

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
BARRY NEWPHER,
Respondent.

No. 61514

FILED

DEC 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; William Rogers, Judge.

The district court convicted respondent Barry Newpher, pursuant to a jury verdict, of two counts of sexual assault of a child under 14 years of age and sentenced him to life in prison with the possibility of parole.¹ Newpher voluntarily withdrew his direct appeal in this court and filed a timely post-conviction petition for a writ of habeas corpus in the district court. The district court granted the petition after conducting an evidentiary hearing. This appeal follows.

The State argues that the district court erred by concluding that defense counsel was ineffective for allowing a CD containing the victim's mother's prejudicial statements to be submitted to the jury during

¹The Honorable Robert E. Estes, Senior Judge, presided over the trial.

its deliberation. The State acknowledges that counsel's performance was deficient, but argues that there was no prejudice because the jury's verdict would have been the same if it had not heard the mother's statements. And the State asserts that the victim's testimony alone was sufficient to support the verdict, the mother's statements were immaterial and cumulative to other evidence that was properly before the jury, and the mother's statements should be reviewed for plain error because the error was not preserved for review.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* When reviewing a district court's resolution of ineffective-assistance claims, we give deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong 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).

The district court found that defense counsel allowed the State to submit a CD to the jury during its deliberations. The CD contained

derogatory statements made by the victim's mother, the statements were unsworn and the mother did not testify at trial. The State told counsel about the mother's statements just before the jury returned its verdict. Counsel did not offer any excuse for failing to file a timely motion for a new trial other than that he was ill at the time.² The district court concluded that counsel's performance was deficient because he allowed the jury to hear the mother's statements and failed to file a timely motion for a new trial.

The district court further found that the primary evidence against Newpher was the victim's testimony. The victim's testimony was not overwhelming and was often inconsistent and contradictory. "Central to the issue of [Newpher's] guilt or innocence was the issue of who was lying." During deliberations, the jury requested a CD player and was able to listen to the victim's mother deliberately attack Newpher's credibility and reputation and vouch for the victim. Newpher had no opportunity to confront and cross-examine the mother about these statements. The mother's statements were not cumulative or harmless; they were material and invaded the province of the jury to decide which witnesses it believed.

²Counsel did file an *untimely* motion to set aside the verdict and the trial court granted that motion after determining that the admission of the mother's statements violated the Confrontation Clause. However, this court concluded that the trial court lacked jurisdiction to consider counsel's untimely motion and ordered the trial court to reinstate the jury verdicts. *State v. Third Judicial Dist. Court*, Docket No. 52832 (Order Granting Petition, June 3, 2009).

The district court concluded that the improper admission of the mother's statements prejudiced Newpher and undermined confidence in the jury's verdicts.

The district court's factual findings are supported by substantial evidence and are not clearly wrong. Counsel's performance was deficient because he failed to verify the contents of the State's CD before it was submitted to the jury, and he failed to seek a timely remedy upon learning that the CD contained the mother's statements. The defense was prejudiced because the jury's verdicts may have been based upon its consideration of improperly submitted testimonial hearsay statements about Newpher's character. See NRS 48.045(1) (prohibiting the use of character evidence to show that a defendant acted in conformity with his character on a particular occasion); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and defendant had a prior opportunity to cross-examine the declarant); *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996) (“[A] defendant's conviction may be based only on the evidence presented during the trial. Sending [unplayed] tapes to the jury room is akin to allowing a new witness to testify privately, without cross-examination, to the jury during its deliberations.”). We conclude that a reasonable probability exists that the trial result would have been different if the jury had not been exposed to the mother's testimonial hearsay statements or

that Newpher would have received a new trial if counsel had filed a timely motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Robert E. Estes, Senior Judge
Hon. William Rogers, District Judge
Attorney General/Carson City
Lyon County District Attorney
Waters Law Firm LLC
Third District Court Clerk

³The State's opening brief and reply brief do not comply with the formatting requirements of NRAP 32(a)(4) because they are not double-spaced and do not have one-inch margins on all four sides. We caution counsel for the State that future failure to comply with the applicable rules when filing briefs in this court may result in the imposition of sanctions. See NRAP 28(j).