

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY RAY BROWN A/K/A JOHNNY  
R. BROWN A/K/A JOHNNY RAE  
BROWN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48898

**FILED**

APR 21 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Johnny Brown's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On March 27, 2002, Brown was convicted, pursuant to a jury verdict, of battery with intent to commit a crime (count I), three counts of sexual assault (counts II-IV), burglary (count V), and grand larceny (count VI). The district court sentenced appellant to serve a term of 26 to 120 months in the Nevada State Prison for count I, three terms of 10 years to life for counts II through IV, 16 to 72 months for count V, and 12 to 36 months for count VI. The district court imposed all terms to run concurrently. This court affirmed Brown's conviction on appeal. Brown v. State, Docket No. 39514 (Order of Affirmance, August 13, 2003). The remittitur issued on September 9, 2003.

On August 12, 2004, Brown, represented by counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On January 22, 2007, following a two-day

evidentiary hearing, the district court denied Brown's petition. This appeal follows.

In his appeal, Brown claims that the district court erred when it denied four of his claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694. The court may dispose of a claim if the petitioner makes an insufficient showing on either prong. Id. at 697. "The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, the "purely factual findings" of the district court "are entitled to deference on . . . review." Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Brown claims that trial counsel was ineffective for failing to preclude evidence of his fugitive status, his violent behavior while in custody, and his threats against a correctional officer. Brown fails to demonstrate that he was prejudiced. With regard to the evidence of Brown's fugitive status, this court has already concluded that it was admissible because it was relevant to demonstrate his consciousness of guilt. Brown v. State, Docket No. 39514 (Order of Affirmance, August 13,

2003). Accordingly, Brown fails to demonstrate that trial counsel was deficient for failing to object to this evidence.

With respect to the testimony of Corrections Officer Steven Young about Brown's violent conduct and threats after being apprehended, the district court concluded that this evidence should have been objected to and should not have come in. Nevertheless, the district court found that Brown had "not shown that but for said errors, there was a reasonable probability that he would have been acquitted at trial." The trial record reflects that Officer Young's testimony was brief and the prosecutor never asked Officer Young to elaborate on his statements. And Officer Young confirmed that Brown had maintained his story that the sexual encounter with the victim was consensual. Officer Young's testimony in this regard supported the defense theory at trial. In light of the evidence presented at trial, including the victim's testimony, her 911 call, documentation of her physical injuries, and Brown's subsequent flight to Michigan, Brown fails to demonstrate that objection to the testimony had a reasonable probability of resulting in his acquittal. Therefore, the district court did not err in denying this claim.

Second, Brown claims that trial counsel was ineffective for opening the door to evidence of a prior confrontation between Brown and the victim. Brown fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. During cross-examination of the victim, trial counsel elicited testimony that Brown had previously tried to kiss the victim, she had then struck him, he struck her back, and the police were called. No one was arrested. The record reflects, and the district court found, that trial counsel made a tactical decision to elicit this testimony in order to show a pattern of fighting followed by consensual

contact. In the context of claims of ineffective assistance of counsel, “a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances.” Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)) (internal quotation marks omitted). Brown has not demonstrated extraordinary circumstances here. Moreover, defense counsel testified that she “still was not certain that the facts of that prior incident as revealed to the jury was actually damaging to the defendant.” Brown fails to demonstrate that, but for trial counsel’s elicitation of this incident, there is a reasonable probability that the result of trial would have been different. Therefore, the district court did not err in denying this claim.

Third, Brown claims that trial counsel was ineffective for calling a defense witness who bolstered the State’s case. Brown fails to demonstrate that he was prejudiced. At trial, the defense called Kathryn Uhrich as a witness in an attempt to show that Brown and the victim had a preexisting loving relationship. However, Uhrich testified that the victim did not like Brown. The district court found that Uhrich’s testimony “did not help put forward [Brown’s] theory that he and the victim had a loving relationship.” However, despite concluding that counsel’s performance was deficient, the district court found that Brown failed to demonstrate prejudice. We agree that in light of the evidence presented at trial, Brown fails to demonstrate that but for this brief testimony, there was a reasonable probability of a different result at trial. Therefore, the district court did not err in denying this claim.

Fourth, Brown claims that trial counsel was ineffective for failing to adequately cross-examine the victim. Specifically, Brown claims that trial counsel was ineffective for failing to impeach the victim with

inconsistencies in her prior statements. Brown fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Brown's trial counsel testified that she "intentionally brought out the victim's inconsistent statements through her examination of Detective Love, rather than by impeaching the victim" as a trial strategy intended to "avoid arousing the jury's sympathies for the victim." As stated above, in the context of claims of ineffective assistance of counsel, "a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances." Id. Brown has not demonstrated extraordinary circumstances here. Moreover, the record reflects that trial counsel "made a very long list for the jury regarding every inconsistent statement the victim made during the investigation of the case" and highlighted them in closing argument. Thus, Brown fails to demonstrate a reasonable probability that, had trial counsel conducted a more forceful cross-examination of the victim, the results of trial would have been different. Therefore, the district court did not err in denying this claim.

Finally, in his opening brief Brown made reference to trial counsel's "almost dozen other instances of failure to prepare and/or object."<sup>1</sup> Brown did not make any cogent argument regarding these additional claims, but in his reply brief he faults the State for failing to

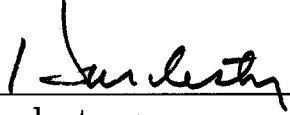
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<sup>1</sup>In his reply brief, Brown lists seven additional claims. Brown claims that trial counsel: (1) failed to call expert witnesses, (2) conceded that the victim was battered, (3) failed to follow up on the victim's drug usage, (4) failed to offer a self-defense instruction, (5) failed to question the sexual assault nurse about her lack of findings of physical trauma, (6) failed to question any witnesses about a condom found at the crime scene, and (7) failed to move to suppress the defendant's statement to police.

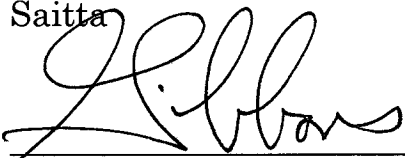
address them in its answering brief. It is the appellant's burden to demonstrate error below. Fairman v. State, 87 Nev. 627, 629, 491 P.2d 1283, 1284 (1971). Because Brown did not present any argument in support of these claims, he fails to demonstrate any error below. Therefore, we conclude that the district court did not err in denying these additional claims.

Having considered Brown's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Douglas W. Herndon, District Judge  
Bunin & Bunin  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk