

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD EDWARD CARBAUGH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45140

**FILED**

JUL 06 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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On November 8, 2002, the district court convicted appellant, pursuant to a jury verdict, of six counts of lewdness with a child under the age of fourteen and one count of sexual assault of a child under the age of fourteen. The district court sentenced appellant to serve six concurrent terms of life in the Nevada State Prison with the possibility of parole after serving ten years and a consecutive term of life with the possibility of parole after serving twenty years. The district court also sentenced appellant to lifetime supervision. This court affirmed the judgment of

conviction and sentence on appeal.<sup>1</sup> The remittitur issued on January 30, 2004.

On January 21, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 8, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised numerous claims of ineffective assistance of trial counsel.<sup>2</sup> To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>3</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the

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<sup>1</sup>Carbaugh v. State, Docket No. 40455 (Order of Affirmance, January 5, 2004).

<sup>2</sup>To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal, and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

proceedings would have been different.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, appellant contended that counsel was ineffective for failing to object to the criminal information because the information failed to give adequate notice of the charges against him. Specifically, appellant claimed that the information did not specify dates so that appellant could properly prepare a defense. This claim is not supported by the record. "The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged."<sup>6</sup> Unless time is an element of the offense charged, the exact date of the commission of the crime is unnecessary.<sup>7</sup> Neither rape nor the commission of lewd and lascivious acts upon a minor are crimes in which time is an element.<sup>8</sup> Therefore, the State "may instead give the approximate date on which it believes the crime occurred."<sup>9</sup> Because the only witness to the appellant's crimes was a child that was five or six

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<sup>4</sup>Id.

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>NRS 173.075(1).

<sup>7</sup>Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) (citing Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961); People v. Wrigley, 443 P.2d 580 (Cal. 1968)).

<sup>8</sup>Id.

<sup>9</sup>Id. at 400, 683 P.2d at 502 (citation omitted).

years old at the time, the State could not be expected to provide anything other than approximate dates. Appellant stated in court that he understood the charges and the possible prison terms. Appellant failed to demonstrate that counsel was ineffective. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that his attorney was ineffective for attempting to coerce and induce appellant into pleading guilty. Appellant failed to demonstrate that counsel's performance was ineffective. Trial counsel stated that he recommended that appellant accept the plea negotiations because of the risk of proceeding to trial, and that appellant had essentially confessed to one act of sexual assault to investigating officers. The court canvassed appellant on his knowledge of the plea and the risk of proceeding to trial. Counsel's candid advice about the maximum sentences upon trial is not deficient. More importantly, appellant did not plead guilty and exercised his right to a jury trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate even though an investigator had been appointed. Appellant listed several collateral issues that counsel should have investigated but failed to demonstrate how these issues would have assisted his case and changed the outcome of the proceedings. Appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Fourth, appellant contended that his counsel was ineffective for only filing one motion in limine. However, appellant did not demonstrate which motions counsel should have filed and how they would have assisted in the trial proceedings. Appellant failed to demonstrate how counsel's performance was ineffective, and the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to object when jury members were allowed to make prejudicial comments in front of other jurors, and failing to insure that the jurors were not unduly influenced. Specifically, appellant claimed that several jurors made statements regarding their prior experiences or contacts with sexual misconduct matters in support of their requests to be excused from jury duty, and that counsel failed to object or request a cautionary statement from the district court. The claim is not supported by the record. All potential jurors who expressed prejudice due to prior experiences with sexual molestation were excused. All the remaining jury members stated that they could be fair and impartial. Appellant failed to demonstrate that counsel's performance was ineffective. Therefore, the district court did not err in denying this claim.

Sixth, appellant contended that his counsel was ineffective for failing to review medical records and failing to consult with or obtain a defense medical expert. This claim is not supported and is belied by the

record.<sup>10</sup> Counsel stated in court that he was familiar with the medical records. In the instant petition, appellant does nothing more than speculate that another medical expert may have provided differing testimony concerning the victim's injuries to her hymen. Appellant does not claim that the methods used by the State's medical expert were unreliable. Appellant failed to demonstrate that a defense medical expert would have changed the results of his trial, or that his counsel was ineffective. Accordingly, the district court did not err in denying this claim.

Seventh, appellant contended that counsel failed to properly confront and cross-examine the victim and the medical expert, and failed to move for dismissal on the sexual assault charge for lack of sufficient evidence. Specifically, appellant argues that counsel failed to cross-examine the victim and medical expert regarding the possibility of the victim injuring her privates in other ways besides molestation. This claim is belied by the record.<sup>11</sup> The State elicited from the victim that she had never injured her privates herself. Trial counsel questioned the medical expert, who had examined the victim, about possible infections or injuries, but the expert testified that the victim had "definite evidence of sexual abuse" and that urine tests were negative for infection. Appellant failed to

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<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>11</sup>Id.

demonstrate that his counsel was ineffective, and the district court did not err in denying this claim.

Eighth, appellant contended that his trial counsel was ineffective for failing to present witnesses and evidence. Specifically, appellant argues that various witnesses should have been called in order to impeach the testimony and reputations of the victim and the mother and grandmother of the victim, and that these witnesses were lying in regards to various other collateral issues such as the victim's grades, the financial support that appellant provided, a boyfriend that the two adult witnesses allegedly shared, and the amount of time that appellant spent alone with the victim. Moreover, appellant claimed that such witnesses would testify that the victim's grandmother previously took the victim to the hospital to be checked for molestation on two other occasions and that she had a reputation for making false allegations. Appellant failed to demonstrate that his counsel's performance was ineffective. Trial counsel specifically cross-examined the witnesses regarding collateral issues. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible, and specific instances of the conduct of a witness may not be proved by extrinsic evidence.<sup>12</sup> The district court specifically heard argument by trial counsel regarding the admission of evidence of an earlier "accusation" by the victim's grandmother in which the victim was examined for signs of molestation. The court found that there was no

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<sup>12</sup>NRS 50.085(2), (3).

evidence that the earlier accusation was false and that the victim had been too young to remember the event and, therefore, denied the admission of the evidence.<sup>13</sup> Therefore, the district court did not err in denying this claim.

Ninth, appellant contended that counsel was ineffective for not allowing appellant to testify on his own behalf. This claim is not supported by the record. Appellant failed to demonstrate that his counsel's performance was ineffective. The district court canvassed appellant on his right not to testify, and cautioned the jury with a specific instruction addressing appellant's right not to testify. Therefore, the district court did not err in denying this claim.

Tenth, appellant contended that counsel was ineffective for failing to object to inappropriate and prejudicial statements that the prosecutor made during opening and closing arguments. Specifically, the prosecutor suggested that appellant may have been masturbating while in the victim's room because there was testimony that appellant had either been buttoning up his pants or tucking in his shirt upon leaving the bedroom. Appellant failed to demonstrate that counsel was ineffective.

We have stated that "[a] prosecutor may not argue facts or inferences not supported by the evidence" or "make statements intended improperly to influence the outcome of a case."<sup>14</sup> "The test for evaluating

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<sup>13</sup>See Miller v. State, 105 Nev. 497, 779 P.2d 87 (1989).

<sup>14</sup>Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).



whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comment 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"<sup>15</sup> Here, the record reveals that the State's opening and closing statements were based upon evidence presented at trial. Appellant failed to demonstrate that his counsel was ineffective, and therefore, the district court did not err in denying this claim.

Eleventh, appellant contended that counsel was ineffective for making inappropriate admissions of guilt during closing arguments. Specifically, appellant claimed that his counsel stated that he was guilty of the molestation in 2001, but not of the crimes in 2000. The claim is not supported by the record, and appellant failed to demonstrate that counsel's performance was ineffective. Taken in context, counsel was merely discussing a statement by the victim when previously asked whether appellant had ever touched her private parts before September 18 and the victim replied "no, he was not here before yesterday." Additionally, counsel had to address appellant's statement admitting that he had touched the victim one time. The district court did not err in denying this claim.

Twelfth, appellant contended that counsel was ineffective for failing to object to jury instructions that relieved the prosecutor of the

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<sup>15</sup>Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 110 (1998) (quoting Bennett v. State, 111 Nev. 1099, 1105, 910 P.2d 676, 680 (1995)).

burden of proof. Specifically, appellant contended that jury instructions relieved the State of having to prove exactly when the assault occurred and the exact number of incidents that occurred. The appellant also argued that because the State was able to charge separate acts from one single encounter, the State's burden was also relieved. The claims are not supported by the record. Both parties stipulated in open court that the instructions had been settled. The State was not required to prove specific dates because of the age of the victim. Separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon.<sup>16</sup> Charging separate distinct acts for one sexual encounter does not relieve the prosecutor of his/her burden. The jury determined that there was reliable indicia that the acts occurred. Therefore, appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Thirteenth, appellant contended that counsel was ineffective for failing to move the court for withdrawal because appellant and counsel developed a conflict. Specifically, appellant claimed that he lost faith in counsel during the trial, moved the district court for a substitution of counsel subsequent to the verdict and just prior to sentencing, and requested counsel to file a motion to withdraw. Appellant failed to demonstrate that there was an actual conflict or that his counsel's

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<sup>16</sup>See Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981).

performance was ineffective. Additionally, we find no conflict in counsel filing appellant's fast track appeal. The purpose of NRAP 3C is to provide for expedited resolution of criminal appeals. Moreover, a criminal defendant is not entitled to reject court appointed counsel and obtain substitution of other counsel at public expense absent a showing of good cause.<sup>17</sup> Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his counsel was ineffective for failing to object to the district court's imposition of lifetime supervision. Appellant failed to demonstrate that his counsel's performance was deficient. The imposition of lifetime supervision was mandatory,<sup>18</sup> and appellant was specifically informed at sentencing that his sentence would include lifetime supervision. Accordingly, we conclude that the district court did not err in denying this claim.

Finally, appellant contended that counsel was ineffective for failing to provide appellant with documents for his habeas corpus petition. Appellant does not claim which documents were requested or how they would have been of assistance. Appellant failed to demonstrate that counsel was ineffective. Therefore, the district court did not err in denying this claim.


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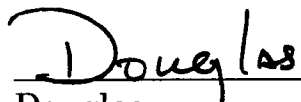
<sup>17</sup>See Thomas v. State, 94 Nev. 605, 584 P.2d 674 (1978).

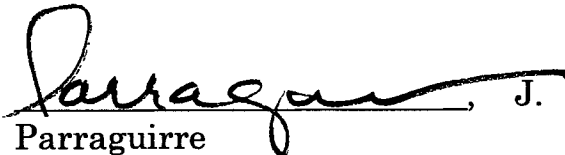
<sup>18</sup>NRS 176.0931.

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.<sup>19</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>20</sup>

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge  
Harold Edward Carbaugh  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>19</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>20</sup>We have reviewed all documents that appellant 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 appellant 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.