

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47318

FILED

JUN 04 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. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Frederic Green was convicted, pursuant to a jury verdict, of sexual assault and aggravated stalking.¹ His convictions stem from his sexual assault and stalking of his wife Camisha Linzie. The district court sentenced him to a life term in prison with the possibility of parole for sexual assault and a consecutive term of 35 to 156 months for aggravated stalking. Green appealed, and we affirmed his judgment of conviction.² The district court denied Green's timely postconviction petition for a writ of habeas corpus after conducting an evidentiary hearing. This appeal followed.

Green challenges several matters on appeal. He first argues that trial and appellate counsel were ineffective for not challenging the district court's jurisdiction over Count II, a charge of sexual assault,

¹Green was acquitted of one count of sexual assault.

²Green v. State, 119 Nev. 542, 80 P.3d 93 (2003).

arguing that he was never bound over for trial on this count. Additionally, he contends that the district court abused its discretion in granting a continuance of the postconviction evidentiary hearing to secure additional evidence relating to this claim. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Green must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.³ He must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the trial would have been different.⁴ To establish ineffective assistance of appellate counsel for failing to raise an issue on direct appeal, Green must demonstrate that the omitted issue would have had a reasonable probability of success on appeal.⁵

A transcript of the preliminary hearing shows that the justice court bound Green over for trial on one count of sexual assault (count I) and one count of aggravated stalking (count III), but reserved ruling on another count of sexual assault (count II). An amended information reflects that Green was charged with all three counts, and the State proceeded to trial consistent with the amended information. The jury convicted Green on counts I and III, but acquitted him on count II. Green

³See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁴See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

⁵See Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004).

alleged in his postconviction habeas petition that he was never bound over on count II and should not have been tried on that count.

This jurisdictional matter was addressed at the evidentiary hearing. The district court stated that it had not received sufficient evidence to decide the matter and, over Green's objection, continued the hearing to secure the testimony of Judge Paul Freitag, who presided over Green's preliminary hearing. When the hearing reconvened, the State introduced a justice court docket sheet noting in Freitag's handwriting that Green was bound over on all counts. Although he had no specific recollection of the preliminary hearing, Freitag testified that he probably reviewed the transcript after the preliminary hearing and discovered sufficient evidence to bind Green over on count II. Washoe County Deputy District Attorney Rebecca Druckman testified that her notes of the preliminary hearing indicated that the justice court bound Green over on counts I and III, but reserved ruling on count II to review witness testimony. She further testified that she received a call from a court clerk advising her that Green was bound over on count II. At the conclusion of the evidentiary hearing, the district court announced that the evidence presented clearly established that Green was properly bound over for trial on count II.

Green argues that the district court abused its discretion and advocated on behalf of the State in continuing the evidentiary hearing because the district court was obligated to base its ruling solely on the evidence presented prior to the continuance. Green further contends that

the continuance violated the procedures dictated in Hill v. Sheriff⁶ and Bustos v. Sheriff.⁷ We disagree. We first note that Green's reliance on Hill and Bustos is misplaced as those cases address the propriety of and procedures necessary to secure continuances in preliminary hearings. Further, NRS 34.790(1) provides that the district court "may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition." Green provides no relevant authority establishing that the district court's continuance was improper. We conclude that the district court did not abuse its discretion in ordering the continuance and denying his claims of ineffective assistance of trial and appellate counsel. Green failed to demonstrate that his counsel's performance was objectively unreasonable or that, in light of his acquittal of Count II, he suffered any prejudice as a result of counsel's alleged deficiencies relating to that charge.

Green next argues that that the district court erred in denying his claim that trial counsel was ineffective for not objecting to a transition instruction advising the jury that it must first unanimously acquit Green of the primary aggravated stalking charge before considering the lesser-included offense of misdemeanor stalking—the so-called "acquittal first" instruction. Green challenged this transition instruction on direct appeal, and we reviewed this matter under a plain error analysis.⁸ This court

⁶85 Nev. 234, 452 P.2d 918 (1969), holding limited by Sheriff v. Marcus, 116 Nev. 188, 995 P.2d 1016 (2000).

⁷87 Nev. 622, 491 P.2d 1279 (1971).

⁸Green, 119 Nev. at 545, 80 P.3d at 94-95.

recognized that it had "not yet had an occasion to review a criminal conviction based upon the use of an 'acquittal first' instruction as a guideline for jury deliberations on lesser-included offenses."⁹ We concluded that although the instruction was improper, Green failed to demonstrate prejudice in light of the testimony from Linzie and her friends and co-workers describing "Green's continuing telephone calls and threats of violence, including threats to douse Linzie in gasoline, set her on fire and to bomb her place of residence, all of which placed her in reasonable fear of death or substantial bodily harm,"¹⁰ as required to establish the offense of aggravated stalking.¹¹

Counsel testified during the evidentiary hearing that the challenged instruction was consistent with the transition instruction used in common practice at the time of Green's trial. The district court determined that Green failed to show that counsel's failure to object was unreasonable under prevailing professional norms at the time of trial, nor did Green establish any prejudice by counsel's failure to object. We conclude that the district court did not err in denying this claim. Moreover, even assuming counsel should have objected to the erroneous instruction, Green failed to demonstrate a reasonable probability that the

⁹Id. at 547, 80 P.3d at 96.

¹⁰Id. at 48, 80 P.3d at 97.

¹¹See NRS 200.575(2); Rossana v State, 113 Nev. 375, 383, 934 P.2d 1045, 1050 (1997) (stating that aggravated stalking, unlike misdemeanor stalking, requires that the defendant must threaten the victim with the intent to cause the victim to be placed in reasonable fear of death or substantial bodily harm).

result of his trial would have been different in light of the overwhelming evidence of his guilt supporting the aggravated stalking charge.

Green also asserts that the district court erred in denying his claim that appellate counsel was ineffective for failing to argue on direct appeal that the district court violated the Confrontation Clause by curbing Green's cross-examination of Linzie. A claim of ineffective assistance of appellate counsel is reviewed under the Strickland test.¹² 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.¹³

Prior to trial, Green filed a motion to be allowed to cross-examine Linzie respecting an extramarital affair resulting in a pregnancy and subsequent miscarriage. Green argued that this evidence fell within an exception to the rape shield law in that it showed Linzie's motive to fabricate the sexual assault, particularly in light of her trial testimony that she initially told police and medical personnel that Green only beat her but did not report that he sexually assaulted her.¹⁴ We note that Linzie also testified that she did not initially report the sexual assault because she did not believe being sexually assaulted by her husband was a crime. The sexual assault only came to light through statements Green made to Sparks Police Department Detective Greta Fye. Specifically, Green explained to Fye that he inserted his fingers into Linzie's vagina to

¹²See Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

¹³Id. at 998, 923 P.2d at 1114.

¹⁴See NRS 48.069; NRS 50.090.

determine whether she had had sexual intercourse with another man. In denying Green's motion to cross-examine Linzie regarding prior sexual activity, the district court ruled that the miscarriage, which occurred on March 3, 2000, was too remote in time to the alleged instant sexual assault that occurred on September 23, 2000. Without explanation, appellate counsel testified during the evidentiary hearing that he did not find this issue to be a particularly attractive appellate issue.

We conclude that Green failed to show that this issue had a reasonable probability of success on appeal. The event Green sought to cross-examine Linzie about occurred eight months prior to the sexual assault at issue and therefore was of questionable relevance. Moreover, Green's desired cross-examination would not have changed the outcome of his case. Accordingly, we conclude the district court did not err in concluding that appellate counsel was not ineffective in this regard.

Finally, Green contends that the district court erred in denying his claim that trial counsel was ineffective for failing to object to improperly admitted prior bad act evidence or request a limiting instruction. Specifically, Green argues that his counsel should have objected to testimony concerning his arrest following an eight-hour standoff, which was resolved with the assistance of a hostage negotiator. During the evidentiary hearing, counsel acknowledged that the challenged evidence was damaging, but that he believed that the evidence was admissible. Later, counsel retreated somewhat and testified that it would be difficult to say exactly how he viewed this evidence at the time.

The partial trial transcript Green provided to this court does not reveal the basis for admitting the challenged evidence. However, during the evidentiary hearing, the district court stated that testimony

relating to Green's arrest was admitted as part of the res gestae of the aggravated stalking offense considering the evidence of repeated interactions Green had with law enforcement and hundreds of telephone calls Green made to Linzie's workplace. The district court determined that counsel was not ineffective for failing to object to this testimony.

Green asserts that the standoff was not so closely related to the charges alleged to fall within the purview of NRS 48.035(3).¹⁵ "The State may present a full and accurate account of the crime, and such evidence is admissible even if it implicates the defendant in the commission of other uncharged acts."¹⁶ However, the statute must be narrowly construed and "admission of evidence under NRS 48.035(3) is limited to the statute's express provisions."¹⁷ "Under the statute, a witness may only testify to another uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime."¹⁸

¹⁵NRS 48.035(3) provides:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

¹⁶Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005).

¹⁷Id.

¹⁸Id.

Here, we conclude that the events related to Green's arrest were not so interconnected with the sexual assault and aggravated stalking as to be admissible under NRS 48.035(3). The State could have presented its evidence supporting these charges without witness testimony referencing Green's standoff with police officers and the use of a hostage negotiator to effectuate his arrest. Nonetheless, we conclude that Green did not demonstrate prejudice resulting from his counsel's failure to object to the challenged evidence or request a limiting instruction. Green included only a partial trial transcript and thus not all the evidence admitted is before us.¹⁹ However, we stated in our prior opinion resolving Green's direct appeal that "the trial record is replete with evidence of various degrees of harassment and physical violence perpetrated by Green against Ms. Linzie."²⁰ Green has presented nothing here suggesting that our conclusion that the evidence overwhelmingly supported the charges was unfounded. Accordingly, we conclude that the district court did not err in denying this claim.²¹

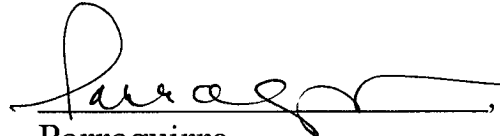
¹⁹See Thomas, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4 (recognizing that appellant bears the responsibility of providing this court with relevant portions of the record essential to the determination of issues raised on appeal).

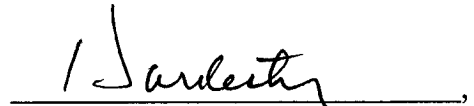
²⁰Green, 119 Nev. at 544, 80 P.3d at 94.

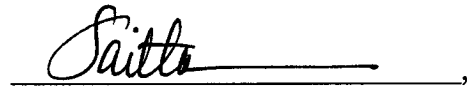
²¹To the extent Green contends that his appellate counsel was ineffective for not raising this matter on direct appeal, we conclude that he did not demonstrate that this issue would have had a reasonable probability of success on appeal. See Lara, 120 Nev. at 184, 87 P.3d at 532.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that the district court did not err in denying Green's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk