

IN THE SUPREME COURT OF THE STATE OF NEVADA

BISMARCK ANTONIO OBANDO A/K/A
BISMARCK ANTONIO OBANDO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49843

FILED

SEP 25 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Bismark Obando's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On March 4, 2004, the district court convicted appellant Bismark Obando, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed appellant's judgment of conviction and sentence on appeal.¹ The remittitur issued on November 30, 2004.

On August 10, 2005, appellant filed a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. Counsel was appointed to represent appellant and, after conducting an

¹Obando v State, Docket No. 43090 (Order of Affirmance, November 4, 2004).

evidentiary hearing, the district court denied appellant's petition on August 7, 2007. This appeal follows.

Appellant argues that the district court erred in denying 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 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 A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁴

First, appellant argues that his trial counsel was ineffective for failing to object when the State, during closing argument, vouched for the credibility of the victim. Appellant argues that the State called the victim a person of honor and integrity, a virgin, compliant, and a simple person; all of which amount to vouching for the victim's credibility.

²See Strickland v. Washington, 466 U.S. 668, 687-88 (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.

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Appellant fails to demonstrate that his counsel was deficient or that he suffered prejudice. Statements by the State amounting “to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence” are improper.⁵ However, the State is allowed “reasonable latitude” to argue concerning the credibility of witnesses.⁶ During closing argument, the State argued that, based on the testimony and evidence concerning the victim’s lack of education, lack of social skills, and that she was from a rural area in Mexico, she would not be able to fabricate her testimony. In addition, the State argued that, based on the testimony, evidence, and her demeanor while testifying, the victim is compliant, meek, and submissive, therefore, she would be unlikely to fabricate her testimony. Further, the State argued that, due to the fact that the victim was a virgin prior to this incident, it was extremely embarrassing for her to discuss it in front of the jury.

When the closing argument is viewed as a whole, the State’s argument was that the victim had no motive to lie and that she lacked the sophistication to lie. The State argued that the jury members would have to use the victim’s characteristics to decide for themselves if the victim was credible. Thus, the State did not improperly vouch for the creditability of the victim.

In addition, at the evidentiary hearing, appellant’s trial counsel testified that he made a tactical decision not to object to these

⁵Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

⁶Rowland v State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

statements because he could effectively challenge them during his closing argument. Tactical decisions of counsel are virtually unchallengeable and appellant fails to demonstrate any such circumstances here.⁷ Therefore, the district court did not err in denying appellant's claim that his trial counsel was ineffective for failing to object to the State's vouching for the creditability of the victim.

Second, appellant argues that his trial counsel was ineffective for failing to object when the State, during closing argument, labeled appellant a liar. The State told the jury that the victim and appellant had different versions of the events, so there must be a "liar in the midst." The State then discussed inconsistencies in appellant's statements to police and his testimony to argue that the jury should believe the victim's version of the events.

Appellant fails to demonstrate that his trial counsel was deficient or that he suffered prejudice. It is not proper argument for the State to argue a defense witness is a liar.⁸ However, the State may use inferences to demonstrate that a witness's testimony is untrue.⁹ When viewed in context, the State simply argued that both the victim's and appellant's testimonies could not both be true, thus the jury had to decide which person to believe. Further, at the evidentiary hearing, appellant's trial counsel stated that he did not object at that time because he felt it would have been harmful as it seemed the State was doing poorly.

⁷See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

⁸Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (1998).

⁹Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990).

Tactical decisions of counsel are virtually unchallengeable and appellant fails to demonstrate any such circumstances here.¹⁰ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to object when the State, during closing argument, argued facts not in evidence. Appellant claims that the State argued that several people, who were not witness to the sexual assault, believed the victim's version of events. The State discussed the reactions of witnesses when they heard about the sexual assault. In addition to referencing testifying witnesses, the State mentioned the victim's brothers' reactions after hearing of the incident, even though they did not testify at trial.

Appellant fails to demonstrate that that he was prejudiced. It is improper for the State to discuss facts that were not presented in evidence.¹¹ A review of the record reveals that all of the reactions discussed by the State were presented in testimony from witnesses. The witnesses, with the exception of the victim's brothers, testified to their own reactions. The victim's brothers' reactions were discussed during the testimony of Maria Garcia, the victim's work supervisor. During closing, the State argued that, based on the facts in evidence, the victim was credible due to her actions with others following the incident and how those people reacted once they heard from the victim concerning the incident. When viewed in context, the State's argument was that the jury should consider the reactions of people who knew the victim when the jury

¹⁰See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹¹Rippo v. State, 113 Nev. 1239, 1255. 946 P.2d 1017, 1027 (1997).

members weighed the credibility of the victim against appellant. Therefore, the district court did not err in denying this claim.

Fourth, it appears that appellant argues that his trial counsel was ineffective for failing to require the district court to provide notice to appellant of lifetime supervision pursuant to NRS 176.0927. Further, it appears that appellant argues that he was not given notice of his duty to register as a sex offender. Appellant failed to demonstrate that he suffered prejudice. Appellant claims that he should be allowed to withdraw his guilty plea due to lack of notice, however, appellant was convicted pursuant to a jury verdict. In addition, appellant fails to demonstrate how notice would have changed the outcome of the proceedings. Therefore, the district court did not err in denying this claim.¹²

Next, appellant argues that the district court erred in denying his claims of 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.¹³ Appellate counsel is not required to raise every non-frivolous issue on

¹²To the extent that appellant claims his appellate counsel was ineffective for failing to raise this claim on direct appeal, we conclude that appellant fails to demonstrate that there was a reasonable probability of success on direct appeal for this claim. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹³Id.

appeal.¹⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁵

First, appellant claims that his appellate counsel was ineffective for failing to argue on direct appeal that the State, during closing argument, vouched for the credibility of the victim. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. As discussed above, appellant failed to demonstrate that the State improperly vouched for the credibility of the victim. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claims that his appellate counsel was ineffective for failing to argue on direct appeal that the State labeled appellant a liar. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. As discussed above, appellant failed to demonstrate that the State labeled appellant a liar. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claims that his appellate counsel was ineffective for failing to argue on direct appeal that the State argued facts not in evidence. Appellant failed to demonstrate that his appellate attorney was deficient or that he was prejudiced. As discussed above, appellant failed to demonstrate that he suffered prejudice when the State referred to the reactions of people who knew the victim. Thus, appellant fails to demonstrate that this issue had a reasonable probability of success

¹⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁵Ford, 105 Nev. at 853, 784 P.2d at 953.

on appeal. Further, at the evidentiary hearing, appellant's appellate attorney stated that he did not raise this claim because he believed that these comments did not warrant individual appellate attention. Therefore, and the district court did not err in denying this claim.

Next, appellant makes numerous challenges to the imposition of lifetime supervision. Appellant argues as follows: (1) that lifetime supervision violates the double jeopardy clause of the constitution, (2) that lifetime supervision imposes an enhancement that was not presented to a jury, (3) that appellant was not properly given notice of lifetime supervision pursuant to NRS 176.0927, (4) that lifetime supervision violates appellant's constitutional right to travel, and (5) that lifetime supervision unconstitutionally restricts appellant's first amendment rights. Claims (1), (2), and (3) could have been raised on appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so.¹⁶ Further, it appears that claims (4) and (5) are not ripe as no specific conditions have been imposed at this time.¹⁷ Therefore, the district court did not err in denying these claims.¹⁸

¹⁶NRS 34.810(1)(b); see also 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).

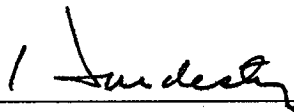
¹⁷Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002).

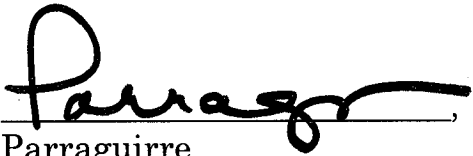
¹⁸Appellant argues in his reply brief that these issues should have been raised by appellant's appellate counsel on direct appeal, therefore appellant received ineffective assistance of his appellate counsel. However, appellant did not raise the issue of ineffective assistance of appellate counsel on these issues in his opening brief, and because reply briefs are limited to countering any matter set forth in answering briefs,

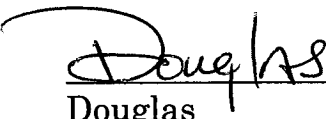
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Accordingly, having considered Obando's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.¹⁹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
Karla K. Butko
Bismark Antonio Obando
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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we decline to consider these claims. See NRAP 28(c); see also Bongiovi v. Sullivan, 112 Nev. 556, 570 n.5, 138 P.3d 433, 443 n.5 (2006).

¹⁹Because Obando is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider the proper person documents that Obando has submitted to this court in this matter.