


IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE C. COCCHIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52855

FILED

MAY 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for writ of habeas corpus. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

First, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) prejudice in that there was a reasonable probability that, but for counsel's deficiency, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Both components of the inquiry must be shown. Id. at 697. This court defers to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but it reviews the district court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Appellant bears the burden of establishing the facts underlying

his claims by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Appellant first argues that trial counsel was ineffective in not objecting to several instances of prosecutorial misconduct during rebuttal argument. Appellant fails to demonstrate deficiency for some comments and prejudice for any comments. Trial counsel objected to the “sexual prowess” statement, and the “absurd” statement was not an improper expression of opinion but rather a comment on the evidence. See, e.g., Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993). The prosecutor impermissibly disparaged the defense theories on several occasions as “offensive” and “ludicrous.” See Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004). However, her comments, made only during rebuttal argument, did not “so infect[] the proceedings with unfairness as to result in a denial of due process,” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005), and appellant has failed to demonstrate a reasonable probability of a different outcome at trial. We therefore conclude that the district court did not err in denying this claim.

Appellant next argues that trial counsel conducted inadequate pretrial investigation because he failed to obtain documentary evidence of the layout of the apartment where the crimes occurred. Appellant fails to demonstrate prejudice. Trial counsel elicited testimony from two former residents of the apartment that the master bedroom door was visible within a few steps of the front door. Appellant fails to demonstrate what additional information could have been adduced or that there was a reasonable probability of a different outcome at trial.

Appellant further argues that trial counsel conducted inadequate pretrial investigation because he failed to interview potential witnesses about the victim's access to a photo of appellant's anatomy and to call those witnesses at trial to impeach the victim and his mother. Appellant fails to demonstrate deficiency or prejudice. Appellant demonstrated only that he informed trial counsel of witnesses who could impeach the credibility of the victim's mother but that trial counsel felt that the tactic of delving into the mother's character could backfire. Appellant also fails to demonstrate how impeaching the mother's credibility would have had a reasonable probability of affecting the trial's outcome when the State's case revolved around the credibility of the victim. Further, substantial evidence supports the district court's finding that counsel elicited evidence at trial that the victim had access to the photo and that he and his mother may have testified untruthfully as to that access. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) resulting prejudice in that "the omitted issue would have a reasonable probability of success on appeal." Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held

that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Appellant argues that appellate counsel was ineffective because he did not raise the issues of prosecutorial misconduct on appeal. Appellant fails to demonstrate prejudice. Appellant fails to demonstrate that the “sexual prowess” statement substantially affected the jury’s verdict. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 478-79 (2008) (applying the harmless error test). As trial counsel did not object to the remaining comments, this court would have reviewed them only for plain error. See id. at ___, 196 P.3d at 477. As discussed above, appellant has not demonstrated that any alleged errors affected his substantial rights. See id. Accordingly, appellant has not demonstrated that the claims would have had a reasonable probability of success on appeal. We therefore conclude that the district court did not err in denying this claim.


Third, appellant argues the district court erred in denying his claim of prosecutorial misconduct. This claim could have been raised on direct appeal, and, in light of the previous discussion, appellant fails to demonstrate good cause and prejudice for failing to do so. See NRS 34.810(1)(b). We therefore conclude that the district court did not err in denying this claim.

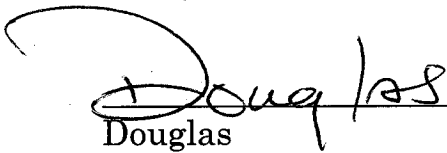
Finally, appellant argues cumulative error because of prosecutorial misconduct and trial counsel’s inadequate investigation of the case. Appellant’s prosecutorial misconduct claim is procedurally barred, so the only possible error would be counsel’s failure to obtain

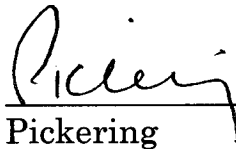
documentary evidence of the crime scene layout. As discussed above, appellant did not demonstrate any prejudice from that error. We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Mark R. Denton, District Judge
Ciciliano & Associates, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk