IN THE SUPREME COURT OF THE STATE OF NEVADA

EMERY SLAYDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44692

FILED

APR 0 4 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Late in the evening of December 13, 1997, paramedics received a call that a child was not breathing and responded to the residence of appellant Emery Slayden and his girlfriend Sandy Doram. Paramedics found two-year-old Yazmine Doram lying on a bed, unconscious, with no pulse, and not breathing. Doram and Slayden told paramedics that Yazmine choked, vomited, and then collapsed. Yazmine was transported to UMC hospital, where she was pronounced dead.

Yazmine's autopsy revealed the presence of hemorrhaging in her head and eyes. The autopsy also disclosed a broken femur, which was in the early stages of healing, and various scrapes and bruises. Medical examiner Dr. Giles Green concluded that Yazmine died from shaken baby syndrome.

Sandy Doram, Yazmine's mother, testified that on various occasions Slayden pushed and shook Yazmine, threw her to the floor, and

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punished the child by putting her in a cold shower if she urinated or defecated in her underwear or in her bed. Doram also testified that on the night her daughter died, Slayden held Yazmine against the wall and shook her, allowing her head to hit a door. Rachelle Cartwright and Carmel Gadsen, Slayden's former girlfriends, testified about the physical abuse Slayden inflicted upon their children. Brandon Cartwright, Cartwright's son, testified that Slayden head-butted him four or five times and hit him on his back, legs, and chest. And in one instance, Slayden slammed him against a bathtub, leaving Brandon with a chipped tooth.

Slayden was convicted of felony child abuse and neglect and murder of Yazmine. The district court sentenced Slayden to 96 to 240 months in prison for child abuse and neglect and a consecutive life term without the possibility of parole for murder. This court affirmed his judgment of conviction.[1] Subsequently, Slayden filed a petition for a writ of habeas corpus, which the district court denied without conducting an evidentiary hearing. This appeal followed.

Slayden argues that he was entitled to an evidentiary hearing on his ineffective-assistance-of-counsel and appellate 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

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[1]Slayden v. State, Docket No. 34605 (Order of Affirmance, March 13, 2002).

entitle him to relief."[2] 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."[3]

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.[4] 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.[5] "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."[6] "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."[7] An ineffective-assistance-of-counsel claim presents a mixed question of law and fact,

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[2]See Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002) (citing Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984)).

[3]Id. at 354, 46 P.3d at 1230.

[4]Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[5]Id. at 694.

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

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

subject to this court's independent review.[8] "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."[9]

Slayden first claims that his counsel were ineffective for failing to preclude the introduction of numerous hearsay statements at trial. Subject to certain exceptions, hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted.[10] Slayden argues that certain statements made by State witnesses Gadsen, Paul Schaaf, and Ernestine Banks were inadmissible hearsay. However, counsel objected to the challenged statements, and in some instances, the district court sustained the objections. Slayden does not explain what additional action he believes counsel should have undertaken.

Other challenged testimony warrants further discussion. Gadsen described an incident in which Slayden became angry with Gadsen's daughter, grabbed the child, and shook her, allowing her head to hit a wall. Slayden argues that the following testimony from Gadsen contained hearsay to which his counsel should have objected:

> [Slayden] wanted to do some math work on the computer with [Gadsen's daughter]. Well, after awhile he felt like she was playing, like she

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[8]See id. at 987, 923 P.2d at 1107.

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

[10]See NRS 51.035; Franco v. State, 109 Nev. 1229, 1236, 866 P.2d 247, 252 (1993).

> wasn't answering the questions on purpose. He got upset with her and got mad, kept asking . . . .
>
> . . . .
>
> He felt she was intentionally not answering the questions. She knew them, but she was playing.

We conclude, however, that the above testimony describes the circumstances of Slayden's abuse of Gadsen's daughter on that particular occasion. He fails to point out any inadmissible hearsay to which his counsel should have objected.

In describing another incident of abuse, Gadsen testified that her daughter did not like to get her hair wet when she was in the shower. On one occasion, Slayden shoved her daughter's head in the shower. Gadsen testified, "She would cry and scream, I don't want my hair wet. She would get louder. He would get angry." Slayden then grabbed the child and threw her up against the wall. The State did not offer Gadsen's testimony to establish that her daughter did not like getting her hair wet. Rather, Gadsen's testimony explained the circumstances surrounding Slayden's attack on her daughter. The challenged statement did not constitute hearsay, and thus there was no basis for objection.

Slayden also contends his counsel should have objected to a conversation between him and Gadsen's daughter about which Gadsen testified:

> Mr. Slayden picked me up from work and told me that he had seen her, my daughter, laying on a little boy. We went and picked her up from school. He asked her. She said, no.

> He kept asking her. She kept saying no, she wasn't doing that. At the stoplight he reached over and shoved her head, hit her head into the dashboard.
>
> She kept telling him no. . . .

Again, the challenged statements are not hearsay. The State did not introduce this testimony to establish the truth of the matter asserted, i.e., that Gadsen's daughter did not behave in a certain way. Counsel had no basis to object to the challenged statements as hearsay.

Slayden next argues that counsel should have objected on hearsay grounds to Cartwright's testimony that others who observed her children with bruises, bite marks, and a chipped tooth called child protective services to report these injuries. Slayden cannot demonstrate prejudice, regardless of whether counsel should have objected to this testimony. The record shows that one of the children testified about the physical injuries Slayden inflicted on him and that Cartwright observed the abuse both of her children suffered. Therefore, failure to object to any improper hearsay was not prejudicial.

Schaaf, a child protective services worker, investigated the injuries to Cartwright's children. He testified that when questioned about a bruise on the head, Brandon replied that Slayden had head-butted him. However, irrespective of whether counsel should have objected to this testimony, Slayden admitted to Schaaf that he head-butted the boy as punishment. And Brandon testified about the physical abuse Slayden inflicted upon him. Therefore, Slayden has not shown any prejudice in this regard.

Finally, Slayden contends that his counsel were remiss in not objecting to the following colloquy between the State and North Las Vegas Police Detective Deborah Anderson, who interviewed Doram after Yazmine's death:

> Prosecutor: And when was it you learned from Sandy that she was afraid, before that conversation?
>
> Anderson: Mostly after.
>
> Prosecutor: Now, based on your conversation with Sandy that she was afraid, what was the next thing that was done?

Slayden fails to adequately explain how this passage violates the hearsay rule. However, to the extent that the prosecutor referred to a conversation in which Doram informed Anderson that she was afraid, it is not hearsay. Anderson's testimony explained Doram's state of mind at the time of the interview and how Doram's mental state affected Anderson's actions.[11] The challenged statements offer no basis for objection.

Slayden fails to demonstrate that his counsel were ineffective respecting any of the challenged statements discussed above. Therefore, we conclude that the district court did not err in denying this claim

Slayden next complains that his trial counsel were ineffective for inadequately investigating his case by failing to consult and call an expert to rebut the State's theory that Yazmine died from shaken baby syndrome. He speculates that an expert would have testified that

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[11]See NRS 51.105.

Yazmine died from a cause other than shaken baby syndrome. Slayden requests this court to review attached research from Dr. John Plunkett; however, he neglected to include the purported research in his submissions. The State introduced overwhelming evidence that the Yazmine died as a result of shaken baby syndrome, and counsel vigorously cross-examined the State's expert witnesses on this matter. The critical issue in this case was not how the baby died, but who inflicted the injuries. Slayden has advanced nothing more than a bare allegation that a defense expert would have changed the outcome of the proceedings. Therefore, we conclude that the district court did not err in summarily denying this claim.

Slayden also argues that his trial counsel were ineffective, pursuant to Giglio v. United States,[12] for failing to investigate the existence of any promises or inducements made by the State to its witness, Elvis Dupree. While housed in a cell with Dupree, Slayden admitted that he "had killed a baby." At the time of trial, Dupree had been convicted of unspecified federal charges. Slayden testified that he did not receive any incentive for his testimony from the District Attorney's Office, the United States Attorney's Office, or his counsel. During cross-examination, counsel queried Dupree whether anyone in the District Attorney's Office wrote a letter to the federal authorities requesting special treatment for him or informing them that he was assisting in a murder trial. Dupree responded that counsel would have to speak to his trial attorneys about

[12]405 U.S. 150 (1972).

the matter and that he never asked his trial attorneys to seek favorable treatment in the federal system. Slayden argues that this exchange illustrates that his trial attorneys failed to investigate potential Giglio material and was unprepared for Dupree's cross-examination.

Slayden acknowledges that the record is void of any proof that the State offered Dupree any incentive to testify. During a hearing on the habeas petition, Slayden's counsel stated that he had no evidence that Dupree received any benefit in exchange for his testimony. Nor has Slayden made any specific factual allegations regarding any incentive Dupree received. We conclude that Slayden has not shown that he was entitled to an evidentiary hearing on this matter. Therefore, the district court did not err in summarily denying this claim.

Slayden further contends that his counsel were ineffective for failing to object to the following argument the State made during closing argument:

> You would hear his aggression turn towards Sandy. You heard from Rachelle and Carmel, they tried to stop, but they couldn't stop it. Some of you have never been the victim in that case. I say--not the victim, in a relationship that Rachelle and Carmel or Sandy had, you may have a hard time understanding what occurred.

Slayden also argues that his appellate counsel was ineffective for failing to challenge the State's comments on appeal. Slayden asserts that the State's comment amounted to a "Golden Rule" argument in that it asked the jurors to place themselves in the shoes of the victims. This court has declared that "Golden Rule" arguments constitute prosecutorial

misconduct.[13] Here, however, the State made no such improper argument. Rather, the State recognized that the jury might have difficulty relating to the responses of Slayden's girlfriends when faced with his physical abuse of their children. We conclude that Slayden fails to demonstrate that his counsel and appellate counsel were ineffective in this regard and that the district court did not err in summarily denying this claim.

Slayden contends that his appellate counsel was ineffective for failing to obtain an adequate review from this court of the district court's instruction regarding malice aforethought. Slayden complains that his counsel should have analogized his case to Wegner v. State[14] and distinguished his case from Collman v. State,[15] which we cited in our order of affirmance in the instant case. However, Slayden ignores the dissimilarities between his case and Wegner. In Wegner, we noted that only one instance of child abuse was alleged and that "a malice instruction is necessary to avoid the circumstance where a single abusive impulsive act by an otherwise decent caretaker would lead to a first degree murder conviction."[16] Here, Slayden was not only charged with murdering the

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[13]See Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000); McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984).

[14]116 Nev. 1149, 14 P.3d 25 (2000).

[15]116 Nev. 687, 7 P.3d 426 (2000).

[16]116 Nev. at 1156, 14 P.3d at 30.

victim but also with abusing the child because he broke her leg on an earlier occasion. Moreover, the record was replete with evidence that Slayden repeatedly inflicted injuries on the victim. Also, in Wegner, we concluded that the instructional error at issue was significant given the lack of overwhelming evidence of guilt.[17] Such is not the case here. Wegner was not helpful to Slayden's cause on appeal, and even if counsel had relied on it, the outcome of the appeal would have been the same. Additionally, he has not demonstrated how counsel could have effectively distinguished Collman. Therefore, we conclude that the district court did not err in summarily denying this claim.[18]

Slayden further argues that his appellate counsel was ineffective for failing to challenge on appeal the admissibility of certain testimony as violative of the hearsay rule. First, Schaaf testified that he interviewed Cartwright's daughter, Britton, in response to an allegation of abuse. Slayden argues that appellate counsel should have challenged the following comments:

> I tried to talk with her. Britton seemed a little groggy from sleeping. She said that she wasn't allowed to talk about it.

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[17]Id.

[18]Slayden also argues that this court's order evinced a cursory review of this claim. To the extent that he contends that we failed to fully review the challenged instruction on direct appeal, we reject this claim. We carefully considered this matter and concluded that the instructional error did not warrant relief.

The district court sustained trial counsel's objection. Slayden does not argue that the district court should have taken further action. Even if this matter had been raised on appeal, he fails to demonstrate any reasonable probability of success on the merits. The challenged testimony was innocuous in light of the evidence revealing in detail the injuries Slayden inflicted on Britton.

Next, Slayden contends that appellate counsel should have challenged a number of statements by Ernestine Banks as inadmissible hearsay. Banks testified about a conversation she had with Doram within hours of Yazmine's death during which Doram was "very quiet" and "numb." Banks also testified that Doram repeated, "I was afraid." Trial counsel objected, and the district court sustained the objection. Again, Slayden does not suggest what further action the district court should have taken. Although Banks's statement was improper, Slayden fails to explain how it prejudiced him. Appellate counsel is not required to raise every nonfrivolous issue.[19] Here, in light of the overwhelming evidence of his guilt, Slayden fails to demonstrate that this matter had any reasonable probability of success.

Next, Slayden contends that his appellate counsel should have challenged the propriety of allowing Banks to testify that she overhead Doram tell a police officer over the telephone, "He did it. He killed her." After trial counsel's objection, the district court noted that Doram made the statement immediately after leaving the police station, having been

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[19]See Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

shown reports of Yazmine's injuries, and that Doram was crying and upset. The district court ruled that Banks's testimony was admissible as an excited utterance by Doram and as evidence of Doram's state of mind. Slayden does not explain why that ruling was erroneous.

Slayden also complains that Banks's testimony constituted improper bolstering, as Doram testified that she was afraid of Slayden and that after learning about the nature of Yazmine's injuries she telephoned police detectives and told them that Slayden killed Yazmine. Based on our review of the record, we conclude that Slayden fails to show that raising this claim would have resulted in any relief considering all of the damaging evidence presented.

Based on the foregoing, we conclude that the district court did not err in denying Slayden's claims that his appellate counsel was ineffective.

In addition to his ineffective-assistance-of-counsel claims, Slayden contends that the district court erred in allowing the State to elicit the purported hearsay testimony described above. However, this claim is a matter appropriate for direct appeal, and he must demonstrate good cause for his failure to raise it then and actual prejudice.[20] He argues that the United Supreme Court decision in Crawford v. Washington[21] is

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[20]See NRS 34.810(1)(b), (3).

[21]541 U.S. 36, 68 (2004) (holding that testimonial hearsay statements made by an unavailable witness must be subject to cross-examination to be admissible).

retroactive and provides him a basis for relief. Crawford held that testimonial hearsay statements made by an unavailable witness must be subject to cross-examination to be admissible. Here, even assuming Crawford is retroactive, our analysis above shows that many of the challenged statements were not testimonial hearsay or even hearsay. Moreover, to the extent that any of these statements were testimonial hearsay, Slayden fails to demonstrate prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Finally, Slayden asserts that the district court erred in instructing the jury on express and implied malice. As this issue is a matter appropriate for direct appeal, he must establish good cause for his failure to raise it at that time and actual prejudice.[22] Slayden does not explain why he did not raise this claim on direct appeal, nor does he demonstrate actual prejudice. Therefore, the district court did not err in summarily denying this claim. Moreover, as a separate and independent basis for denying this claim, we have repeatedly upheld the challenged statutory instruction; therefore, the trial court did not err in giving it.[23]

Having reviewed the record and Slayden's assignments of error, we conclude that the district court did not err in refusing to conduct

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[22]See 34.810(1)(b), (3).

[23]See NRS 200.020; Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000); Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992); Ruland v. State, 102 Nev. 529, 533, 728 P.2d 818, 820 (1986); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

an evidentiary hearing and denying his 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. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk