

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD JOHNSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52830

FILED

JUN 23 2010

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus and a post-conviction petition for a writ of habeas corpus filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Direct Appeal Claims

First, appellant argues that there was insufficient evidence presented to convict him due to a lack of evidence that appellant committed a sexual penetration and the victim was not specific as to the time and date of the offenses. Pursuant to NRS 200.364, cunnilingus and any intrusion, however slight, of any part of a person's body into the genital opening of another are included in the definition of sexual penetration. The victim described in detail numerous instances of sexual acts, including cunnilingus, that appellant forced her to participate in when she was 11, 12, and 13 years old. Further, time and date are not essential elements of a sexual offense against a minor. Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Based on the victim's

testimony, a rational juror could have been convinced of appellant's guilt beyond a reasonable doubt. Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996), abrogated on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. 859, 59 P.3d 477 (2002).

Second, appellant argues that the district court erred in admitting evidence of a sexual relationship between appellant, his wife, and the victim's mother because it was irrelevant, its prejudice outweighed its probative value, and it shifted the burden of proof. The district court admitted this evidence in order to allow the jury to understand why the victim was living with appellant and admonished the jurors not to consider appellant's lifestyle as evidence of guilt. Appellant fails to demonstrate that the district court abused its discretion in admitting evidence about the relationship between appellant, his wife, and the victim's mother. See Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (citing Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004)).

Third, appellant argues that his sentence was cruel and unusual. The sentence imposed was within the statutory limits and appellant fails to demonstrate that the sentence is so unreasonably disproportionate to the offense that it shocks the conscience. Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); Allred v. State, 120 Nev. 410, 420-21, 92 P.3d 1246, 1253-54 (2004).

Fourth, appellant argues that reference to his accuser as a "victim" violated his right to a fair trial and created an inference of guilt. However, appellant does not cite to any case law holding that use of the word "victim" at trial is prejudicial to a defendant. We do not agree that

use of the word “victim” in this case created an inference of guilt. The jury was instructed on the presumption of innocence, and in light of the facts of this case, appellant fails to demonstrate that the use of the word “victim” to describe the accuser affected his substantial rights. See NRS 178.598. Therefore, the district court did not err in denying this claim.

Fifth, appellant argues that allowing the State to label him a Mormon was error because it caused an improper appearance that he was practicing polygamy and preying upon young girls. Appellant also claimed that labeling him a Mormon violated his First Amendment rights. Because appellant failed to raise an objection at trial, we review this claim for plain error and determine appellant has not demonstrated error that effected his substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). At trial, the victim stated that appellant told her not to tell anyone about the sexual abuse because no one would believe her because appellant was a Mormon. Appellant’s own statement that he was a Mormon was properly admitted as a statement of a party opponent. NRS 51.035(3)(a). Thus, the State’s brief reference to this testimony was a proper comment on the evidence. See Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 67 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993)). In addition, as this was appellant’s own statement, its admission did not violate appellant’s First Amendment rights.

Sixth, appellant argues that the district court committed misconduct for attempting to speed up the trial, for interrupting the defense, and for aiding the State during questioning. A review of the

record reveals that the district court appropriately controlled the flow of the proceedings. Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584-85 (2004). In addition, the district court rephrased questions for both parties and did not commit misconduct by doing so because it was done to avoid confusion and clarify questions for the witnesses. See id. at 140-41, 86 P.3d at 585; Robins v. State, 106 Nev. 611, 624, 798 P.2d 558, 566-67 (1990).

Seventh, appellant argues that the district court abused its discretion by failing to have appellant undergo a psychiatric evaluation to determine his competency because he ingested pain medication and had memory trouble during trial. Appellant failed to demonstrate that either of these issues precluded him from aiding his counsel or understanding the charges against him. Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing Dusky v. United States, 362 U.S. 402, (1960)).

Eighth, appellant argues that he is entitled to relief due to cumulative error. However, any error that occurred during the trial resulted in minimal prejudice to appellant. Even when these errors are considered cumulatively, we conclude that they do not entitle him to relief. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Therefore, the district court did not err in denying this claim.

We affirm the denial of the Lozada petition.¹

¹Appellant argues in his reply brief that the State improperly commented on the reasonable doubt standard during closing arguments. However, appellant did not raise this issue in his opening brief, and
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Post-Conviction Claims

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of counsel.² To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel, but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).³

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because reply briefs are limited to countering any matter set forth in answering briefs, we decline to consider this claim. See NRAP 28(c); Elvik v. State, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998).

²We note that appointment of post-conviction counsel for this portion was discretionary. See NRS 34.750.

³The State argues that claims of ineffective assistance of counsel are not properly raised in a Lozada appeal. As the district court considered
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First, appellant argues that his trial counsel was ineffective for giving a short opening statement. Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had counsel given a longer opening statement. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to object to and suppress the evidence of the relationship between him, his wife, and the victim's mother. Appellant cannot demonstrate that his trial counsel's performance was deficient because counsel objected to the admission of this evidence. In addition, as discussed previously, appellant fails to demonstrate the district court abused its discretion in admitting evidence about their relationship and, thus, fails to demonstrate prejudice. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to investigate the victim's background and seek to have her examined by a therapist. Appellant fails to demonstrate prejudice. Appellant fails to identify what an investigation into the victim's background or an examination by a therapist would have revealed. Appellant fails to demonstrate a reasonable probability that there would


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the ineffective assistance of counsel claims as part of the post-conviction proceedings on the merits and not as the direct appeal claims, we also will consider those claims on the merits as part of the post-conviction proceedings.


have been a different outcome at trial had counsel performed an investigation in these areas. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

⁴The State argues that appellant failed to raise his claims that the State improperly labeled him a Mormon, that the district court committed misconduct during trial, and that counsel failed to investigate the victim's background before the district and therefore, should be precluded from raising these claims on appeal. However, appellant did raise these claims in his petition and they were discussed at a hearing before the district court. Therefore, they are properly raised on appeal.

cc: Hon. James M. Bixler, District Judge
Herbert Sachs
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk