

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLEN WHORTON, DIRECTOR OF THE  
NEVADA DEPARTMENT OF  
CORRECTIONS AND SHERYL  
FOSTER, WARDEN AT S.N.W.C.C.,  
WASHOE COUNTY, NEVADA,  
Appellants,  
vs.  
MELONIE LYNN SHEPPARD,  
Respondent.

No. 54284

**FILED**

**JUN 23 2010**

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

ORDER OF REVERSAL

This is an appeal from an order of the district court granting in part and denying in part a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Ineffective assistance of trial counsel

On appeal, the State first argues that the district court erred by granting relief on three of Sheppard's claims of ineffective assistance of trial counsel. 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). The question of whether a defendant has received ineffective assistance of counsel at trial is a mixed question of law and fact, and is thus subject to independent review. State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (citing Strickland, 466 U.S. at 698). However, purely factual findings of the district court are entitled to deference on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).<sup>1</sup>

The district court granted Sheppard relief based on three claims of ineffective assistance of trial counsel. As to each of those claims, the district court concluded that counsel was deficient. The district court also concluded that Sheppard failed to demonstrate that any of the errors alone were so severe that they rendered the jury's verdict unreliable, but that taken cumulatively, the errors amounted to prejudice sufficient to

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<sup>1</sup>The State contends that the district court's findings on the reasonableness of Sheppard's counsel should not be entitled to deference because Sheppard did not present expert testimony concerning professional standards of conduct. As discussed above, claims of ineffective assistance of counsel are mixed questions of law and fact and therefore, are subject to independent review. Love, 109 Nev. at 1138, 865 P.2d at 323. While the district court may determine that expert testimony on professional standards of conduct is relevant, the district court need not hear such testimony if it concludes that it would not assist its fact-finding. Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994).

demonstrate ineffective assistance of counsel. Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001). Giving appropriate deference to the district court's factual findings, we conclude as a matter of law that the district court erred in granting relief on these three claims of ineffective assistance of trial counsel.

First, the State argues that the district court erred in determining that Sheppard's trial counsel was ineffective for failing to challenge the prior bad act evidence introduced by the State at trial. Before trial, the State filed a motion entitled "Points and Authorities Re: Res Gestae," arguing that Sheppard's motive for robbery stemmed from the nonpayment for an act of prostitution with the victim. At a pretrial hearing, the district court reviewed the evidence of prostitution under evidentiary rules for prior bad acts and under the theory of res gestae. See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 507-08 (1985), modified on other grounds to comport with new statute as stated in Sonner v. State, 1328, 1334, 930 P.2d 707, 711-12 (1996), modified on rehearing, 114 Nev. 321, 994 P.2d 673 (1998). At the pretrial hearing, the district court concluded that the State had proven the prostitution allegation by clear and convincing evidence and also determined that the probative value of the prostitution evidence outweighed its prejudicial nature. The district court also concluded that the evidence was admissible under the theory of res gestae.

Following an evidentiary hearing during the post-conviction proceedings, the district court determined that had trial counsel challenged the prostitution evidence, the district court would have excluded the evidence as a prior bad act because the evidence was

prejudicial and not proven by clear and convincing evidence. In its written order, the district court did not discuss whether the evidence would have been admissible under the res gestae rule had trial counsel challenged its admission under that theory.

We conclude that the district court erred in determining that the evidence of prostitution would have been inadmissible had Sheppard's trial counsel challenged it. As the State alleged that Sheppard's acts of prostitution with the victim started the events that culminated in the victim's death, an examination under the doctrine of res gestae, rather than as a prior bad act, was appropriate. "If the doctrine of res gestae is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts." State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (emphasis omitted); see also NRS 48.035(3). "[T]he determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence," but rather if the uncharged acts are so "inextricably intertwined with the charged crimes" that they complete the story leading up to the arrest. Shade, 111 Nev. at 894-95, 900 P.2d at 331. If uncharged acts are necessary to complete the story of the crime, the evidence of the uncharged acts is admissible under the res gestae rule and the evidence of the uncharged crime "shall not be excluded." NRS 48.035(3); Shade, 111 Nev. at 895, 900 P.2d at 331.

In this case, the State could not have presented the events leading to the robbery without presenting evidence that Sheppard believed she was owed money by the victim for an unpaid act of prostitution. Thus, the act of prostitution with the victim was inextricably intertwined with

the charged crimes. Accordingly, the uncharged act was properly admitted. Thus, Sheppard's trial counsel was not deficient for failing to argue that the prostitution evidence was inadmissible, and the district court erred in so determining in the post-conviction proceedings. Given that the evidence was admissible under the *res gestae* rule, Sheppard cannot demonstrate that she was prejudiced by her trial counsel's failure to challenge its admission. Therefore, the district court erred in granting relief on this claim.

Second, the State argues that the district court erred by determining that Sheppard's trial counsel was ineffective for failing to object to prosecutorial misconduct that occurred during the State's closing and rebuttal arguments. At the evidentiary hearing, Sheppard's counsel testified that it was his practice to make a tactical decision not to object to every instance of error in closing and that he believed using fewer objections to be part of the "art of litigation." Sheppard's trial counsel also testified that he made a tactical decision about objections during closing arguments and the record reveals that counsel chose not to object often during the closing and rebuttal in this case. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances." See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). When considering the challenged statements in context, the circumstances were not so extraordinary that a reasonable counsel would have necessarily lodged multiple objections. Thomas v. State, 120 Nev. 37, 47-8, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)); United States v. Young, 470 U.S. 1, 11 (1985). As Sheppard failed to demonstrate that the tactical decision not to object to the

challenged statements was unreasonable, Sheppard failed to demonstrate that her trial counsel's performance was deficient and the district court erred in so concluding.

We further note that because the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence and that the jury was properly instructed on the charged crimes, Sheppard did not demonstrate that there was a reasonable probability of a different outcome at trial had her counsel objected to the challenged statements. Therefore, the district court erred in granting relief on this claim.<sup>2</sup>

Third, the State argues that the district court erred in determining that Sheppard's trial counsel was ineffective for failing to request a jury instruction on theft or larceny as a lesser-included offense to the charge of robbery. The district court determined that, taken alone, Sheppard had failed to demonstrate prejudice based on counsel's failure to request instructions for theft or larceny, but granted relief on this claim due to cumulative prejudice.

We agree that Sheppard failed to demonstrate prejudice for this claim. Given the jury's verdict, the jury necessarily found that the

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<sup>2</sup>The State notes that the district court did not specifically address all of the instances of alleged prosecutorial misconduct that Sheppard raised below. As the district court only addressed five of Sheppard's allegations of prosecutorial misconduct and stated that all of the remaining claims are denied, we conclude that the district court denied the claims that were not specifically discussed in the district court's order.

elements of conspiracy to commit robbery, robbery, and murder were proven beyond a reasonable doubt and discounted Sheppard's testimony that she was not aware that the victim would be robbed. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (stating that it is for the jury to determine the weight and credibility to give conflicting testimony). On direct appeal, this court determined that there was sufficient evidence to support the jury's verdict, given that more than one witness testified that Sheppard participated in the planning of the robbery, participated in the robbery, and used the proceeds of the robbery as if they were her own. Sheppard v. State, Docket No. 43129 (Order of Affirmance, December 20, 2005). Accordingly, Sheppard failed to demonstrate a reasonable probability that the outcome of trial would have been different had her trial counsel sought instructions on theft or larceny as lesser-included offenses. As Sheppard failed to demonstrate that she was prejudiced by her trial counsel's failure to seek the lesser-included-offense instructions, Sheppard failed to demonstrate that her trial counsel was ineffective. Therefore, the district court erred in granting relief on this claim.<sup>3</sup>

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<sup>3</sup>The State also argues that the district court erred by allowing Sheppard to file a second supplemental petition which raised this claim. NRS 34.750(5) grants the district court broad discretion to allow supplemental pleadings in post-conviction petitions for a writ of habeas corpus. State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006). The State fails to demonstrate that the district court abused its discretion by allowing Sheppard to file additional supplemental pleadings.

As noted above, the district court found there was cumulative prejudice based on the three claims of ineffective assistance of trial counsel discussed in this order. As the district court erred in concluding that trial counsel was deficient for failing to challenge the admission of evidence of an act of prostitution and for failing to object to prosecutorial misconduct during closing arguments, we need not consider the cumulative prejudice from those claims. Therefore, the district court erred in granting relief on Sheppard's ineffective assistance of trial counsel claims.

Ineffective assistance of appellate counsel

Next, the State claimed that the district court erred in concluding that Sheppard had established ineffective assistance of appellate counsel in three aspects. To prove a claim of ineffective assistance of appellate 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 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). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

For the three claims that the district court determined Sheppard received ineffective assistance of appellate counsel, the district court concluded that counsel was deficient. However, we note that the district court's order is unclear whether it considered prejudice for the



claims of ineffective assistance of counsel individually or cumulatively. Upon review and giving appropriate deference to the district court's factual findings, we conclude as a matter of law that the district court erred in granting relief on Sheppard's three claims of ineffective assistance of appellate counsel.

First, the State argues that the district court erred in concluding that Sheppard's appellate counsel was ineffective for failing to argue that the district court erred in admitting the prostitution evidence. As discussed above, this evidence was admissible under the *res gestae* rule, and therefore, Sheppard cannot demonstrate a reasonable probability of success on appeal. Therefore, the district court erred in granting relief on this claim.

Second, the State argues that the district court erred in concluding that Sheppard's appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct during closing and rebuttal arguments. Because trial counsel did not object to the challenged statements, Sheppard's claim would have been subject to plain error analysis. Plain error requires a consideration of prejudice; whether the error affected the substantial rights of the defendant. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) (citing Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000)). We conclude that Sheppard's appellate counsel was not objectively unreasonable for failing to argue the challenged statements amounted to plain error. Strickland, 466 U.S. at 688. When considered in context, the challenged statements did not affect Sheppard's substantial rights. Thomas, 120 Nev. at 48, 83 P.3d at 825 (citing Darden, 477 U.S. at 181); Young, 470 U.S. at 11. As

the statements did not affect Sheppard's substantial rights, Sheppard cannot demonstrate that she was prejudiced. Therefore, the district court erred in granting relief on this claim.

Third, the State argues that the district court erred in concluding that Sheppard's appellate counsel was ineffective for failing to argue that the district court erred by not instructing the jury on theft or larceny as lesser-included offenses of robbery. Because trial counsel did not request the instructions, Sheppard's claim would have been subject to plain error analysis. As stated previously, plain error requires a consideration of prejudice; whether the error affected the substantial rights of the defendant. Leonard, 117 Nev. at 63, 17 P.3d at 403 (citing Cordova, 116 Nev. at 666, 6 P.3d at 482-83). The evidence shows that Sheppard led her codefendants to the victim's room, told several witnesses that the victim owed her money, and took advantage of the threatening situation by absconding with the pouch containing the victim's money and betting slips. Given this evidence, Sheppard failed to demonstrate that the failure to instruct the jury on theft or larceny affected her substantial rights. See Hillis v. State, 103 Nev. 531, 536, 746 P.2d 1092, 1095 (1987). Thus, Sheppard failed to demonstrate a reasonable likelihood that this claim would have had success on appeal. Therefore, the district court erred in granting relief on this claim.

As noted above, the district court's order is unclear whether it considered prejudice for the claims of ineffective assistance of counsel individually or cumulatively. As the district court erred in concluding that appellate counsel was deficient for failing to argue that the district court erred in admitting evidence of an act of prostitution and for failing to

challenge prosecutorial misconduct during closing arguments, we need not consider the cumulative prejudice from those claims. Therefore, the district court erred in granting relief on Sheppard's ineffective assistance of appellate counsel claims.

For the reasons set forth in this order, we

ORDER the judgment of the district court REVERSED.<sup>4</sup>



Saitta

J.

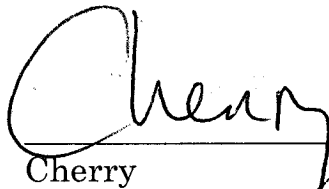


Gibbons

J.

CHERRY, J., concurring in part and dissenting in part:

I agree that the district court erred in granting relief based on the ineffective-assistance claim related to the prostitution evidence. But I cannot agree that the district court erred as to the deficiency prong of the other ineffective-assistance claims and would remand for the district court to reconsider its cumulative prejudice determination based on those claims.



Cherry

J.

<sup>4</sup>As this appeal has been resolved, we vacate the stay of the district court proceedings entered on January 15, 2010.

cc: Hon. Janet J. Berry, District Judge  
Washoe County District Attorney  
Eric W. Lerude  
Washoe District Court Clerk