

IN THE SUPREME COURT OF THE STATE OF NEVADA

PABLO RAMON GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59697

FILED

JAN 16 2013

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 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 June 6, 2006, 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 propose a jury instruction defining consent, failing to argue that the instructions failed to properly define consent, and failing to argue that the instructions did not inform the jury that a victim must resist for the sexual act to not have been consensual. Appellant argues that, had the jury been properly instructed, it would have concluded that the victim actually consented to the sexual act as the victim did not physically or mentally resist appellant. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

There was overwhelming evidence that the sexual act 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 v. State, 105 Nev. 782, 790, 783 P.2d 942, 947 (1989) (citing NRS 200.366). The circumstances surrounding the sexual act in this case demonstrate that appellant used physical force against the victim and threats of physical force against the victim, her children, and her parents to coerce the victim to submit to sexual intercourse. "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)). Further, the evidence demonstrated that the victim reasonably manifested her opposition to engage in sexual acts under these circumstances. See id. (citing Dinkens v. State, 92 Nev. 74, 78, 546 P.2d 228, 230 (1976)). 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

overwhelming 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 counsel was ineffective for failing to seek an instruction informing the jury that there can be no sexual assault without the use of force or threatened use of force. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. 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. Given the overwhelming evidence that the sexual assault in this case occurred through the use of physical force against the victim and threats of physical force against the victim, her children, and her parents, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought further instructions regarding the use of force. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that portions of the district court's findings are not entitled to deference on appeal. As discussed previously, this court gives deference to the district court's factual findings regarding

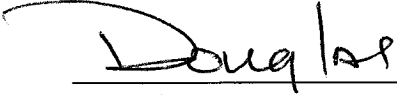
¹In a footnote, appellant asserts that the improper instructions also made a violation of Batson v. Kentucky, 476 U.S. 79 (1986), "even more glaring." However, appellant merely references this claim as raised in the petition and makes no cogent argument as to how the district court erred when reviewing this claim. To the extent appellant intends to raise this claim independent of his claims regarding the jury instructions, we need not consider issues so presented. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); NRAP 28(e)(2).


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 concluding they are without merit, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

²Because appellant is represented by counsel in this matter and has informed the court of his desire to maintain the representation of counsel in this appeal, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider any claims raised in the proper person documents that appellant has submitted to this court in this matter.

cc: Hon. Elissa F. Cadish, District Judge
Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk