

IN THE SUPREME COURT OF THE STATE OF NEVADA

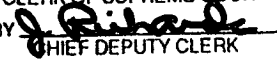
JUSTIN REATA STANTON,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 44947

**FILED**

JUN 29 2005

ORDER OF AFFIRMANCE

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Justin Reata Stanton's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On January 17, 2002, the district court convicted Stanton, pursuant to a jury verdict, of four counts of statutory sexual seduction, four counts of sexual assault on a child under 16 years of age, and one count of lewdness on a child under 14 years of age. The district court sentenced Stanton to serve five consecutive life terms in prison with the possibility of parole for the sexual assault and lewdness counts. Stanton was also sentenced to four concurrent terms of 24 to 60 months for the sexual seduction counts. This court affirmed Stanton's judgment of conviction on appeal.<sup>1</sup> The remittitur issued on September 18, 2002.

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<sup>1</sup>Stanton v. State, Docket No. 39126 (Order of Affirmance, August 23, 2002).

On August 15, 2003, Stanton filed a post-conviction petition for a writ of habeas corpus in the district court. After conducting an evidentiary hearing, the district court denied Stanton's petition. This appeal followed.

On appeal, Stanton asserts several claims of ineffective assistance of trial and appellate counsel. To succeed on his claims of ineffective assistance of trial counsel, he must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>2</sup> To establish prejudice based on the deficient assistance of appellate counsel, Stanton must show that an omitted issue would have a reasonable probability of success on appeal.<sup>3</sup>

Stanton first claims that his counsel was ineffective for dissuading him from testifying on his own behalf without good reason. During the post-conviction evidentiary hearing, trial counsel testified that he advised Stanton of his right to testify but advised against him doing so in light of certain prior bad acts that could have been used to impeach him. Stanton had suffered previous felony convictions. Additionally, Stanton acknowledged that his counsel advised him that the decision to testify was ultimately his, and Stanton presents no evidence indicating that counsel prevented him from testifying. Finally, the district court

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

advised Stanton of his right to testify during trial. Accordingly, we conclude that the district court did not err in denying this claim.

Stanton next claims that trial counsel was ineffective for failing to challenge alleged juror misconduct. Specifically, he asserts that counsel was made of aware of a sleeping juror during trial and did nothing. Counsel testified at the evidentiary hearing that he was advised during the course of the trial of a sleeping juror. He further testified that he never observed a sleeping juror and that if he had he would have brought it to the district court's attention. A trial spectator, Stanton's former babysitter, testified that she observed a sleeping juror and advised trial counsel. The district court noted that neither the trial judge nor any juror was called as a witness at the hearing. Apparently the district court did not find the spectator's testimony credible. The district court's factual findings respecting a claim of ineffective assistance of counsel are entitled to deference upon appellate review.<sup>4</sup> We conclude that Stanton fails to demonstrate that the district court erred in denying this claim.

Stanton further claims that his counsel "was ineffective for failing to exclude, move to continue, or investigate last minute chicanery that led Wes Pearson, a Stanton witness, to flip-flop on the eve of trial in violation of [his] constitutional rights." Stanton suggests that a clandestine meeting between the State and Pearson transpired on the eve of trial; however, there is no support in the record for this assertion. Additionally, Stanton offers no basis upon which Pearson's testimony

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<sup>4</sup>See Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

could have been excluded. During the evidentiary hearing, counsel acknowledged that once he learned that Pearson's story had changed, he would have benefited from a continuance. However, Stanton neglected to include in the record a transcript of Pearson's testimony, including counsel's cross-examination, if any, or other relevant testimony and evidence upon which to review the effect Pearson's testimony may have had on Stanton's trial. Thus, we conclude that the district court did not err in denying this claim.

Stanton also claims on appeal that the State's chief investigator "boasted he would not rest until Mr. Stanton was in jail for life." He asserts that his counsel was ineffective for failing to expose the investigator's hatred of Stanton. However, even assuming the investigator was biased against him, Stanton fails to demonstrate prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Stanton next claims that his counsel was ineffective for failing to investigate and present a defense. On appeal, Stanton asserts that his defense to the crimes was that the State's witnesses were liars and that the accusers made him the scapegoat for the sex crimes committed by another individual. To support his claim, Stanton called at the evidentiary hearing several witnesses he asserts would have impeached the testimony of the accusers or other State witnesses. However, Stanton fails to establish on what basis much of this testimony would be admissible. Moreover, he fails to explain what evidence was presented or include any transcripts of relevant testimony presented at trial. Therefore, even assuming all of the testimony presented at the evidentiary

hearing was admissible, its potential effect, if any, on the jury is impossible to determine given the thin record provided.

Additionally, the district court determined that "Stanton's rather complicated and arguably convoluted proposed theory of defense is largely premised on speculation as to the quality and/or admissibility of the proposed evidence and the effect that the final presentation of the new defense theory would have on the jury." Based on the sparse record provided, we conclude that that the district court did not err in denying this claim.

Stanton further claims that his trial counsel was ineffective for failing to advise him of his right to appeal. However, Stanton's claim is belied by the record as he filed a direct appeal.<sup>5</sup>

He also argues that appellate counsel was ineffective for failing to preserve federal constitutional violations for direct appeal. However, Stanton fails to identify which direct appeal claims he believes his counsel should have "federalized." Moreover, even assuming Stanton believes that any or all of the claims he raises in this appeal should have been framed as constitutional violations on direct appeal, he fails to demonstrate prejudice. Accordingly, we conclude that this claim lacks merit.

Finally, Stanton claims that his appellate counsel was ineffective for failing to challenge on appeal the sufficiency of the evidence for the sexual assault and lewdness counts. However, Stanton fails to

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

identify the evidence introduced or to provide complete transcripts of the relevant testimony presented at trial. Therefore, we are left without an adequate record on appeal upon which to review this claim. As Stanton fails to carry his burden of making a proper appellate record,<sup>6</sup> we conclude that he fails to demonstrate that his appellate counsel was ineffective in this regard.

Stanton also raises the following claims: that juror misconduct violated his constitutional rights; that the district court erred in issuing a pretrial order admitting evidence concerning his prior felonies; that there was insufficient evidence to support the lewdness conviction; that there was insufficient evidence to support the sexual assault convictions; that the verdict form violated his constitutional rights; and that the instructions regarding reasonable doubt and the presumption of innocence were erroneous. However, these issues are only appropriate for direct appeal, and Stanton has not demonstrated good cause for his failure to raise them on direct appeal or actual prejudice.<sup>7</sup> Therefore, we conclude that Stanton waived these matters.<sup>8</sup>

Additionally, Stanton claims that the district court erred in denying him the opportunity to have a defense expert examine the child

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<sup>6</sup>See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).


<sup>7</sup>See NRS 34.810(1)(b)(2), (3).


<sup>8</sup>See Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

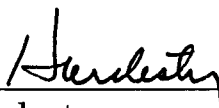
victims. However, this court considered and rejected this claim on direct appeal. Therefore, the law of the case precludes further review of this matter.<sup>9</sup>

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that the district court did not err in denying Stanton's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. J. Michael Memeo, District Judge  
Matthew J. Stermitz  
Attorney General Brian Sandoval/Carson City  
Elko County District Attorney  
Elko County Clerk

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<sup>9</sup>See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975)