

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN MICHAEL SHELTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56932

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Anderson
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's January 12, 2010, post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant claims that the district court erred in denying his 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). 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).

First, appellant claims that trial counsel failed to properly object to the admissibility of appellant's HIV/AIDS status prior to trial. Specifically, appellant claims that trial counsel should have argued that appellant's HIV/AIDS status did not impact the victim's ability to consent and, therefore, the district court should not have ruled that it was admissible for cross-examination.¹ Appellant fails to demonstrate that he was prejudiced because he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel made that argument. There was overwhelming evidence presented at trial that appellant was the perpetrator and that the contact was against the will of the victim. Therefore, the district court did not err in denying this claim.

Second, appellant claims that trial counsel was ineffective for conceding that appellant had contact with the victim. Appellant fails to demonstrate prejudice because he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel not conceded that appellant had contact with the victim. There was overwhelming evidence presented at trial that the victim and appellant met that night. Further, the statements made by trial counsel did not imply sexual contact. Therefore, the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for informing the jury that appellant would testify. Appellant fails to demonstrate prejudice because he fails to demonstrate a reasonable

¹We note that trial counsel did file a motion in limine prior to trial to try to limit the admissibility of appellant's HIV/AIDS status.

probability of a different outcome at trial had trial counsel not told the jury that appellant would testify. There was overwhelming evidence that appellant committed these crimes. Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that trial counsel was ineffective for failing to investigate and prepare a defense. Specifically, he claims that trial counsel should have investigated the sporting goods store near the mall and should have impeached or cross-examined the victim and the police officers regarding the receipt from the sporting goods store. Appellant fails to demonstrate prejudice because he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel done further investigation or impeached the victim and police officers. As stated above, there was overwhelming evidence that appellant was the perpetrator, and appellant fails to allege how further investigation or impeachment would have resulted in a different outcome at trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claims that trial counsel was ineffective for failing to request a limiting instruction regarding prior bad acts. Specifically, appellant claims that trial counsel should have requested a limiting instruction regarding the false identification found in his pocket at the time he was arrested. Appellant fails to demonstrate prejudice because he fails to demonstrate a reasonable probability of a different outcome had trial counsel requested a limiting instruction given the overwhelming evidence. Therefore, the district court did not err in denying this claim.

Sixth, appellant claims that trial counsel was ineffective for failing to object to four instances of prosecutorial misconduct. Appellant

fails to demonstrate that counsel was deficient or that he was prejudiced. Trial counsel did object to two of the instances, and those objections were sustained. Appellant fails to demonstrate that the other two instances were objectionable.

In the first instance cited by appellant, the State told the jurors in its opening statement that

We, as parents—we as a society, try to teach our children to protect our children. Don't talk to strangers. If you get lost, honey, look for a policeman. The badge is meant to protect and serve. But not for [the victim]. On May 21, 2006 last year, 14 year old [victim], the badge was used to prey on the child, not to protect him.

Appellant claims that this was an improper statement because it was an attempt to inflame or excite the passions of the jury. However, these statements were the facts of the case. Appellant approached the victim and told him that he was a police officer and that he was investigating a crime. The State was merely using the evidence that was to be presented to the jury to explain why the victim would have left with appellant in the first place. Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (“It is proper for the prosecutor to outline his theory of the case and propose those facts he intends to prove.”). Further, to the extent that the language used may have tended to inflame the passions of the jury, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected given the overwhelming evidence against appellant.

In the second instance cited by appellant, the State told the jurors, “Because one of the things that happened at the time of the attack, adding insult to injury, was that he was forced to swallow the ejaculate.” The victim testified at trial that appellant forced him to swallow the ejaculate, therefore, the State was outlining the facts it intended to prove.

See id. Further, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected given the overwhelming evidence against appellant. Therefore, the district court did not err in denying these claims.

Seventh, appellant claims that trial counsel was ineffective for failing to request jury instructions on appellant's theory of defense, namely, statutory sexual seduction and consent. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. There was no evidence presented at trial that would support a theory of statutory sexual seduction or consent; therefore, appellant would not have been entitled to instructions on those issues. Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Further, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel requested the instructions given the overwhelming evidence presented at trial. Therefore, the district court did not err in denying this claim.

Next, appellant claims that the district court erred in denying his claims that he received ineffective assistance of appellate counsel. To prove 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697. 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 v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claims that appellate counsel was ineffective for failing to properly brief issues on appeal. Specifically, he claims that appellate counsel should have argued that the receipt from the sporting goods store should not have been admissible because it was withheld impeachment evidence rather than arguing the evidence was withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963). Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. Appellate counsel did argue that the receipt was impeachment evidence. Further, appellant fails to demonstrate a reasonable probability of success on appeal had counsel more vigorously argued impeachment rather than Brady. This court concluded on appeal that even though trial counsel did not learn of the receipt until trial, he was still fully capable of impeaching the victim's testimony using his prior inconsistent statements. Further, the evidence against appellant was overwhelming. Therefore, the district court did not err in denying this claim.

Second, appellant claims that appellate counsel was ineffective for failing to cite to authority for the proposition that he was entitled to rely on the State's open-file policy. This argument relates to the claim above about the sporting goods receipt. Appellant fails to demonstrate prejudice because he fails to demonstrate a reasonable probability of success on appeal had appellate counsel cited to authority regarding this point. As state above, the evidence against appellant was overwhelming. Therefore, the district court did not err in denying this claim.

Third, appellant claims that appellate counsel was ineffective for failing to properly object to inadmissible prior bad act evidence. Appellant admits that appellate counsel did raise this issue on appeal and fails to argue what more appellate counsel could have done on appeal with regard to this issue. Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct. Specifically, appellant claims that appellate counsel should have raised prosecutorial misconduct as to the four instances discussed above. The first two instances were objected to by trial counsel and the objections were sustained by the district court. The other two were proper statements of the facts in this case and appellant failed to demonstrate there was a reasonable probability of success on appeal had appellate counsel raised these claims because there was overwhelming evidence of guilt. Accordingly, the district court did not err in denying these claims.

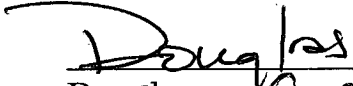
Fifth, appellant claims that appellate counsel was ineffective for failing to raise the issue of improper vouching by one of the detectives. Appellant failed to demonstrate a reasonable probability of success on appeal had appellate counsel raised this issue given the overwhelming nature of the evidence against appellant. Therefore, the district court did not err in denying this claim.


Sixth, appellant claims that appellate counsel was ineffective for failing to argue that the district court made an improper statement when it overruled an objection by trial counsel. Specifically, the State was eliciting testimony from the victim's mother regarding the victim's demeanor after the incident. Trial counsel objected and the district court

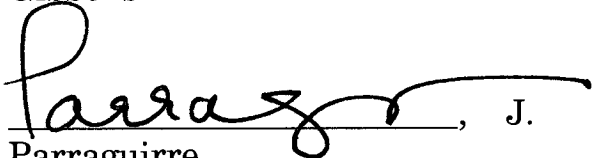
stated, "I think it goes to his credibility and truthfulness and whether the incident actually occurred so I am going to allow it." Appellant failed to demonstrate that appellate counsel was deficient because the district court's statement explained why it was overruling the objection and did not comment directly on the testimony. Further, appellant failed to demonstrate a reasonable probability of success on appeal had appellate counsel raised this issue given the overwhelming nature of the evidence against appellant. Therefore, the district court did not err in denying this claim.

Having considered appellant's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk