IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LAMAR RHYMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47392

FILED

OCT 17 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Michael A. Cherry, Judge.

On August 7, 2003, the district court convicted appellant, pursuant to a jury verdict, of lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after serving a minimum of ten years. This court affirmed appellant's judgment of conviction on direct appeal.[1] The remittitur issued on April 19, 2005.

On March 30, 2006, 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 May 12, 2006, the district court denied appellant's petition. This appeal followed.

[1]Rhymes v. State, 121 Nev. 17, 107 P.3d 1278 (2005).

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In his petition, appellant contended that his appellate counsel was ineffective. 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.[2] Appellate counsel is not required to raise every non-frivolous issue on appeal.[3] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[4]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence to support his conviction for lewdness with a minor and that reasonable doubt existed. Specifically, appellant claimed that counsel should have argued that the State did not prove all the elements of lewdness: (1) the State failed to prove that appellant pulled down the victim's pajama bottoms, and (2) the State failed to show lewd touching. Appellant failed to demonstrate that counsel's performance was deficient or that this claim had a reasonable probability of success on appeal. The "testimony of a sexual assault victim alone is sufficient to uphold a conviction" provided that the victim testifies as to the incident with some particularity.[5] The

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[2]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

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

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

[5]LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

victim testified that she was awakened by her pajama pants being pulled down. Appellant was lying beside her, facing her. He apologized for waking her and then threw a blanket over her. Appellant then began to massage the victim's lower thigh. The other children in the room were asleep, so appellant was the only person in the room that had the opportunity to pull the victim's pajama bottoms down. The jury could have reasonably determined in light of the victim's testimony that appellant committed a lewd and lascivious act "upon or with the body" of the victim "with the intent of arousing, appealing to, or gratifying the lust or passions" of either appellant or the child.[6] Thus, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the victim's testimony was inconsistent with earlier statements she made to the police. Specifically, appellant claimed that counsel should have argued that initially the victim stated that she awoke to find her pajama bottoms down, whereas she later testified that she awoke because her pajama bottoms were being pulled down. Appellant failed to demonstrate that counsel's performance was deficient or that this claim had a reasonable probability of success on appeal. The victim's earlier statements were consistent with her testimony. The victim stated in her initial interview that she believed she awoke because her pajama pants were being pulled down. Thus, the district court did not err in denying this claim.

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[6]NRS 201.230(1).

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the court erred in admitting bad act evidence to show intent. Specifically, appellant claimed that it was error to admit the prior uncharged bad acts because they were dissimilar and highly prejudicial. Appellant failed to demonstrate that his appellate counsel's performance was ineffective. This court previously determined in appellant's direct appeal that the district court did not err in admitting bad act evidence because the acts were relevant as to intent and similarity and were not overly prejudicial.[7] Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to argue that the district court did not conduct a Petrocelli[8] hearing prior to admitting the bad act evidence. This claim is belied by the record.[9] Counsel did argue that the district court failed to conduct a Petrocelli hearing, but this court found that the court had conducted such a hearing prior to admitting the evidence.[10] Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred by failing to give a timely limiting instruction on the admission of bad act evidence.

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[7]See Rhymes, 121 Nev. at 22, 107 P.3d at 1281.

[8]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[10]See Rhymes, 121 Nev. at 22, 107 P.3d at 1281.

This claim is belied by the record.[11] Counsel did argue that the district court failed to give a limiting instruction at the time of admission of the bad act evidence in appellant's direct appeal. This court held that the absence of such an instruction at the time of the admission of evidence did not substantially affect appellant's rights and the error was harmless.[12] Thus, the district court did not err in denying this claim.

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.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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[11]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[12]See Rhymes, 121 Nev. at 24, 107 P.3d at 1282.

[13]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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