

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJARDI BATUCAN VIRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47804

FILED

JUN 01 2007

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; Stewart L. Bell, Judge. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On October 6, 2003, the district court convicted appellant, pursuant to a jury verdict, of six 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 two counts of felony preventing or dissuading a person from testifying or producing evidence. The district court sentenced appellant to serve multiple consecutive and concurrent terms totaling life in the Nevada State Prison with the possibility of parole after forty years. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on June 21, 2005.

¹Viray v. State, 121 Nev. 159, 111 P.3d 1079 (2005).

Appellant filed multiple petitions for a writ of habeas corpus in the district court prior to sentencing and entry of the judgment of conviction and while his direct appeal was pending. The district court denied these petitions without prejudice. This court affirmed the denial of the petitions on appeal and informed appellant that after the conclusion of his direct appeal he could file a post-conviction petition for a writ of habeas corpus that complied with chapter 34 of the Nevada Revised Statutes.²

On May 1, 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 July 6, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel.³ To state a claim of ineffective assistance of

²Viray v. Warden, Docket No. 43001 (Order of Affirmance, June 7, 2004).

³To the extent that appellant raised any of these claims in the context of a claim of ineffective assistance of appellate counsel, we conclude that appellant failed to demonstrate that his appellate counsel were ineffective and we affirm the denial of these claims. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (holding that 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

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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.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

First, appellant claimed that his trial counsel were ineffective for failing to have a strategy or viable defense. Specifically, appellant claimed that his counsel should have defended him on the basis that he did not have an opportunity to commit the crimes as alleged and that the victim fabricated the allegations in retaliation for kicking her and her mother out of the house. This claim is belied by the record.⁶ The record reveals that appellant's counsel attempted to defend appellant on these bases. Accordingly, we conclude the district court did not err in denying this claim.

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the omitted issue would have a reasonable probability of success on appeal) (citations omitted).

⁴Strickland, 466 U.S. 668; Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

⁶See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Second, appellant claimed that his trial counsel were ineffective for failing to investigate appellant's work schedule, the victim's mother's work history and work schedule, the timing of the victim's mother's doctor's appointments, the victim's school schedule and the family grocery schedule. Appellant claimed that investigation into these areas would have supported his defense that he had no opportunity to commit the crimes as alleged. Appellant failed to demonstrate that he was prejudiced. The witnesses were questioned extensively about the family's schedules. All witness testimony regarding the family's schedules established that the victim was frequently in the house with appellant when no other adults were present. The victim testified that all of the acts of lewdness occurred either after her mother went to work or when her mother was gone shopping or at a doctor's appointment. The victim further testified that when appellant sexually assaulted her in the garage her mother was in the house and when appellant sexually assaulted her in the laundry room her cousin was in the house. Appellant failed to demonstrate how additional investigation into the family's schedule would have altered the outcome of the trial. Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel were ineffective for failing to properly impeach the State's witnesses. Specifically, appellant claimed that his counsel made no attempt to draw attention to gaps in conflicting evidence. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. The record reveals that counsel repeatedly pointed out inconsistencies in witness testimony, and appellant failed to specify what additional inconsistencies his counsel

should have elaborated upon that would have altered the outcome of the trial.⁷ Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel were ineffective for failing to introduce evidence to discredit the victim's testimony. Appellant argued that his counsel should have introduced evidence about credit card transactions for one of the dates in question, and the family's work, school and grocery shopping schedules. Appellant argued that this evidence would have demonstrated that he did not have an opportunity to commit the crimes as alleged. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. Even if the credit card transaction demonstrated that appellant and the victim's mother were out on the evening of one of the alleged assaults, the victim testified that the assault in question occurred earlier in the day when the entire family was at home. Additionally, as noted above, the witnesses were extensively questioned about the family's work and school schedules. Appellant failed to demonstrate that introduction of the credit card transactions or additional questioning about the family's schedule would have altered the outcome of the trial. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that this trial counsel were ineffective for failing to present witnesses to testify about the victim's untruthfulness

⁷See *id* at 502, 686 P.2d at 225.

and her motivation to lie. Appellant failed to identify who his counsel should have called to testify in this regard.⁸ Further, trial counsel argued the victim was motivated to lie about the lewdness and sexual assaults in order to get back at appellant for how appellant disciplined and treated her. Appellant failed to demonstrate that additional argument regarding the victim's motivation to lie would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel were ineffective for failing to cross-examine the victim about her prior consistent and inconsistent statements. Specifically, appellant claimed that his counsel should have questioned the victim regarding: (1) the victim's statement to police that the victim told her mother first about the sexual abuse, compared with her testimony that the victim told her cousins about the sexual abuse first; (2) the victim's failure to mention in her statement to the police that appellant threatened her, compared with her testimony that appellant threatened her after he sexually assaulted her; (3) the victim's testimony that she told her cousin about the sexual assaults in the laundry room on the day they occurred, compared with the cousin's failure to mention this when she was first interviewed by the police; (4) the victim's statement in a police interview that appellant sexually assaulted her for twenty minutes, compared with the victim's testimony that

⁸See id.

appellant sexually assaulted her for a while, stopped for about five minutes and then repeated the action; (5) the victim's preliminary hearing testimony that she told one of her cousins about the lewdness when they were inside of the victim's house, compared with the victim's testimony at trial that she and her cousin were outside of the victim's house when the disclosure was made; and (6) the victim's preliminary hearing testimony that appellant did not touch her "front" or "back."

Claims one and two are belied by the record.⁹ The police report indicated that the victim's mother, not the victim, initially stated that the victim told her about the sexual abuse while they were en route to their cousins' house. The victim consistently stated that she told her cousins about the sexual abuse first and then told her mother. Additionally, the police reports indicated that the victim informed the police that appellant threatened her after sexually assaulting her. As to claim three, the victim's cousin was thoroughly questioned regarding this issue, and appellant failed to demonstrate that questioning the victim about this same issue would have altered the outcome of the trial. Finally, appellant failed to demonstrate that cross-examining the victim regarding the inconsistencies identified in claims four through six would have altered the outcome of the trial. As to claim four, the victim consistently testified that on two separate occasions appellant sexually assaulted her, stopped the assault for a short duration and then repeated the assault.

⁹See *id* at 503, 686 P.2d at 225.

The duration of the sexual assault was immaterial for determining whether, and how many times, appellant sexually assaulted the victim. As to claim five, the relevant issue regarding the victim telling her cousin about the lewdness was when the disclosure was made, not the location where the disclosure was made. As to claim six, the victim's testimony at the preliminary hearing that appellant did not touch her "front" or "back" was a response to a question regarding whether appellant had touched her in any ways other than what she had previously testified to. The victim testified at the preliminary hearing and at trial regarding specific acts of lewdness and sexual assault, and the fact that the victim testified at the preliminary hearing that no additional touching was involved was not relevant to determining whether the alleged acts occurred. Because appellant failed to demonstrate that his counsel were deficient or that he was prejudiced, we conclude the district court did not err in denying these claims.

Seventh, appellant claimed that his trial counsel were ineffective for failing to bring out evidence that: (1) appellant and the victim could not have been in the garage looking for a Christmas light because the lights had been thrown away the prior summer; and (2) other people would have heard the victim if she had "screamed" stop while they were in the laundry room. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. Testimony from the victim, her mother, and a police officer who interviewed appellant established the fact that appellant went into the garage with the victim when the alleged assault occurred for the purpose of looking for an outdoor light or a tool for the light. Appellant failed to demonstrate that evidence

that the family had thrown away the Christmas lights the year before would have altered the outcome of the trial. Claim two is belied by the record.¹⁰ The victim's cousin testified that she heard the victim say "stop it" while the victim was in the laundry room with appellant. Accordingly, we conclude that the district court did not err in denying these claims.

Eighth, appellant claimed that his trial counsel were ineffective for failing to discredit the victim by introducing the victim's preliminary hearing testimony that she told her cousin about the lewdness, but not about the sexual assault. Appellant argued that it was impossible for the victim to tell her cousin about the alleged sexual assault at the time she told him about the lewdness because the sexual assaults were not fabricated until later that year. Appellant failed to demonstrate that he was prejudiced. A review of the preliminary hearing testimony indicates that the victim stated that she did not tell her cousin about the sexual assaults because she was attempting to clarify that she only told her cousin about the acts of lewdness. Appellant failed to demonstrate that introduction of this testimony at the trial would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant argued that his trial counsel were ineffective for defending against the charge of preventing or dissuading a witness from testifying or producing evidence based on the "incorrect legal

¹⁰See id.

supposition that no valid judgment of conviction could be entered absent proof of intimidation or threats." Appellant argued that NRS 199.230 requires that to be guilty of this crime, a criminal investigation or proceeding must be pending, and counsel should have based the defense to these charges on the fact that there was no investigation or proceeding pending when appellant allegedly threatened the victim. Appellant failed to demonstrate that his counsel were deficient. NRS 199.242(1) provides that showing that an official proceeding was not pending or about to be instituted it is not a defense to a charge under NRS 199.230. Accordingly, we conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel were ineffective for failing to contact witnesses or otherwise undertake any investigation in an effort to demonstrate that the State did not have probable cause to arrest him or sufficient evidence to bind him over to trial. Appellant failed to demonstrate that he was prejudiced. There is probable cause to arrest "when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested."¹¹ Appellant was arrested after the victim reported the sexual abuse, and after police officers interviewed the victim, her mother, her cousins and appellant, and determined that the victim's statements about when things occurred were corroborated by the other

¹¹Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991).

statements. Further, the justice court found there was probable cause to bind appellant over for trial.¹² Appellant failed to identify what additional investigation his counsel should have undertaken, and failed to demonstrate how additional investigation would have resulted in a determination that probable cause to arrest and bind appellant over for trial had not been demonstrated. Accordingly, we conclude the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel were ineffective for failing to challenge the sufficiency of the evidence supporting his convictions and for failing to move for a mistrial. Appellant failed to demonstrate that his counsel were deficient. The record on appeal reveals that sufficient evidence was presented to establish appellant's guilt beyond a reasonable doubt as determined by a rational trier of fact.¹³ The jury could reasonably infer from the evidence presented that appellant committed the crimes charged.¹⁴ The victim testified at trial that while appellant was wearing underwear, he made her sit on his "private parts" facing appellant's feet, and the victim would have to

¹²See NRS 171.206.

¹³See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

¹⁴See May v. State, 89 Nev. 277, 279 & n.2, 510 P.2d 1368, 1369 & n.2 (1973) (holding that the testimony of the sexual assault victim alone is sufficient to uphold a conviction), overruled on other grounds by Turner v. State, 111 Nev. 403, 892 P.2d 579 (1995).

massage appellant's lower legs while sitting in that position. The victim further testified that on some occasions when she was done with the massage her bottom would be wet, although it was not wet when she started the massage. The victim further testified that appellant unbuttoned her pants, put his hand inside her underwear and placed his fingers inside her vaginal lips. The victim testified that appellant digitally penetrated her two times while they were in the garage and two times while they were in the laundry room. The victim also testified that, after digitally penetrating her, appellant threatened her not to tell anyone about what happened. Accordingly, we conclude the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel were ineffective for failing to question the victim's cousins about the victim's report of the sexual assault to them and their failure to report it to their own mother or the police. Appellant failed to demonstrate that he was prejudiced. The record reveals that both of the victim's cousins were questioned about when the victim reported the sexual abuse to them and why they did not report the sexual abuse to anyone. Appellant failed to demonstrate that additional questioning regarding this issue would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel were ineffective for failing to challenge Dr. Vergara's conclusions regarding the victim's sexual assault examination. Appellant argued that his counsel should have challenged Dr. Vergara's conclusions by calling a Dr. Ricci who would have testified that redness in the vaginal area of children has

no diagnostic value and could have testified that redness may have been due to poor hygiene. Appellant further argued that his counsel should have challenged Dr. Vergara's statement that the vaginal tissues heal quickly and counsel should have pointed out that Dr. Vergara's own report of the sexual assault examination stated that there was no physical evidence of sexual assault. Appellant failed to demonstrate that he was prejudiced. Dr. Vergara testified that during the sexual assault examination of the victim she noticed redness in the vagina below the hymen. Although Dr. Vergara testified that the redness was consistent with digital penetration, she also testified that based on the redness alone, without any patient report or history, the redness would be classified as nonspecific vaginitis and there could be a lot of causes for the redness. In its closing argument, the State conceded that Dr. Vergara's findings were nonspecific and her testimony could not establish that any of the alleged acts occurred. Appellant failed to demonstrate that additional questioning of Dr. Vergara or the introduction of additional expert testimony to challenge Dr. Vergara's conclusions would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Fourteenth, appellant claimed that his trial counsel were ineffective for failing to have the victim undergo a physical or psychological examination. Appellant argued that such exams would have demonstrated that the victim had poor hygiene and no sexual assault occurred. Appellant failed to demonstrate that he was prejudiced. As noted above, the victim underwent a sexual assault examination and the findings from that examination were nonspecific. Appellant failed to

demonstrate that additional examinations would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Fifteenth, appellant claimed that his trial counsel were ineffective for failing to subpoena or question Ms. Sisley regarding her role in preparing the victim for testimony. Appellant alleged that the victim was allowed to attend a private session with Ms. Sisley to help the victim prepare her testimony for trial. Appellant did not identify what questions his counsel should have asked of Ms. Sisley that would have altered the outcome of the trial.¹⁵ Accordingly, we conclude the district court did not err in denying this claim.

Sixteenth, appellant claimed that his trial counsel were ineffective for failing to recall the victim during the preliminary hearing to have the victim explain or clarify her testimony regarding her response that, except for the incidents already related, appellant did not touch her on the front or on the back. Appellant failed to demonstrate that he was prejudiced. The victim had already testified regarding the acts of lewdness, the sexual assaults and appellant's threats. This testimony was sufficient to establish probable cause to bind appellant over for trial.¹⁶ Appellant failed to demonstrate that additional testimony from the victim that the appellant did not commit any additional acts would have resulted

¹⁵See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁶See Doleman, 107 Nev. at 413, 812 P.2d at 1289.

in appellant not being bound over for trial. Accordingly, we conclude the district court did not err in denying this claim.

Seventeenth, appellant argued that his trial counsel were ineffective for failing to challenge the introduction of inadmissible or uncharged bad acts. Specifically, appellant claimed his counsel should have challenged testimony regarding: (1) an incident where appellant threw/pushed the victim into a refrigerator and kicked the victim after she fell, and (2) making the victim sleep on the laundry room floor surrounded by dirty clothes. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."¹⁷ The record reveals that appellant's counsel made a tactical decision not to challenge the introduction of these acts. Appellant's defense was that the victim fabricated the sexual abuse allegations in order to get back at appellant for his treatment of her. Appellant did not demonstrate any extraordinary circumstance for challenging counsel's decision not to object to testimony regarding the refrigerator or laundry room acts. Accordingly, we conclude the district court did not err in denying this claim.

Eighteenth, appellant claimed that his trial counsel were ineffective for failing to argue that the refrigerator incident identified above did not occur. Appellant argued that his counsel should have interviewed the victim's teachers and friends who would have testified

¹⁷Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

that they never saw any bruises. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. The victim testified about the incident and her mother and one of her cousins testified that they witnessed the incident. As noted above, counsel made a tactical decision not to challenge the testimony regarding this incident, and appellant failed to demonstrate an extraordinary circumstance for challenging this decision.¹⁸ Accordingly, we conclude the district court did not err in denying this claim.

Nineteenth, appellant claimed that his trial counsel were ineffective for failing to challenge the introduction of testimony that appellant ran around the house with loaded weapons in the presence of children. Appellant failed to demonstrate that his counsel were deficient. The record reveals that appellant's counsel objected when this testimony was presented. The objection was overruled. Appellant failed to demonstrate that additional objections to this testimony would have been successful. Accordingly, we conclude the district court did not err in denying this claim.

Twentieth, appellant claimed that his trial counsel were ineffective for failing to object to the introduction of pictures that showed damage to the interior of the house and damage to some children's furniture. Appellant failed to demonstrate that he was prejudiced. The record reveals that the pictures were introduced when the victim's mother

¹⁸See id.

was testifying about a fight she had with appellant on the evening appellant kicked her and the victim out of the house. The victim's mother testified that during the fight appellant threw objects at her, punched holes in the walls and doors, and broke some children's chairs. The photos were introduced to show how the house looked on the evening the victim and her mother were kicked out. The jury was instructed that evidence of other offenses could not be considered to prove that appellant was a person of bad character or had the disposition to commit the crimes alleged. Appellant failed to demonstrate that admission of the pictures rendered the jury's verdict unreliable. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-first, appellant claimed that his trial counsel were ineffective for failing to challenge juror number three for cause or for exercising a peremptory challenge to remove that juror. Appellant argued that juror number three was a co-worker of his grandmother. Appellant failed to demonstrate that he was prejudiced. During the jury voir dire, juror number three stated that he did not know the defendant and he did not know anything about the case. Appellant did not assert, and did not demonstrate, that juror number three was biased. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-second, appellant claimed that his trial counsel were ineffective for failing to challenge or object to the underrepresentation of Filipinos on the jury venire, and for failing to obtain and preserve records and statistics for the 2003 master jury lists and jury venires depriving him of the ability to make a prima facie case. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that such a

challenge would have been successful because he failed to demonstrate that Filipinos are systematically excluded from the jury selection process.¹⁹ Therefore, appellant failed to demonstrate that his counsel were ineffective. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-third, appellant claimed that his trial counsel were ineffective for failing to make a better argument for a mistrial based on apparent juror misconduct. Specifically, appellant argued that his counsel should have placed more emphasis on the possibility that the actions and statements of a juror who had been removed indicated that the entire jury may have pre-judged the case. Appellant failed to demonstrate that his counsel were deficient or that he was prejudiced. The record reveals that during the middle of the trial juror number four informed the district court that he did not feel he could sit in judgment in this case. The district court inquired whether juror number four had spoken to any other jurors about this and juror number four said he spoke with juror number five. Juror number five was questioned about the content of her discussion with juror number four and informed the judge that she had not prejudged the case. Appellant failed to demonstrate that the actions of juror number four indicated that the entire jury had pre-judged the case, and failed to demonstrate that arguing for a mistrial on this basis would have been

¹⁹See Duren v. Missouri, 439 U.S. 357, 364 (1979); Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996).

successful. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-fourth, appellant claimed that his trial counsel were ineffective for failing to object and seek a mistrial based on instances of prosecutorial misconduct. Appellant also claimed that his trial counsel were ineffective for failing to advise the trial court of its duty to exercise its discretionary power to control obvious prosecutorial misconduct. Appellant claimed that the prosecution: (1) induced the victim to give false testimony by asking her leading questions; (2) argued that the wetness on the victim's bottom and clothing was semen when no evidence supported this fact; (3) allowed the victim to give false testimony and took no action to cure it; (4) elicited and used perjured testimony to bolster the victim's testimony and credibility; (5) presented the witnesses in a confusing order; (6) disparaged a legitimate defense tactic by exclaiming "I knew it!, they are going to use that defense"; (7) used two dolls to demonstrate the alleged inappropriate conduct; (8) allowed Dr. Vergara to present false testimony about the meaning of the redness of the victim's vaginal area and about the healing properties of vaginal tissue; (9) misrepresented the facts of the case and misapplied the law as it pertained to the charges for preventing or dissuading a witness from testifying or presenting evidence; (10) terminated questioning at the preliminary hearing after eliciting favorable testimony to the defense; (11) introduced unreliable evidence of child abuse and other bad act evidence; (12) stated during final closing argument that appellant was "conditioning" the victim into not saying "no" and was a "predator

grooming a child"; and (13) persuaded the trial court to impose three consecutive life sentences.

Appellant failed to demonstrate that his counsel were deficient. Claims two, six and nine are belied by the record.²⁰ As to claims one, three, four, and eight, appellant failed to demonstrate that any witnesses gave false testimony or that the State elicited or used perjured testimony during trial. Finally, the record reveals that none of the other instances cited by appellant amounted to prosecutorial misconduct. Accordingly, we conclude the district court did not err in denying these claims.

Twenty-fifth, appellant claimed that his trial counsel were ineffective because they were incompetent. Appellant argued that his counsel failed to: (1) visit him at the Clark County Detention Center; (2) correspond with him about a request for bail reduction; (3) investigate or interview State and defense witnesses; (4) request an expert witness who has knowledge of abuse and non-abuse in children; (5) review discovery with appellant; and (6) formulate a proper defense.²¹ These claims were bare and naked claims for relief that were unsupported by specific factual

²⁰See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

²¹To the extent that appellant raised these claims in the context of other specific claims of ineffective assistance of counsel, these claims have been addressed when resolving the specific claims.

allegations.²² Accordingly, we conclude the district court did not err in denying these claims.

Twenty-sixth, appellant claimed that his trial counsel were ineffective because they had a conflict of interest. Specifically, appellant claimed that the victim and her mother were both represented by the public defender's office in family court matters related to appellant's trial and their representation occurred prior to the public defender's representation of him. Appellant also claimed that a conflict of interest arose because an individual with the public defender's office stood with the victim during the victim's testimony. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The record indicates that appellant was represented by the Clark County Public Defender and the victim and her mother were represented by the Clark County Special Public Defender in a family court matter. The Clark County Special Public Defender is a separate entity from the Clark County Public Defender and is generally appointed to represent an individual when a conflict exists with the Clark County Public Defender. Because the Clark County Public Defender and the Clark County Special Public Defender are different entities, appellant failed to demonstrate that his counsel had a conflict of interest. Accordingly, we conclude the district court did not err in denying this claim.

²²See *id.* at 502, 686 P.2d at 225.

Twenty-seventh, appellant claimed that his trial counsel were ineffective for failing to challenge the prosecution's introduction and unfounded reference to witness intimidation and threats or the implied existence of threats. Appellant failed to demonstrate that his counsel were deficient. Appellant was charged with two counts of preventing or dissuading a person from testifying or producing evidence. It was therefore necessary for the State to introduce testimony regarding the threats appellant made to the victim in order to prove the charges against appellant. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-eighth, appellant claimed that his trial counsel were ineffective for making prejudicial and impermissible comments. Specifically, appellant stated that during closing argument his counsel stated "the District Attorney's Office could have easily added more counts and/or charges." Appellant argued that this statement amounted to a concession of guilt and raised a conflict of interest. Appellant failed to demonstrate that he was prejudiced by his counsels' statement. The record reveals that during closing argument appellant's counsel stated "according to the [district attorney] she could have charged, I don't know, 50 or 80 counts of sexual abuse because he had thousands of chances to be alone with [the victim] and to do sexually inappropriate things to her." This statement was made in response to a statement made by the prosecution during its closing argument. Appellant's counsel made this statement in the context of arguing that the victim's account of what occurred was not believable, and the statement was not a concession of guilt of behalf of appellant. Further, the statement did not create a

conflict of interest between appellant and his counsel. Accordingly, we conclude the district court did not err in denying this claim.

Twenty-ninth, appellant claimed that his trial counsel were ineffective for impermissibly mentioning that appellant had been housed in the Clark County Detention Center since his arrest. This claim is belied by the record.²³ The record reveals that appellant's counsel never stated that appellant had been housed in the Clark County Detention Center since his arrest. During closing arguments, appellant's counsel mentioned that appellant was arrested after being interviewed regarding the allegations of sexual abuse. The statement was made while counsel was attempting to explain a detective's testimony that towards the end of an interview with appellant, appellant told the detective to take appellant to jail and lock him up. Counsels' reference to appellant's arrest was harmless. Accordingly, we conclude the district court did not err in denying this claim.

Thirtieth, appellant claimed that his trial counsel were ineffective for failing to challenge unreliable and aggravating evidence introduced at sentencing. Specifically, appellant argued his counsel should have objected to the prosecution's reference to appellant throwing the victim against the refrigerator and kicking her, and the prosecution's suggestion that his family would be better off without him. Appellant failed to demonstrate that his counsel were deficient or that he was

²³See *id.* at 503, 686 P.2d at 225.

prejudiced. "A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial."²⁴ In this case, testimony regarding the refrigerator incident was presented at trial and this information was properly considered by the district court at sentencing. Further, there is no indication in the record that the district court imposed an excessive sentence based on the prosecutor's comments about the refrigerator incident.²⁵ The record indicates that while arguing for consecutive sentences the prosecution referenced violent acts that appellant had committed and that were introduced at trial and stated "the world is a better place without him." Even assuming that this statement was improper, appellant failed to demonstrate that he was prejudiced by the error. The record reveals that before this statement was made, the district judge stated that he already knew what he was going to do with regard to sentencing. The district court imposed the mandatory sentences for the lewdness and sexual assault counts,²⁶ and ran all but three of appellant's sentences concurrently. Although the sentence imposed was

²⁴Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)).

²⁵Cf. Norwood, 112 Nev. at 439-40, 915 P.2d at 278 (district court abused its discretion by imposing a harsher sentence based on unsubstantiated allegation that appellant was a gang member); Goodson v. State, 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982) (district court abused its discretion by imposing a harsher sentence based on its unsubstantiated belief that appellant was a drug dealer).

²⁶See NRS 200.366; NRS 201.230.

harsher than the sentence recommended in the PSI, the sentence was within the limits prescribed by statute and appears to be less harsh than the sentence requested by the prosecution. Accordingly, we conclude the district court did not err in denying this claim.

Thirty-first, appellant claimed that his trial counsel were ineffective for failing to act as a partisan advocate at sentencing. Appellant claimed his counsel failed to contact anyone to provide mitigating evidence and failed to prepare for sentencing. Appellant failed to identify who his counsel should have contacted, and failed to identify what these individuals would have testified to that would have reduced the sentence appellant received.²⁷ Accordingly, we conclude the district court did not err in denying this claim.

Appellant next claimed that his appellate counsel were ineffective for failing to confer with appellant about what issues should have been raised on appeal. It appears that appellant wanted his appellate counsel to raise all of the above claims in the context of direct appeal claims in his direct appeal. Appellant claimed that his appellate counsel was ineffective because they only raised two claims on appeal, did not file a supplemental opening brief as requested by appellant, and did not file a reply brief. Appellant failed to demonstrate that his appellate counsel were deficient or that he was prejudiced.²⁸ Although appellate

²⁷See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

²⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

counsel only raised two issues on direct appeal, appellate counsel is not required to raise every non-frivolous issue on appeal.²⁹ Further, this court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.³⁰ Appellant failed to demonstrate that the claims he wanted raised would have had a reasonable probability of success on appeal and failed to demonstrate that the filing of a supplemental opening brief or a reply brief would have altered the outcome of his appeal. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed that the State engaged in misconduct by depriving him of complete pre-trial records and complete transcripts of the trial for preparation of his habeas petition. Appellant argued that he should have been provided the records and transcripts at State expense. Appellant failed to demonstrate how records and transcripts would have served a useful purpose and failed to demonstrate that he would be prejudiced without being provided copies of the records and transcripts at State expense.³¹ Accordingly, we conclude the district court did not err in denying this claim.

Finally, appellant claimed that cumulative error warranted the reversal of his conviction and sentence. Because appellant did not

²⁹Jones v. Barnes, 463 U.S. 745, 751 (1983).

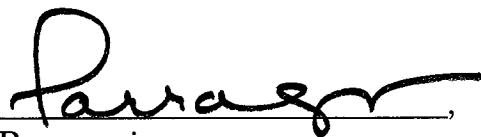
³⁰Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

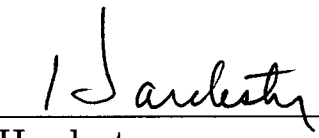
³¹See Peterson v. Warden, 87 Nev. 134, 483 P.2d 204 (1971).


demonstrate that his counsel erred, he necessarily failed to establish a claim of cumulative error. Accordingly, we conclude 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.³² Accordingly, we

ORDER the judgment of the district court AFFIRMED.³³


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

³²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³³We 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.

cc: Hon. Stewart L. Bell, District Judge
Hon. Valerie Adair, District Judge
Benjardi Batucan Viray
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk