

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY BOLIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45383

**FILED**

JUN 22 2007

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On October 2, 1996, the district court convicted appellant Gregory Bolin, pursuant to a jury verdict, of first-degree kidnapping, sexual assault, and first-degree murder. The jury returned a verdict of death for the murder. This court affirmed the judgment of conviction and sentence of death.<sup>1</sup> The United States Supreme Court denied Bolin's petition for a writ of certiorari on March 1, 1999. Bolin subsequently filed the instant petition, which the district court denied on July 11, 2005, without conducting an evidentiary hearing. This appeal followed.

First, Bolin claims the district court erred by denying his claim that he was entitled to a new trial based on the erroneous admission of evidence of his prior Colorado conviction for kidnapping and sexual assault. The district court ruled that this evidence was proper to show

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<sup>1</sup>Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), abrogated in part by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002); see also Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

identity and sexual aberration and for other purposes. The district court instructed the jury that it could consider the evidence in deciding whether Bolin possessed a propensity for sexual aberration. Bolin argued in his direct appeal that the evidence was improperly admitted. We held that the evidence was properly admitted to show identity;<sup>2</sup> consequently, we declined to consider whether the evidence was improperly admitted for any other purpose, including to show a propensity for sexual aberration.<sup>3</sup>

The State argues that this claim is barred by the law of the case doctrine.<sup>4</sup> We disagree. In Bolin's direct appeal, we expressly declined to consider whether evidence of the prior bad act was improperly admitted to show sexual aberration. Thus, the claim is not barred by the law of the case. The claim was not waived because Bolin raised it in his direct appeal, and his petition is not successive, so the procedural bars of NRS 34.810 are not at issue. Bolin argues that our decisions in Braunstein v. State<sup>5</sup> and Richmond v. State,<sup>6</sup> which were both decided after his conviction became final, entitle him to relief on this claim.

The State argues that Bolin is not entitled to application of Braunstein and Richmond because his conviction was final when those cases were decided and they do not demand retroactive application on

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<sup>2</sup>Id. at 520-21, 960 P.2d at 795-96.

<sup>3</sup>Id. at 521 n.5, 960 P.2d at 796 n.5.

<sup>4</sup>See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>5</sup>118 Nev. 68, 40 P.3d 413 (2002).

<sup>6</sup>118 Nev. 924, 59 P.3d 1249 (2002).

collateral review.<sup>7</sup> We need not reach this issue here because even if those cases were applied retroactively to Bolin, they would not entitle him to relief. Braunstein would not have barred admission of the prior bad act evidence; the evidence would still have been admissible to show identity, which we have already ruled was proper. And while Richmond would have rendered the sexual-aberration jury instruction improper, we conclude the error in giving the instruction would have been harmless in light of the weight of the evidence supporting Bolin's conviction. That evidence included Bolin's history of frequenting the victim's place of work and asking the victim and her sisters out on dates; surveillance videotape placing Bolin at the victim's place of work minutes before she arrived and approximately two hours before she departed on the night of her death; a witness who saw Bolin drive away from the crime scene in the victim's truck just before the witness discovered the dying victim; the victim's truck being found five blocks from Bolin's home with a bloody screwdriver inside; and evidence that Bolin was included among the one in every 2,400-2,600 African-Americans who could have been the donor of DNA evidence found on the victim's body. Thus, we conclude the district court did not err in denying this claim.

Bolin also claims his trial and appellate counsel were ineffective with regard to the prior bad act evidence and sexual aberration jury instruction. 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 and that counsel's errors were so severe that they

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<sup>7</sup>See generally Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

rendered the jury's verdict unreliable.<sup>8</sup> "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."<sup>9</sup> We conclude the district court did not err in ruling that counsel were not ineffective. Trial counsel filed a pre-trial motion to exclude prior bad acts, and appellate counsel raised this issue on direct appeal. Neither counsel was deficient for failing to cite Braunstein and Richmond when those cases had not yet been decided.

Second, Bolin claims the district court erred by denying his claim that the DNA evidence should have been excluded as inconclusive and therefore irrelevant; Bolin also claims that the State's evidence and argument about the related statistical probabilities should have been excluded as a result. We concluded in Bolin's direct appeal that the DNA evidence and related statistics were proper. That ruling is now the law of the case.<sup>10</sup> The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument made after reflection upon the prior proceedings.<sup>11</sup> Accordingly, we conclude the district court did not err in denying this claim.

Bolin also argues that his counsel were ineffective for failing to challenge the DNA and statistical probability evidence by arguing that

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<sup>8</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>9</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>10</sup>See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

<sup>11</sup>Hall, 91 Nev. at 316, 535 P.2d at 799.

its inconclusiveness rendered it irrelevant. Bolin failed to establish that counsel's performance was deficient or prejudiced him. The State's expert witness testified that she found DNA evidence on the root and shaft of a foreign pubic hair recovered from the victim's body. She testified that a hair root would contain DNA, while the shaft would not, and thus, the DNA on the shaft must have been deposited there. She further testified that the DNA profiles she obtained from the root and the shaft were the same, but she could not determine whether the DNA on the shaft had been deposited there by the root, had come from somewhere else on the donor, or came from an entirely different donor with the same profile. She also testified that 1 in approximately 2,600 African-American males, including Bolin, would fit that profile. Her testimony that she could not draw a conclusion on how the DNA got on the shaft of the hair did not render the whole of the DNA evidence inconclusive or irrelevant. The jury was capable of assessing the proper weight to give this evidence. We note that trial counsel called its own DNA expert to testify as well. Thus, we conclude the district court did not err in denying this claim.

Third, Bolin contends the district court erred in denying his claim that the State violated Brady v. Maryland<sup>12</sup> by failing to disclose a second, lighter pubic hair recovered from the victim's body and by failing to preserve the first, darker pubic hair, which was tested, for independent analysis by the defense. Bolin also argues his counsel were ineffective for failing to investigate this issue during trial and for failing to raise this argument on direct appeal.

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<sup>12</sup>373 U.S. 83 (1963).

To the extent Bolin raises this claim as a direct appeal claim, it was waived by his failure to raise it on direct appeal.<sup>13</sup> As an ineffective assistance of counsel claim, Bolin failed to establish that counsel's performance was ineffective. Brady and its progeny require a prosecutor to disclose exculpatory evidence that is material to the defense.<sup>14</sup> A claim that the State committed a Brady violation must show that: the evidence at issue was favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material.<sup>15</sup> Here, the State disclosed the existence of the lighter hair though it did not preserve it. It also disclosed the darker hair though it consumed the hair's root in testing it. Bolin does not allege that the State acted in bad faith, and he merely speculates that either hair might have exculpated him. Such speculation is not sufficient to support a Brady claim or a claim of improper loss of evidence or to demonstrate counsel's deficiency or prejudice, and we conclude the district court did not err in denying this claim.

Fourth, Bolin contends that the district court erred in denying his claim that a witness identified him after an unduly suggestive show-up procedure and that the show-up tainted the witness's subsequent in-court identification of Bolin; thus, Bolin argues, both identifications should have been excluded at trial. In Bolin's direct appeal, we concluded that the show-up procedure was not improper. This ruling is now the law of the

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<sup>13</sup>See NRS 34.810(1)(b)(2).

<sup>14</sup>See Strickler v. Greene, 527 U.S. 263, 280 (1999).

<sup>15</sup>Id. at 281-82.

case and will not be revisited.<sup>16</sup> Bolin also argues that the district court erred in denying his claim that this court misapprehended the facts relating to this claim in his direct appeal. This claim was not properly brought in a postconviction petition for a writ of habeas corpus. We note that after this court decided his direct appeal, Bolin unsuccessfully sought rehearing.<sup>17</sup> Bolin also argues his counsel were ineffective for failing to challenge the identifications. As we have already ruled that the show-up procedure was not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Bolin further argues that trial counsel were ineffective for failing to object to testimony by the witness who observed him at the crime scene that he recognized Bolin's face, even though the witness had also testified that he did not see Bolin's face. We conclude counsel was not ineffective. Our review of the record indicates that the witness testified that at the crime scene he saw Bolin's face in profile but not straight-on. The State questioned the witness about these facts, and the jury was capable of assessing the witness's credibility and weighing his identification of Bolin. Thus, the district court did not err in denying these claims.

Fifth, Bolin contends the district court erred in denying his claim that the search warrant was invalid because the affidavit supporting it contained material misrepresentations of fact and did not establish probable cause. Bolin also argues the State violated his constitutional rights by conducting a second blood draw from Bolin without obtaining a

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<sup>16</sup>See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

<sup>17</sup>Bolin v. State, Docket No. 29497 (Order Denying Rehearing, August 27, 1998).

second search warrant after realizing it had used the wrong serology kit in the first blood draw. In Bolin's direct appeal, this court ruled that the affidavit provided a substantial basis for finding probable cause and that the second blood draw was not improper. This ruling is now the law of the case and will not be revisited.<sup>18</sup> The law of the case doctrine cannot be avoided by a more detailed and precisely focused argument made after reflection on the prior proceedings.<sup>19</sup> Bolin also argues his trial counsel were ineffective for failing to adequately challenge the warrant and searches. As we have already ruled that the warrant and searches were not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Thus, the district court did not err in denying these claims.

Sixth, Bolin claims his trial counsel were ineffective at sentencing for failing to call his family members and friends to testify in mitigation that they loved Bolin and would suffer as a result of the imposition of the death penalty, that Bolin was committed to his education, and that he had a relationship with his son. Bolin did not raise this argument below and alleges no cause for his failure to do so. Further, in light of the facts of this case, Bolin failed to establish that counsel's performance prejudiced him. Accordingly, the district court did not err in denying this claim.

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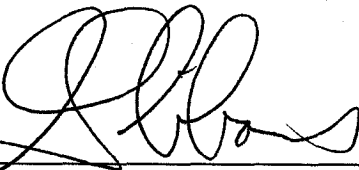
<sup>18</sup>See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

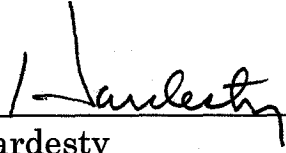
<sup>19</sup>Hall, 91 Nev. at 316, 535 P.2d at 799.

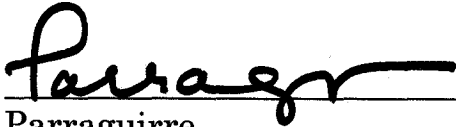


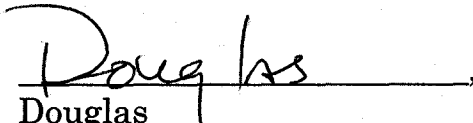
Finally, Bolin argues that the district court erred by denying his petition without conducting an evidentiary hearing. We disagree. Bolin failed to state any facts that, if true, would entitle him to relief.<sup>20</sup>

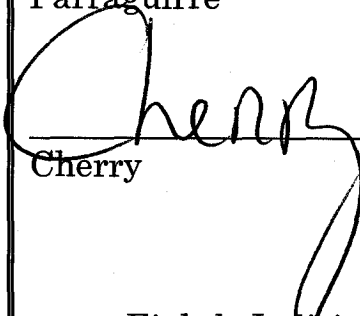
ORDER the judgment of the district court AFFIRMED.

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

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

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

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

  
\_\_\_\_\_, J.  
Cherry

cc: Eighth Judicial District Court, Dept. No. 18  
Munger, Toller & Olson LLP  
JoNell Thomas  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

<sup>20</sup>See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).