

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44239

FILED

FEB 24 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying Matthew James King's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On April 30, 2002, the district court convicted King, pursuant to a jury verdict, of one count each of attempted murder, first-degree kidnapping, robbery and grand larceny auto. The district court sentenced King to serve a term of life in the Nevada State Prison, with the possibility of parole after five years for the kidnapping conviction. The district court also sentenced King to serve multiple determinate terms for the other convictions. All sentences were imposed to run concurrently. This court affirmed King's appeal from the judgment of conviction and sentence.¹ The remittitur issued on November 4, 2003.

On August 25, 2004, King filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and filed supplemental points and authorities. King

¹King v. State, Docket No. 39698 (Order of Affirmance, October 7, 2003).

filed a response to the supplemental points and authorities. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent King or to conduct an evidentiary hearing. On November 3, 2004, the district court denied King's petition. This appeal followed.

In his petition, King raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.² A petitioner must further establish there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, King claimed that his trial counsel was ineffective for failing to object to the prosecution's use of perjured testimony. King failed to demonstrate that his counsel was ineffective in this regard. There is nothing in the record to indicate, and King failed to demonstrate, that the victim lied at trial. Although there were inconsistencies in the victim's testimony, King's counsel thoroughly cross-examined the victim regarding these inconsistencies. Accordingly, we conclude that the district court did not err in denying this claim.

Second, King claimed that his trial counsel was ineffective for failing to conduct scientific and DNA tests on the hair collected from the

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

³Id.

⁴Strickland, 466 U.S. at 697.

crime scene. King alleged that the hair was potentially exculpatory and that, by failing to perform such tests, his counsel "allowed the jury to assume the hair belonged to the alleged victim." King failed to demonstrate that his counsel was ineffective in this regard. Our review of the record on appeal reveals that King's counsel presented evidence at trial that the victim's hair was blonde, not red, at the time of the incident. Further, King's counsel argued before the jury that, because the State failed to conduct any scientific tests on the hair, the State could not prove that the hair was that of the victim. Accordingly, we conclude that the district court did not err in denying this claim.

Third, King claimed that his trial counsel was ineffective for failing to conduct scientific and DNA tests on a bloodlike substance found on a wall and switch plate at the crime scene. The evidence presented against King at trial was overwhelming. King failed to demonstrate that, even if scientific and DNA tests demonstrated that the substance was not either King's or the victim's blood, the results of the trial would have been different. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, King claimed that his trial counsel was ineffective for failing to investigate information and evidence indicating the possibility of another assailant. King argued that because three items had latent fingerprints on them that did not match either the victim or himself, his counsel was ineffective for failing to ascertain to whom the fingerprints belong. King failed to demonstrate that his counsel was ineffective in this regard. King's counsel thoroughly cross-examined the State's witnesses regarding the presence of unidentified fingerprints found at the crime scene. Further, a claim that the victim was attacked by another assailant

would have been inconsistent with King's claim that the victim's injuries were a result of consensual rough sex. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, King claimed that his counsel was ineffective for failing to present expert medical testimony in his favor. Specifically, King argues that his counsel "failed to adequately explain Dr. S. Mussehls' report which clearly states the alleged victim suffered no injuries." This claim is belied by the record.⁵ Accordingly, we conclude that the district court did not err in denying this claim.

King also raised several claims of ineffective assistance of appellate counsel.⁶ "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."⁷ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁸ "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."⁹

⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁶To the extent that King raised any of these claims separately from his ineffective assistance of appellate counsel claims, King waived these claims by failing to demonstrate good cause for failing to raise them on direct appeal. NRS 34.810(1)(b).

⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

⁸Jones v. Barnes, 463 U.S. 745 (1983).

⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

First, King claimed that his appellate counsel was ineffective for failing to raise the issue that the State and its agents failed to collect and preserve material exculpatory and forensic evidence found at the alleged crime scene. King specifically alleged that the State's failure to collect and forensically test an open individual condom box, a pack of rolling papers, a sock bearing reddish brown stains, and an unrolled condom prejudiced his defense.

In Daniels v. State,¹⁰ this court adopted a two-part test to determine whether an injustice has resulted from the State's failure to gather evidence. The defense must first show that the evidence was material, meaning that had the evidence been available to the defense, there is a reasonable probability that the result of the trial would have been different.¹¹ If the evidence is determined to be material, "then the court must determine whether the failure to gather the evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case."¹² King failed to show that the result of the trial would have been different had the above evidence been available to the defense.

