

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DOTEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49706

FILED

NOV 06 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 Michael Doten's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On November 20, 2003, the district court convicted appellant Michael Doten, pursuant to a jury verdict, of one count of sexual assault with a child under 14 and one count of lewdness with a child under 14. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 20 years for the sexual assault count and a concurrent term of life with the possibility of parole after 10 years for the lewdness count. This court affirmed appellant's judgment of conviction and sentence on appeal.¹ The remittitur issued on May 17, 2005.

¹Doten v. State, Docket No. 42373 (Order of Affirmance, April 20, 2005).

On October 16, 2005, appellant filed a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent appellant. On June 12, 2007, the district court denied appellant's petition without conducting an evidentiary hearing. This appeal follows.

Appellant argues that the district court erred in denying his ineffective assistance of counsel claims without conducting an evidentiary hearing. 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 there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³ To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.⁴

First, appellant argues that his trial counsel was ineffective for failing to object when the State improperly referred to hearsay statements during opening statements and closing arguments.

²See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland).

³Strickland, 466 U.S. at 697.

⁴Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Specifically, appellant challenges the State referencing when the victim told relatives about the assault. Appellant argues that only two witnesses were allowed to testify concerning the victim's out-of-court statements about the assault; therefore the failure to object allowed for more corroboration of the victim's testimony than was permissible. Appellant fails to demonstrate his trial counsel was deficient or that he was prejudiced. When viewed in context, both were attempts by the State to give an outline of the persons the victim told about the incident and how that led the victim to discuss the incident with her mother. Opening statements and closing arguments are not evidence and appellant fails to demonstrate that he was prejudiced given the evidence presented during the trial. Further, based on the evidence, these were proper comments during closing arguments.⁵ Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues his trial counsel was ineffective for failing to object when the State labeled appellant a child molester during opening statements by stating "child molesters very rarely photograph or take photographs of what they're doing." Appellant argues that this statement argued facts not in evidence and improperly implied that appellant had committed prior bad acts. Appellant fails to demonstrate that he was prejudiced. "Generally, the prosecution has a duty to refrain

⁵See Klein v. State, 105 Nev. 880, 883-84, 784 P.2d 970, 972-73 (1989).

from making statements in opening arguments that cannot be proved at trial.”⁶ However, such statements do not constitute misconduct if they are not made in bad faith.⁷ When the statement is viewed in context, it was an attempt by the State to explain to the jury why there was no photographic evidence and nothing in the record indicates the statement was made in bad faith. Appellant failed to demonstrate that any objection to the statement would have had a reasonable probability of altering the outcome of the trial. Moreover, appellant failed to demonstrate that the State argued facts not in evidence. Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to investigate facts concerning an independent psychological evaluation of the victim. Appellant argues that the victim’s mental or emotional state may have been affected by a separate sexual abuse case involving her brother. Appellant fails to demonstrate that he suffered prejudice. The district court may grant a request for an independent psychological evaluation of a victim where the defendant demonstrates that there is a compelling need for such an evaluation.⁸ A compelling

⁶Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), abrogated on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006).

⁷Rice at 1312-13, 949 P.2d at 270.

⁸See generally Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006).

need may be demonstrated when “there is little or no corroboration evidence and ‘whether there is a reasonable basis for believing that the victim’s mental or emotional state may have affected his or her veracity.’”⁹ At trial, the victim’s mother testified that the victim did not know any details about the case involving her brother. In light of this, appellant fails to demonstrate a reasonable probability that the district court would have considered that the separate sexual abuse case involving the victim’s brother would have demonstrated a compelling need for a psychological evaluation and granted a request for an independent psychological evaluation of the victim. Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, appellant argues that his trial counsel was ineffective for failing to investigate a past case in which the victim’s brother was abused. Appellant argues that it is possible that further investigation could have shown that the victim had fabricated her story by basing it on the case involving her brother. Appellant fails to demonstrate that he suffered prejudice. Appellant fails to set forth what information would have been discovered with a more thorough investigation or demonstrated a reasonable probability of a different outcome at trial.¹⁰ Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

⁹Id. 122 Nev. at 724, 138 P.3d at 468 (quoting Koerschner v. State, 116 Nev. 1111, 1117, 13 P.3d 451, 455 (2000)).

¹⁰Id.

Accordingly, having considered Doten's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry J.
Cherry

Maupin J.
Maupin

Saitta J.
Saitta

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk