IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62805

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition filed on July 16, 2012, appellant raised several 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,

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous 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 claimed that trial counsel was ineffective for failing to file a motion for rehearing or reconsideration when the district court denied his motion for judgment of acquittal. Specifically, appellant claimed that trial counsel should have argued that the district court applied the wrong standard when reviewing this claim. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellate counsel raised this claim on appeal and this court concluded that the claim lacked merit. *Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to defend him against administrative collateral estoppel and double jeopardy. Specifically, appellant claims that trial counsel should have filed a motion to dismiss arguing that the State violated his double jeopardy rights because it sought an indictment after being unsuccessful at his preliminary hearing. Further, he argues that the State should have been estopped from pursuing the indictment. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. While trial counsel did challenge the State's seeking of the indictment in a motion to dismiss, trial counsel did not argue double jeopardy or estoppel. However, appellant failed to demonstrate that a claim of double jeopardy or estoppel would have been successful. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding that counsel is not deficient for

failing to make futile motions). NRS 178.562(2) specifically states that "the discharge of a person accused upon preliminary examination is a bar to another complaint against the person for the same offense, but does not bar the finding of an indictment or filing of an information." Further, double jeopardy does not attach until a jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 34-35 (1978). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to request a lesser-included offense or an alternative offense of battery. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Battery is not a lesser-included offense of lewdness with a minor under the age of 14. *See* NRS 200.481; NRS 201.230; *Smith v. State*, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (defining lesser-included offense). Further, appellant was not entitled to an instruction on a lesser-related offense. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss arguing that his speedy trial rights were violated. Appellant failed to demonstrate that trial counsel was deficient. According to a hearing held on December 2, 2008, trial counsel stated that appellant had waived his speedy trial rights because a writ petition was filed. It appears that the petition may have been filed in a separate but related case, but counsel and the district court believed that the waiver was for both cases. Therefore, because appellant had waived, a motion to dismiss based on a speedy trial violation would have been futile. *Donovan*,

94 Nev. at 675, 584 P.2d at 711. As such, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to move for the dismissal of the criminal complaint in justice court for lack of jurisdiction. Specifically, appellant claimed that the justice court lacked jurisdiction because appellant was charged with felonies and the justice court only has jurisdiction over misdemeanors. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. The justice court has jurisdiction to conduct a preliminary hearing on felony charges and bind a defendant over for trial in the district court. *See* NRS 171.196 (providing for a preliminary examination in the justice court); NRS 171.206 (providing that the magistrate shall bind a defendant over to the district court if there is probable cause to believe an offense has been committed and the defendant has committed it). Thus, a motion to dismiss on this basis would have been futile. Counsel cannot be deemed ineffective for failing to file a futile motion. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel's cross-examination of the victim C.S. constituted ineffective assistance of counsel. Specifically, appellant claimed that trial counsel asking the victim about other incidences of touching was inappropriate cross-examination. Appellant failed to demonstrate that trial counsel was deficient. Trial counsel asked about these other incidents in order to demonstrate and later argue that the victim changed her story often. The other incidents were incidents that the victim told to the police and the grand jury but denied at trial. In addition, the victim added an incident to the story at

trial that she had never told anyone before. Therefore, this was a tactical decision to undermine the testimony of the victim and is virtually unchallengeable absent extraordinary circumstances, *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant failed to demonstrate. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to seek dismissal of all of the charges because appellant did not willfully and lewdly commit any lewd or lascivious act. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. On appeal, appellant argued that the touching that occurred in this case did not constitute a lewd or lascivious act. This court concluded that the touching did constitute a lewd or lascivious act. *See Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). To the extent that appellant is claiming that trial counsel did not seek dismissal on this basis or did not raise this argument on appeal, this claim is belied by the record. To the extent that appellant claims that trial counsel should have sought dismissal because he did not willfully and lewdly commit the act, appellant failed to demonstrate that this argument would have been successful because this court already determined that the acts were lewd and that he had the intent to commit the acts. *See id.* Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct during closing arguments. Specifically, he claimed that the State improperly vouched for the witnesses, improperly referenced appellant's guilt, misrepresented the law, inflamed the jury, and argued facts not in

evidence. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced because appellant failed to demonstrate that these were misconduct that trial counsel should have objected to, *see Epps v. State*, 901 F.2d 1481 (8th Cir. 1990) (explaining that prosecutor's comments that were not objectionable could not be a basis for an ineffective-assistance claim based on counsel's failure to object); *Broussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that decision whether to object is a strategic one and "must take into account that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"), or that had trial counsel objected, the objection would have resulted in a different outcome at trial. The record demonstrates that the State was simply pointing out the lack of motive for the victims to fabricate, which did not rise to vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004), the statements were reasonable inferences based on the evidence and were proper argument to the jury, and the discussion of the pornography was proper as testimony regarding those pictures was in evidence. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that the cumulative errors of trial counsel required reversal of his conviction. Because appellant failed to demonstrate any error, we conclude that the district court did not err in denying this claim.

Next, appellant raised three claims of ineffective assistance of appellate counsel. 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*, 466 U.S. at 697. 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*, 105 Nev. at 853, 784 P.2d at 953.

First, appellant claimed that appellate counsel was ineffective for failing to argue that the State failed to prove that appellant willfully and lewdly committed a lewd and lascivious act. Specifically, he claimed that the victims did not tell him that they did not like that type of touch and, therefore, he had no idea that his conduct was inappropriate. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. As stated above, this court concluded on appeal that appellant had the intent to, and committed, a lewd and lascivious act. *Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). Appellant failed to show that the victim's failure to inform him they did not like to be touched would have had a reasonable likelihood of success on appeal. Further, we note that the victim's testified that they moved away from him when he would touch them and that appellant threatened them to keep them quiet. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel should have raised his speedy trial claim on appeal. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. As stated above, appellant waived his speedy trial rights and, therefore, this claim did not have a reasonable likelihood of success on appeal had appellate

counsel raised it. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective for failing to reargue the claims summarily denied in the order of affirmance and for failing to argue that appellant did not commit a willful and lewd act. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. Appellant failed to provide any specific argument as to the summarily denied claims and how rearguing them would be successful on rehearing. *See* NRAP 40(c)(1); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, as stated above, appellant failed to demonstrate that argument regarding a willful and lewd act would have been successful on rehearing. *See* NRAP 40(c)(1) and (2). Therefore, the district court did not err in denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Valerie Adair, District Judge
Michael D. Wilson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk