IN THE SUPREME COURT OF THE STATE OF NEVADA

BRADLEY DWIGHT HEINZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45218

FILED

JUN 22 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of six counts of lewdness with a minor under the age of fourteen, and one count of sexual assault of a child under the age of fourteen. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Bradley Dwight Heinz raises four arguments on appeal: (1) that a petition for a writ of habeas corpus asserting claims of ineffective assistance of trial counsel may be properly filed after a verdict is rendered but before sentencing; (2) that, in the alternative, this court should consider his claims of ineffective assistance of counsel on direct appeal; (3) that the State committed prosecutorial misconduct in its closing argument; and (4) that the jury's findings of guilt on two of the counts of which he was convicted were not supported by substantial evidence.[1] We disagree. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

[1]Heinz also argued on appeal that the district court improperly considered the State's pre-sentence report because the State did not offer evidence reflecting what objective standards were used to create the report or how they were applied, as required by NRS 213.10988. We reject this argument because the record reflects that evidence was offered at Heinz's

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Pre-sentence petition for a writ of habeas corpus

Heinz contends that the district court erred in concluding that his petition for a writ of habeas corpus filed pursuant to NRS 34.360 was premature and refusing to address the merits of his ineffective assistance of counsel claims. Heinz filed his petition after the verdict issued but before sentencing. Heinz asserts that his liberty was diminished after the trial verdict was rendered because the condition of his detention was changed—he was taken into custody—and the condition of his release was changed—a prison sentence was now certain. Although he was released on bail during his trial, he was considered to be in constructive custody during that time.[2] Heinz argues that after the verdict, the court revoked his bail and his liberty was further restrained. Heinz now challenges that change in the conditions of his detention. Heinz asserts, in the alternative, that this court should at least permit a review of the record on a pre-sentence petition for a writ of habeas corpus to determine if ineffective assistance of counsel occurred as a matter of law.

Whether Heinz may bring a petition for a writ of habeas corpus after trial but before sentencing is a question of statutory interpretation. "The construction of a statute is a question of law that we

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. . . continued

sentencing establishing that objective standards were used to create the pre-sentence report.

[2]Jacobson v. State, 89 Nev. 197, 199-200, 510 P.2d 856, 857-58 (1973).

review de novo."[3] Additionally, "we will not look beyond the statutory language unless the language is ambiguous."[4]

NRS 34.360 provides that "[e]very person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." NRS 34.724 comprehends and takes the place of all other remedies challenging judgments of conviction. A claim of ineffective assistance of counsel is a challenge to the judgment of conviction. NRS 34.724 et. seq. contemplates a judgment of conviction be entered prior to the filing of the petition.

Accordingly, we conclude that NRS 34.360 does not permit Heinz to bring a petition for writ of habeas corpus raising claims of ineffective assistance of counsel after a verdict is entered but before sentencing. We determine that Heinz's post-conviction ineffective assistance of counsel claims should be brought in a post-conviction petition for a writ of habeas corpus.

Ineffective assistance of counsel on direct appeal

Heinz asserts, in the alternative, that his claim for ineffective assistance of counsel should be considered on direct appeal. Heinz contends that Bruce Lindsay's performance was deficient as a matter of law.

This court has determined that "[a] claim of ineffective assistance of counsel presents a mixed question of law and fact and is

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[3]Dettloff v. State, 120 Nev. 588, 593, 97 P.3d 586, 589 (2004).

[4]Attaguile v. State, 122 Nev. 504, 507, 134 P.3d 715, 717 (2006).

therefore subject to independent review."[5] Accordingly, claims of ineffective assistance of counsel should be presented in a timely first post-conviction petition for a writ of habeas corpus because such claims necessitate an evidentiary hearing and are generally not appropriate for review on direct appeal.[6] This court has consistently declined to entertain claims of ineffective assistance of counsel on direct appeal and held that the proper vehicle for review of counsel's effectiveness is a post-conviction relief proceeding.[7]

However, where an evidentiary hearing has been held on the claims of ineffective assistance of counsel, or where such a hearing would be unnecessary, this court may entertain such claims, even on direct appeal.[8] In Mazzan v. State, defendant's counsel berated the jury during a sentencing hearing and invited it to sentence his client to death.[9] This court determined that as a matter of law, counsel's antagonistic remarks

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[5]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[6]See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[7]Pellegrini v. State, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Feazell, 111 Nev. at 1449, 906 P.2d at 729; Ewell v. State, 105 Nev. 897, 900, 785 P.2d 1028, 1030 (1989); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981) (determining that examination of the trial record alone was insufficient—the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief so that an evidentiary hearing may be held).

[8]Pellegrini, 117 Nev. at 883, 34 P.3d at 534.

[9]100 Nev. 74, 77, 675 P.2d 409, 411 (1984).

to the jury and failure to present mitigating circumstances during sentencing constituted error that required a new penalty hearing.[10]

This court has also considered ineffective assistance of counsel cases on direct appeal when exceptionally prejudicial misconduct was evinced on the record. In Jones v. State, this court reversed a murder conviction on direct appeal where counsel, to the surprise of his client, admitted his client's guilt.[11] However, this court was careful to limit its decision to situations where counsel "undermine[s] his client's testimonial disavowal of guilt during the guilt phase of the trial."[12] Additionally, in Johnson v. State, this court held that the use of an insanity defense against a client's will was reversible error.[13] This court stated that "the issue presented is purely one of law, and an evidentiary hearing below would be of little value."[14] Finally, in contrast to the previous cases, this court determined in Gibbons v. State that even though it was "difficult to conceive of a reason for any of the . . . actions of counsel . . . on the basis of . . . the trial record alone," an evidentiary hearing was necessary because counsel might have been able to rationalize his performance.[15]

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[10]Id. at 79-80, 675 P.2d at 412-13.

[11]110 Nev. 730, 738-39, 877 P.2d 1052, 1057 (1994).

[12]Id. at 739, 877 P.2d at 1057 (emphasis omitted).

[13]117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

[14]Id. at 161, 17 P.3d at 1013.

[15]97 Nev. 520, 522, 634 P.2d 1214, 1216 (1981).

We therefore conclude that claims of ineffective assistance of counsel are not appropriate for consideration on direct appeal unless the issue raised is a pure question of law that may be resolved upon a review of the trial record alone. All other claims of ineffective assistance of counsel should be presented in a timely first post-conviction petition for a writ of habeas corpus so that an evidentiary hearing may be held.

In this case, Heinz alleges that an evidentiary hearing is not required because his counsel's actions were ineffective as a matter of law. He argues, inter alia, that Lindsay failed to ask critical questions of the victims that would have created reasonable doubt or, at the very least, established a theory of defense.[16] Heinz also alleges that there are no possible strategic or tactical reasons for Lindsay's actions and therefore an

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[16]More specifically, Heinz argues that Lindsay's representation was ineffective because Lindsay failed to (1) challenge the staleness and remoteness in time of the allegations; (2) request that available exculpatory evidence be presented to the grand jury; (3) present the evidence at trial that his now former wife, Suzy Heinz, repeatedly accused Heinz of molesting their children before they made any accusations against him; (4) offer evidence that one of the minor children resented Heinz; (5) offer evidence that Suzy attempted to get one of the minor children to recant her accusations against Heinz; (6) offer evidence that Suzy worked at two different government agencies charged with investigating child abuse allegations; (7) offer evidence that Suzy was within the category of persons required to report child abuse under Nevada law; (8) offer evidence that Suzy falsely accused Heinz of molesting their dog; (9) impeach the competency, reliability, or credibility of the alleged victims; (10) request independent psychological examinations of each of the children; (11) properly prepare witnesses; (12) present the exculpatory testimony of the defense witnesses; and (13) adequately cross-examine the prosecution's witnesses with inconsistent prior statements.

evidentiary hearing is not required. We disagree. As the State correctly asserts, without an evidentiary hearing, we are left to speculate as to the potential effectiveness of other possible defense strategies. Furthermore, Lindsay may be able to rationalize his performance or specifically articulate the strategy he employed during Heinz's trial. At the very least, Lindsay's actions at trial do not present on the record a pure question of law as to his ineffectiveness.

Prosecutorial misconduct

Heinz alleges that the State committed prosecutorial misconduct during its closing argument. However, Heinz failed to object to the State's closing argument at trial. Accordingly, we analyze his assertions under the plain error rule.

As a general rule, "'the failure to make timely objections [to prosecutorial misconduct] and to seek corrective instructions during trial [precludes appellate consideration].'"[17] During trial, Heinz made no objections during the prosecutor's closing argument. However, this court "may consider sua sponte plain error which affects the defendant's substantial rights, if the error either: '(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.'"[18]

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[17]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (alterations in original) (quoting Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998)).

[18]Id. (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

Heinz argues that the State's closing argument amounted to "'an opinion as to the veracity of a witness . . . where veracity might well have determined the ultimate issue.'"[19] Heinz argues that the State improperly vouched for the credibility of the victims' testimony by making the following statements in closing arguments:

> They are basically overall honest children. Ladies and gentlemen they are. They told you the truth from the stand. They told you exactly what happened. They told you exactly what the defendant did. And everything they told you he did is embodied in Counts I through VII of the Indictment. The State has proven its case beyond a reasonable doubt, because these children are credible. They are believable.
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> [The minor children are] very credible . . . .
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> Ladies and gentlemen, the State would submit to you they are credible witnesses. Very credible witnesses.
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> . . . .
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> The State has proven its case beyond a reasonable doubt as to all seven counts based on the credibility of these witnesses.

Heinz asserts that in this case, there was no corroborating physical evidence, no witnesses to the charges, and no admission of guilt. Therefore, the strength of the State's case rested on the credibility of Heinz's accusers.

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[19]Id. at 39, 39 P.3d at 119 (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)).

This court has determined that it must weigh the level of misconduct against the strength of the State's case to assess whether a prosecutor's comments on credibility require the reversal of a conviction. "'The level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt.'"[20] In addition, "'[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial.'"[21] Even if this court considers the State's conduct prejudicial, this court must consider the prejudicial impact in the context of the entire proceeding.[22]

Nevertheless, this court has also held that even clear instances of prosecutorial misconduct may be "insufficient to amount to reversible plain error."[23] In Rowland v. State, this court affirmed the district court's conviction and held that a prosecutor's statements characterizing a witness as a "'man of integrity' and 'honor' who told the truth" were not grounds for reversing a conviction when there was overwhelming evidence of the defendant's guilt.[24]

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[20]Id. at 38, 39 P.3d at 118 (quoting Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998)).

[21]Id. 38 P.3d at 118-19 (quoting Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)).

[22]Id. 38 P.3d at 118; see Libby, 109 Nev. at 911, 859 P.2d at 1054.

[23]Id. at 40, 39 P.3d at 120.

[24]Id. at 39-40, 39 P.3d at 119-20.

While the State may have improperly commented on the credibility of the witnesses, there was substantial evidence against Heinz. The three victims in this case offered similar testimony about Heinz's sexual misconduct. In addition, the jury was clearly informed that counsel's statements did not constitute evidence and that it was its responsibility to determine the credibility of the witnesses. Therefore, the State's comments during its closing argument concerning the victims' veracity did not constitute plain error warranting reversal. Accordingly, we determine that the State's comments did not rise to the level of misconduct necessary to reverse Heinz's conviction.

Sufficiency of the evidence of sexual assault

Heinz also argues that the evidence was insufficient to support a sexual assault conviction. Heinz contends that the evidence at trial failed to prove (1) that sexual penetration occurred and (2) that Heinz's actions occurred without the minor child's consent. This court has stated that when "reviewing the evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced of the defendant's guilt by the competent evidence beyond a reasonable doubt."[25]

Evidence of actual penetration

Heinz argues that there is no evidence that he ever penetrated the minor child. Because the minor child stated that Heinz's penis "maybe partially" entered her, Heinz claims that she expressed doubt that penetration actually occurred. The State responds by arguing that the

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[25]Middleton v. State, 114 Nev. 1089, 1102, 968 P.2d 296, 306 (1998).

jury could have found there was some penetration, however slight, and that Heinz therefore sexually assaulted the minor child.

NRS 200.366(1) states that

> A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

Arguing that any penetration meets the "however slight" standard, the State points to the minor child's testimony that Heinz did not penetrate her "all the way " as evidence of penetration.[26]

A jury clearly could have found that the minor child's statement that Heinz did not penetrate her "all the way" was sufficient to meet the "however slight" standard in NRS 200.364(2). Accordingly, we determine that there was sufficient evidence to support a sexual assault conviction.

Evidence of lack of consent

Heinz argues that if penetration occurred, the State failed to prove at trial that the penetration was against the minor child's will. He also argues that the jury was not instructed on what constituted either lack of consent or physical incapability. Heinz argues that the jury therefore could not adequately consider that element of the offense.

