

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL WILLIAM THOMAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50697

**FILED**

SEP 04 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

This is an appeal from an order of the district court dismissing appellant Daniel Thomas' post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Mineral County; Robert W. Lane, Judge.

On July 23, 2003, the district court convicted appellant, pursuant to a jury verdict, of two counts of lewdness with a child under the age of 14 years. The district court sentenced appellant to two consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed the judgment of conviction and sentence on direct appeal. Thomas v. State, Docket No. 43168 (Order of Affirmance, December 20, 2005). The remittitur issued on January 17, 2006.

On June 22, 2006, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed post-conviction counsel, and counsel filed a supplement to the petition. The State opposed the petition. Pursuant to NRS 34.770, the district court declined to hold an evidentiary hearing. On November 13, 2007, the district court dismissed the petition. This appeal follows.

Appellant argues that the district court erred in rejecting his claims that he received ineffective assistance of trial and appellate counsel. Appellant further argues that he is entitled to a new trial based on newly discovered evidence and false evidence presented at trial. He also contends that the State violated his due process rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Appellant asserts that he should have received an evidentiary hearing on all of his claims. For the reasons stated below, we conclude that these claims lack merit, and affirm the decision of the district court.

Ineffective assistance of counsel claims

Appellant claims that he received ineffective assistance of trial counsel due to counsel's failure to request an independent psychological examination of the victims, failure to request an independent medical examination of the victims, failure to file a motion to exclude evidence related to the sheriff's interrogation of the appellant, failure to investigate the victims, failure to file a pretrial petition for a writ of habeas corpus, and the failure to request a limiting instruction involving prior bad act evidence admitted at trial. Appellant also claims that appellate counsel was ineffective for failing to raise the limiting instruction issue on appeal. Finally, appellant contends that the cumulative effect of these errors indicates that appellant received ineffective assistance of trial and appellate counsel.

To state a claim of ineffective assistance of trial 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). Similarly, to support a claim of ineffective assistance of appellate counsel, a petitioner must show that his counsel's performance both fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal. Strickland, 466 U.S. at 694; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996). 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). An appellant is entitled to an evidentiary hearing on claims of ineffective assistance of counsel only if he raises claims supported by factual assertions that, if true, would entitle him to relief, and those claims are not belied by the record on appeal. Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984).

Failure to request an independent psychological exam of the victims

Appellant first claims that trial counsel was ineffective for failing to request an independent psychological examination of the victims. We conclude that appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. To obtain an independent psychological examination of a child sexual assault victim, a defendant must demonstrate that a compelling need exists for the examination. Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000). In determining whether or not a compelling need exists, a district court weighs (1) whether the State "calls or obtains some benefit from an

expert in psychology or psychiatry;” (2) “whether evidence of the offense is supported by little or no corroboration beyond the testimony of the victim;” and (3) “whether there is a reasonable basis for believing that the victim’s mental or emotional state may have affected his or her veracity.” *Id.* at 1116-17, 13 P.3d at 455; see also *Abbott v. State*, 122 Nev. 715, 728, 138 P.3d 462, 471 (2006) (reaffirming the test set forth in *Koerschner*).

With respect to the first factor of this test, appellant argues that the State obtained the benefit of an expert at trial because

the State called Denise Brown [the victims’ mother] to testify at trial and this witness made specific reference to Dr. Lippert, the children’s counselor. The State’s reference to the children’s counselor provided a benefit to the state because it provided information to the jury that the children were in counseling and having problems.

We disagree. In *Abbott v. State*, this court concluded that the State generally obtains benefit from a psychological expert when a witness “describes techniques used to determine truthfulness, analyzes the facts of the interview, and/or states whether there was evidence that the victim was coached or biased against the defendant.” 122 Nev. at 730, 138 P.3d at 472. Here, Dr. Lippert did not testify, and appellant does not allege that Denise Brown’s testimony made any reference to Dr. Lippert’s opinions regarding whether or not the victims were telling the truth. Therefore, the State did not obtain the benefit of an expert at trial. Regarding the second and third factors of the test, while appellant presented evidence that the victims had a propensity for lying, the abuse was corroborated by other evidence, including appellant’s own acknowledgement that he had touched the victims inappropriately. Accordingly, it is highly unlikely that the district court would have found a

compelling reason to order an independent psychological examination of the victims. Counsel cannot be deemed ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In addition, given the other overwhelming evidence presented against appellant, including his own acknowledgement that he touched the victims inappropriately, appellant has not demonstrated reasonable probability of a different result at trial had appellant obtained an independent psychological examination. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to request an independent medical examination of the victims

Next, appellant claims that trial counsel was ineffective for failing to request an independent medical examination of the victims. Appellant does not indicate what evidence, if any, an independent medical examination would have revealed, nor does he cite any law indicating that he was entitled to an independent medical examination. "Contentions unsupported by specific argument or authority should be summarily rejected on appeal." Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000). In addition, penetration is not an element of lewdness with a child under the age of 14. NRS 201.230. Thus, even if an independent medical examination revealed no evidence of vaginal penetration of either victim, this evidence would not be exculpatory in nature. Given the other overwhelming evidence presented against appellant, including his own admission that he inappropriately touched the victims, appellant has not demonstrated any reasonable probability of a different result at trial had counsel sought an independent medical examination. Therefore, the

district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to file a motion to exclude evidence

Next, appellant claims that trial counsel was ineffective for failing to file a motion to exclude statements made to Detective Kelley Heydon of the Washoe County Sheriff's Office. After appellant was arraigned and appointed counsel in the Fifth Judicial District (Mineral County), he was interviewed by Detective Heydon regarding possible sexual abuse of the victims that occurred in Washoe County. In that interview, appellant stated that he "probably" had previously had inappropriate sexual contact with C.B. Because his attorney was not present at this interview, appellant contends that counsel was ineffective for failing to file a motion to exclude this statement. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The Sixth Amendment right to the assistance of counsel is offense specific. See Texas v. Cobb, 532 U.S. 162, 167-68 (2001). While appellant had been appointed counsel in connection with the charged abuse in Mineral County, the interview with Detective Heydon, and appellant's subsequent confession, concerned other misconduct that occurred in Washoe County. Therefore, a motion to exclude the evidence from this interview would have had little likelihood of success on the merits. See Donovan, 94 Nev. at 675, 584 P.2d at 711. Further, given appellant's other properly admitted confession to Sergeant David Cornell concerning the conduct at issue in Mineral County, appellant has failed to show a reasonable probability of a different result had his statements to Detective Heydon been excluded. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.

### Failure to investigate the victims' backgrounds

Next, appellant contends that trial counsel was ineffective for failing to adequately investigate the victims' backgrounds. Appellant alleges that trial counsel had information that the victims had not been truthful in prior instances, and that one of the victims wrote in her diary that "nobody" liked appellant, and that she hoped God would help her "get rid" of appellant, and that her "real father" would come back. Based on these statements, appellant argues that trial counsel should have performed additional investigation into the victims' backgrounds. We conclude that appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At trial, counsel called multiple defense witnesses who testified that C.B. and T.B. were liars, or capable of lying. The diary excerpt was admitted at trial. Appellant has failed to indicate what evidence, if any, would have been revealed by further investigation into the victim's backgrounds. Further, given the other overwhelming evidence presented against appellant at trial, appellant has failed to demonstrate any reasonable probability of a different result had trial counsel performed additional investigation. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

### Failure to file a pretrial petition for a writ of habeas corpus

Next, appellant argues that trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus. Appellant argues that at the preliminary hearing, the victims did not testify to the alleged acts with adequate specificity and did not sufficiently identify the defendant, indicating that trial counsel should have sought a pretrial petition for a writ of habeas corpus. We conclude that appellant failed to

demonstrate that counsel's performance was deficient or that he was prejudiced. To bind a defendant over on a criminal charge, the State must demonstrate probable cause that the suspect committed the charged crime, in this case, two counts of lewdness with a child under the age of 14. See Sheriff v. Steward, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993). A determination of probable cause may be based on slight or even marginal evidence; it does not involve a determination of the guilt or innocence of the accused. Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). The State must also present some corroborative evidence, beyond the statements or confessions of the accused, to establish the elements of the crime charged. Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). However, this "corroborative evidence need not be sufficient, independent of the [accused's] statements, to establish . . . that the offense has been committed." Id. (quoting United States v. Todd, 657 F.2d 212, 216 (8th Cir.1981)).

In this case, each of the minor victims testified at the preliminary hearing that appellant had touched them on their breasts and on their vaginas. One of the victims testified that this took place when they were living in Hawthorne, Nevada. Sergeant Cornell testified that he had interviewed each of the victims and that they had identified the appellant as the person who had touched her. Sergeant Cornell identified appellant on the record. Sergeant Cornell also testified that appellant had lived with the victims on English Street, in Hawthorne, and that appellant had admitted to him that during the preceding January, he had fondled each of the victims after disciplining them. Despite arguments by trial counsel that the State had not established the location of the crime or sufficiently identified the defendant, the justice court concluded that the



State sufficiently established probable cause to establish that appellant had committed two counts of lewdness with a child under the age of 14. Given the testimony presented, we agree that the State established probable cause, indicating that a pretrial petition for a writ of habeas corpus would have had little likelihood of success on the merits. As indicated above, counsel will not be deemed ineffective for failing to file futile motions. Donovan, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to request a limiting instruction

Next, appellant argues that trial counsel was ineffective for failing to request a limiting instruction after certain bad act evidence was introduced. Specifically, appellant claims that a limiting instruction should have been introduced after Detective Heydon testified that appellant had confessed to inappropriately touching C.B. in connection with an investigation in Washoe County. Appellant also claims that a limiting instruction should have been introduced after testimony by Nurse Lily Clarkson indicated that C.B. presented vaginal injuries consistent with penetration. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. With respect to the testimony of Nurse Clarkson, it does not appear that a limiting instruction was necessary, as Nurse Clarkson's testimony, did not, in and of itself, implicate appellant. Regarding the testimony of Detective Heydon, a limiting instruction would have been appropriate immediately following Detective Heydon's testimony. See Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). Even so, the jury received the appropriate limiting instruction at the close of evidence. This court has concluded

that failure to give a contemporaneous limiting instruction is “harmless if the error did not have a substantial and injurious effect or influence the jury’s verdict.” Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005). One factor to consider in this analysis is whether the jury was provided a proper limiting instruction prior to deliberation. Id. Given that the jury was provided with a proper limiting instruction prior to deliberation, as well as the overwhelming evidence presented against appellant, we conclude that the failure to give a contemporaneous limiting instruction was harmless. Accordingly, appellant has failed to demonstrate a reasonable probability of a different result had a contemporaneous limiting instruction been given. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Appellant also argues that appellate counsel was ineffective for failing to raise the issue of the limiting instruction on direct appeal. Appellant has failed to demonstrate that appellate counsel’s performance was deficient or that he was prejudiced. As indicated above, the district court’s failure to give the limiting instruction was harmless. Accordingly, this issue would not have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

#### Cumulative error

Finally, appellant argues that the cumulative effect of trial and appellate counsel’s alleged errors indicates that he received ineffective assistance of counsel. Given the overwhelming evidence presented against appellant, including his own confession that he had inappropriate sexual contact with the victims, the jury’s verdict was not rendered unreliable by

the cumulative nature of any of trial or appellate counsel's alleged errors. Therefore, the district court did not err in denying this claim.

New trial and Brady claims

In addition to his claims of ineffective assistance of counsel, appellant claims he is entitled to a new trial on the basis of false evidence presented at trial or newly discovered evidence. He also claims that the State violated his due process rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963). All of these claims center around the testimony of Lily Clarkson, a member of the Child Abuse Report Examination (CARE) team at Northern Nevada Medical Center, who examined both of the victims. Nurse Clarkson testified at trial that C.B. presented injuries consistent with repeated vaginal penetration. Prior to appellant's trial in July of 2003, the State provided the defense with a copy of Nurse Clarkson's curriculum vitae (CV). The most recent "employment" entry stated that Nurse Clarkson worked for Planned Parenthood of Orlando from 1997 to 2000. The CV did not list Nurse Clarkson's current employer.

Appellant now alleges that in 2001, Nurse Clarkson examined two minor victims in an unrelated case and concluded that both of the victims were missing hymenal tissue, indicating sexual abuse. In 2002, a different doctor examined the victims and concluded that both victims had intact hymens. Appellant claims that this "new evidence," as well as the State's failure to provide an updated CV for Nurse Clarkson indicate that appellant is entitled to a new trial on the basis of false or newly discovered evidence, and that the State violated his due process rights pursuant to Brady. For the reason stated below, we disagree.

### False evidence

Appellant claims that he is entitled to a new trial on the basis that Nurse Clarkson presented false testimony at trial. Specifically, it appears appellant contends that Nurse Clarkson's potentially inaccurate conclusions in the unrelated case indicate that her conclusion that C.B. had injuries consistent with vaginal penetration was false. To obtain a new trial on the basis of false testimony, a habeas petitioner must establish that (1) the testimony of a material witness was false; (2) the evidence indicating that the testimony was false is newly discovered; (3) the evidence could not have been discovered before trial with the exercise of reasonable diligence, and (4) "it is probable that had the false testimony not been admitted, a different result would have occurred at trial." Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995).

While the evidence that Nurse Clarkson reached a potentially inaccurate conclusion in an unrelated case may diminish the credibility of her testimony, it does not establish that Nurse Clarkson testified falsely in this case. Further, even if appellant could establish that Nurse Clarkson's conclusions were false, appellant has not demonstrated that a different result would have occurred at trial. Penetration is not an element of lewdness with a child under the age of 14. See NRS 201.230. Therefore, evidence that C.B.'s hymen was intact would not have been exculpatory. Given the overwhelming evidence presented against appellant, including his own admissions that he touched the victims inappropriately, appellant failed to demonstrate a reasonable probability that a different result would have occurred at trial had Clarkson's testimony not been admitted. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Newly discovered evidence

Appellant also contends that he is entitled to a new trial on the basis that Nurse Clarkson's potentially inaccurate conclusions in the unrelated case are newly discovered evidence. First, we note that a motion for a new trial based on newly discovered evidence is governed by NRS 176.515. NRS 176.515(3) provides that "a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt." Appellant did not file his post-conviction petition until June 22, 2006, nearly three years after the district court entered his judgment of conviction. Accordingly, his request for a new trial was untimely, and the district court did not err in denying his request.

Second, even if appellant had filed a motion for a new trial in a timely manner, his claim lacks merit. The standard for a new trial based on newly discovered evidence is that

"(1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits."

Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998) (quoting Callier, 111 Nev. at 988, 901 P.2d at 626). In this case, the newly discovered evidence is simply an attempt to discredit Nurse Clarkson. Thus, appellant cannot establish the sixth element of this test. Further, as indicated above, based on the other overwhelming evidence presented against appellant, appellant failed to demonstrate a reasonable

probability of a different result on retrial. Therefore, the district court did not err in denying this claim.

#### Brady violation

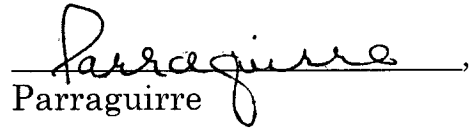
Finally, appellant argues that the State's failure to provide him with a more recent copy of Nurse Clarkson's CV and the failure to inform him that Nurse Clarkson's conclusions in an unrelated case had been questioned resulted in a violation of his due process rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation in a post-conviction petition, a petitioner must demonstrate that: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)). Even if appellant were able to establish that the State withheld the alleged evidence related to Nurse Clarkson, he cannot establish that prejudice ensued. First, the fact that Nurse Clarkson's conclusions in an unrelated case were questioned does not necessarily indicate that she reached the wrong conclusion in this case. Second, as indicated above, penetration is not an element of lewdness with a child under the age of fourteen. Thus, evidence that appellant did not penetrate C.B.'s vagina has little bearing on the question of whether he fondled her inappropriately. Finally, appellant's guilt was proven by other evidence, including his own admissions that he inappropriately touched the victims. Therefore, the district court did not err in denying this claim.


#### Conclusion

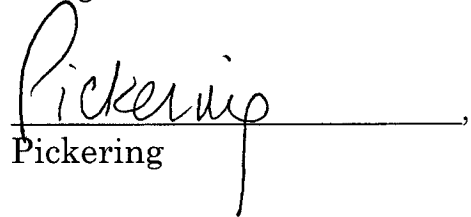
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Robert W. Lane, District Judge  
Law Offices of John P. Schlegelmilch, Ltd.  
Attorney General Catherine Cortez Masto/Carson City  
Mineral County District Attorney  
Mineral County Clerk