IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MICHAEL FARNUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60335

FILED

JAN 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant John Farnum was found guilty of multiple counts of sexual assault of a minor under the age of fourteen and lewdness with a child under the age of fourteen and one count of attempted lewdness with a child under the age of fourteen. In his post-conviction petition for a writ of habeas corpus, Farnum argued that trial counsel was ineffective for giving him Xanax during the trial, failing to call an expert witness, failing to object to statements by the prosecutor, failing to investigate, and failing to present a defense. The district court denied his petition. This court affirmed in part and remanded to the district court for an evidentiary hearing on Farnum's claims that counsel was ineffective for failing to investigate and present a defense. The district court conducted the evidentiary hearing and determined that Farnum was not entitled to relief

on those claims. On appeal, Farnum argues that the district court erroneously denied his claims of ineffective assistance of counsel.

To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in 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, 694 (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 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, Farnum argues that counsel's investigation was inadequate because counsel failed to regularly meet with him to discuss the defense and prepare for trial. Farnum failed to demonstrate deficiency or prejudice. The district court found credible counsel's testimony at the evidentiary hearing that he met with Farnum many times to prepare him for trial.[1] Farnum failed to establish that the result of the proceedings

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[1]Farnum asks this court not to give deference to factual findings made by the district court because (1) the district court mistakenly stated that counsel conducted over seventy trials between evidentiary hearings, (2) the district court did not read his petition, and (3) trial counsel was not

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would have been different had counsel met with him more. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Accordingly, we conclude that Farnum is not entitled to relief on this claim.

Second, Farnum argues that counsel's investigation was inadequate because counsel did not determine whether Farnum's penis was too large to penetrate the victim. Farnum failed to demonstrate deficiency or prejudice. The district court found credible counsel's testimony that he was aware of the size of Farnum's penis and made a strategic decision not to investigate further because his ultimate goal was to focus upon the State's lack of evidence rather than distract the jury with sensational facts. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable"). Farnum failed to demonstrate a reasonable probability that the results of the proceeding would have been different had counsel investigated this matter further. Accordingly, we conclude that Farnum is not entitled to relief on this claim.

Third, Farnum argues that counsel was ineffective for failing to (1) subpoena records from the victims' day care and school regarding their alleged behavioral issues, (2) request a psychological evaluation on

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. . . continued

credible. We disagree, and thereby defer to the factual findings of the district court that are supported by substantial evidence and are not clearly wrong.

the victims, (3) subpoena records to determine whether Farnum ever picked up A.R. at day care, and (4) hire an investigator and (5) generally investigate the case. Farnum failed to demonstrate deficiency or prejudice. The district court found that counsel spent substantial time consulting experts, conducting a mock trial, and evaluating the State's evidence, and that his decision not to investigate in the manner that Farnum suggests was out of a legitimate fear that doing so could have prejudiced the case as the results would be discoverable or such efforts would be futile. See Harrington v. Richter, 562 U.S. ___, ___, 131 S. Ct. 770, 789-90 (2011) (noting that an attorney is not ineffective for failing to "pursue an investigation that would be fruitless, much less one that might be harmful to the defense"). Farnum failed to demonstrate that the results of the proceeding would have been different had counsel done any of the above. Accordingly, we conclude that Farnum is not entitled to relief on these claims.

Fourth, Farnum argues counsel was ineffective for presenting a legally invalid defense. Farnum failed to demonstrate deficiency or prejudice. He asserts that counsel's focus at trial on the lack of physical evidence was inherently flawed because physical corroboration is not necessary to find guilt. Farnum is mistaken. Counsel appropriately argued that the lack of physical corroboration raised a reasonable doubt as to whether any of the crimes occurred. The argument was only a portion of counsel's strategy, which also focused on discrediting A.R. and her mother. Farnum failed to demonstrate that counsel's tactical decision fell below the reasonableness standard enunciated in Strickland or that it is likely the verdict would have otherwise been different. See Dawson, 108

Nev. at 117, 825 P.2d at 596. Accordingly, we conclude that Farnum is not entitled to relief on this claim.

