

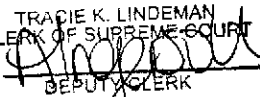
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ROMANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62460

FILED

FEB 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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; Michael Villani, Judge.

Appellant argues that the district court erred in denying the claims of ineffective assistance of trial counsel raised in his November 2, 2011, 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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not

belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant argues that his trial counsel was ineffective for failing to object to testimony regarding his feature on America's Most Wanted. Appellant failed to demonstrate that he was prejudiced. The challenged testimony was considered on direct appeal under a plain error standard and this court concluded that the comments did not prejudice appellant, as the show was only mentioned twice during trial, and because there was substantial evidence of appellant's flight presented at trial and the jury would have learned he was a fugitive even without reference to America's Most Wanted. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011). Moreover, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to testimony regarding his appearance on America's Most Wanted as any error in admitting the brief reference to that show was harmless. *See Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his trial counsel was ineffective for failing to file a pretrial petition for a writ of mandamus in this court or filing a second motion in the district, both regarding a request for a psychological evaluation of the victim. Appellant also argues counsel should have raised such a claim as a constitutional claim, which he asserts would have provided him a favorable standard of review of such claims in both the district court and on appeal. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel filed a motion to compel a psychological examination of the child

victim and the district court denied that motion. This court concluded on direct appeal that the district court properly denied the motion and this court properly examined that claim under the abuse-of-discretion standard of review. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011); *see also Abbott v. State*, 122 Nev. 715, 723, 138 P.3d 462, 467 (2006). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel made repeated attempts to challenge this issue or made attempts to seek a different standard of review, either before the district court or before this court. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to assert that two of the State's witnesses were not properly noticed pursuant to NRS 174.234(2), as they testified as experts in psychology or bodily fluids. Appellant also argues that as these witnesses were not properly noticed as experts, counsel should have objected to the State's representation that it would not present expert testimony and then sought to limit these witnesses' testimony to a recitation of the facts that they observed. Appellant failed to demonstrate that he was prejudiced. While the majority of these witnesses' testimonies related to their personal conduct in investigating this matter, to the extent that their testimony could be characterized as providing specialized knowledge, appellant fails to demonstrate that the State would not have been permitted to present such testimony. *See Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1259-60 (2005) (discussing the range of possible remedies for failure to make appropriate expert witness disclosures). Moreover, as the child victim testified at trial and provided detailed

testimony regarding the sexual activity she was subjected to by appellant, appellant fails to demonstrate a reasonable probability of a different outcome at trial had the district court refused to permit the two challenged witnesses to testify or limited their testimony to the facts that they observed. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, appellant argues that his trial counsel was ineffective for failing to object when the State's witnesses vouched for the credibility of the victim or for failing to argue that their testimony invaded the province of the jury by commenting on the veracity of the victim. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant does not cite to any statements that contained improper vouching for the credibility of the victim and the record does not reveal that any such vouching occurred. *See Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). Appellant's claim is a bare claim, which is insufficient to demonstrate that he is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Moreover, this court concluded on direct appeal that the State's witnesses did not vouch for the credibility of the victim, and accordingly, appellant fails to demonstrate any prejudice related to this claim. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that his counsel was ineffective for failing to argue that the State violated *Miranda v. Arizona*, 384 U.S. 436 (1966), because there was no written waiver of his rights and the recording of his statement did not contain his oral waiver. Appellant also

asserts that counsel erred by failing to ask the court to require the State to prove he made an intelligent waiver of his *Miranda* rights, given his use of prescription medication. Appellant fails to demonstrate either deficiency or prejudice for this claim as counsel filed a motion to suppress his statements and this court concluded on direct appeal that appellant knowingly and intelligently waived his *Miranda* rights. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel made further efforts seeking suppression of his statements. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, appellant argues that his trial counsel was ineffective for failing to present expert testimony regarding psychology and bodily fluids. Appellant fails to demonstrate either deficiency or prejudice for this claim as he does not demonstrate that there were any experts in these areas which would have testified in a manner favorable to his defense or that there was a reasonable probability of a different outcome at trial had counsel presented any favorable expert testimony in these areas. Appellant's claim is a bare claim, which is insufficient to demonstrate that he is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Seventh, appellant argues that his trial counsel was ineffective for failing to argue that Investigator Sheldon testified beyond the scope of his expertise. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Investigator Sheldon testified that he received training regarding

investigation of child sexual abuse allegations, in interviewing child victims, and that he used that training when interviewing the child victim in this case. Accordingly, appellant fails to demonstrate that Sheldon's testimony regarding his investigation of the child victim's allegations of sexual abuse by appellant and his interview of the child victim during the investigation amounted to improper testimony because it was within his personal knowledge. *See* NRS 50.025(1)(a). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to Sheldon's testimony on this basis. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Eighth, appellant argues that his trial counsel was ineffective for failing to object to hearsay from the recordings of interviews with the child victim and that the recordings violated his right to confrontation. Appellant also argues that counsel was ineffective for failing to ensure that the recordings were edited to remove hearsay and vouching for the child victim. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. The trial court properly concluded that the recordings of the child's interviews were admissible pursuant to NRS 51.385, and therefore, a hearsay objection to this evidence would have been futile. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In addition and as discussed on direct appeal, the child victim testified at trial which provided appellant the opportunity to confront the victim. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011). Moreover, appellant fails to demonstrate that the interview recordings contain improper vouching for the veracity of the child victim. Appellant fails to demonstrate a

reasonable probability of a different outcome at trial had counsel objected to the introduction of the interview recordings on these bases. Therefore, the district court did not err in denying these claims without conducting an evidentiary hearing.

Ninth, appellant argues that his trial counsel was ineffective for failing to object to hearsay statements contained in the recording of his custodial interview with the police and for failing to argue that the recording of the interview contained improper vouching for the child victim. Appellant fails to demonstrate either deficiency or prejudice for this claim. This court already considered the underlying claim on direct appeal and concluded that it was without merit. *Id.* Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Tenth, appellant argues that his trial counsel was ineffective for failing to object to evidence of his flight as improper prior-bad-act evidence. Appellant also asserts that his counsel improperly failed to request a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), prior to the introduction of the flight prior-bad-act evidence. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel filed a pretrial motion to preclude reference to appellant's flight, but the district court denied the motion. In addition, the flight evidence was not introduced as a prior bad act; rather it was properly introduced to demonstrate that appellant fled with the consciousness of guilt. *See Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005); *Turner v. State*, 98 Nev. 103, 106, 641 P.2d 1062, 1064 (1982). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had

counsel objected to the flight evidence or sought a *Petrocelli* hearing regarding that evidence. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Eleventh, appellant argues that his trial counsel was ineffective for failing to argue that the State failed to prove that he intended to flee and for failing to object to the flight instruction. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel filed a pretrial motion to preclude reference to appellant's flight, but the district court denied the motion. In addition, the district court properly instructed the jury on flight because there was substantial evidence that appellant fled with the consciousness of guilt, as appellant fled to Florida shortly before the beginning of his trial, used a different name while in Florida, and appellant himself testified that he left Nevada because he did not want to go back into custody. *See Walker v. State*, 113 Nev. 853, 871, 944 P.2d 762, 773 (1997); *see also United States v. Hernandez-Miranda*, 601 F.2d 1104, 1107 (9th Cir. 1979) (finding that "[f]light immediately after the commission of a crime, or immediately prior to trial, both support an inference of consciousness of guilt"). Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel argued that the State failed to prove he intended to flee or objected to the flight instruction. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Twelfth, appellant argues that his trial counsel was ineffective for failing to argue that the jury instructions improperly used the term "victim." Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant does not cite to any

case law holding that use of the word "victim" at trial is prejudicial to a defendant or that objectively reasonable counsel would object to use of that term. Appellant also fails to demonstrate that use of the word "victim" in this case created an inference of guilt. The jury was instructed on the presumption of innocence, and, in light of the facts of this case, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to use of the term "victim" in the instructions. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Thirteenth, appellant argues that his trial counsel was ineffective for waiting until one day before the start of trial to file a motion requesting discovery and failing to request a continuance of trial in order to review the discovery that was received in an untimely manner. Appellant fails to demonstrate either deficiency or prejudice for this claim because counsel filed a motion requesting discovery approximately nine months before the start of trial. Moreover, while counsel stated at a pretrial hearing that he did not receive the actual recordings of the interviews in a timely manner, he informed the court that he received transcripts of the interviews far in advance of trial. Under these circumstances, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel requested a continuance to further review the evidence. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant argues that his appellate counsel was ineffective. 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 v. Washington*, 466 U.S. 668, 697 (1984). 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).

Appellant argues that his appellate counsel was ineffective for failing to raise a claim regarding the denial of his request for a psychological examination of the victim under constitutional grounds, which he asserts would have provided him a favorable standard of review on appeal. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel raised the underlying claim on appeal and this court properly examined that claim under the abuse-of-discretion standard of review. *Romano v. State*, Docket No. 54303 (Order of Affirmance, April 28, 2011). Appellant fails to demonstrate that he would have gained a more favorable standard of review by asserting that the claim was raised under the constitution. Appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel raised further arguments regarding this issue on appeal. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

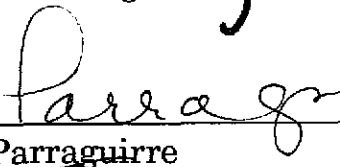
Next, appellant argues that the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Appellant fails to demonstrate that any errors, even if considered cumulatively, amount to ineffective assistance of

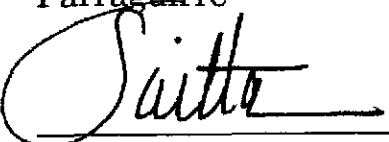
counsel. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Finally, appellant argues that the district court did not make sufficient findings of fact or conclusions of law in its order denying the petition. However, we conclude that the district court's order was sufficient to allow this court to properly review appellant's claims in this appeal and, as discussed previously, appellant fails to demonstrate that any of his claims had merit. Therefore, appellant is not entitled to relief regarding his argument that the district court's order was insufficient.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

cc: Hon. Michael Villani, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk