

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMETRIOUS STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59105

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Tracie K. Lindeman
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; David B. Barker, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of counsel raised in his December 31, 2009, petition. 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 propose a jury instruction defining consent and failing to argue that the jury instructions failed to properly define consent. Appellant argues that, had the jury been properly instructed, they would have concluded that the victim actually consented to the sexual contact because the victim bargained with appellant regarding types and occurrence of sexual acts. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

"Submission is not the equivalent of consent." McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992) (citing Tryon v. State, 567 P.2d 290, 293 (Wyo. 1977)). Moreover, "[a] rape victim is not required to do more than her age, strength, and the surrounding facts and attending circumstances would reasonably dictate as a manifestation of her opposition." Id. (citing Dinkens v. State, 92 Nev. 74, 78, 546 P.2d 228, 230 (1976)); see also Shannon v. State, 105 Nev. 782, 790, 783 P.2d 942, 947 (1989) (discussing that factors such as the victim's age, maturity level, the influence of the defendant over the victim, and the victim's act of feigning sleep evidenced that the sexual acts occurred against the victim's will).

While the victim in this case stated that appellant reached an agreement with her to not perform certain sexual acts and to limit the sexual encounters to three times per week, the victim also testified that there was nothing she could do to stop appellant from performing at least some sexual acts on her, that on at least one occasion appellant initiated a sexual act while she was still asleep, and that appellant picked her bedroom door lock after she locked the door in an effort to stop him from

performing sexual acts on her. Testimony also demonstrated that appellant was the victim's step-father, appellant had acted as the victim's parent since the victim was a one-year-old, and the victim was between the ages of 12 to 14 years during the occurrence of the numerous sexual acts.

There was substantial evidence that the sexual acts occurred against the victim's will or under conditions in which appellant knew or should have known that the victim was mentally or physically incapable of resisting. See Shannon, 105 Nev. at 790, 783 P.2d at 947 (citing NRS 200.366). Appellant fails to demonstrate that reasonably competent counsel would have argued for further instructions regarding consent under the circumstances of this case. Moreover, as there was substantial evidence that the victim did not consent, appellant fails to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel sought additional instructions regarding consent. Therefore, the district court did not err in denying this claim.¹

Second, appellant argues that his trial counsel was ineffective for failing to object to the jury instruction regarding a defendant's reasonable but mistaken belief in consent. Appellant asserts this instruction shifted the burden of proof to appellant as only appellant's own

¹Appellant further argues in his reply brief that the victim consented as evidenced by the fact that appellant did not use physical force or the threat of physical force in conjunction with the sexual acts, and therefore, appellant did not commit sexual assault. Appellant's argument is without merit as physical force or the threat of physical force is not necessary for a crime of sexual assault. See Shannon, 105 Nev. at 790, 783 P.2d at 947.

testimony could prove he was mistaken regarding the consent of the victim. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The instruction properly informed the jury that they should find appellant not guilty if they concluded he had a reasonable but mistaken belief that the victim consented to the sexual acts. See Carter v. State, 121 Nev. 759, 766, 121 P.3d 592, 596-97 (2005). As the jury was properly instructed regarding the law on reasonable but mistaken belief in consent, an objection to this instruction arguing it shifted the burden of proof to appellant would have been futile. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims.").

In addition, considering testimony that the appellant initiated at least one sexual act while the victim was sleeping, that the victim's attempt to stop the sexual acts by locking her bedroom door was thwarted by appellant's use of a hanger to pick the lock, the age of the victim during the incidents, and appellant's own recorded statements concerning the sexual encounters with the victim, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected to the challenged instruction. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred in denying his claim 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 had 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 v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

Appellant argues that his appellate counsel was ineffective for failing to argue that the jury instructions failed to properly define consent and improperly shifted the burden of proof to appellant. As discussed previously, appellant fails to demonstrate deficiency for this claim. He likewise fails to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred in using the term "victim" in the jury instructions as it creates an improper irrebuttable presumption. As this claim is raised independent of appellant's claims of ineffective assistance of counsel, it was reasonably available to be raised on direct appeal and appellant fails to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b); Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003). Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred in concluding that the following claims raised in appellant's initial proper person petition were waived because he failed to raise them on direct appeal: the State engaged in prosecutorial misconduct by vouching for the credibility of a witness, the sentence was unreasonable and excessive, the district court was biased against appellant, and the district court

committed cumulative error. Appellant appears to argue that the district court should have construed these claims as claims of ineffective assistance of counsel. Appellant's argument is without merit. The district court properly concluded that claims raised independent of claims of ineffective assistance of counsel are procedurally barred as they were reasonably available to be raised on direct appeal and were without good cause. NRS 34.810(1)(b)(2); Hathaway, 119 Nev. at 253, 71 P.3d at 506. Thus, the district court properly concluded that these claims were waived pursuant to NRS 34.810(1)(b)(2) and without good cause for the failure to raise them on direct appeal. Therefore, the district court did not err in denying these claims as procedurally barred.

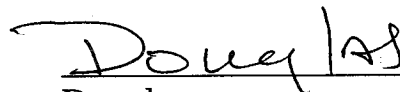
Next, appellant argues that the district court erred in concluding that appellant's claim in his initial proper person petition that the State's closing argument inflamed the jury was barred by the doctrine of law of the case. However, this claim was considered and rejected on direct appeal. Stewart v. State, Docket No. 48738 (Order of Affirmance, March 31, 2009). The doctrine of law of the case prevents further litigation of this claim and "cannot be avoided by a more detailed and precisely focused argument." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court properly concluded that this claim is barred from further review by the doctrine of law of the case.


Finally, appellant argues that portions of the findings of the district court are not entitled to deference on appeal. As discussed previously, this court gives deference to the district court's factual findings regarding ineffective assistance of counsel but reviews the district court's application of the law to those facts de novo. Lader, 121 Nev. at 686, 120 P.3d at 1166. In reviewing appellant's claims of ineffective assistance of

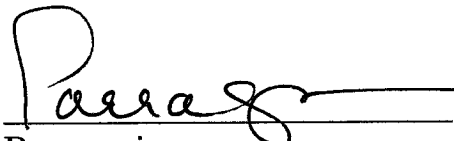
counsel under that standard, appellant fails to demonstrate that any of his claims are meritorious. Therefore, appellant is not entitled to relief regarding his argument that portions of the district court's order are not entitled to deference.

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

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Douglas

 _____, J.
Gibbons

 _____, J.
Parraguirre

cc: Hon. David B. Barker, District Judge
Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk