

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO ESTEBAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46696

FILED

JUL 10 2006

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; Valorie Vega, Judge.

On May 22, 2003, the district court convicted appellant, pursuant to a jury verdict, of twenty-three counts involving the sexual abuse of two victims, E.E. and L.E.¹ Specifically, regarding E.E., appellant was convicted of seven counts of lewdness with a child under the age of fourteen, six counts of sexual assault of a minor under the age of fourteen, one count of incest, and two counts of battery with intent to commit a crime; regarding L.E., appellant was convicted of two counts of lewdness with a child under the age of fourteen, four counts of sexual assault of a minor under the age of fourteen, and one count of incest. The district court sentenced appellant to serve terms totaling life in the

¹An amended judgment of conviction correcting an error in the term of imprisonment for count seventeen, battery with intent to commit a crime, was entered on July 16, 2003.

Nevada State Prison with the possibility of parole after sixty-eight years. This court affirmed the conviction on direct appeal.² The remittitur issued on September 29, 2004.

On August 18, 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 January 13, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant contended his counsel was ineffective for failing to challenge the justice's court's determination that probable cause existed to bind appellant over to the district court for trial. Appellant

²Esteban v. State, Docket No. 41423 (Order of Affirmance, September 3, 2004).

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

⁴Strickland, 466 U.S. at 697.

claimed counsel should have objected to the determination because the State failed to prove the dates of the charged incidents.

Appellant failed to demonstrate counsel's performance was deficient in this regard. "Unless time is an essential element of the offense charged, there is no absolute requirement that the state allege the exact date, and the state may instead give the approximate date on which it believes the crime occurred."⁵ Time is not an essential element of sexual assault or lewdness with a minor.⁶ Our review of the record on appeal reveals that the State alleged a specific time frame of one to two years for each count. Further, E.E. testified at the preliminary hearing that the charged conduct took place weekly between July 2000 and May 2002. L.E. testified that the charged conduct took place between July 2000 and May 2002. This was sufficient to establish a time frame for the charged conduct. Counsel was therefore not deficient for failing to object on this ground, and the district court did not err in denying this claim.

Second, appellant contended his counsel was ineffective for failing to seek dismissal at trial of count nineteen, lewdness with a child under the age of fourteen (L.E.). Appellant claimed the State failed to prove the act of lewdness charged in count nineteen was not redundant to

⁵Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) (citations omitted).

⁶See NRS 200.366; NRS 201.230; Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961) (holding that time is not an element of the offense of rape); see also People v. Wrigley, 443 P.2d 580 (Cal. 1963) (holding that time is not an essential element of the crime of committing lewd and lascivious acts upon a minor).

the acts charged in counts twenty-five and twenty-six, sexual assault of a minor under the age of fourteen, pursuant to Braunstein v. State.⁷ Appellant failed to demonstrate counsel's performance was deficient. L.E. testified that appellant made her touch his penis and penetrated her with his fingers and his penis more than one time. This testimony was sufficient to establish that the incident of lewdness was separate from the incidents of sexual assault. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant contended his counsel was ineffective for failing to seek dismissal of four counts of sexual assault against L.E. (counts twenty-two, twenty-three, twenty-four and twenty-five). Appellant claimed the indictment did not distinguish the charged incidents in time and therefore did not give him adequate notice of the charges. "Unless time is an essential element of the offense charged, there is no absolute requirement that the state allege the exact date, and the state may instead give the approximate date on which it believes the crime occurred."⁸ Our review of the record on appeal reveals that the State alleged in the information that the four counts charged conduct occurring "on or between July 18, 2000 and December 31, 2002." This was sufficient to establish a time frame for the charged conduct. Appellant also contended counsel was ineffective for failing to challenge these four counts

⁷118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (holding that a conviction for both lewdness and sexual assault would be unlawful if the convictions were based on the same act).

⁸Cunningham, 100 Nev. at 400, 683 P.2d at 502.

on the ground that their lack of specificity as to time violated the prohibitions against redundancy and double jeopardy. However, redundancy and double jeopardy only prohibit multiple punishments for the same offense, not multiple charges for what may, through testimony, be revealed to be the same conduct.⁹ Accordingly, we conclude counsel was not deficient for failing to object on these grounds, and the district court did not err in denying this claim.

Fourth, appellant contended his counsel was ineffective for failing to seek dismissal of all the counts because the trial testimony did not establish a time frame for any of the incidents. Appellant failed to demonstrate counsel was deficient. Our review of the record indicates the State elicited testimony from E.E. and L.E. that was sufficient to place the charged conduct within the charged time frames.¹⁰ Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant contended his counsel was ineffective for failing to object to jury instruction number eleven or to request an instruction on redundancy pursuant to Braunstein.¹¹ We conclude that appellant failed to demonstrate counsel's performance was deficient. Jury instruction eleven stated, "Where multiple sexual acts occur as part of a

⁹See generally Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003); Gaxiola v. State, 121 Nev. ___, 119 P.3d 1225 (2005).

¹⁰See Cunningham, 100 Nev. at 400, 683 P.2d at 502.

¹¹118 Nev. at 79, 40 P.3d at 421 (holding that a conviction for both lewdness and sexual assault would be unlawful if the convictions were based on the same act).

single criminal encounter a defendant may be found guilty for each separate or different sexual act." Appellant admitted this instruction was correct; we agree, and conclude it adequately incorporated Braunstein. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, again citing Braunstein, appellant contended trial counsel was ineffective for failing to cross-examine the victims effectively to show the lewdness counts were redundant to the sexual assault counts. Appellant failed to demonstrate counsel's performance prejudiced him. Appellant conceded that no trial testimony indicated any of the lewdness counts were incidental to any of the sexual assault counts, and appellant failed to demonstrate that cross-examination of the victims would have elicited such testimony. Further, E.E. testified that on multiple occasions appellant touched her chest, vagina, and buttocks, and made her touch his penis; L.E. testified that on multiple occasions appellant touched her buttocks and made her touch his penis. This conduct would be sufficient to support a lewdness charge, and would not be considered incidental to sexual assault. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant contended trial counsel was ineffective for failing to object to the State's closing argument, in which, appellant alleged, the State mischaracterized the elements of sexual assault. Appellant claimed the State improperly argued in closing that (a) the victims did not need to manifest their lack of consent and (b) the jury could not legally find that the victims consented, due to their ages (eight and one-half years and ten and one-half years) and the fact that appellant

was their father. Appellant failed to demonstrate counsel's performance prejudiced him. Even if the State's arguments were in some way improper, they were cured by the jury instructions. The jury was instructed that a person "is not required to do more than her age, strength, surrounding facts and attending circumstances make it reasonable for her to do to manifest opposition to a sexual assault." The jury was also instructed that a defendant is guilty of sexual assault of a minor when he subjects the minor to "sexual penetration, against the minor's will or under conditions in which the perpetrator knows or should know the minor is mentally or physically incapable of resisting or understanding the nature of his conduct. . .". The jury could reasonably have concluded that, whether the victims manifested opposition or not, appellant should have known the sexual assault was against the victims' will or that the victims were incapable of resisting or understanding appellant's conduct because appellant knew the victims' ages and that they were both his daughters. Further, E.E. testified that she would sometimes try to get away from appellant or hit or kick him, but he would physically restrain her or slap her. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, appellant contended trial counsel was ineffective for failing to object to the State's closing argument, in which, appellant alleged, the State improperly vouched for the victims' credibility as witnesses. Specifically, appellant contended trial counsel should have objected to the State's comment that the victims had no reason to lie. "It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the

prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony."¹² Our review of the record on appeal reveals the State did neither; rather, the State simply reviewed the evidence and argued that the evidence did not reveal any reason for the victims to lie. Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant contended trial counsel was ineffective for failing to object to the State's asking a leading question of one of the victims in its direct examination. Specifically, appellant contended that E.E. had not testified that penetration occurred during any incident with appellant, but the State asked her ". . . how did that feel when he put [his penis] in your vagina?" Appellant failed to demonstrate counsel's performance was deficient or prejudiced him. At the trial court's discretion, child victims testifying about sexual abuse may be asked leading questions about that abuse.¹³ Further, E.E. had already responded in the affirmative when asked if appellant had attempted to place anything in her vagina. In addition, expert medical testimony established that E.E. (and L.E.) had "obliterated" hymenal tissue, which could only be caused by repeated sexual penetration by an object such as a penis. Accordingly, we conclude the district court did not err in denying this claim.

¹²Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (quoting United States v. Roberts, 618 F.2d 530, 533 (1980)).

¹³See Barcus v. State, 92 Nev. 289, 550 P.2d 411 (1976).

Tenth, appellant contended trial counsel was ineffective for failing to object to an aggravating factor in the pre-sentence investigation report (PSI), specifically, that appellant had illegally entered the United States. We conclude appellant failed to demonstrate counsel's performance was deficient. Martinez v. State¹⁴ makes clear the sentencing judge may not rely on a defendant's nationality, whatever his or her legal status:

A trial judge may not, however, consider a defendant's nationality or ethnicity in its sentence determination; consideration of these facts violates a defendant's right to due process. Thus, the district court here violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens.

We cannot, however, determine from the record whether the district court actually based its sentencing decision on appellants' nationality.¹⁵

However, there is no indication in the record that the sentencing court relied on appellant's nationality in making its sentencing determination. We therefore conclude counsel was not deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Eleventh, appellant contended trial counsel was ineffective for failing to object to the district court's refusal to allow appellant's wife to testify at appellant's sentencing. Appellant failed to demonstrate counsel

¹⁴114 Nev. 735, 961 P.2d 143 (1998).

¹⁵Id. at 738, 961 P.2d at 145 (internal citations omitted).

was deficient. The sentencing court has the discretion to hear any "reliable and relevant evidence" at sentencing,¹⁶ but appellant failed to demonstrate the sentencing court abused its discretion by refusing to allow appellant's wife to testify. Only the defendant and his or her counsel have a right to speak at sentencing.¹⁷ Accordingly, we conclude the district court did not err by denying this claim.

Twelfth, appellant contended trial counsel was ineffective for failing to request a mental health evaluation of appellant for use at sentencing to give the sentencing judge a "more in-depth understanding of [appellant's] psyche and humanity." Appellant failed to demonstrate counsel's performance prejudiced him. Appellant failed to state what a mental health report would have disclosed and how that would have resulted in a more lenient sentence. Accordingly, we conclude the district court did not err by denying this claim.

Thirteenth, appellant contended trial counsel was ineffective for failing to object to the district court's entering an amended judgment of conviction increasing the maximum term for count seventeen. The original judgment of conviction was entered on May 22, 2003, and, for count seventeen, appellant was sentenced to serve 72 to 120 months. This was a violation of NRS 193.130(1), which prohibits the minimum term from exceeding forty percent of the maximum term. On July 16, 2003, the district court entered an amended judgment of conviction, amending the sentence for count seventeen to 72 to 180 months. Appellant contended

¹⁶NRS 176.015(6).

¹⁷NRS 176.015(2).

this violated Miranda v. State,¹⁸ in that it unnecessarily increased the sentence to bring it into compliance with statutory law. Appellant failed to demonstrate counsel was deficient. At a hearing on the issue, the sentencing judge stated that she had intended to sentence appellant to 72 to 180 months on count seventeen, but became distracted while trying to keep track of which count pertained to which victim and "misspoke." We have noted that an increase in the severity of a sentence may be allowable when the sentencing court's original sentence was a product of inadvertent neglect.¹⁹ Our review of the record on appeal reveals that the district court's original sentence on count seventeen was the product of inadvertent neglect, and we conclude counsel was not deficient for failing to object to the amended judgment of conviction. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.²⁰ Appellate counsel is not required to

¹⁸114 Nev. 385, 956 P.2d 1377 (1998).

¹⁹See Campbell v. District Court, 114 Nev. 410, 413, 957 P.2d 1141, 1143 (1998) ("We emphasize that this is not a case where the district court explained that it intended to include the 'no house arrest' provision in the original judgments but inadvertently neglected to do so.").

²⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

raise every non-frivolous issue on appeal.²¹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²²

First, appellant claimed appellate counsel was ineffective for failing to argue that count nineteen, lewdness on a child under the age of fourteen, was redundant to the acts charged in counts twenty-five and/or twenty-six, sexual assault of a minor under the age of fourteen. Appellant failed to demonstrate appellate counsel was deficient. As stated above, the evidence at trial was sufficient to establish that the incident of lewdness was separate from the incidents of sexual assault. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed appellate counsel was ineffective for failing to argue that counts twenty-two, twenty-three, twenty-four and twenty-five were redundant and constituted double jeopardy. Appellant failed to demonstrate appellate counsel was deficient. As stated above, the counts did not violate the prohibitions against redundancy and double jeopardy. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed appellate counsel was ineffective for failing to argue that appellant's conviction be reversed because the State failed on each count to establish a time frame for the incidents supporting each count. Appellant failed to demonstrate appellate counsel was deficient. As stated above, time was not an essential element of the

²¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

²²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

charges, and the State properly alleged a time frame for each count.²³ The testimony of L.E. and E.E. was sufficient to place the charged conduct within the time frames alleged for each count. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed appellate counsel was ineffective for failing to argue that jury instruction eleven was improper because it did not address the potential redundancy of convictions for lewdness and sexual assault pursuant to Braunstein. Appellant failed to demonstrate appellate counsel was deficient. As stated above, jury instruction eleven was a correct statement of the law and adequately incorporated Braunstein's holding that convictions are redundant when they are "based on a single act."²⁴ Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred in refusing to allow appellant's wife to testify at appellant's sentencing. Appellant failed to demonstrate appellate counsel was deficient. As stated above, appellant's wife had no statutory right to speak at the sentencing, and appellant failed to demonstrate the sentencing court abused its discretion by refusing to allow appellant's wife to testify.²⁵ Accordingly, we conclude the district court did not err by denying this claim.

²³See Cunningham, 100 Nev. at 400, 683 P.2d at 502; see also Martinez, 77 Nev. 184, 360 P.2d 836; Wrigley, 443 P.2d 580.

²⁴118 Nev. at 79, 40 P.3d at 421.

²⁵See NRS 176.015(2), (6).

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.²⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁷

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Valorie Vega, District Judge
Pedro Esteban
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁷We 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.