It is uncontested that King paid the victim to have sex with him. At trial, the victim gave the following account. After the victim agreed to have sex with King, King left the motel room to obtain a condom. While King was out of the room the victim looked at King's identification. After King returned to the room, the victim opened the condom box and

¹⁰114 Nev. 261, 956 P.2d 111 (1998).

¹¹Id. at 267-68, 956 P.2d at 115.

¹²Id. at 267, 956 P.2d at 115.

placed the condom on King. They then made several unsuccessful attempts at having intercourse. The victim decided to leave and called her manager to check out. As the victim was dressing, King approached her from behind and put his arm across her neck in a chokehold. They both fell to the floor and King got on top of the victim, placed his hands around her throat and choked her. As the victim attempted to fight back, King began banging the victim's head against the floor and bed frame. The victim then tried lying still, hoping King would stop, but King only choked her harder, causing her to lose consciousness. When the victim awoke, she found herself in the bathtub with a telephone cord wrapped tightly around her neck and handcuffs on her wrists. As the victim dressed, she realized that her purse, money, keys, cellular phone, and car were missing. She then went to the front office to call for help. Upon being interviewed by the police, the victim identified her assailant by name and later identified him out of a photographic line-up. Police officers testified at trial that when they saw the victim her face was swollen and red, her eyes were extremely red, and she had marks on her neck and wrists.

King's defense at trial was that the victim sustained her injuries as a result of consensual rough sex. Therefore, the condom box, rolling paper, sock, and unrolled condom would not have changed the result of the trial. Because King failed to demonstrate that this evidence was material, we decline to reach the second part of the test, and we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.

Second, King claimed that his appellate counsel was ineffective for failing to raise a claim that the State failed to disclose

material exculpatory evidence. Brady and its progeny¹³ require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.¹⁴ There are three components to a Brady violation: the evidence at issue is favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material.¹⁵ The evidence is material if there exists a reasonable probability that the result of the proceedings would have been different had disclosure occurred.¹⁶

King alleged that the State failed to provide his counsel with all of the photographs used for the photographic line-up and that this hampered his ability to prepare his defense. King failed to demonstrate that the State did not provide his counsel with all of the photographs used in the photographic line-up. Further, even if additional photographs had been used and were not provided to King, because the victim identified King by name, in addition to identifying him in the photographic line-up, and King admitted to being present at the crime scene, King failed to demonstrate that such photographs would have been material. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.

¹³Brady v. Maryland, 373 U.S. 83 (1963); see also Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972).

¹⁴See Strickler v. Greene, 527 U.S. 263, 281 (1999).

¹⁵Id. at 281-82.

¹⁶Id. at 280.

King also alleged that the State engaged in prosecutorial misconduct by failing to provide his counsel with a copy of a statement taken from the victim while she was in the ambulance. King failed to demonstrate that the State failed to disclose all statements given by the victim. The record reveals that King's trial counsel was aware that the victim had given more than one statement regarding the incident. Two statements, one given by the victim to the hospital and one given by the victim to the police, were admitted at trial and King's trial counsel extensively cross-examined the victim regarding the inconsistencies in those statements. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.

Third, King claimed that his appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct. King alleged that the prosecutors intentionally introduced or demonstrated perjured testimony from the victim. King failed to demonstrate any prosecutorial misconduct in this regard. As stated above, there is nothing in the record to indicate, and King failed to demonstrate, that the victim lied at trial. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.

King also alleged that the prosecutors engaged in misconduct by destroying exculpatory evidence. King argues that although the State collected a condom from the crime scene, the State "'lost' the condom in a deliberate attempt to block any D.N.A. testing of the condom." King failed to demonstrate any prosecutorial misconduct in this regard. King failed to demonstrate that the State intentionally lost the condom. Further,

because the defense never disputed the State's assertion that the victim and King used a condom while attempting to engage in intercourse, King did not demonstrate that availability of the condom would have altered the outcome of his trial. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.


In his petition, King also claimed that the trial court violated his rights of due process and fair trial by: (1) allowing prejudicial unqualified medical testimony from a police officer; (2) admitting highly prejudicial hearsay testimony made by his mother; (3) denying his motion to dismiss the charge of first-degree kidnapping; and (4) allowing the State to amend the original complaint on the eve of trial. All of these issues were raised on direct appeal. In the order affirming the judgment of conviction, this court determined that all of these issues lacked merit. The doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and precisely focused argument."¹⁷ Accordingly, the district court did not err in denying these claims.

Finally, King contended that the cumulative errors committed by his counsel denied him a fair trial. However, because King did not demonstrate that his counsel erred, he necessarily failed to establish a claim of cumulative error. Therefore, the district court did not err in denying this claim.


¹⁷Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁹


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Matthew James King
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁹We have reviewed all documents that King has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that King has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.