IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID DANIEL HAN,

Appellant/Cross-Respondent,

vs.

WARDEN, LOVELOCK CORRECTIONAL CENTER, JOHN IGNACIO,

Respondent/Cross-Appellant.

No. 35313

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from an order of the district court granting, in part, appellant's post-conviction petition for a writ of habeas corpus. A jury convicted David Daniel Han of two counts of sexual assault of his wife, and the district court sentenced him to serve two concurrent terms of imprisonment of ten to twenty-five years. This court affirmed his conviction on direct appeal.[1] Han later filed a post-conviction petition for a writ of habeas corpus in the district court alleging that his trial counsel was ineffective for (1) failing to request a lesser included instruction on spousal battery, (2) failing to present medical testimony, and (3) failing to file a motion to dismiss based on the State's failure to collect the victim's underwear. After an evidentiary hearing, the district court granted the petition and ordered a new trial on the ground that trial counsel's failure to request a lesser included instruction on spousal battery

[1]Han v. State, Docket No. 29967 (Order Dismissing Appeal, June 3, 1997).

constituted ineffective assistance of counsel. The district court denied the petition on all other grounds.

Han appeals the partial denial of his petition on the grounds that trial counsel rendered ineffective assistance of counsel due to his failure to: (1) request an instruction on reasonable mistaken belief of consent; (2) introduce Dr. Dedolph's medical testimony of the absence of forcible penetration; (3) pursue a motion to dismiss based on the State's failure to collect the victim's underwear; (4) request a spoliation of the evidence instruction; and (5) properly impeach the victim. The State cross-appeals, arguing that the order granting the petition and a new trial was erroneous because the failure to request a lesser included instruction on spousal battery was neither deficient nor prejudicial.

We conclude that the failure to request a lesser included instruction on spousal battery did not constitute ineffective assistance of counsel. However, we conclude that it was ineffective assistance of counsel to fail to request an instruction on reasonable mistaken belief of consent and that Han's post-conviction petition for a writ of habeas corpus should have been granted on that ground. Hence, we affirm the order of the district court granting Han a new trial and remand for further proceedings consistent with this order.

Lesser included instruction on spousal battery

We review claims of ineffective assistance of counsel de novo.[2] To establish a viable claim for ineffective assistance of counsel, the petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) such deficiencies prejudiced

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[2]State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

the petitioner.[3] Reasonable strategic decisions do not constitute objectively deficient performance.[4] Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.[5]

A lesser included offense instruction is required, upon a defendant's request, when at least some evidence adduced at trial supports its consideration.[6] We have determined that trial counsel's failure to request such an instruction is ineffective assistance when the inclusion of the instruction would have reasonably altered the outcome of the trial.[7] Factors to consider in determining whether the inclusion of the instruction would have reasonably altered the outcome of the trial include the legal merits of the instruction, the consistency of the instruction with the defense theory, and the evidentiary support for that theory.[8]

In this case, we conclude that the failure to request a lesser included instruction on spousal battery was neither deficient nor

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[3]Strickland v. Washington, 466 U.S. 668, 687-88 (1984), adopted in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]See Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-82 (1994); see also Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991).

[5]Strickland, 466 U.S. at 694; Love, 109 Nev. at 1138, 865 P.2d at 323.

[6]Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

[7]See, e.g., Doyle v. State, 116 Nev. 148, 162, 995 P.2d 465, 474 (2000); Riley, 110 Nev. at 653-54, 878 P.2d at 281-82; Davis, 107 Nev. at 603, 817 P.2d at 1171.

[8]See, e.g., Doyle, 116 Nev. at 162, 995 P.2d at 474; Riley, 110 Nev. at 653-54, 878 P.2d at 281-82; Davis, 107 Nev. at 603, 817 P.2d at 1171.

prejudicial. Trial counsel's tactical decisions are presumed to be reasonable absent evidence to the contrary.[9] Trial counsel reasonably could have determined that requesting a lesser included instruction on spousal battery could result in Han's conviction for both spousal battery and sexual assault, particularly since Han admitted to committing the battery. Thus, we conclude that the failure to request the instruction was not unreasonable under the circumstances.

Moreover, as we concluded in Han's direct appeal, sufficient evidence was adduced at trial to support the jury's verdict of conviction for sexual assault, including testimony that Han pinned the victim to the bed and had intercourse with her. There is no evidence that the inclusion of the spousal battery instruction would have affected that outcome. Accordingly, we conclude that it was error for the district court to grant the petition on that ground.

Reasonable mistaken belief of consent instruction

However, we conclude that Han is correct in arguing that his petition should have been granted on the alternative ground that trial counsel was ineffective in failing to request an instruction on reasonable mistaken belief of consent.[10] Han's defense was that he believed the victim was engaging in consensual sexual intercourse with him. If the instruction had been given, that a reasonable mistaken belief in consent is a defense to a sexual assault charge, there is a reasonable probability that the outcome would have been different.

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[9]Riley, 110 Nev. at 653, 878 P.2d at 281-82.

[10]Although Han improperly raised this issue on appeal pursuant to NRAP 28(c), because the failure to request this instruction constituted clear error, we elect to review the merits of this claim.

To establish that trial counsel's failure to request an instruction was deficient, it must have been objectively reasonable for trial counsel to have known to request that instruction based on the law in existence at the time of trial.[11] At the time of Han's trial in 1996, this court had stated in 1980, in Owens v. State, that the defense of reasonable mistaken belief of consent may be available as long as some evidence supports its consideration.[12] Moreover, treatises and California law clearly established the possibility that this defense was available.[13] Thus, because a reasonably competent attorney would have been aware of the possibility of this defense and would have requested an instruction on it, we conclude that trial counsel's failure to do so in this case was deficient.

Accordingly, we conclude that Han's post-conviction petition for a writ of habeas corpus should have been granted on this ground, and we affirm the order of the district court granting a new trial on this basis.[14]

Han's remaining assignments of error

As for Han's appeal of the remaining claims on which the district court denied his petition, we conclude that none of them has merit.

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[11]See Riley, 110 Nev. at 653-54, 878 P.2d at 281-82.

[12]96 Nev. 880, 884 n.4, 620 P.2d 1236, 1239 n.4 (1980). Hardaway v. State also raises the possibility of this defense and was published a few months before Han's trial. 112 Nev. 1208, 1210-11, 926 P.2d 288, 289-90 (1996).

[13]See Wayne R. LaFave, Criminal Law § 5.1 (2d ed. 1986); see also People v. Mayberry, 542 P.2d 1337 (Cal. 1975).

[14]See also our recent decision in Honeycutt v. State, 118 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 70, October 31, 2002) (recognizing defense of reasonable mistaken belief in consent to sexual assault claim).

Han contends that trial counsel rendered ineffective assistance of counsel by failing to present Dr. Dedolph's testimony of the absence of medical evidence of forcible penetration. Han argues that this testimony would have been crucial because NRS 200.373 requires proof of forcible penetration. We disagree.

NRS 200.373 states that the fact that the victim is married to the perpetrator is not a defense to a sexual assault charge if the assault was committed by force or threat of force.[15] The statute merely requires that the penetration is committed by force or threat of force, not that the penetration itself be forcible. Other states with similar statutory language have reached similar conclusions.[16]

Because forcible penetration is not required, we conclude that the failure to present Dr. Dedolph's testimony on the absence of forcible penetration was not error because it would not have influenced the jury's verdict. Both the victim's and Han's testimony that Han punched the victim in the face and pinned her to the bed immediately before having sexual intercourse with her provides a sufficient basis for the jury's finding that the penetration occurred by force. Testimony that there was no evidence of forcible penetration would not have refuted that undisputed fact. Moreover, Dr. Dedolph's testimony also could have harmed Han's

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[15]NRS 200.366, the statute defining sexual assault, on the other hand, merely requires proof of sexual penetration against the will of the victim and without consent, and does not require proof of overt force or threats. See McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992); see also Dinkens v. State, 92 Nev. 74, 77, 546 P.2d 228, 230 (1976).

[16]See, e.g., People v. M.D., 595 N.E.2d 702 (Ill. App. Ct. 1992); Lane v. State, 703 A.2d 180 (Md. 1997); Morse v. Com., 440 S.E.2d 145 (Va. Ct. App. 1994).

arguments in that Dr. Dedolph stated that abrasions, swelling or other common indicators of forcible penetration often do not appear even when force has been used. Thus, we conclude that the absence of Dr. Dedolph's testimony would not have influenced the jury's verdict and could have been a reasonable defense strategy.

Likewise, we conclude that trial counsel's failure to pursue a motion to dismiss under State v. Havas,[17] in light of the State's failure to collect and preserve the victim's underwear, was not error because there is no evidence it would have been material or exculpatory.[18] Under Deere v. State, dismissal of charges of sexual assault may be required if a victim's underwear has not been preserved only if it is shown that the presence of the underwear would be material or exculpatory.[19]

The testimony and evidence adduced at trial does not suggest that the victim's underwear would have provided any relevant evidence. Neither the victim nor Han testified that the victim's underwear or clothing was torn, ripped or stretched. The victim only testified that she struggled while Han removed her clothing. Moreover, Han testified that

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[17]95 Nev. 706, 601 P.2d 1197 (1979), clarified in Deere v. State, 100 Nev. 565, 566, 688 P.2d 322, 323 (1984).

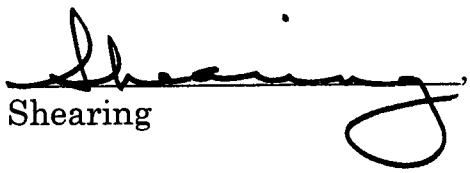
[18]This court revised the rule regarding the State's preservation of evidence and presented a new rule in Daniels v. State, requiring dismissal only if the failure to gather evidence was the result of gross negligence or bad faith. 114 Nev. 261, 266-68, 956 P.2d 111 (1998). Because this rule is not given retroactive application, both parties concede that the Daniels test does not apply in this case. See Gier v. District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990).

[19]100 Nev. at 566, 688 P.2d at 323 (1984), see also Cook v. State, 114 Nev. 120, 126 n.5, 953 P.2d 712, 716 n.5 (1998).

he used no force in removing the victim's underwear. Because there is no ambiguous or contradictory evidence as to the state of the victim's underwear, Han has failed to demonstrate its materiality or exculpatory nature. Thus, a Havas motion was not warranted, and trial counsel was not deficient in failing to request it.

Because Han failed to properly raise two of his assignments of error on appeal, we decline to address the substantive merits pursuant to NRAP 28(c).[20] Accordingly, having concluded that one of Han's claims has merit, and that the district court properly granted the petition and ordered a new trial, we

ORDER the judgment of the district court AFFIRMED.



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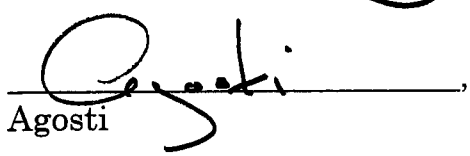

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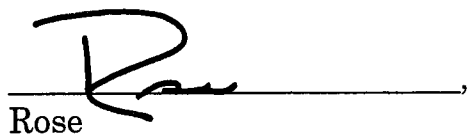

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[20]These claims are: (1) failure to properly impeach the victim, and (2) failure to request a spoliation of the evidence instruction. Because each of these assignments of error relate to Han's appeal of the district court's partial denial of his post-conviction petition for a writ of habeas corpus, which he could have raised in the opening brief, appellate review is precluded. See Leonard v. State, 114 Nev. 639, 662, 958 P.2d 1220, 1237 (1998); see also Ducksworth v. State, 113 Nev. 780, 792, 942 P.2d 157, 165 (1997), clarified on other grounds, 114 Nev. 951, 966 P.2d 165 (1998).

cc: Stephen P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
Washoe District Court Clerk