Jury Instruction No. 25 states, in pertinent part, that one of the elements of sexual assault requires that "sexual penetration was done

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[26]See NRS 200.364(2).

against the will of . . . [the minor child] . . . or under conditions in which [Heinz] knew or should have known that . . . [the minor child] . . . was mentally or physically incapable of resisting or understanding the nature of . . . [Heinz's] conduct."

This court has repeatedly held that circumstantial evidence alone may support a conviction.[27] In consideration of the minor child's age at the time, between five and eleven years old, and the fact that Heinz used sexual acts as punishment, we conclude that a reasonable jury could find that his sexual assault of the minor child occurred without her consent. At the very least, sufficient circumstantial evidence was presented for the jury to reasonably conclude that the minor child was incapable at the time of understanding the nature of Heinz's conduct.

Sufficiency of the evidence of lewdness with a minor under the age of fourteen

Heinz argues that there was a fatal variance in the alleged time period between the Count II charge and the trial evidence. Count II states that the lewdness acts with one of the three minor children occurred between the years of 1995 and 1996. Heinz points out that this minor child claims the sexual offenses began when she was five or six, or between 1997 and 1999.

The State argues that Heinz does not assert that any prejudice occurred because of the date variance and that this court should disregard

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[27]Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002); Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000), cert. denied, 532 U.S. 978 (2001).

the claim.[28] In addition, the State points out that there was no variance between the indictment and the trial evidence. We determine that the date variance was not material in this case because the indictment provided Heinz with sufficient notice as to the dates that the alleged lewdness occurred.

CONCLUSION

We conclude that NRS 34.360 does not permit Heinz to bring a petition for writ of habeas corpus after a verdict is rendered but before sentencing. We determine that a post-conviction challenge alleging the ineffective assistance of counsel should be brought in a post-conviction petition for a writ of habeas corpus. We further conclude that Heinz's claims of ineffective assistance of counsel were not appropriate for consideration on direct appeal because the issue raised did not present a pure question of law that may be resolved upon a review of the trial record alone. Next, we conclude that the State's comments during its closing argument concerning the veracity of the witnesses did not constitute plain

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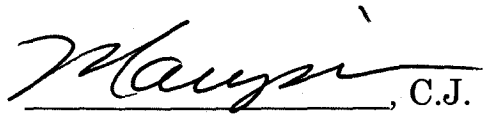
[28]See Garden v. State, 73 Nev. 312, 318-19, 318 P.2d 652, 655 (1957) (holding that a variance between the charging information and the trial evidence was not material).

error warranting reversal. Finally, we conclude that sufficient evidence was supports Heinz's conviction for sexual assault. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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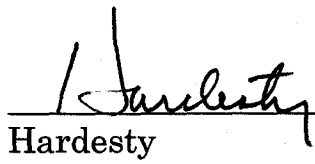

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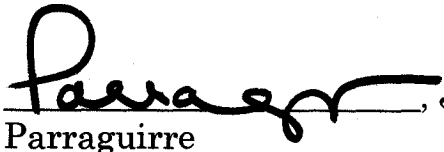

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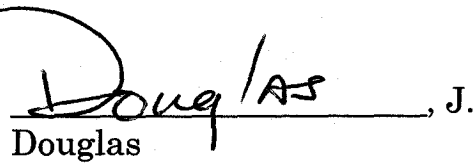

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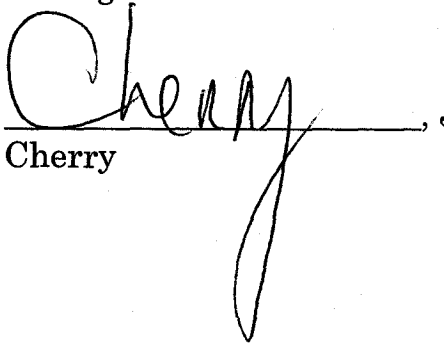

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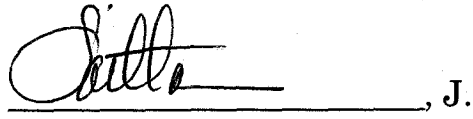

_____, J.
Saitta

cc: Hon. Jerome Polaha, District Judge
Martin H. Wiener
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk