

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEGRAND, IN HIS OFFICIAL
CAPACITY AS WARDEN OF THE
LOVELOCK CORRECTIONAL
CENTER; AND GREG COX, IN HIS
OFFICIAL CAPACITY AS DIRECTOR
OF THE NEVADA DEPARTMENT OF
CORRECTIONS,
Appellants,
vs.
RYAN LEE FRASER,
Respondent.

No. 62531

FILED

DEC 18 2013

TRACEE K LINDEMAN
CLERK OF APPEALS COURT
BY *Angersall*
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 Ryan Lee Fraser, pursuant to a jury verdict, of sexual assault of a child under 14 years of age and sentenced him to serve life in prison with the possibility of parole.¹ We affirmed the judgment of conviction. *Fraser v. State*, Document No. 53675 (Order of Affirmance, June 23, 2010). Fraser subsequently 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 followed.

¹The Honorable David A. Huff, District Judge, presided over the trial and sentencing.

The State argues that the district court erred by concluding that trial counsel was ineffective for failing to (1) consult with a psychological expert and/or present the expert's testimony at trial, (2) present the victim's competency hearing statements and preliminary hearing testimony to the jury, (3) retain an investigator and present additional witness testimony to the jury, and (4) pursue a motion for an independent psychological evaluation of the victim.²

Ineffective assistance of counsel

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). "A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. ___, ___, 131 S. Ct. 770, 787 (2011) (internal quotation marks omitted). "To overcome that presumption, a [petitioner] must show that counsel failed to act reasonably considering all the circumstances." *Cullen*

²To the extent that the State argues that "the district court's findings of fact are clearly erroneous because the district court left out critical information necessary for meaningful appellate review," we conclude that the State has not demonstrated error. Instead of identifying the findings of fact that the district court should have included in its order, the State offered its own statement of facts to supplement the district court's findings of fact. The State is not a fact-finder and its statement of facts is not entitled to deference.

v. Pinholster, 563 U.S. ___, ___, 131 S. Ct. 1388, 1403 (2011) (internal alteration and quotation marks omitted). Petitioner must also show prejudice: “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. 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).

Forensic psychological expert

Fraser claimed that counsel was ineffective for refusing to consult with an expert in the field of examining child witnesses who are alleged victims of sex abuse and/or present the expert’s testimony at trial.

The district court made factual findings based on the testimony that was presented during the evidentiary hearing. The district court found that Kelly Fraser testified that she and her husband had retained counsel to represent their son. Kelly spoke to counsel about using the services of Victims of Child Abuse Laws (VOCAL). She told counsel that according to VOCAL it is very important for the defense to have a forensic psychologist review the interviewing techniques used by the investigating officer. And she informed counsel that VOCAL suggested contacting Dr. Frieelander and that Dr. Frieelander said that

he would work the case pro bono if he took it. Counsel remembered talking with Kelly Fraser about Dr. Frieland, but he did not contact him or any other outside source.

Dr. William O'Donohue testified that he is a specialist in sexual abuse and the methodology of interviewing children who may have been sexually abused. He reviewed the reports and interview transcripts generated by the victim's accusations in this case. And he found the victim's accusations against Fraser were inconsistent, noted that his profession distinguishes between core and peripheral details, observed that the victim's inconsistencies all related to core details, and concluded that her inconsistencies may indicate suggestibility, false memories, or false allegations. Dr. O'Donohue also testified that there are 18 sources of bias that must be ruled out to avoid potentially biased interview and stated his opinion that 12 of these sources of bias could not be ruled out of Sergeant Sherri Rye's interview of the victim. Counsel admitted that Dr. O'Donohue's testimony was consistent with his theory of the case and would have been helpful had it been presented to the jury.

Counsel testified that his theory of the case was that the statements made by the victim were tainted, uncorroborated, and could not be relied upon to convict Fraser. Counsel believed that the victim's statements were tainted because the victim was very susceptible to suggestibility and sought to please whoever was talking to her by going down any path they led her on. And counsel knew that critiquing Sergeant Rye's interview of the victim was an important part of the

defense because Sergeant Rye was a professional with some training in interviewing child witnesses and therefore the jury might find that the responses the victim gave during the interview were accurate.

Counsel testified that he made a strategic decision not to hire an expert witness. He believed that the victim's story was so unbelievable that the jury would not believe it, he was prepared to cross-examine Sergeant Rye based on his own research and trial experience, expert assistance was not needed to develop his cross-examination, and an expert witness was unnecessary. Counsel researched the topic of child suggestibility and subpoenaed the teaching materials used in the courses that Sergeant Rye had taken on interview techniques. Counsel used his research to cross-examine Sergeant Rye, and he used the subpoenaed materials to show inconsistencies in Sergeant Rye's interview technique. Counsel admitted that it occurred to him that a better strategy would have been to hire an expert witness.

The district court found that Kelly Fraser, Dr. O'Donohue, and trial counsel testified credibly and we conclude that the district court's factual findings pertaining to this testimony are supported by substantial evidence and are not clearly wrong. However, this testimony does not support the district court's determination that counsel was ineffective for failing to retain and consult with a forensic psychological expert. The record reveals that counsel was well aware that the crux of the case was to show that the victim's statements were unbelievable and that he must overcome the possibility that the jury would find that the victim's

statements to Sergeant Rye were credible. Counsel investigated child suggestibility and child interview techniques in preparation for the trial. And counsel considered the possibility of hiring an expert witness but decided that his own preparations and trial experience were sufficient to defend this case. We conclude that counsel made a strategic choice to forego using an expert witness after a reasonable investigation and, while this choice may not have been the best option, it was a reasonable choice and did not place counsel's representation "outside the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690-91.

Victim's pretrial testimony

Fraser claimed that counsel was ineffective for failing to present the videotaped recording or transcript of the victim's preliminary hearing testimony and the transcript of the victim's competency hearing testimony.

The district court found that during the preliminary hearing the victim testified on direct examination that Fraser had never inappropriately touched her, she did not remember telling her mother or grandmother that Fraser assaulted her, and she did not remember talking with her grandmother about Fraser inappropriately touching her, and, on cross-examination, the victim testified that she had been truthful during the direct examination. The district court further found that the trial court conducted a competency hearing to see if the victim would be allowed to testify and determined that the victim was competent even

though she was unable to identify Fraser as he sat in the courtroom for the hearing.

The district court found that counsel testified credibly that his trial strategy included presenting the preliminary hearing videotape recording and transcript to the jury. Counsel changed this strategy when the victim testified at trial that the district attorney told her what say on the witness stand and that Fraser had not done anything to her. Counsel decided not to present the videotape recording so that the defense would end on a high note. Counsel believed the recording was unnecessary because the fact that the victim's preliminary hearing testimony exonerated Fraser had been brought out orally and the victim's trial testimony had been favorable to the defense. Counsel did not consider using the recording to show that the district attorney had motive to coach the victim's trial testimony. Counsel also testified that he considered presenting the victim's competency hearing statements to the jury because they were consistent with his theory of the case. Counsel did present some of the victim's competency hearing statements to the jury, but he decided against reading the victim's statements to the jury because the victim's trial testimony was consistent with her competency hearing statements.

The district court found that even though the jury heard the victim exonerate Fraser on cross-examination, the recording of her preliminary hearing testimony would have shown the jury that the victim was unable to identify Fraser on more than one occasion and that her responses to identifying Fraser were consistent regardless of whether it

was the State or defense counsel who was asking the questions. The district court found that counsel did not have a valid strategic reason for not playing the recordings of the victim's preliminary hearing testimony and concluded that his decision not to do so was unreasonable.

Although the district court's factual findings are supported by substantial evidence, counsel's testimony that the victim's preliminary hearing testimony was brought out orally is not accurate. The record reveals that counsel addressed the victim's preliminary hearing testimony briefly during his opening statement, but did not enter this testimony into evidence for the jury to deliberate upon. Counsel's failure to enter this testimony into evidence was objectively unreasonable because this case hinged solely on the believability of the victim and the victim's preliminary hearing testimony fully exonerated Fraser, was inconsistent with the victim's trial testimony, and demonstrated that the district attorney had motive to coach the victim. Accordingly, we conclude that counsel's performance was deficient in this regard.

Investigator and potential witnesses

Fraser claimed that counsel was ineffective for failing to retain an investigator and interview witnesses that he and his parents had identified as material to the case.

The district court found that Kelly Fraser testified that when she and her husband first retained counsel, he said that he would hire an investigator. Kelly Fraser spoke to counsel about several witnesses who she thought would provide testimony helpful to her son's case: Tori

Lamonda, Kevin Marriot, and Bandy Davis. She told counsel that Thomas Cervantes overheard a conversation between Rebekah Duff, the victim's mother, and Noelle, the mother of three of Fraser's children, in which they discussed getting their story straight. And she told counsel that Duff had given notice at her job, was moving to Colorado, and wanted to drop the charges against Fraser. Kelly Fraser felt it was very important to have Duff testify because she testified during the preliminary hearing that Fraser told her to call Child Protective Services and that she had performed a vaginal examination on the victim. The district court heard testimony from several potential witnesses during the evidentiary hearing.

Tori Lamonda testified that she worked for a domestic abuse shelter. Duff entered the shelter after claiming that she was being abused by a boyfriend—the boyfriend was not Fraser. However, Duff was later asked to leave because she could not abide by the shelter rules: she did not keep her living space clean, she left the shelter overnight, and she did not have her children in the shelter before the curfew. Additionally, Lamonda testified that Duff would not immediately change her children's soiled diapers and seemed not to notice when the children had soiled their diapers.

Kevin Marriott testified that he had a romantic relationship with Duff. The relationship began after Duff's relationship with Fraser ended and lasted for about nine months. For a time Marriott lived with Duff. Marriott babysat the victim and never observed any abnormal

behaviors, and the victim never mentioned being abused by Fraser. Duff never told Marriott about allegations made against Fraser, and Marriott did not learn about the allegations until after the relationship had ended. Duff slapped Marriott around on at least one occasion and supplied him with alcohol while he was still underage. Marriott testified that he was not contacted by counsel, but admitted that he may have talked with counsel and just forgot about it.

Brandy Davis testified that she operated a daycare center out of her house and babysat the victim in 2006 and 2007. Davis had informed Duff that the victim was exhibiting overly sexual behavior and had redness and sores in her pubic area. Davis was questioned by Child Protective Services and interviewed by the Yerington Police Department. The police told Davis that Fraser had suggested that she was responsible for the issues with the victim's pubic area. Although Davis was contacted by counsel and told to show up at trial, counsel did not interview her or go over what she might testify to, and she was not called as a witness.

Laura Valdes testified that she stopped babysitting the victim and the victim's brother because she and Duff could not agree on how the children should be disciplined. The police came to Valdes' house and took her statement in response to Duff's allegations that Valdes had tried to hit her and was not taking good care of her children. Over a six-month period, every time Valdes bathed the victim the victim would say that Fraser had touched her private parts. Valdes further testified that the children sometimes arrived at her house without appropriate clothing,

they always arrived needing a bath, and one time the victim's brother arrived with a serious diaper rash. Duff was often late in collecting her children, she dressed provocatively, and she dressed the victim in short skirts. Valdes was not interviewed by counsel.

Kevin Marriott's older sister, Alicia Marriott, testified that she helped babysit the victim and the victim's brother 15 to 20 times during the period that Kevin was dating Duff. The victim never mentioned anything about being molested and did not exhibit any behavior relating to being molested. The one time that Alicia bathed the victim, the victim did not mention being touched in her genital area and did not mention Fraser. Alicia was not contacted by counsel.

Counsel testified that he did not hire an investigator because all of the witnesses were local and he could contact them by phone. Counsel had talked with Tom Cervantes after the preliminary hearing, but did not remember the contents of their conversation and did not know that Cervantes overheard Duff and Noelle talking about the case. Counsel stated that if Cervantes had information that Duff was coaching the victim to testify against Fraser that information would have been consistent with his theory of the case.

Counsel acknowledged that he and Kelly Fraser spoke about Duff and her plans to leave Nevada before the trial. Counsel planned to call Duff as a witness to show the jury that Duff was not convinced that the victim was telling the truth; she was unstable, drank and partied a lot, and left the victim in the care of other people; and she had performed a

vaginal examination on the victim. Counsel thought the evidence of the vaginal examination supported his theory of the victim's suggestibility and the victim's statements of abuse were the result of that examination. Counsel attempted to get evidence of the vaginal examination in front of the jury through other witnesses, but felt that it would have been better coming from Duff. Counsel did not subpoena Duff because he assumed that the State had subpoenaed her and planned to call her as witness. Counsel admitted that he did not check with the district attorney's office to see if they planned to call Duff as a witness.

Counsel knew who Lamonda was and had listed her as a potential witness. He did not recall if he had talked with her, and he decided not to call her because the information that she had was not relevant and was cumulative to the other evidence. Counsel knew that Marriott had dated Duff after she and Fraser broke-up, and he was pretty sure that he contacted Marriott and Marriott told him that he did not want to get involved. Counsel listed Davis as a witness, but decided not to call her because the evidence was in Fraser's favor and Davis's testimony would not add to the case. Counsel did not know Valdes, admitted that the information she had regarding her dealings with Duff was consistent with his theory of the case, and stated that he would have wanted to interview her before deciding whether to call her as a witness. Counsel did not know Alicia Marriott or whether she had information relevant to his case. Counsel admitted that her information about the victim's

behavior was consistent with his theory of the case and that he may have wanted to present her testimony to the jury.

The district court found that Kelly Fraser, trial counsel, and each of the potential witnesses testified credibly. The district court's factual findings are supported by substantial evidence and are not clearly wrong. However, the district court's conclusion that *Buffalo v. State*, 111 Nev. 1139, 901 P.2d 647 (1995), and *Warner v. State*, 102 Nev. 635, 729 P.2d 1359 (1986), apply to the facts in this case is misplaced. In both of those cases, this court found that defense counsel's failure to investigate facts, research legal issues, and prepare for trial left the defendant without any defense at trial. *Buffalo*, 111 Nev. at 1149, 901 P.2d at 653-54; *Warner*, 102 Nev. at 637-38, 729 P.2d at 1361. Here, in contrast, counsel actively investigated the facts, developed a theory of the case, conducted research in preparation for trial, and presented a meritorious defense to the jury. *See Harrington v. Richter*, 562, U.S. at ___, ___, 131 S. Ct. 770, 791 (2011) ("[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.").

We conclude that counsel understood the State's case, what he must defend against, what evidence was available to support the defense, and made reasonable professional decisions as to the extent of the investigations necessary to mount a viable defense. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary.”). However, we also conclude that counsel’s failure to subpoena Duff and ensure her presence at trial was unreasonable because counsel’s trial strategy included calling Duff as a witness.

Psychological evaluation

Fraser claimed that counsel was ineffective for failing to file a motion for an independent psychological evaluation of the victim.

The district court found that counsel testified credibly that he did not file a motion for an independent psychological evaluation because he did not believe there were sufficient grounds to request one, largely because the victim’s preliminary hearing testimony exonerated Fraser. Counsel knew that the State was going forward with the case and that the victim’s competency would be a significant issue. And, counsel admitted that an independent psychological evaluation could have been a good idea.

Guided by *Abbott v. State*, 122 Nev. 715, 718, 138 P.3d 462, 464 (2006) (reinstating the three-prong test for independent psychological evaluations announced in *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000)), the district court found that counsel had adequate grounds to demonstrate a compelling need for an independent psychological evaluation of the victim because (1) Sergeant Rye’s testimony was more than a recitation of the facts, it included her opinions about the victim’s mental capacity and the objectivity of her interview, and it demonstrated that she acted as an expert witness on behalf of the State; (2) because there was no physical evidence of the sexual abuse and no one witnessed

the sexual abuse, the only evidence of the crime was the victim's accusations; and (3) because the victim gave multiple and differing accounts of the sexual abuse, appeared to have had a "horrible and neglectful" mother, and was constantly in the care of different adults, there is a reasonable basis to believe that her mental or emotional state may have affected her veracity.

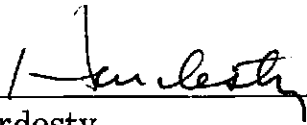
The district court's factual findings are supported by substantial evidence and are not clearly wrong. Pursuing an independent psychological evaluation of the victim would have been consistent with counsel's theory of the case and should have been part of counsel's trial strategy because the results of such an evaluation had the potential to significantly bolster the defense's argument that the victim's statements were unbelievable and she was susceptible to suggestibility. However, it is not clear from the record that counsel failed to research the criteria for obtaining an independent psychological evaluation, and we conclude that the record does not demonstrate that counsel acted unreasonably in this regard.

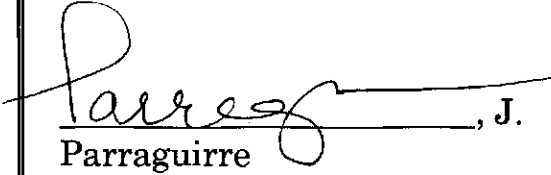
Prejudice

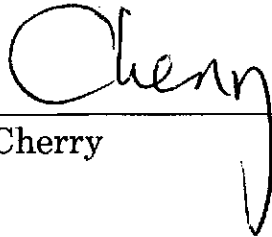
We have determined that counsel's failure to subpoena the victim's mother and present the victim's preliminary hearing testimony to the jury constituted unprofessional errors. It is not evident that counsel's failure to present Duff as a witness was prejudicial. However, we conclude a reasonable probability exists that the trial result would have been different if the jury had heard the victim's preliminary hearing testimony

exonerating Fraser of the charged offenses. Accordingly, the district court did not err by granting Fraser's petition for a writ of habeas corpus, and we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry

cc: Hon. William Rogers, District Judge
Attorney General/Carson City
Lyon County District Attorney
Richard F. Cornell
Third District Court Clerk

³The State's briefs do not comply with NRAP 32(a)(4)-(5) because they are not double-spaced and the footnotes in the opening brief are in a smaller font than the text of the brief. We caution counsel for the State that future failure to comply with the applicable rules for filing briefs in this court may result in the imposition of sanctions. NRAP 28(j).