IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN LEDBETTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48297

FILED

JAN 08 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant John Ledbetter's proper person post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

In 2004, Ledbetter was convicted by the district court, pursuant to a jury verdict, of 14 counts of sexual assault on a minor under 14 years old and 12 counts of sexual assault on a minor under 16 years old. He was sentenced to serve two consecutive terms of life in prison with the possibility of parole in 20 years on two of the sexual assault counts. The remaining counts were imposed to rule concurrently.[1] This court affirmed his conviction on direct appeal, but remanded to the district court for the limited purpose of correcting or clarifying clerical errors in his judgment of conviction.[2]

[1]Pursuant to this court's directing on remand, the district court entered an amended judgment of conviction on April 10, 2006.

[2]Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

In 2006, Ledbetter filed in the district court a proper person post-conviction petition for a writ of habeas corpus. The district court declined to appoint counsel or conduct an evidentiary hearing.[3] On September 15, 2006, the district court denied Ledbetter's petition. This appeal followed.

Ineffective assistance of trial counsel claims

Ledbetter contended in his petition below that his trial counsel, Clark County Deputy Public Defenders Stacey Roundtree and Jeffrey Banks, were ineffective. To establish that counsels' assistance was ineffective, a petitioner must show (1) that their performance was deficient because it fell below an objective standard of reasonableness, and (2) prejudice, i.e., a reasonable probability that absent the errors of his counsel the result of the proceeding would have been different.[4]

First, Ledbetter contended that his counsel failed to investigate witnesses who could have presented mitigating evidence during his sentencing hearing. He contended that he provided his counsel with the full names, addresses, and telephone numbers of his brothers, sister, and brother-in-law. Other than generally asserting that these witnesses could have testified about his "social, ethical, and moral background," Ledbetter failed to specify what information these witnesses

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[3]See NRS 34.750; NRS 34.770.

[4]See Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

could have provided that would establish a reasonable probability of a different sentence.[5] The district court properly denied this claim.

Second, Ledbetter contended that his counsel were ineffective because they did not call an additional medical expert witness to testify about the physical examination performed on the victim, L.R. The State called two medical expert witnesses during trial. Ledbetter called one. He maintained that an additional expert witness was necessary to bolster the testimony of his sole expert. Ledbetter failed to demonstrate that an additional witness could have created a reasonable likelihood of a different outcome at trial. The district court properly denied this claim.

Third, Ledbetter contended that his counsel failed to object to remarks by the prosecutor during closing argument that challenged the testimony of his medical expert witness and improperly shifted the burden of proof. A trial is an adversarial process,[6] and a prosecutor during closing argument "'enjoys wide latitude in arguing facts and drawing inferences from the evidence.'"[7] Ledbetter failed to demonstrated that the prosecutor referred to facts and inferences that were not supported by the evidence. That the prosecutor challenged the testimony of Ledbetter's expert witness does not improperly shift the burden of proof or otherwise

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[5]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[6]See generally Foster v. State, 121 Nev. 165, 169, 111 P.3d 1083, 1086 (2005).

[7]Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 67 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) (quoting Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993)).

constitute misconduct that would warrant an objection. Thus, counsel were not ineffective in failing to object to the prosecutor's remarks, and the district court properly denied this claim.

Fourth, Ledbetter contended that counsel failed to object to the information filed against him. He maintained that his ability to present an adequate defense was impaired because the information did not contain specific facts, such as when and where the sexual abuse of L.R. occurred. The information alleged the name of the victim, the crime charged for each count, the year each count was committed, and the means by which is was committed. Other than whether the victim was under the age of 14 or 16 years old, the precise time of the crime was not a material element of the offenses charged.[8] Neither was the location. The information complied with NRS 173.075(1), and Ledbetter failed to demonstrate that an objection to its contents would have been successful. The district court properly denied this claim.

Fifth, Ledbetter contended that his counsel failed to have an audiotape of an interview between L.R. and a child abuse investigator properly transcribed. He maintained that two separate transcripts of the interview contained irregularities and that it was error for these transcripts to be relied upon in examining L.R. during trial. Ledbetter is correct that there are some discrepancies between the two transcripts. But these discrepancies were minor. For example, one transcript stated that L.R.'s response to a question by the investigator was "yeah," while

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[8]See NRS 200.364; NRS 200.366; see also Brown v. State, 81 Nev. 397, 402, 404 P.2d 428, 431 (1965) (holding that the precise time of a crime need not be alleged in an information where it is immaterial).

another transcript stated that her response was "yes." Only one exerpt from one of the transcripts was directly relied upon at trial when L.R. was asked on cross-examination if she told the investigator when Ledbetter last abused her. Relying on the transcripts to refresh her recollections, L.R. replied, "I was around 10 or 11." Ledbetter contended that the other transcript of the interview showed that L.R. gave a different response to the question: "It was around ten or eleven." He maintained that the difference between the two responses was significant because one response apparently concerned L.R.'s age and the other concerned time. However, later on redirect examination, L.R. clarified any confusion by testifying unequivocally that she was referring to the time of night. Ledbetter failed to demonstrate that he was prejudiced by his counsels' performance, and the district court properly denied this claim.

Sixth, Ledbetter contended that his counsel failed to obtain an audiotape that could have impeached the credibility of the State's witness, T.B. According to Ledbetter, the tape contains T.B.'s statement that she had fabricated allegations of sexual abuse against Ledbetter's son, and the tape was admitted during an Oregon trial where Ledbetter's son was allegedly acquitted of "sexual related charges." Ledbetter maintained that he informed his counsel about the existence of the tape and they should have located it and used it to impeach T.B. Ledbetter, however, failed to set forth specific facts to support his claim. He did not indicate who made the tape, when it was recorded, and where it was recorded. Moreover, T.B. was cross-examined and re-cross-examined by Ledbetter's counsel, and the evidence of Ledbetter's guilt was overwhelming. The district court did not err in denying this claim.

Additionally, Ledbetter contended that his counsels' failure to locate and use the tape violated Brady v. Maryland.[9] Ledbetter, however, did not allege that the State was in possession of the tape and withheld it from him. Thus, he failed to make a prima facie allegation that a violation of Brady occurred,[10] and the district court properly denied this claim.

Seventh, Ledbetter contended that his counsel failed to ensure that he was competent to be tried. A defendant is not competent to stand trial when he is "not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense."[11] When "doubt arises" about competency, the district court must suspend the proceedings until the question of competency is resolved.[12] Other than his own assertions that he was "mentally sick," Ledbetter cited to no evidence raising doubt about his competency. He failed to demonstrate that his counsel were ineffective, and the district court properly denied this claim.

Finally, Ledbetter contended that his counsel failed to object to jury instruction no. 14, which provided:

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[9]373 U.S. 83 (1963).

[10]See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (recognizing that a meritorious Brady claim has three components: (1) the evidence is favorable to the accused; (2) the evidence was withheld by the State, and (3) the evidence was material).

[11]NRS 178.400; see Calvin v. State, 122 Nev. ___, ___, 147 P.3d 1097, 1100 (2006) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)).

[12]See NRS 178.405.

> There is no requirement that the testimony of a victim of a sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

He maintained that this instruction violated his constitutional right to a fair trial by removing the burden of proof from the State and allowing the jury to disregard evidence. Jury instruction no. 14 is a correct statement of the law.[13] Ledbetter failed to demonstrate that his trial counsel were ineffective for failing to object to the instruction. The district court properly denied this claim.[14]

Ineffective assistance of appellate counsel claims

In addition to his claims that he received ineffective assistance of trial counsel, Ledbetter raised nine claims that his appellate counsel, Christopher Oram, was ineffective in handling his direct appeal. To support a claim of ineffective assistance of appellate counsel, a petitioner must show that his counsel's performance both fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal.[15]

First, Ledbetter contended that his counsel failed to "federalize" all of the issues raised on direct appeal by framing them as

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[13]See Matter of T.R., 119 Nev. 646, 649, 80 P.3d 1276, 1278 (2003); Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

[14]Ledbetter also raised this claim as one involving the effectiveness of his appellate counsel. For the above reasons, the district court properly denied this claim as well.

[15]Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14; Strickland, 466 U.S. at 694, 697.

violations of his rights under the Untied States Constitution. Ledbetter, however, failed to demonstrate that had his counsel framed his direct appeal claims in this manner that they had any reasonable probability of success. The district court properly denied this claim.

Second, Ledbetter contended that his counsel failed to argue that the district court improperly denied his mistrial motion. That motion was made after a remark by L.R., in which she insinuated that Ledbetter had committed an additional act of sexual abuse. It was also based on a claim that the district court improperly admitted evidence of uncharged prior sexual abuse. Both of these issues were raised on direct appeal and thoroughly addressed by this court.[16] The record belied Ledbetter's allegations, and the district court properly denied this claim.

Third, Ledbetter contended that his counsel failed to argue that the prosecutor engaged in misconduct by asking L.R. leading, unsubstantiated, and irrelevant questions. Ledbetter cited to eleven objections raised by his trial counsel during L.R.'s direct examination. He maintained that the number of objections gave the jury the impression that his defense was overzealous and that he desired to hide information. Yet nine of the objections were sustained. And L.R. did not respond to seven of the objected-to questions. One of her answers was ordered stricken, and limitations were placed on another answer. Ledbetter failed to demonstrate that the questions were prejudicial.[17] The district court properly denied this claim.

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[16]See Ledbetter, 122 Nev. at 258-64, 129 P.3d at 676-80.

[17]See Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001) (improperly leading questions are not generally grounds for reversal).

Fourth, Ledbetter contended that his counsel failed to argue that an exchange between the prosecutor and LVMPD Detective John Stewart elicited prejudicial testimony. The prosecutor asked Detective Stewart about whether he had any reason to question L.R.'s veracity. The detective replied, "No." Ledbetter's trial counsel objected, and the district court struck Detective Stewart's response and admonished the jury: "He's not to judge her credibility. Jury to disregard it." Assuming that the prosecutor's question was improper,[18] any prejudice flowing from the exchange was cured by the district court's prompt actions.[19] The district court properly denied this claim.

Fifth, Ledbetter contended that his counsel failed to argue that evidence admitted during his trial though his ex-wife, Cathy Cuellar, violated the marital communications privilege. NRS 49.295(e) provides in party that the privilege does not apply during a criminal proceeding where one spouse is charged with a crime against "a child of either, or of a child in the custody or control of either." Cuellar was L.R.'s mother. Thus, the marital communications privilege did not apply, and the district court properly denied this claim.

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[18]Compare DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000) ("[A] lay witness's opinion concerning the veracity of the statement of another is inadmissible."), with Abbott v. State, 122 Nev. 715, 727-30, 138 P.3d 462, 470-72 (2006) (recognizing that in some child abuse cases a detective may qualify as an expert witness and give his opinion on the veracity of a victim).

[19]See generally Emmons v. State, 107 Nev. 53, 60, 807 P.2d 718, 722-23 (1991), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

Sixth, Ledbetter contended that his counsel failed to argue that the third paragraph in jury instruction no. 12 was an improper statement of the law. He also maintained that an alternative instruction proposed by his trial counsel should have been given. Specifically, he contended that the following portion of the instruction was erroneous:

> Submission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent. Lack of protest by a victim is simply one among the totality of circumstances to be considered by the jury.

Ledbetter's trial counsel objected to this portion of the instruction, but it was a correct statement of the law.[20] Moreover, Ledbetter did not provide a copy of his proposed alternative instruction. Thus, Ledbetter failed to demonstrate that has his counsel raised this issue on direct appeal that it had any reasonable probability of success. The district court properly denied this claim.

Seventh, Ledbetter contended that his counsel failed to argue that the district court improperly instructed the jury regarding the use of prior uncharged bad acts evidence and that the instruction given was insufficient to limit the prejudicial impact of the evidence. The district court instructed the jury as follows:

> You have heard evidence of two alleged offenses by the defendant. You may not assume that because there was evidence of two alleged prior offenses that he must have also done the offenses alleged in this case. The defendant's past is not on trial.

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[20]See McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992).

> This evidence was offered only to show the defendant's possible intent during the offenses charged in this courtroom, lack of mistake or accident, or the presence of a common scheme or plan by the defendant when he performed the acts alleged in this courtroom. You may not consider it for any other purpose. It is up to you to determine if the evidence has any value or weight in relation to the offense alleged in this courtroom.

On direct appeal, this court reviewed this instruction and specifically addressed the prejudicial impact of the district court's admission of evidence of Ledbetter's uncharged prior bad acts in light of the instructions that were given.[21] This court held that any deficiency in the limiting instructions was harmless because of the overwhelming evidence of guilt.[22] Thus, the record belied Ledbetter's allegation, and the district court properly denied this claim.

Eighth, Ledbetter contended that his counsel failed to argue that a "mug shot" picture of him that was displayed on a screen during the State's closing argument was prejudicial because he did not have an opportunity to "properly clean, bathe, and shave due to being in custody" before the picture was taken. Ledbetter's trial counsel objected to use of the photograph. District courts have discretion to admit photographs into evidence,[23] but the relevance of the "mug shot" is highly questionable and

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[21]See Ledbetter, 122 Nev. at 259-60, 264 n.21, 129 P.3d at 677, 680 n.21.

[22]Id. at 264 n.21, 129 P.3d at 680 n.21.

[23]See Thomas v. State, 114 Nev. 1127, 1141, 967 P.2d 1111, 1120 (1998).

may have been improper.[24] Given the overwhelming evidence of guilt, Ledbetter failed to demonstrate that he was prejudiced by the photograph.[25] The district court properly denied this claim.

Finally, Ledbetter contended that his counsel failed to argue that insufficient evidence supported each of the 26 sexual assault counts because L.R. did not testify with sufficient particularity to support each individual count.[26] However, L.R. testified at trial about the general time frames the sexual abuse occurred; her ages when it occurred; the frequency of the abuse; and, she gave graphic details about specific incidents and the various manners in which Ledbetter abused her. Her testimony was corroborated by other witnesses and physical evidence. This court reviewed the evidence supporting the jury's verdict on direct appeal and concluded that it "overwhelmingly supported his conviction."[27] Thus, his allegation was belied by the record. The district court properly denied this claim.[28]

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[24]See NRS 48.025(3).

[25]See Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 47 (2004) (concluding that trial counsel was not ineffective for failing to object to the admission of a "mug shot" because it had not prejudicial effect).

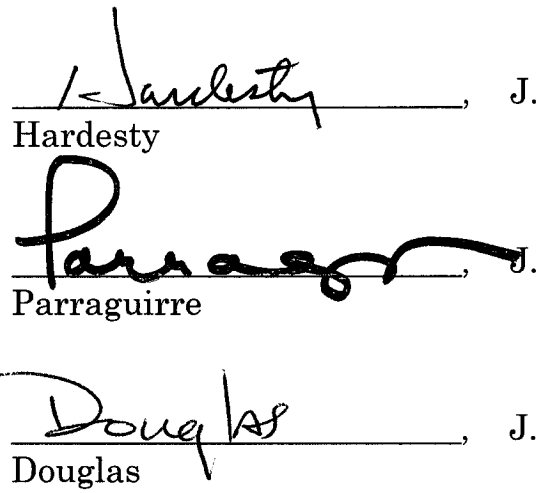
[26]See LaPierre v. State, 108 Nev. 528, 531, 839 P.2d 56, 58 (1992) (holding that a child abuse victim must testify with "some particularity" regarding the incident in order to uphold a conviction) (emphasis in original).

[27]Ledbetter, 122 Nev. at 263-64 n.21, 129 P.3d at 679-80 n.21.

[28]Ledbetter also contended that he was entitled to relief based on the cumulative ineffectiveness of his trial and appellate counsel. For the reasons above, the district court properly denied him relief on this claim.

We conclude that the district court properly denied Ledbetter's post-conviction petition.[29] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[30]



_____, J.
Hardesty

_____, J.
Parraguirre

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Douglas

cc: Hon. Stewart L. Bell, District Judge
John Allen Ledbetter
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[29]Ledbetter appeared to frame several claims in his petition below independent of ones involving the effectiveness of his counsel. To the extent he did so, these claims should have been raised on direct appeal and are procedurally barred. See NRS 34.810(1), (3).

[30]We have reviewed all proper person documents that Ledbetter has submitted to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent he has attempted to present claims and facts that were not presented in the proceedings below, we decline to consider them in the first instance.