

IN THE SUPREME COURT OF THE STATE OF NEVADA

JODY BACON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50420

**FILED**

MAR 26 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Jody Bacon's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In September, 2004, the district court convicted appellant, pursuant to a jury verdict, of three counts of sexual assault on a minor under the age of fourteen, four counts of lewdness with a child under the age of fourteen, two counts of lewdness with a child under the age of fourteen with the use of a deadly weapon, and one count of first-degree kidnapping. The district court sentenced appellant to multiple concurrent and consecutive life terms in the Nevada State Prison with the possibility of parole. This court affirmed appellant's conviction on direct appeal. Bacon v. State, Docket No. 43994 (Order of Affirmance, October 19, 2006). The remittitur issued on November 15, 2006.

On August 2, 2007, appellant, through counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The

State opposed the petition. Following a hearing, the district court denied appellant's petition on October 29, 2007. This appeal follows.

Appellant argues that the district court erred in denying his 11 claims of ineffective assistance of 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 was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. 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 in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. To demonstrate that counsel was ineffective, a petitioner must also support his claims with specific factual assertions, and may not assert "naked" claims for relief. See Pellegrini v. State, 117 Nev. 860, 889, 34 P.3d 519, 538 (2001).

First, appellant argues that trial counsel was ineffective for failing to investigate his claims that he was "out of town" when some of the alleged acts occurred. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. Beyond his general allegation, appellant failed to specify any details of his alibi defense that trial counsel should have investigated. At trial, appellant expressed his frustration regarding counsel's lack of investigation into his alibi defense. Trial counsel responded that he believed such an investigation would be futile, and that as a strategic matter, investigation into appellant's claims of an

alibi was unnecessary. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here. See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) abrogated in part on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). Given the victim's age, it is understandable that the victim may not perfectly recall dates of abuse. To show that appellant was out of town on specific dates would have little probative value, indicating that counsel's decision not to investigate appellant's alibi claims was reasonable. See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (noting that while a sexual assault victim must testify with some particularity regarding the charged events, a child victim need not recall the exact number of incidents or specific dates upon which the charged conduct occurred). In addition, given the other overwhelming evidence presented against appellant, including the victim's testimony, DNA evidence, and the letter written by appellant to his family, we conclude that appellant did not demonstrate that investigation of his alleged alibi would have produced a different result at trial. Therefore, the district court did not err in denying this claim.

Second, appellant argues that trial counsel was ineffective for failing to contact witnesses identified by the defendant who would testify that the victim always appeared happy during the time of the alleged abuse, and that the victim and her mother both had a reputation for "being manipulative," and lying to get their way. Appellant fails to show that he was prejudiced. Even if such testimony was presented, appellant

failed to demonstrate a reasonable probability of a different outcome given the overwhelming evidence presented against appellant, including DNA evidence and appellant's letter to his family. Therefore, the district court did not err in denying this claim.

Third, appellant argues that trial counsel was ineffective for failing to present testimony of his own character for truthfulness. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. As appellant did not testify at trial, appellant's reputation for honesty was not generally relevant to the defense. Therefore, counsel was not deficient for failing to produce this evidence. Further, appellant has not specifically described the evidence counsel should have presented, nor has he shown how the result at trial would have been different had the jury been presented with this evidence. Accordingly, given the other overwhelming evidence presented against appellant, we conclude that the district court did not err in denying this claim.

Fourth, appellant argues that trial counsel was ineffective for failing to file a motion to suppress evidence stemming from the traffic stop by Officer Cripe. Appellant argues that there was no probable cause to stop his vehicle on the night of his arrest. Appellant failed to demonstrate that counsel was deficient. "[A] vehicle stop that is supported by probable cause to believe that the driver has committed a traffic infraction is 'reasonable' under the Fourth Amendment, even if a reasonable officer would not have made the stop absent some purpose unrelated to traffic enforcement." Gama v. State, 112 Nev. 833, 836, 920 P.2d 1010, 1012-13 (1996) (citing Whren v. United States, 517 U.S. 806 (1996)). Here, Officer

Cripe testified that appellant's vehicle was illegally parked in a traffic lane, indicating that the stop was supported by probable cause, and that a motion to suppress would not have been meritorious. Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that trial counsel was ineffective for stipulating to the chain of custody of some of the victim's clothing recovered from appellant's car. Appellant failed to specify any defects regarding the chain of custody. Therefore, given appellant's failure to support this claim with factual assertions, the district court did not err in denying this claim.

Sixth, appellant argues that counsel was ineffective for failing to cross examine Officer Cripe regarding the circumstances of the traffic stop, and "potential inaccuracies" in his testimony. Appellant fails to specify what additional questions counsel should have asked, or what the "potential inaccuracies" in Officer Cripe's testimony were. In addition, even if counsel had established several technical inaccuracies in Officer Cripe's description of the initial traffic stop, given the other overwhelming evidence presented against appellant, appellant did not demonstrate that the result of the trial would be any different. Therefore, the district court did not err in denying this claim.

Seventh, appellant argues that counsel was ineffective for failing to cross examine the victim regarding changes in her testimony. Appellant fails to demonstrate that counsel was deficient, or that he was prejudiced. On cross examination, counsel asked the victim if her story had changed over time, and the victim acknowledged that it had. Counsel

did not pursue this line of questioning further. Given the age of the victim, it was an understandable strategic decision of counsel to not cross examine the victim more aggressively. See Howard, 106 Nev. at 722, 800 P.2d at 180 (noting that strategic decisions of counsel are virtually unchallengeable absent extraordinary circumstances). In addition, as the victim had already acknowledged that her story had changed from when she first spoke to the police, appellant did not demonstrate that the result of the trial would have changed if counsel had cross examined the victim more aggressively. Therefore, the district court did not error in denying this claim.<sup>1</sup>

Eighth, appellant argues that trial counsel was ineffective for delivering an inadequate opening statement. Appellant fails to show that counsel was deficient, or that he was prejudiced. Appellant argues that counsel's opening statement was ineffective because it comprised only one page of trial transcript, did not specifically refer to any evidence, and simply requested that the jury ensure that they held the State to its burden of proof. Appellant has not specified what additional pieces of information counsel should have included in his opening, nor has he shown that the result of trial would have been any different if counsel had

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<sup>1</sup>To the extent appellant also argues that trial counsel should have cross examined various police officers regarding the inconsistencies in the victim's statements to the police, appellant has failed to identify any specific factual inconsistencies that should have been the subject of questioning. Accordingly, the district court did not error in denying this claim.

delivered a longer opening statement. In addition, counsel's decision to deliver a short opening statement was strategic in nature, and appellant did not demonstrate any "extraordinary circumstances" necessitating judicial review of this decision. See id. Therefore, the district court did not err in denying this claim.

Ninth, appellant argues that trial counsel was ineffective for stating in closing argument that there was no evidence of violence or actual penetration by appellant. Appellant argues that this was inappropriate because the State had not alleged actual penetration or violence. Appellant fails to show that counsel was deficient, or that he was prejudiced. During closing argument, counsel stated that the examining doctor found

no bruises . . . , no bleeding, she found no evidence of trauma to the vaginal area, no evidence of redness, no cuts to the hymen, no evidence of penetration.

The State charged appellant with three counts of sexual assault of a minor under the age of fourteen. Sexual assault requires proof of some type of penetration, either through digital penetration, cunnilingus, or sexual intercourse. See NRS 200.364; NRS 200.366. Counsel's references to bleeding, bruising, and redness appear to be interconnected with his argument attacking a finding of penetration. Therefore, counsel was not ineffective for arguing that there was no evidence of penetration. In addition, appellant has not demonstrated that omission of this statement would have had any reasonable probability of altering the jury's verdict. Accordingly, the district court did not err in denying this claim.

Tenth, appellant argues that trial counsel was ineffective for referring to him twice as a child molester in open court. Appellant fails to demonstrate that he was prejudiced. Despite appellant's contentions, he provides no citation to the record demonstrating that trial counsel referred to him as a child molester in court. Rather, it appears that appellant twice complained to the judge, outside the presence of the jury, that the trial counsel had called him a child molester during their conversations. Because the jury was not privy to any of these interactions, appellant has not demonstrated how this conduct had any reasonable probability of altering the jury's verdict. Accordingly, the district court did not err in denying this claim.

Finally, appellant argues that all of the actions of counsel described above indicate that trial counsel was ineffective for failing to subject the case against appellant to meaningful adversarial testing. As established by the United States Supreme Court in United States v. Cronic,

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.

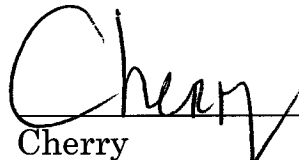
466 U.S. 648, 656 (1984) (internal footnote omitted). Appellant fails to demonstrate that trial counsel failed to subject the State's case to meaningful adversarial testing. Trial counsel asked multiple follow up




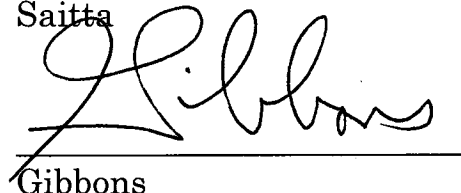
questions to the jury following voir dire by the district court judge, and exercised all of the defense's peremptory challenges. Trial counsel cross-examined each witness, and made multiple objections during the State's examination of witnesses and during its closing argument. Trial counsel moved for a directed verdict after the victim was unable to identify the appellant on the day of trial, due to changes in his appearance. Given each of these actions, we conclude that counsel appropriately tested the State's case. Therefore, the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.

  
Cherry, J.

  
Saitta, J.

  
Gibbons, J.

cc: Hon. Michelle Leavitt, District Judge  
Patti, Sgro & Lewis  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk