

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ESTES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58193

**FILED**

DEC 12 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malme  
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. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

On appeal from the denial of his November 28, 2007, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of 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 argues that his trial counsel was ineffective for failing to obtain experts to testify regarding appellant's mental health in support of the insanity defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that appellant was adamant that poisoning from prescription lithium caused him to be mentally impaired during the incident, but that mental illness did not cause him to commit the crimes. Counsel testified that she investigated potential experts to testify regarding lithium poisoning rendering someone legally insane, but was unable to find any expert willing to provide testimony of that nature. Further, a mental health expert who examined appellant following his conviction testified at the evidentiary hearing that he could not state that appellant was legally insane during the crime. Therefore, appellant fails to demonstrate a reasonable probability of a different outcome had counsel performed additional investigation into expert testimony. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). The district court concluded that counsel did not provide ineffective assistance regarding expert testimony and substantial evidence supports that decision. Therefore, we conclude that the district court did not err in denying this claim.<sup>1</sup>

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<sup>1</sup>The State argues that appellant conceded that he failed to demonstrate trial counsel was ineffective for failing to investigate expert witnesses before the district court and therefore, waived his opportunity to seek appellate review of this claim. Our review of the record reveals that this issue was not withdrawn and that appellant did not concede he had

*continued on next page . . .*

Second, appellant argues trial counsel was ineffective for failing to object to admission of appellant's statements to the victim that he was in a Mexican gang and on probation, as appellant asserts they were inadmissible prior bad acts. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, evidence was produced that appellant told the victim he was in a Mexican gang, on probation, possessed firearms, and that the victim or the victim's family would suffer harm if the victim told others of the sexual assault. These statements were properly admitted as they were evidence of appellant's commission of the charged crime of preventing or dissuading a person from testifying or producing evidence. These statements were also inextricably intertwined with the sexual assault, lewdness, and kidnapping charges, and therefore, were necessary to complete the story of the crime. See State v. Shade, 111 Nev. 887, 894-95, 900 P.2d 327, 331 (1995). Further, trial counsel informed the district court that she did not wish further instruction to the jury regarding appellant's probation statements as she did not want those statements to be highlighted. This was a tactical decision and, as such, is "virtually unchallengeable absent extraordinary circumstances," Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant did not demonstrate. In addition, there was overwhelming evidence of appellant's guilt, and therefore, appellant fails to demonstrate a reasonable probability of a different outcome at trial

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... continued

failed to demonstrate that trial counsel was ineffective. Therefore, this issue was properly preserved for appeal.

had counsel argued that the Mexican gang and probation statements were inadmissible prior bad acts. Therefore, the district court did not err in denying this claim.<sup>2</sup>

Next, appellant argues that the district court erred in denying his claims of 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, 105 Nev. at 853, 784 P.2d at 953.

First, appellant argues that his appellate counsel was ineffective for failing to challenge admission of appellant's statements that he was in a Mexican gang and on probation as improper prior bad acts. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. As discussed previously, appellant's statements regarding involvement in a Mexican gang and serving a term of probation were properly admitted as evidence of preventing or dissuading a person from testifying or producing evidence and as necessary to tell the story of

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<sup>2</sup>The State argues that this claim should be rejected because appellant did not provide an adequate record for this court to review this claim. We disagree. Appellant provided a sufficient record.

the sexual assault, lewdness, and kidnapping charges. Appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel argued those statements were inadmissible as prior bad acts as there was overwhelming evidence of his guilt. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his appellate counsel was ineffective for failing to argue that admission of multiple out-of-court statements by the victim was improper. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel argued on appeal that one of the challenged statements was improperly admitted and this court rejected that argument. Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006). The other challenged statements were properly admitted by the district court under hearsay exceptions for excited utterances and medical examinations. See NRS 51.095; NRS 51.115. Therefore, any challenge on direct appeal to admission of those statements would have been futile. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); see also Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). Further, given the overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel raised additional challenges to admission of these out-of-court statements. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that the cumulative effect of trial and appellate counsel's errors amounts to ineffective assistance of counsel. Appellant fails to demonstrate that trial or appellate counsel provided deficient performance or that he was prejudiced for any of the above claims. Thus, appellant fails to demonstrate cumulative error amounting

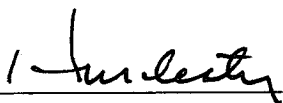
to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Elissa F. Cadish, District Judge  
Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk