IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN RYAN, III A/K/A JOHN RYAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48802

FILED

JUL 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an 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; Sally L. Loehrer, Judge.

On July 28, 2004, the district court convicted appellant John Ryan, pursuant to a jury verdict, of sexual assault. The district court sentenced Ryan to serve a prison term of 10 to 25 years. This court affirmed Ryan's judgment of conviction on direct appeal.[1]

With the assistance of retained counsel, Ryan filed a timely post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel filed a supplemental petition. Following an evidentiary hearing, the district court denied Ryan's petition. This appeal follows.

In his petition, Ryan contends that the district court erred in concluding that he did not receive ineffective assistance of counsel. To

[1]Ryan v. State, Docket No. 43820 (Order of Affirmance, January 31, 2005).

state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsels' performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsels' errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[3] A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[4] Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, Ryan contends that trial counsel were ineffective for failing to interview and present witnesses. Specifically, Ryan contends that trial counsel should have investigated and presented Josh Gajardo, Adrian Aldan, Jared Aldan, and "Jeff" as witnesses, who would have testified that the victim was a "drama queen" who exaggerated events. Following the evidentiary hearing, the district court found that counsel was not ineffective for failing to call witnesses and the witnesses who appeared during the evidentiary hearing presented inconsistent testimony. The district court's factual findings are supported by

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

[3]Strickland, 466 U.S. at 697.

[4]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[5]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

substantial evidence and are not clearly wrong. Counsel testified at the evidentiary hearing that they did not present certain witnesses during trial for tactical reasons.[6] In particular, during the hearing, counsel testified that they interviewed Gajardo, but felt that his testimony would have hurt the defense theory, and that Gajardo and other possible witnesses would have made an unfavorable impression upon the jury. Counsel testified that they were never informed about either of the Aldans and that they attempted to contact other witnesses and could not locate them. Accordingly, the district court did not err in denying this claim.

Second, Ryan contends that trial counsel were ineffective for failing to present testimony from Eric "Joe" Valdez that the victim once falsely accused him of rape. The district court found that Ryan merely presented bare and naked allegations that were not supported by specific facts. In particular, Ryan did not demonstrate that the victim reported prior false rape allegations to the police department. The district court's findings are supported by substantial evidence and are not clearly wrong. Accordingly, we affirm the denial of this claim.

Third, Ryan contends that trial counsel were ineffective for failing to adequately discuss a plea negotiation with him. The district court found that Ryan failed to demonstrate that counsels' discussion of a plea offer fell below an objective standard of reasonableness. Counsel testified at the post-conviction hearing that before trial, the district court asked if a plea deal could be negotiated. The prosecutor agreed to offer a

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[6]See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (holding that tactical decisions by counsel are virtually unchallengeable absent extraordinary circumstances).

deal in which Ryan could plead guilty to attempted sexual assault, and the district court stated that it would sentence him to 2 to 5 years on that count. However, trial counsel testified that Ryan refused to plead guilty to a sexual offense, and the prosecutor would not agree to allow Ryan to plead guilty to a non-sexual offense. The district court's findings are supported by substantial evidence and are not clearly wrong. Accordingly, the district court did not err in finding that counsels' performance was not deficient.

Next, Ryan contends that the district court erred in not conducting an evidentiary hearing on his remaining claims that trial and appellate counsel were ineffective. An evidentiary hearing is warranted if the petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.[7]

First, Ryan contends that trial counsel were ineffective for failing to adequately examine witnesses at the suppression hearing. Ryan contends that the officer's statements made in the affidavit to the search warrant were inconsistent with testimony at the suppression hearing. However, Ryan fails to articulate how the officer's "stories" changed, and there are no inconsistencies apparent from our review of the record. Accordingly, the district court did not err by denying this claim without an evidentiary hearing.

To the extent that Ryan argues that appellate counsel was ineffective for failing to raise on direct appeal that his statements should have been suppressed because he was in custody when detectives

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

interviewed him and they failed to advise him of his Miranda[8] rights, Ryan has not demonstrated that this claim had a reasonable probability of success on appeal.[9] Ryan fails to demonstrate that he was actually in custody.[10] Further, Ryan fails to demonstrate that he was necessarily prejudiced by the admission of these statements in that if they had been suppressed the outcome of the trial would have been different. During the interview with the detectives, Ryan denied having a sexual encounter with the victim and, when asked if he would voluntarily supply a buccal swab, he requested to talk to his attorney first. Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

Second, Ryan contends that trial counsel were ineffective for failing to pursue a violation of Ryan's speedy trial rights.[11] In determining whether a defendant's Sixth Amendment right to a speedy trial was violated, this court considers four factors: the "[l]ength of [the] delay, the

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[8]Miranda v. Arizona, 384 U.S. 436 (1966).

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

[10]Casteel v. State, 122 Nev. 356, 361-62, 131 P.3d 1, 4-5 (2006) (specifying that the pertinent inquiry in determining custody for Miranda purposes where there is no formal arrest is that a reasonable person would feel "at liberty to terminate the interrogation and leave") (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

[11]To the extent that Ryan also raised this claim as a claim of ineffective assistance of appellate counsel, as discussed, he failed to demonstrate that a speedy trial claim would have had a reasonable probability of success on appeal. Accordingly the district court did not err by denying this claim without an evidentiary hearing. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[12] Here, although the length of the delay—approximately seven months—warrants further inquiry, the delay was not so long as to be presumptively prejudicial.[13] Further, most of the delay was attributable to the defense: continuances were granted for defense counsel to attempt to locate witnesses and because Ryan replaced counsel. Therefore, we cannot attribute the entire delay to the State.[14] Finally, we conclude that Ryan was not prejudiced by the delay because Ryan was in custody for a probation violation on another matter, and, although defense counsel claimed that there were problems locating witnesses, there was no allegation in this case that valuable witnesses or evidence were lost as a result of the delay.[15] Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

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[12]Barker v. Wingo, 407 U.S. 514, 530 (1972).

[13]Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998) (holding that a 2 ½ year delay did not give rise to a finding of presumptive prejudice, especially when the appellant was responsible for most of the delay).

[14]See Brinkman v. State, 95 Nev. 220, 223, 592 P.2d 163, 164-65 (1979).

[15]Cf. Barker, 407 U.S. at 534 (concluding that "prejudice was minimal" despite the fact that the appellant spent 10 months in jail prior to trial because no evidence was lost due to the delay); State v. Fain, 105 Nev. 567, 779 P.2d 965 (1989) (holding that a 4 ½ year delay did not violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory was lost due to the delay).

Third, Ryan contends that trial counsel were ineffective for failing to object to questions regarding his criminal record.[16] Where the complaining party first questions a witness regarding otherwise inadmissible testimony, that party is barred from preventing the testimony's admission under the open door doctrine.[17] The State questioned Ryan regarding his fear of probation revocation after Ryan testified to being on probation for a prior criminal conviction. Because defense counsel opened the door during direct as to Ryan's prior criminal record, Ryan failed to demonstrate his counsel was ineffective for failing to object to questions about his criminal record. Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

Fourth, Ryan contends that trial counsel were ineffective for making statements which emphasized the brutality of the offense. He contends that these statements were reinforced by comments by the State demeaning the "star witness," to which defense counsel did not object. Ryan claims that these statements had a "substantial and injurious effect on the jury verdict." Defense counsel stated during closing argument that "the crime of sexual assault . . . is one of the most serious and heinous crimes in the law." From our review of the record, and taken in context, it

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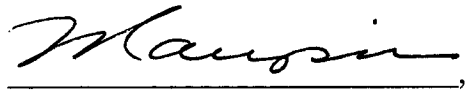
[16]To the extent that Ryan also raised this claim as a claim of ineffective assistance of appellate counsel, as discussed, he failed to demonstrate that this claim would have had a reasonable probability of success on appeal. Accordingly the district court did not err by denying this claim without an evidentiary hearing. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

[17]See U.S. v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988) (citations omitted).

is apparent that defense counsel was emphasizing the duty of the jury to determine whether the State had met its burden, and that the neglect of those duties would result in a severe penalty for the defendant. Further, a prosecutor may legitimately argue deductions and conclusions reasonably drawn from the evidence.[18] Here, it is apparent from the record that the State was commenting on the witness's testimony and arguing deductions reasonably drawn from the evidence. Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

Having considered Ryan's contentions and determined that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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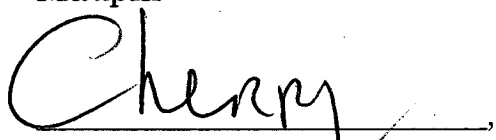

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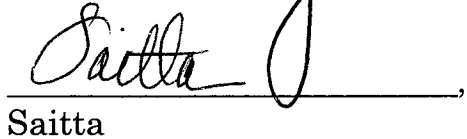

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[18]See Cunningham v. State, 113 Nev. 897, 907, 944 P.2d 261, 267 (1997); State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.").

cc: Hon. Sally L. Loehrer, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk