

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD ALLEN BEVERLY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49416

**FILED**

OCT 31 2007

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
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; Joseph T. Bonaventure, Judge.

On February 4, 2004, the district court convicted appellant, pursuant to a jury verdict, of four counts of sexual assault of a minor under fourteen years of age; two counts of sexual assault of a minor under sixteen years of age; one count of sexual assault; one count of attempted sexual assault; and one count of coercion. The district court sentenced appellant to serve six terms of life with the possibility of parole after twenty years for each of the six counts of sexual assault of a minor; life with the possibility of parole after ten years for the count of sexual assault; five to twenty years for the count of attempted sexual assault; and twelve to thirty months for the count of coercion in the Nevada State Prison. All counts were to be served concurrently. This court affirmed

appellant's judgment of conviction on appeal.<sup>1</sup> The remittitur issued on March 15, 2006.

On January 16, 2007, 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 June 13, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised four 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 resulting prejudice such that there is a reasonable probability of a different outcome but for counsel's errors.<sup>2</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>3</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file a pretrial motion to suppress transcripts of interviews with the victim, the victim's mother and appellant conducted by Detective Kristen Meegan of the Las Vegas Metropolitan Police Department, which were admitted at trial even though audiotapes of the interviews had been

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<sup>1</sup>Beverly v. State, Docket No. 42767 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, February 16, 2006).

<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Strickland, 466 U.S. at 697.

destroyed. While this evidence was admitted at trial over the objection of trial counsel,<sup>4</sup> appellant contended that trial counsel was ineffective because she did not file a pretrial motion to suppress. To demonstrate that the evidence was inadmissible appellant must show that the State acted in bad faith in destroying the audiotapes or that he was prejudiced by the loss of the audiotapes.<sup>5</sup>

Appellant failed to demonstrate that his trial counsel was ineffective in relation to the victim's transcripts. This court previously determined on direct appeal that the victim's transcripts were admissible. Therefore, the underlying issue relating to the victim's transcripts is governed by the doctrine of the law of the case.<sup>6</sup> Consequently, appellant failed to demonstrate that trial counsel was ineffective for failing to file a motion to suppress because appellant failed to show that a motion to suppress the victim's transcripts would have been meritorious.<sup>7</sup> Therefore, the district court did not err in denying this claim.

Appellant also failed to demonstrate that his trial counsel was ineffective for failing to file a motion to suppress the transcripts of interviews with the victim's mother. Appellant failed to show that the motion to suppress was meritorious and that there was a reasonable

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<sup>4</sup>See Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998) (noting that district courts are vested with considerable discretion in determining the relevance and admissibility of evidence).

<sup>5</sup>See Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988).

<sup>6</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>7</sup>Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

likelihood that the exclusion of the evidence would have changed the result at trial.<sup>8</sup> Appellant provided no evidence that the State acted in bad faith in destroying the audiotapes. In contrast, the evidence adduced at trial showed that the tapes were destroyed after the case went to the Justice Court for the preliminary hearing because the computer system erroneously showed that the case had been dismissed on State's motion, when it was actually dismissed because it went to the grand jury. Detective Meegan further testified that it is standard procedure to destroy evidence in cases that have been dismissed because there is no reason to keep the evidence. Appellant also failed to demonstrate that he was prejudiced by the admission of the victim's mother's transcript. As noted above, the jury was aware that the audiotapes had been destroyed. Although Detective Meegan testified that the transcripts were accurate, the victim's mother testified that the transcripts did not accurately reflect the statements she made during her interview with Detective Meegan. The issue of the veracity of the victim's mother's transcripts was fully litigated at trial and the jury was presented with the conflicting testimony at trial.<sup>9</sup> Thus, appellant failed to demonstrate that he was prejudiced by the admission of this evidence. Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue and the district court did not err in denying this claim.

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<sup>8</sup>Id.

<sup>9</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Finally, appellant also failed to demonstrate how he was prejudiced by the admission of the transcripts of his interview with Detective Meegan, other than to attack the accuracy of the transcripts. Appellant failed to elucidate how the admission of his transcript impacted the jury's verdict in this case. Therefore, appellant failed to show that the motion to suppress was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result at trial.<sup>10</sup> Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to seek the admission of critical exculpatory evidence, including several potential defense exhibits. Many of these exhibits related to the victim's recantations and included: two letters that the victim wrote to the district court judge, one letter that the victim wrote to appellant, and a transcript of an interview with the victim conducted by appellant's initial trial attorney Stanley Walton. The victim's recantation was fully litigated at trial. Therefore, this evidence was cumulative to that presented at trial. Appellant failed to demonstrate that the presentation of this evidence would have altered the outcome of his trial in light of the testimony regarding recantation presented at trial. Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue and the district court did not err in denying this claim.

Appellant also claimed that trial counsel failed to present several exhibits which were exculpatory. Appellant claimed that the

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<sup>10</sup>Kirksey, 112 Nev. at 990, 923 P.2d at 1109.

following exhibits were exculpatory: several school registration forms, several tests indicating that the victim tested positive for Chlamydia and that he had tested negative for HIV and Syphilis, a letter from appellant's earlier trial counsel, Judge Jackie Glass, addressed to the State discussing her intention to call his step-son at the Grand Jury, and affidavits from appellant's son and step-son which contained evidence cumulative to the testimony given at trial. A review of these exhibits reveals that none of the exhibits demonstrate that appellant did not commit the crimes for which he was convicted. Thus, appellant failed to demonstrate that the presentation of this evidence would have altered the outcome of his trial. Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue and the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to adequately investigate and prepare a defense because she declined to present testimony from three potential witnesses: Jacklyn Glass, Rolando Larraz, and Sharon Allen. Appellant argued that he considered the testimony of these individuals key to the proper development of his defense. However, appellant failed to elucidate upon the specific testimony that these potential witnesses would have offered at trial.<sup>11</sup> As a result, appellant failed to demonstrate how trial counsel's further investigation of these witnesses would have resulted in a reasonable probability of a different outcome.<sup>12</sup> Thus, appellant failed to

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<sup>11</sup>Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984).

<sup>12</sup>See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to address issues regarding the jury and witnesses that were prejudicial to his case. First, appellant argued that trial counsel was ineffective for failing to raise issues about problems with the recess area outside Department 6, where his trial was held. Appellant contended that the victim/witness advocate approached his brother outside the courtroom and began making "accusations of unethical behavior." Appellant also contended that the victim/witness advocate was going in and out of the courtroom during the trial and inappropriately discussing testimony with the other witnesses. Appellant claimed that his trial counsel was aware of these occurrences and did nothing to address them. However, appellant failed to present any evidence that the witnesses involved in this case were biased by these alleged events, and appellant failed to show how these alleged events impacted the jury's verdict in this case. Thus, appellant failed to demonstrate prejudice. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that he received ineffective assistance of trial counsel because his trial counsel failed to present his pretrial motion to disqualify attorneys Kephart and Peterson to the jury. This claim was patently meritless. The jury heard testimony regarding the disqualification of the State's attorneys and it is very unlikely that this additional evidence would have changed the outcome of appellant's trial. Therefore, the district court did not err in denying appellant's claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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.<sup>13</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>14</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>15</sup>

First, appellant claimed that his appellate counsel should have presented issues regarding a juror that fell asleep during trial.<sup>16</sup> Appellant failed to demonstrate that the issue had a reasonable probability of success on appeal.<sup>17</sup> During the trial, the district court stopped testimony, very briefly, and asked a juror if he was alright. The juror replied that he was fine and that the artificial lights bothered his eyes. The district court then verified that the juror was just keeping his head down to avoid the lights but was paying full attention to the trial. The district court then instructed the juror to inform the court if he was

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<sup>13</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>14</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>15</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>16</sup>To the extent appellant claimed ineffective assistance of trial counsel on this issue, we conclude that he failed to demonstrate prejudice. Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>17</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.



feeling tired and the juror reiterated that it was just that the light hurt his eyes. Appellant has presented no evidence demonstrating that this juror was in fact asleep or that the trial court proceedings were impacted by this event. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to address issues concerning juror Judith Draper's conversation with appellant's bail bondsman.<sup>18</sup> Appellant failed to demonstrate that the issue had a reasonable probability of success on appeal.<sup>19</sup> During trial, juror Judith Draper had a brief conversation with appellant's bail bondsman, who was apparently a person with whom she bowled. After this conversation, Draper wrote a letter to the district court informing the court of this communication. The district court held a hearing outside the presence of the jury, with both the state and defense counsel present, to determine the nature of the conversation. During this hearing, Draper told the court that she had discussed the case with appellant's bail bondsman who had informed her that appellant had posted bail and that a German woman put up the money for appellant's bail. After the bail bondsman made this statement, Draper informed the bail bondsman that it was improper for them to discuss the case further. Appellant provided no evidence that Draper's conversation with

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<sup>18</sup>To the extent appellant claimed ineffective assistance of trial counsel on this issue, we conclude that he failed to demonstrate prejudice. Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>19</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

appellant's bail bondsman impacted the jury's verdict in his case. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to investigate and present issues relating to post-trial comments made to trial counsel. Appellant failed to explain what post-trial comments were made to his trial counsel, and by whom, and how further investigation of these comments would have impacted his appeal. As a result, the district court did not err in denying this claim as appellant failed to demonstrate that this issue would have a reasonable probability of success on appeal.<sup>20</sup>

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue prosecutorial misconduct premised upon improper comments made during trial and during closing arguments. Specifically, appellant contended that appellate counsel should have investigated and presented issues relating to the following comment by the prosecution: "[A.M.] said to you under oath: that was meaningless (it didn't happen and I lied when I said it did). Mom's testimony in this court before this jury, same thing." Appellant failed to demonstrate that this issue regarding the prosecutor's argument had a reasonable probability of success on appeal.<sup>21</sup> On direct appeal, appellant argued prosecutorial misconduct because the prosecutor lied to the victim, held the victim hostage to get her to testify before the grand jury, and intimidated the victim into testifying that her initial accusations were true. Appellant

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<sup>20</sup>Id.

<sup>21</sup>Id.

also argued that it was improper for the State to grant the victim immunity from prosecution and then point out that because of the immunity, the victim was not constrained to tell the truth. This court rejected all of these arguments. Appellant failed to demonstrate that any further argument of prosecutorial misconduct would have had a reasonable probability of a different result.<sup>22</sup> Therefore, the district court did not err in denying this claim.

Next, appellant contended that there was insufficient evidence to support the jury's finding of guilt. This claim was litigated and rejected on appeal and is governed by the doctrine of the law of the case.<sup>23</sup> Therefore the district court did not err in denying this claim.

Appellant further claimed that new evidence demonstrated that he was actually innocent of the crimes for which he was convicted. To support his claim of actual innocence, appellant presented a letter written by the victim and addressed to Judge Jeffrey Sobel recanting her accusations of sexual assault, evidence relating to an interview conducted by his former trial attorney Stanley Walton, wherein the victim recanted her testimony and named her previous step-father as the person who sexually assaulted her, various school registration forms identifying both her previous step-father and appellant as the victim's emergency contact, and affidavits from appellant's son and step-son.

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<sup>22</sup>Id.

<sup>23</sup>Hall, 91 Nev. at 316, 535 P.2d at 799.

""[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>24</sup> To demonstrate actual innocence, appellant would have to establish that ""it is more likely than not that no reasonable juror would have convicted him.""<sup>25</sup>

Appellant failed to demonstrate actual innocence. First, appellant failed to present any exculpatory evidence which would make it more likely than not that no reasonable juror would have convicted him.<sup>26</sup> The victim's recantation was fully litigated at trial. The additional evidence does not demonstrate appellant's factual innocence. Moreover, appellant failed to demonstrate that any of the remaining evidence was new or not reasonably available at trial.<sup>27</sup> Therefore, the district court did not err in denying this claim.

Finally, appellant raised the following claims, which should have been raised on direct appeal: (1) that he was subjected to a selective and vindictive prosecutorial process before, during, and after trial, (2) that the jury was biased due to statements made by the victim's advocate involved in the case, (3) that the prosecutor misstated facts and used unfair means to impeach petitioner's credibility, (4) that he was prejudiced by a five and a half month pre-indictment delay, and (5) that cumulative

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<sup>24</sup>Bousley v. United States, 523 U.S. 614, 623 (1998); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>25</sup>Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).


<sup>26</sup>Id.

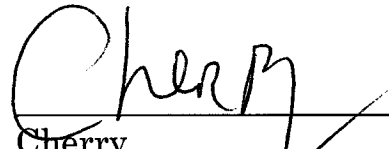
<sup>27</sup>Hall, 91 Nev. 314, 535 P.2d 797.

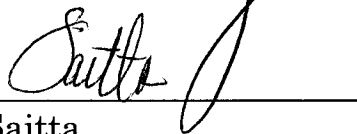
error at trial constituted error requiring dismissal. Appellant failed to demonstrate good cause for his failure to raise these claims on direct appeal, and they were therefore waived.<sup>28</sup>

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.<sup>29</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Cherry

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

cc: Chief Judge, Eighth Judicial District  
Hon. Joseph T. Bonaventure, Senior Judge  
Todd Allen Beverly  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>28</sup>See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>29</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).