IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN SAMUEL BRAUNSTEIN
A/K/A STEVEN SAMUEL JALBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46609

FILED

DEC 05 2006

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

ORDER OF AFFIRMANCE

This is an 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; Michael A. Cherry, Judge.

On March 17, 2000, the district court convicted appellant Steven Samuel Braunstein, pursuant to a jury verdict, of two counts of sexual assault of a minor under the age of 14. The district court sentenced Braunstein to serve two concurrent terms of 20 years to life in prison. This court affirmed the judgment of conviction and sentence on direct appeal.[1]

Braunstein filed a timely post-conviction petition for a writ of habeas corpus, which his counsel supplemented. The district court declined to conduct an evidentiary hearing and denied the petition after hearing argument. This appeal followed.

Braunstein contends he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that

[1]Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002).

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.[2]

First, Braunstein argues that his counsel was ineffective for failing to investigate by obtaining the services of a physician expert witness to refute the State's expert's finding that the victim showed physical evidence of sexual penetration when examined shortly after the abuse was reported. At trial, the State also called a physician who performed a sexual abuse examination of the victim several years earlier and found no evidence of sexual penetration at that time. Braunstein claims that a review of both exams by Dr. Ricci, an expert he retained in connection with this petition, revealed no differences between the two exams.

We disagree that counsel was ineffective in this regard. Assuming counsel had located a physician who would have testified in accordance with Dr. Ricci's opinion, the jury would have been presented with a disagreement between expert witnesses, both of whom reviewed the report and videotape from the victim's prior exam. Braunstein's claim that the jury would have found a physician's testimony more credible than that of the State's expert, a nurse practitioner whose findings were confirmed through peer review with a physician, is mere speculation. Further, there was evidence supporting the convictions beyond the physical evidence, including the testimony of the victim, a school counselor, and the victim's mother and cousin. In addition, as Dr. Ricci

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

noted, lack of physical evidence does not rule out sexual abuse; thus, had the jury disbelieved the State's expert, it could still have convicted Braunstein on the weight of the other testimony.

Second, Braunstein argues that counsel was ineffective for failing to object to improper witness-vouching by Detective Tanja Wasielewski and the victim's school counselor, Nancy Gentis. "[I]t is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false";[3] it is also generally improper for one witness to vouch for the testimony of another.[4]

Gentis testified that after the victim disclosed the sexual abuse to her, she reported it to the police and then told the victim, "I was proud that she told somebody and that it was not her fault." This statement did not necessarily constitute witness vouching, but it was not relevant.[5] However, Braunstein did not object to the statement, and it does not rise to the level of plain error.[6]

After examining Wasielewski about her training to work with suspected child sexual abuse victims and her interview with the victim, the State asked if the interview led her to open a case. Wasielewski

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[3]Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

[4]Marvelle v. State, 114 Nev. 921, 930-31, 966 P.2d 151, 156-57 (1998), abrogated in part on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

[5]See Townsend, 103 Nev. at 119, 734 P.2d at 709.

[6]See NRS 178.602; Herman v. State, 122 Nev. ___, ___, 128 P.3d 469, 474 (2006); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

responded that she felt "very confident [the victim] was telling me truth and the case was going to proceed further." Although Wasielewski was not certified as an expert witness, we conclude this statement was improper, especially in light of Wasielewski's testimony about her training in interviewing suspected child victims.[7] However, we conclude counsel was not ineffective for failing to object, as the comment was isolated and defense counsel may not have wanted to draw attention to it.[8] Further, given the other evidence, we conclude that there was no reasonable probability of a different outcome if counsel had objected.

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[7]See generally Abbott v. State, 122 Nev. ___, ___, 138 P.3d 462, 471 (2006), in which we held that

> [a] witness is acting as an expert witness, for the purposes of Koerschner, when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant. Therefore, should the State decide to call its forensic investigator, the State should limit the testimony to recitation of the facts of the interview. If the State intends that the investigator will testify beyond the facts of the case and will provide his own experiences and assessments of the interview, the State must notify the district court prior to trial, so as to afford the defendant time to request his own independent psychological evaluation of the victim or otherwise obtain rebuttal testimony.

[8]Cf. Marvelle, 114 Nev. at 930-31, 966 P.2d at 156-57 (holding that "unbridled testimony that the [victim] was telling the truth" coupled with the district court's erroneous denial of the defense's motion for an independent psychological evaluation of the victim prejudiced the defendant).

Third, Braunstein argues that counsel was ineffective for failing to object to Wasielewski's allegedly nonresponsive answer to the State's question about the time frame of the incidents. We conclude that counsel was not ineffective. Counsel elicited specific information about the time frame of the first incident on cross-examination. Several witnesses, including the victim, testified as to the date of the final incident. We conclude that there was no reasonable probability of a different outcome if counsel had objected.

Fourth, Braunstein argues that counsel was ineffective for failing to move to strike Wasielewski's testimony that some child victims may not disclose abuse because the perpetrator lives in the household and the victim is intimidated. We disagree that counsel was ineffective. Counsel objected to the testimony, stating in the jury's presence, "That's not the situation in this case." We conclude that there was no reasonable probability of a different outcome if counsel had moved to strike.

Fifth, Braunstein argues counsel was ineffective for failing to object to Wasielewski's testimony that the victim's mother remembered after her initial interview that the victim had at times been alone with Braunstein. Braunstein also argues counsel was ineffective for failing to object to questions from the State and testimony from Wasielewski regarding the victim's mother's level of cooperation in the investigation. Braunstein fails to specify what in Wasielewski's testimony about the victim's mother's cooperation was objectionable.[9] We conclude that there

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[9]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on "bare" or "naked" claims for relief that are unsupported by any specific factual allegations).

was no reasonable probability of a different outcome if counsel had objected.

Sixth, Braunstein argues counsel was ineffective for failing to object to the district court's instructing the jury on flight. This claim is belied by the record, which indicates that counsel did object to this instruction but was overruled.[10]

Seventh, Braunstein argues counsel was ineffective for failing to ensure that all bench conferences were recorded. Braunstein claims that an unrecorded bench conference led to a change in a jury instruction after the jury had begun deliberating, in violation of NRS 175.161. However, the record reveals that counsel stipulated to the change. Braunstein fails to specify how the failure to record this or any other bench conference prejudiced him.[11]

Braunstein also claims that he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the omitted issue would have a reasonable probability of success on appeal.[12] Appellate counsel is not required to raise every nonfrivolous issue on appeal.[13] This

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[10]See id. at 503, 686 P.2d at 225 (holding that a petitioner is not entitled to an evidentiary hearing on claims that are belied by the record).

[11]See id. at 502, 686 P.2d at 225.

[12]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

[13]Jones v. Barnes, 463 U.S. 745, 751 (1983).

court has stated that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[14]

First, Braunstein argues that appellate counsel was ineffective for failing to challenge alleged witness-vouching by Wasielewski and Gentis. Trial counsel did not object to either testimony, and appellate counsel thus would have had to demonstrate that the testimony amounted to plain error.[15] As stated above, the testimony did not constitute plain error, and appellate counsel was not ineffective for failing to make this argument.

Second, Braunstein argues that appellate counsel was ineffective for failing to challenge the flight instruction. We disagree. "[A] district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest."[16] Trial testimony established that Braunstein knew the victim had made allegations against him. Detective Larry Smith testified that he and Wasielewski had gone to Braunstein's house and requested he come outside, but he refused. Testimony also established that while Wasielewski and Smith were at his door, Braunstein called his lawyer, told the lawyer the police were there, asked what to do, and was advised to stay inside and wait for the detectives to get a warrant. Smith testified that after half an hour of trying to get Braunstein to come outside,

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[14]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[15]See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

[16]Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005).

Wasielewski left and Smith returned to his car and watched Braunstein's house. He then testified that, although he had not seen Braunstein leave his house, he received information that Braunstein was at a nearby minimart. He proceeded to the minimart and found Braunstein out of breath and with dirt and grass on his clothing. This was sufficient to support an inference that Braunstein had left his house due to his consciousness that he was guilty of assaulting the victim and in an attempt to evade arrest.[17]

Third, Braunstein argues that appellate counsel was ineffective for failing to challenge testimony from Smith that an unidentified woman told him that Braunstein was at the minimart and had called her to pick him up. Braunstein argues that Smith's testimony about these statements, in support of the flight instruction, violated his right to confrontation as interpreted in Crawford v. Washington[18] and Flores v. State.[19] Neither Crawford nor Flores had been decided when Braunstein's conviction became final, and Braunstein fails to demonstrate he is entitled to application of either. Even if Crawford and Flores were applied here, any error would be harmless. As stated above, even without the statements of the unidentified woman, there was sufficient evidence to support the flight instruction.

Fourth, Braunstein argues that appellate counsel was ineffective for failing to raise federal constitutional claims based on the

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[17]See id.

[18]541 U.S. 36 (2004).

[19]121 Nev. 706, 120 P.3d 1170 (2005).

admission of prior bad acts, cumulative hearsay testimony of statements by the victim, the district court's denial of his motion for a new trial, and the sufficiency of the evidence. Braunstein refers to general principles of due process but fails to cite any case law or present any argument to explain how any of these claims should have been raised or how, had they been so raised, they had a reasonable probability of success on appeal.[20]

Braunstein also argues that the trial court erred by allowing cumulative hearsay testimony and evidence of prior bad acts and by denying Braunstein's motion for a new trial. The propriety of the bad act evidence and denial of the motion for a new trial were addressed on appellant's direct appeal. Those rulings are now the law of the case, and we will not revisit them here.[21] Braunstein's argument regarding impermissibly cumulative hearsay testimony was waived by his failure to raise it on direct appeal, and Braunstein fails to demonstrate good cause and prejudice for the failure.[22]

Finally, Braunstein argues that the above errors, viewed cumulatively, warrant reversal. We conclude that any errors that occurred were minimal and did not unfairly prejudice him independently or cumulatively.

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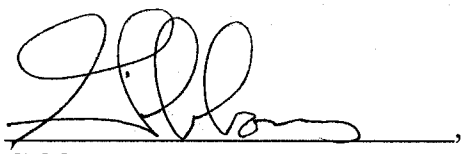
[20]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

[21]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).

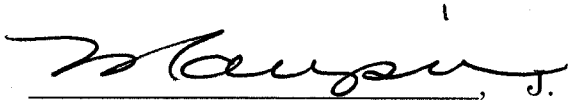
[22]See NRS 34.810(1)(b)(2), (3).

Having reviewed Braunstein's contentions and concluded they are without merit, we

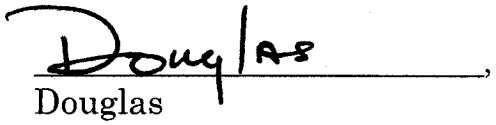
ORDER the judgment of the district court AFFIRMED.[23]



_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Michael A. Cherry, District Judge
Karen A. Connolly
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[23]In light of the foregoing, Braunstein's proper person motion filed in this court on October 12, 2006 is hereby denied.