

IN THE SUPREME COURT OF THE STATE OF NEVADA

INMER MEJIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50703

FILED

NOV 05 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On July 26, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of sexual assault on a minor under the age of fourteen years and seven counts of lewdness with a minor under the age of fourteen years. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after serving twenty years on the sexual assault count and concurrent terms of life imprisonment on the lewdness counts. This court affirmed the conviction on appeal.¹ The remittitur issued on June 20, 2006.

On March 26, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On

¹Mejia v. State, 122 Nev. 487, 134 P.3d 722 (2006). This court remanded the matter for the district court to correct a clerical error in the judgment of conviction.



that same date, appellant filed a motion for the appointment of counsel, an application to proceed in forma pauperis and a certificate of his inmate account demonstrating his indigency. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 19, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received 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 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.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his trial counsel was ineffective for failing to object to and ask for a curative jury instruction due to alleged prosecutorial misconduct during closing arguments. Specifically, appellant claimed that the prosecutor vouched for the credibility of the victims when he argued:

And you saw how difficult it was for [R.W.] And it was painful for me to have to ask those questions

²Strickland 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).

³Strickland, 466 U.S. at 697.

where she obviously didn't want to answer and obviously didn't want to have to demonstrate that it was that the defendant did. Do you think [R.W.] wanted to come in here and make something up? And if they did, they deserve all the credit in the world, because not only did they fool their friends who associated with on a day-to-day level; their grandparents, who they saw, by their testimony, a number of times a week; their own mother; the case worker who got involved in the case, who admittedly went to the case looking for a reason to dismiss it as a bogus call; and not to mention the people from our office who have been involved in this case. The question is, do you believe [A.W. and R.W.] when they say that the defendant did what he did.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The prosecutor vouches for a witness when the prosecutor "places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'"⁴ The prosecutor's comments in the instant case did not amount to improper vouching as the prosecutor did not place the prestige of the government behind his comments or provide a personal assurance of the veracity of the State's witnesses. Further, appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial given the isolated nature of the comment. Therefore, we conclude that the district court did not err in denying this claim, and we affirm the denial of this claim.

⁴Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (alteration in original)).

Second, appellant claimed that his trial counsel was ineffective for failing to object to and ask for a curative jury instruction due to alleged prosecutorial misconduct during closing arguments. Specifically, appellant claimed that the State made false representations to the jury that the victims had no prior contact with social services when in fact the victims had been exposed to social services. Appellant failed to demonstrate that he was prejudiced. Even assuming that the prosecutor's statement was false, appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel objected to the isolated comments regarding social services. Therefore, we conclude that the district court did not err in denying this claim, and we affirm the denial of this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to conduct adequate pretrial investigation. Appellant claimed that his trial counsel should have interviewed the victims' mother for information regarding the victims' prior husband and stepson because A.W. had been sexually abused by her stepbrother. Appellant claimed that such information would have allowed him to show that A.W. would have known of things of a sexual nature from the prior abuse and would have known of the consequences of a sexual allegation—the removal of the offender from the house. Appellant's theory of defense was that the victims lied about the sexual abuse because they were jealous of the amount of time appellant spent with the victims' mother.

“A child-victim's prior sexual experiences may be admissible to counteract the jury's perception that a young child would not have the

knowledge or experience necessary to describe a sexual assault unless it had actually happened.”⁵ A review of the record on appeal reveals that trial counsel was aware of the prior sexual abuse of A.W. as there was a discussion prior to trial to prohibit testimony regarding penetrating injury findings relating to the prior sexual abuse. However, the record is devoid of any specifics regarding the prior sexual abuse and whether it was probative in the instant case or whether the probative value outweighed the prejudice. Appellant’s theory of defense at trial was that the victims lied about the sexual abuse allegations in the instant case because of their jealousy and wish to remove him from the home. However, because the district court did not conduct an evidentiary hearing on this issue, it is unclear from the record on appeal before this court the reason why this line of inquiry was not pursued, whether an adequate investigation was conducted, or whether this line of inquiry would have changed the outcome of the trial.⁶ Thus, we cannot affirm the denial of this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to conduct an adequate pretrial investigation. Specifically, appellant claimed that A.W. had made a prior false allegation of sexual

⁵Chapman v. State, 117 Nev. 1, 5, 16 P.3d 432, 434 (2001) (citing Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985)).

⁶The decision not to pursue this line of inquiry at trial may very well have been a strategic decision, and strategic decisions of trial counsel are virtually unchallengeable. See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). However, this court is reluctant to presume a strategy where none may have been intended and where the strategy is not patently obvious to anyone viewing the record. Thus, an evidentiary hearing is essential in the evaluation of this claim.

abuse against a former boyfriend of the victims' mother and that trial counsel failed to investigate this prior false allegation.

This court has carved out an exception to the rape shield law to permit introduction of evidence of a prior false allegation of sexual abuse.⁷ In order to introduce this type of evidence, the defendant must prove by a preponderance of the evidence that “(1) the accusations were made; (2) the accusations were false; and (3) the extrinsic evidence is more probative than prejudicial.”⁸ It is not clear from the record on appeal whether there was a prior false allegation of sexual abuse made by A.W., whether trial counsel was made aware by appellant of the prior allegation, or whether trial counsel pursued any investigation into this area. In view of appellant's theory of defense at trial, that the victims lied about the sexual abuse, a prior false allegation of sexual abuse may have had probative value. However, because the district court did not conduct an evidentiary hearing on this issue, it is unclear from the record on appeal before this court the reason why this line of inquiry was not pursued, whether an adequate investigation was conducted, or whether this line of inquiry would have changed the outcome of the trial.⁹ Thus, we cannot affirm the denial of this claim on the record.

⁷Abbott v. State, 122 Nev. 715, 732, 138 P.3d 462, 473-74 (2006).

⁸Id. at 733, 138 P.3d at 474 (quoting Efrain M., a Minor v. State, 107 Nev. 947, 950, 823 P.2d 264, 265 (1991)).

⁹It is not clear from the record on appeal whether appellant could satisfy the requirements for the introduction of such evidence at trial.

Fifth, appellant claimed that his trial counsel was ineffective for failing to have the victims undergo a psychological evaluation because there was a reason to question the veracity of the victims.

The law in effect at the time of appellant's conviction provided that the district court should order a psychological evaluation of the victim if the defendant presented a compelling need for such an examination.¹⁰ In determining whether there is a compelling need, the district court should consider "whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity."¹¹ The district court's findings of fact summarily concluded that trial counsel was not ineffective in this regard, but provided no actual analysis of the factors as set forth above. The district court's conclusions of law contain the list of factors to consider, but again, no analysis or application of the law to the facts is set forth in the district court's order. It is unclear from the record before this court whether trial counsel was deficient in failing to seek a psychological evaluation in light of the theory of defense

¹⁰Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000).

¹¹Id. at 1117, 13 P.3d at 455. These factors are weighed by the district court to determine whether there is a compelling need for such an intrusion and the factors are not necessarily given equal weight.

and appellant's assertion that A.W. made a prior false allegation of sexual abuse. Thus, we cannot affirm the denial of this claim.¹²

Sixth, appellant claimed that his trial counsel was ineffective for failing to file a motion for a new trial based upon newly discovered evidence. Appellant claimed that prior to sentencing trial counsel learned of information that the victims recanted their trial testimony.

In evaluating recantation claims, whether raised in a motion for a new trial or in post-conviction petition for a writ of habeas corpus, the district court should consider whether:

- (1) the court is satisfied that the trial testimony of material witnesses was false;
- (2) the evidence showing that false testimony was introduced at trial is newly discovered;
- (3) the evidence could not have been discovered and produced for trial even 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.¹³

At the sentencing hearing, the parties discussed a telephone call to Child Protective Services that someone placed indicating that in a computer chat room two little girls indicated that they were told to lie in court and their names were A. and R. The State indicated that they had investigated this and concluded that the victims had no access to post such a message. However, trial counsel indicated that her investigation had not been

¹²The basis for this court's decision is the paucity of analysis and is not indicative of any inclination regarding the merits of his claim.

¹³Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995).

completed. The district court denied a request to continue sentencing and indicated the issue could be raised in a post-conviction motion. No such motion was filed in the district court. The district court's denial of this claim simply stated that trial counsel was not ineffective for refusing to move for a new trial. However, the record provides no basis to determine why trial counsel did not file a motion for a new trial and the denial of the claim provides no application of facts to the law. Thus, we cannot affirm the denial of this claim.

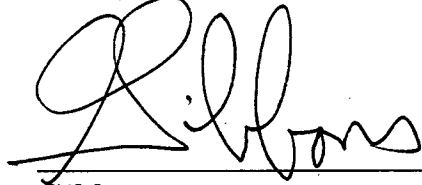
The district court denied the latter four claims without an evidentiary hearing, and these claims raised factual issues outside the record on appeal. Further, as discussed previously, the order of the district court, prepared by the State, contained no application of facts to the law, but rather statements of law and broad findings that trial counsel was not ineffective. These circumstances do not permit adequate appellate review of the claims.¹⁴ Therefore, we reverse the district court's denial of these claims and remand for an evidentiary hearing. In light of the significant consequences of the conviction, a term of life imprisonment, and the potential complexity of these issues both legally and factually, we determine that the district court abused its discretion in denying the motion for appointment of counsel in the instant case.¹⁵ Therefore, we direct the district court to appoint post-conviction counsel.

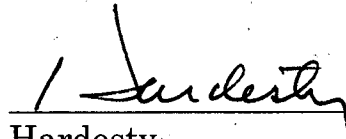
¹⁴Nothing in this order should be interpreted as indicative of the merits of any of the claims.

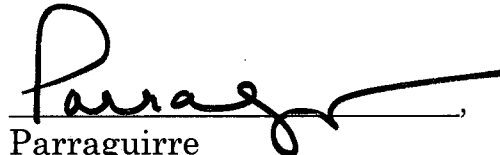
¹⁵See NRS 34.750(1). Notably, appellant filed a motion for the appointment of counsel and a certificate of his inmate account.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁷


_____, C. J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Jackie Glass, District Judge
Inner Mejia
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.