IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
YURIK MIKAYELYAN,
Respondent.

No. 50606

FILED

DEC 03 2008

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

ORDER OF AFFIRMANCE

This is the State's appeal from an order of the district court granting respondent Yurik Mikayelyan's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

On January 3, 2006, the district court convicted Mikayelyan, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced Mikayelyan to serve a prison term of 10 to 20 years. We affirmed the judgment of conviction.[1]

On March 30, 2007, Mikayelyan filed a timely post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition and Mikayelyan opposed the State's motion. Thereafter, the district court held an evidentiary hearing, entered findings of fact and conclusions of law, and granted the petition. This appeal followed.

[1]Mikayelyan v. State, Docket No. 46583 (Order of Affirmance, November 13, 2006).

The State contends that the district court abused its discretion during the evidentiary hearing by "allowing a witness to testify, over objection, to his opinion about whether the men he had interviewed were telling the truth." The State further claims that the district court's decision to admit this witness' opinions into evidence infected the entire post-conviction proceeding.

"A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong."[2]

During the evidentiary hearing, Private Investigator Randall Leben testified that he was retained by defense counsel to locate and interview two men: Gevorg Harutyunyan and Artak Mnatsakanyan. Leben testified that when he interviewed Gevorg, Gevorg said that he had had sexual relations with the victim. Post-conviction counsel asked Leben what conclusions he had drawn from Gevorg's body language and Leben responded, "non-deceptive and actually a lack of apprehension." The State objected to Leben's "testimony on the subject of someone else's veracity," whereupon the following colloquy occurred:

> [POST-CONVICTION COUNSEL]: Well, Your Honor, I can move to admit Mr. Leben as an expert witness as it relates to interpreting body language based upon his prior experience, education, training and career with the FBI. In addition to that, Your Honor, it goes to his mental state of mind as to whether or not he was getting a good interview from this witness.

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[2]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

> THE COURT: All right. I'll overrule this. I think that Mr. Leben has sufficient background and training from the Federal Bureau of Investigation in this area here. Go ahead.
>
> [THE STATE]: Your Honor, are you admitting it for the truth that his opinion is correct, or that he believed the witness was being truthful?
>
> THE COURT: Just his belief, just the witness's belief.

Thereafter, without objection, Leben testified that he also interviewed Artak, that Artak said that he had had sexual relations with the victim, and that Artak's body language indicated that he was being truthful. We conclude that the district court did not abuse its discretion by admitting this testimony into evidence for the limited purpose of showing that Leben believed that the information he collected during his interviews was valid. We note that Gevorg and Artak later testified at the evidentiary hearing, thereby providing the district court with an opportunity to consider their credibility.

The State also presents three challenges to the district court's determination that trial counsel had rendered 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, and that the petitioner was prejudiced by counsel's performance.[3] Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is

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[3]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

therefore subject to independent review.[4] However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."[5]

First, the State claims that "[t]he district court erred in finding that the testimony of two men who claimed to have had sex with the victim some weeks before the crime was admissible to impeach the victim's denial of such sexual activity." The State specifically asserts that it was defense counsel who first asked the victim about her sexual history, not the prosecutor.

NRS 50.090 prohibits the accused from impeaching a sexual assault victim's credibility with evidence of her prior sexual conduct, "unless the prosecutor has presented evidence [of the victim's previous sexual conduct] or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim."

Here, the prosecutor opened the door to questions about the victim's previous sexual conduct on direct-examination when she presented evidence that the victim (1) was not having sex with her estranged husband, (2) possibly told a SART examiner that she had consensual intercourse several days prior to the alleged sexual assault, (3) did not remember if she was still having sexual relations with her husband in the course of trying to reconcile with him, and (4) was not

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[4]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[5]Id.

having sexual relations with anyone besides her husband. Under these circumstances, defense counsel was permitted to introduce evidence challenging the victim's assertion that she was not having sexual relations with anyone. Accordingly, the district court's finding to this effect is supported by substantial evidence and is not clearly wrong as a matter of law.[6]

Second, the State claims that the district court erred by finding that the testimony of the men who claimed to have had sex with the victim was admissible to corroborate the defense's theory that Mikayelyan had a reasonable but mistaken belief as to consent by the victim. The State specifically asserts that no evidence of this theory was presented at trial and therefore there was nothing to corroborate. However, the State appears to have misapprehended the district court's findings.

The district court found that defense counsel knew that Garik Mikayelyan (Mikayelyan's son) could testify about Mikayelyan's knowledge of the victim's prior sexual relations with the other young men. The trial judge had instructed defense counsel not to get into the victim's sexual history, but had not closed the door to the defense on this issue. Defense counsel knew that this issue was critical to the defense of "reasonable but mistaken belief" of the victim's consent, but failed to (1) make any offers of proof, (2) explore the victim's sexual relationships with these men during the trial, or (3) try to use this evidence for impeachment purposes.

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[6]See Johnson v. State, 113 Nev. 772, 777, 942 P.2d 167, 170-71 (1997); Cox v. State, 102 Nev. 253, 256-57, 721 P.2d 358, 360 (1986).

The district court further found that defense counsel's failure "to argue [for] the admission of the evidence of [the victim's] sexual relationship with the young men here and present [Mikayelyan's] knowledge thereof in support of the 'reasonable but mistaken belief' of consent defense" constituted deficient performance. We note that the district court's findings are supported by substantial evidence and are not clearly wrong as a matter of law, and we conclude that the State has failed to demonstrate error in this regard.

Third, the State claims that the district court erred by finding that the trial result may have been different "if the jury had heard the evidence that the victim had had sex with two other men, some weeks earlier, in a different location, under different circumstances." The State asserts that most courts that have considered this issue "have concluded that a properly instructed jury, conscientiously following its instructions, could not possibly reach the conclusion" that a victim's past sexual behavior gives rise to a reasonable belief that she had consented to the sexual encounter that is the subject of the criminal charge.[7]

The district court found that this was a close case, the only witnesses were the victim and Mikayelyan, and the evidence regarding the victim's credibility and Mikayelyan's state of mind was critical to the determination of guilt or innocence. Further, the district court found that Mikayelyan demonstrated a reasonable probability that, but for defense counsel's failure to challenge the victim's credibility and support the

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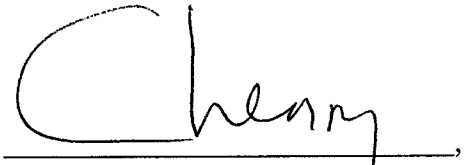
[7]The State cites to Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981); United States v. Kasto, 584 F.2d 268, 271 (8th Cir. 1978); and People v. Williams, 330 N.W.2d 823, 827-31 (Mich. 1982).

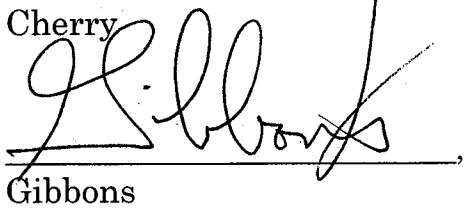
defense theory of the case with evidence of the victim's prior sexual history, the result of the trial would have been different. We conclude that the State has failed to demonstrate that district court erred in this regard.

Having considered the State's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



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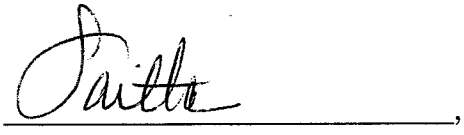

_____, J.
Saitta

cc: Hon. Patrick Flanagan, District Judge
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Chesnoff & Schonfeld
Washoe District Court Clerk