

IN THE SUPREME COURT OF THE STATE OF NEVADA

DION FABION CASTEEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50486

FILED

SEP 24 2009

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Dion Fabion Casteel's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On September 24, 2003, the district court convicted Casteel, pursuant to a jury verdict, of ten counts of sexual assault of a minor under the age of fourteen and twelve counts of production of child pornography. The district court sentenced Casteel to serve concurrent terms of life in the Nevada State Prison with the possibility of parole after twenty years for the sexual assault counts and concurrent terms of life with the possibility of parole after ten years for the child pornography counts. The district court imposed the sentences for the child pornography counts consecutive to the sexual assault sentences. On appeal, this court affirmed the judgment of conviction in part but reversed eight counts of production of child pornography. Casteel v. State, 122 Nev. 356, 131 P.3d 1 (2006). The remittitur issued on June 13, 2006.

On June 13, 2007, Casteel 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 Casteel or to conduct an evidentiary hearing. On September 12, 2007, the district court denied Casteel's petition. This appeal followed.

In his petition, Casteel contended that his trial counsel was ineffective on seven grounds, none of which warrant relief. 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.

Failure to interview witnesses

Casteel claimed that his counsel was ineffective for failing to contact or interview witnesses. Specifically, he claimed that his counsel failed to: (1) question the victim's mother concerning the fact that the victim had been seen conversing with older men; (2) interview the victim's mother about the victim's knowledge of sexual matters, particularly that the victim knew about sexual acts, admitted that she encouraged the contact between her and Casteel, enjoyed the contact, and bragged about the contact; and (3) interview a friend of the victim and that friend's mother about the victim's knowledge of sexual matters and the victim's promiscuousness. He claimed that these proposed inquiries would have

revealed evidence that demonstrated that the victim understood the nature of her contact with Casteel and could consent to it.

“An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary.” State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691). A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Casteel failed to demonstrate deficiency or prejudice. The mere fact that the victim may have spoken to other men, without more, is not evidence that she understood sexual matters or was capable of resisting Casteel’s advances. Even if the proffered evidence showed that the victim had some knowledge of sexual matters, it does not necessarily speak to whether she was emotionally capable of resisting sexual advances. Regarding the evidence of promiscuity, while NRS 48.069 permits the introduction of evidence of prior sexual conduct to prove that a sexual assault victim consented to the assault, it does not address whether such evidence is admissible to prove that a victim was capable of consent. Further, evidence of the victim’s promiscuity would not necessarily demonstrate that she was capable of resisting sexual advances. In light of the evidence that Casteel had raised the victim since she was two years old and that he had engaged in sexual conduct with her between the ages of nine and eleven, he did not demonstrate that the jury would have concluded that the victim’s apparent sexual knowledge was attributable to a circumstance other than that contact with him. Therefore, the district court did not err in denying this claim.

Failure to call psychological expert

Casteel claimed that his counsel was ineffective for failing to call a psychological expert as a witness. He contended that an expert witness would have testified to: (1) whether the victim understood the nature of the acts at issue; (2) whether the acts were against the victim's will; (3) whether the victim was capable of resisting; and (4) whether Casteel could have reasonably believed, based on the victim's behavior, that she understood the nature of acts and could consent to them. Casteel failed to demonstrate that his counsel was deficient or that he was prejudiced. While Casteel identified the specific testimony he hoped to elicit, he did not identify any expert who would have offered this testimony. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Failure to call medical expert

Casteel claimed that his counsel was ineffective for failing to call an expert witness to explain that the victim could not have contracted Chlamydia from Casteel unless he also had the disease. He asserted that if he showed that the victim had sex with other individuals it would have demonstrated that she had the capacity to consent. Casteel failed to demonstrate that his counsel was deficient or that he was prejudiced. While Casteel identified the specific testimony he hoped to elicit, he did not identify any expert who would have offered this testimony. See id. Further, the presence of a sexually transmitted disease that was not the result of her contact with Casteel may indicate that she had sexual contact with another individual, but it does not necessarily indicate that she consented or could consent to that contact. Therefore, the district court did not err in denying this claim.

Failure to cross-examine victim's mother

Casteel claimed that his counsel was ineffective for failing to cross-examine the victim's mother concerning her statements that were made to the police. Specifically, he claimed that police reports indicated that the victim told her mother that "I've got your man," and that the victim acknowledged that "she liked some of the things they did together," and sometimes encouraged the conduct. Casteel failed to demonstrate that his counsel was deficient or that he was prejudiced. During cross-examination, the victim acknowledged that some of her contact with Casteel physically felt good. Further, the victim's mother stated that the victim acknowledged that she felt like she was competing with her mother for Casteel. Moreover, in light of the evidence that Casteel had raised the victim since she was two years old and that he had engaged in sexual conduct with her between the ages of nine and eleven, he did not demonstrate that the jury would have concluded that the victim's statements evidenced her knowledge of and capacity to consent to sexual conduct rather than that they were the result of the sexual contact. Therefore, the district court did not err in denying this claim.

Defense of consent

Casteel claimed that his counsel was ineffective for failing to pursue a defense that the acts performed on the victim were not against her will and were conducted under circumstances that he knew or should have known that the victim was incapable of resisting or understanding the nature of the acts. At most, Casteel asserted, he was guilty of the lesser-included offense of statutory sexual seduction. He failed to demonstrate that his counsel was deficient. During opening arguments, counsel conceded that Casteel was guilty of statutory sexual seduction but

argued that a conviction of sexual assault was not appropriate. During the State's case, counsel's cross-examination of the victim focused on her participation and understanding of their relationship. Specifically, counsel inquired as to whether Casteel used threats or violence to force her into engaging in sexual conduct. Counsel also inquired as to whether the victim ever instigated any sexual conduct. Casteel testified in his own defense that the victim instigated the sexual contact and willingly participated in it. And again, in the closing arguments, counsel conceded that Casteel was guilty of statutory sexual seduction but not sexual assault. Therefore, the district court did not err in denying this claim.

Jury instruction

Casteel claimed that his counsel was ineffective for failing to request a jury instruction on "mistaken belief of consent." Appellant contended that his counsel should have requested an instruction similar to the proposed jury instruction in Honeycutt v. State, 118 Nev. 660, 670-71, 56 P.3d 362, 369 (2002), overruled in part on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005). Appellant failed to demonstrate that his counsel was deficient. "[A] proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration." Honeycutt v. State, 118 Nev. 660, 670, 56 P.3d 362, 369 (2002). However, Honeycutt was prosecuted on a theory of forcible rape where consent was an issue. Id. at 663-66, 56 P.3d at 364-66. In the instant case, however, actual consent was not an issue. Rather, the capacity to consent, which was an issue in this case, was not addressed by the proposed instruction.

Moreover, Casteel failed to demonstrate that he was prejudiced. The jury was instructed, as NRS 200.366(1) provides, that it

could not find Casteel guilty of sexual assault unless it found beyond a reasonable doubt that the sexual penetration occurred “under conditions in which the perpetrator knows or should have known that the victim is mentally or physically incapable of resisting or understanding the nature of the defendant’s conduct.” Thus, the jury was permitted an adequate opportunity to consider Casteel’s defense under the instructions given. Cf. Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (“It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury.” (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991)), cert. denied, ___ U.S. ___, 129 S. Ct. 95 (2008)). Therefore, the district court did not err in denying this claim.

Failure to object to prosecutor’s comments

Casteel claimed that his counsel was ineffective for failing to object to the State’s comment that “[Casteel] treated that apartment like it was his personal jungle and like she was his chosen prey.” Casteel failed to demonstrate that his counsel was deficient. This court has found such an argument proper where the evidence shows that the defendant repeatedly molested the victim. See id. at 209-10, 163 P.3d at 418-19; see also Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 58-59 (2005) (providing that State’s characterization that defendant “preyed” upon victims from which he stole was supported by evidence).

Even assuming that the challenged comment was improper, Casteel failed to demonstrate that he was prejudiced considering overwhelming evidence that he sexually assaulted a child under the age of fourteen and produced child pornography. See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000); Ross v. State, 106 Nev. 924, 928, 803

P.2d 1104, 1106 (1990); see also NRS 178.598. In particular, the victim testified that Casteel engaged in sexual conduct with her over the course of several years, while she was between the ages of nine and eleven, and photographed her in lewd poses and engaging in sexual conduct. Casteel admitted that he engaged in sexual conduct with the victim and took the aforementioned photographs, which were admitted. Therefore, the district court did not err in denying this claim.

Casteel also claimed that his counsel was ineffective for failing to object to the prosecutor's comments that the victim testified that (1) Casteel paid her to swallow his semen and (2) the victim contracted a sexually transmitted disease from Casteel. He contended that the statements were not supported by the evidence. Casteel failed to demonstrate that his counsel was deficient. Regarding the first statement, the State elicited testimony from the victim that Casteel paid her to swallow his semen. Regarding the second statement, the State did not argue that Casteel infected the victim with a sexually transmitted disease but merely pointed out that she tested positive for it. A doctor that examined the victim testified that a swab from her rectum revealed the presence of Chlamydia. Thus, the State's arguments were proper comment on the evidence presented or a reasonable inference derived from that evidence. See Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) ("The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."). Therefore, the district court did not err in denying this claim.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Casteel is not entitled to relief and that

briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, C. J.
Hardesty

Gibbons, J.
Gibbons

CHERRY, J., dissenting:

I respectfully dissent.

Cherry, J.
Cherry

cc: Hon. David B. Barker, District Judge
Dion Fabion Casteel
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk