IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY LEE STARRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35862

FILED

JAN 31 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Barry Lee Starry appeals the district court's denial of his petition for post-conviction relief. Starry asserts that he was provided ineffective assistance of counsel in various instances at trial and on direct appeal. We conclude that Starry's trial counsel's performance fell below an objective standard of reasonableness, and but for the errors, the result of Starry's trial probably would have been different.

Under Strickland v. Washington,[1] to prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient assistance prejudiced the defense, i.e., that but for counsel's error, the result of the trial would probably have been different.[2]

The crux of Starry's defense was that the child he was accused of assaulting either improperly perceived the events that occurred or was coached about her testimony. Essential to this defense was a child psychiatrist or psychologist who could qualify to testify. Starry's attorney

[1]466 U.S. 668 (1984).

[2]Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (citing Strickland, 466 U.S. at 687-88, 694).

03-01689

retained Dr. Lee Coleman on Starry's behalf, a child psychiatrist who had previously testified as an expert in Nevada courts.[3] The State moved to disqualify Dr. Coleman from testifying because he was a forensic expert and had not seen the child. Starry's trial attorney argued that Dr. Coleman was going to testify on the "veracity" of the child victim, which was in error, and the district court disqualified Dr. Coleman from testifying, in part because he could not testify to the "veracity" of the victim.

Starry's attorney did attempt to have the child victim examined by an expert, but went about it improperly. She scheduled an examination of the child without notice to the State or permission from the district court. The State was obviously angered when it belatedly found out about the examination and filed a motion in limine to prevent the examination from occurring. The district court noted that the examination was requested late in the proceedings, and it did not think a psychological examination was warranted at that time. Arranging for the independent examination of the child was bungled, and Starry may have been successful if the request had been properly handled.

Because the defense lacked its own psychological expert or an independent examination of the child, Starry's attorney attempted to prove his case by calling the State's expert, Dr. Joan Behrman-Lippert, and this proved to be extremely counterproductive. In this testimony, Dr. Lippert impermissibly opined that the child victim was being forthright

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[3]See Felix v. State, 109 Nev. 151, 161, 849 P.2d 220, 227 (1993) (noting that Dr. Coleman testified for the defense regarding the techniques used in interviewing children that were alleged to have been abused).

and telling the truth, and concluded that the child had been sexually abused. No objections to answers elicited were made by Starry's counsel.

The father of the child had stated to others after the incidents that he regretted filing the criminal charges against Starry and asked the prosecutor to drop them. Starry's attorney did not examine the father about these statements, but later asked the person who heard these statements about them when he was testifying. The district court disallowed the inquiry because it was hearsay, and this important evidence was not received at the trial because of the improper examination procedures used by Starry's attorney.

In closing arguments, the prosecutor implied that the jury would be victimizing the child if it did not return a guilty verdict, and the verdict should honor our children, "God's hope for the future." This line of argument was inflammatory and highly prejudicial, yet no objection to it was made by Starry's counsel. The performance of Starry's attorney in not objecting fell below an objective standard of reasonable legal representation.

The collective errors of Starry's counsel prevented Starry from presenting a full defense and permitted prejudicial statements to stand unchallenged.[4] But for these numerous instances of ineffective assistance of counsel, the trial result probably would have been different. Accordingly, we

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[4]Having concluded that sufficient grounds for reversal exist, we need not address Starry's other contentions.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Rose

_____, J.
Becker

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk

SHEARING, J., dissenting:

I would affirm the judgment of the district court. I do not agree that collective errors of Starry's counsel prevented Starry from presenting a full defense as the majority concludes.

Starry argues that a child psychiatrist or psychologist was essential to Starry's defense and that Starry's trial counsel was ineffective in failing to qualify such a professional. This issue was decided by this court in the order dismissing appeal. This court stated:

> Finally, Starry contends that the district court erred when it limited Dr. Coleman's testimony to medical opinions only and when it disallowed the proffered testimony regarding investigative methodology. This court has held that "[t]he competency of an expert witness is a question for the sound discretion of the district court, and we will not disturb the ruling absent a clear abuse of discretion." Additionally, any error in determining admissibility of expert testimony is evaluated under the harmless error standard.
>
> If the district court's exclusion of this testimony were improper, it would be harmless; the court adequately instructed the jury on Starry's "coaching" theory, and defense counsel thoroughly argued that theory to the jury during his closing arguments.[1]

This holding is the law of the case. This court has determined that there was no ineffective assistance of counsel on this basis. Furthermore, the district court concluded, after hearing the psychologist's testimony, that even if the testimony had been admitted at trial, the result would not have been different. There is no basis for saying that the psychologist's

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[1]Starry v. State, Docket No. 22951 (Order Dismissing Appeal, March 30, 1994) (citations omitted).

testimony was not allowed because counsel said the psychologist would testify on "veracity."

Starry argues that his trial counsel was ineffective for failing to obtain a physical and psychological examination of the child-victim. Before trial, the district court denied any examination on the basis that the child-victim had been traumatized enough by prior examinations. Furthermore, the physical examination by the State had been negative as to any physical signs of sexual abuse. That was as favorable a result for which the defense could possibly hope. The defense was not deprived of any relevant evidence. The trial court's finding that the child-victim had been traumatized enough, and should not be further subjected to any more physical or psychological examination, is sufficient to justify denial of an additional examination. No compelling reason for such an examination was presented either at the trial or in the post-conviction petition.[2]

Furthermore, the experienced trial counsel testified at the hearing: "I don't have an independent recollection in this particular case, but in other cases where it talks about psychologists or psychiatrists, it's sometimes better not to have any independent examination of a child because it might affirm what the prosecution has already got." In other words, experience had taught the trial attorney that it was often a better defense strategy not to request a psychological examination of a child.

Starry argues that trial counsel was ineffective for not objecting the prosecutor's allegedly inflammatory statements. On direct appeal, this court held that the allegedly inflammatory statements did not deny Starry a fair trial, nor were they so patently prejudicial as to inflame or excite the passions of jurors against the accused. Therefore, even if it

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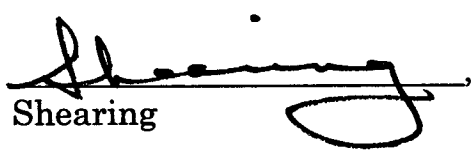
[2]Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101,1102 (1980).

were to be found that trial counsel fell below an objective standard of reasonableness in failing to object, which the district court did not find, this court, in our March 30, 1994 order, already decided that the statements did not prejudice the defense. Therefore, the second prong of Strickland v. Washington,[3] has not been satisfied. This court has already determined that the allegedly improper comments did not affect the verdict. It would have made no difference if appellate counsel's argument had been couched in constitutional terms.

Starry argues that his counsel was ineffective for failing to introduce evidence that the child-victim's father had expressed a wish to drop the charges. Trial counsel certainly was not ineffective for not succeeding in introducing this evidence. This evidence was totally irrelevant to the charges. Parents often have their own motives for not wishing to continue prosecution, which may be at odds with the best interests of the child-victim or may be simply to protect the child from the trauma of participating in the justice system. None of the parents' motives changes the State's interest in protecting society from predators. The trial court properly excluded that evidence, and thus, counsel's ineffectiveness was not responsible for its exclusion.

There is no basis for finding ineffective assistance of Starry's counsel either at trial or on appeal. Therefore, we should order the judgment of the district court affirmed.



Shearing, J.

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[3]466 U.S. 668, 687-88 (1984).