Fifth, Farnum argues that counsel was ineffective for failing to support the theory of defense with witness testimony. Essentially, the witnesses offered by Farnum at the evidentiary hearing stated that, if called, they would have testified that Farnum was never alone with the victims, that A.R.'s mother was encouraging her daughter to make up stories of sexual abuse out of a desire to be a bigger part of Farnum's life, that A.R.'s mother was a liar who consistently made false allegations of sexual abuse, and that A.R. was sexually troubled before and after meeting Farnum. Farnum failed to demonstrate deficiency or prejudice. The district court determined that counsel made strategic choices not to call these witnesses for a variety of reasons–either because they were not credible, the testimony would not have been admissible, or the witness would have focused the jury's attention on the more sensational elements of the case that counsel was attempting to avoid. The decision whether to call a witness is a proper exercise of counsel's discretion and Farnum failed to demonstrate that counsel's decisions fell below the reasonableness standard enunciated in Strickland or that it was likely the verdict would have otherwise been different. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (noting that "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call"). Accordingly, we conclude that Farnum is not entitled to relief on this claim.

Sixth, Farnum argues counsel was ineffective for failing to support the theory of defense by presenting evidence that A.R.'s mother

made similar allegations against multiple other men, that A.R. had been acting out sexually before and after meeting Farnum, and that A.R.'s testimony was inconsistent. Farnum failed to demonstrate deficiency or prejudice. The district court found credible counsel's testimony that he attempted to present this evidence as much as he could through cross-examining the State's witnesses rather than through witnesses with credibility issues, and that counsel made an informed, deliberate decision to focus on the lack of evidence and inconsistencies with the victim's statements rather than distract the jury. Farnum failed to demonstrate that counsel's decisions fell below the reasonableness standard enunciated in Strickland or that it was likely the verdict would have otherwise been different. See Dawson, 108 Nev. at 115, 825 P.2d at 595; see also Harrington, 562 U.S. at ___, 131 S. Ct. at 790 ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates."). Accordingly, we conclude that Farnum is not entitled to relief on this claim.

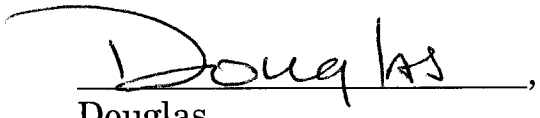
Seventh, Farnum argues that counsel was ineffective for failing to support the theory of defense by advising him not to testify. Farnum failed to demonstrate deficiency or prejudice. The district court found credible counsel's testimony that he advised Farnum not to testify because he feared that Farnum might open the door to testimony related to prior sexual assault allegations lodged against him by a different child. Farnum failed to demonstrate that counsel's decisions fell below the reasonableness standard enunciated in Strickland or that it was likely the verdict would have otherwise been different. See Dawson, 108 Nev. at

115, 825 P.2d at 595. Accordingly, we conclude that Farnum is not entitled to relief on this claim.

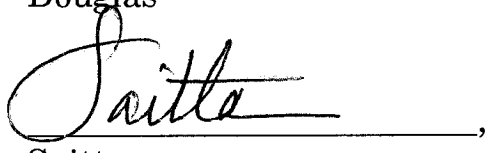
Having considered Farnum's contentions and concluded that none warrant relief,[2] we

ORDER the judgment of the district court AFFIRMED.[3]

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Saitta

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[2]Farnum raises several other allegations of ineffective assistance of counsel. We have included in our review only the allegations that were timely raised below and fall under the scope of this court's March 17, 2011 order. See Farnum v. State, Docket No. 53753 (Order Affirming in Part, Reversing in Part, and Remanding, March 17, 2011).

[3]We note that after denying Farnum's motion for leave to file an opening brief in excess of 30 pages, Farnum v. State, Docket No. 60335 Order Denying Motion, August 10, 2012) it appears that Farnum removed the statement of facts from his brief and directed this court to read the statement of facts submitted in an earlier proceeding before this court. This is inappropriate. We note that this court can and has imposed sanctions for failing to comply with court orders. NRAP 28(j).

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