, the error, if any, was harmless, as we concluded in our prior order. Accordingly, we conclude that Nelson fails to establish prejudice in this regard.

Nelson contends, second, that his counsel was ineffective for failing to request a psychological examination of the victims because one of the victims became emotional during her trial testimony and because his defense theory was that the victims were lying. Nelson asserts that "if the psychological examination came back with helpful information it would

²See NRS 34.726(1); Gonzales v. State, 118 Nev. 590, 593, 53 P.3d 901, 902 (2002).

³See NRS 34.726(1).

⁴See Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987) (holding that it was proper for the State's expert witness to express an opinion as to whether the victim had been sexually assaulted or abused).

have been used to bolster the defense and lead to better cross-examination." A defendant must establish a compelling need to require a victim to undergo a psychological examination.⁵ Here, counsel thoroughly cross-examined both witnesses, and Nelson fails to point to any evidence suggesting that the mental state of either victim affected her veracity. Moreover, by Nelson's own admission, any benefit a psychological evaluation may have bestowed on the defense was speculative. Accordingly, we conclude that Nelson fails to establish prejudice in this regard.

Nelson claims, third, that his counsel was ineffective for failing to call a defense expert to counter the State expert's testimony. Nelson does not explain how such an expert's testimony would have aided his defense. Even assuming counsel's failure to call a defense expert was deficient, based on the sparse record submitted on appeal and our conclusion in our prior order that the evidence of guilt was overwhelming, we conclude that Nelson fails to demonstrate any prejudice resulting from this omission. Consequently, we conclude Nelson is not entitled to relief on this claim.

Nelson also claims that his counsel was ineffective for failing to object to the State's use of leading questions during the victims' direct examinations. Nelson concedes that the district court may in its discretion allow leading questions during the direct examination of a child witness. However, Nelson complains that his counsel "never objected to preserve the issue on appeal" or give the district court an opportunity to rule on the

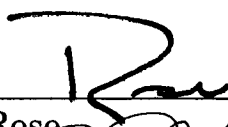
⁵See Koerschner v. State, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000), holding modified by State v. Dist. Ct. (Romano), 120 Nev. ___, 97 P.3d 594 (2004).

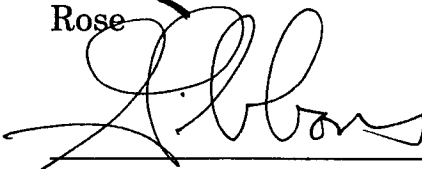
matter. Nelson fails to explain whatsoever any prejudice he might have suffered in this regard. Accordingly, we conclude that Nelson is not entitled to relief on this matter.

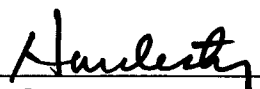
Finally, Nelson claims that he was entitled to an evidentiary hearing on his petition. For the foregoing reasons, we conclude that Nelson fails to demonstrate that he was prejudiced by the absence of an evidentiary hearing.⁶

Having reviewed the record on appeal and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. John P. Davis, District Judge
David H. Neely III
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk

⁶See NRS 34.770; Hodges v. State, 119 Nev. 479, 482, 78 P.3d 67, 68 (2003).