IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES BEN FRITSCHE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65128

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Charles Ben Fritsche challenges the district court's denial of his July 9, 2010, habeas petition. A jury found Fritsche guilty of sexual assault and lewdness with a child under the age of fourteen. The Nevada Supreme Court affirmed Fritsche's judgment of conviction on direct appeal. *Fritsche v. State*, Docket No. 54131 (Order of Affirmance, May 10, 2010). And the district court denied Fritsche's habeas petition after conducting an evidentiary hearing on his claims of ineffective assistance of counsel.

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

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(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. 86, 104 (2011) (internal quotation marks omitted). "To overcome that presumption, a [petitioner] must show that counsel failed to act reasonably considering all the circumstances." *Cullen 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. 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).

Alibi defense

Fritsche claimed that counsel was ineffective for failing to present an alibi defense and call alibi witnesses at trial despite having filed an alibi defense notice.

Counsel testified that he filed the alibi defense notice to be used in the event that he was able to create or find a basis for such a defense. The primary reason he chose to abandon this defense was that the proposed alibi witnesses became hostile to the defense. He ultimately concluded that the alibi defense was "dangerous ground" and made a strategic decision to abandon the defense because it was not "air tight." The district court found that counsel testified credibly, counsel made a

sound decision to abandon the alibi defense because the defense was not complete, and Fritsche failed to establish that counsel's performance was deficient on this ground.

The record supports the district court's findings and we conclude that Fritsche failed to demonstrate that counsel's performance was deficient in this regard. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) ("A strateg[ic] decision . . . is virtually unchallengeable absent extraordinary circumstances." (internal quotation marks omitted)).

Victim's inconsistent statements

Fritsche claimed that counsel was ineffective for failing to bring out the inconsistencies between the victim's out-of-court statements and her courtroom testimony. However, the district court found that counsel testified credibly that the victim was a strong witness for the State, he had to be careful with his cross-examination to avoid jury backlash, and he carefully considered his cross-examination style as part of his trial strategy. The record supports the district court's findings and we conclude that Fritsche failed to demonstrate that counsel's performance was deficient in this regard. *See Silva v. Woodford*, 279 F.3d 825, 852 (9th Cir. 2002) (concluding that counsel's limited cross-examination of an adverse witness was reasonable because a more forceful cross-examination could have made the witness more sympathetic in the eyes of the jury).

Fritsche's right to testify

Fritsche claimed that counsel was ineffective for advising him not to testify on his own behalf and for failing to present evidence that he consistently denied culpability.

The district court found that Fritsche expressly chose not to testify after being canvassed about his constitutional privilege against self-incrimination and that counsel attempted to present evidence that Fritsche consistently denied culpability through his cross-examination of a police detective. However, the prosecutor objected to counsel's questions and the trial court rejected counsel's doctrine-of-completeness argument. And when the trial court suggested questions that could be asked, counsel chose not to ask them because he believed that it was unlawful for a court to formulate questions on Fritsche's behalf, he felt that the doctrine of completeness had been violated, and he sought to preserve these issues for appellate review. The district court further found that counsel was not ineffective for failing to call Fritsche as a witness and counsel's decision to not ask the trial court's suggested questions was a tactical decision.

The record supports the district court's findings. We conclude that counsel's performance was not deficient. Counsel made a tactical choice to forego asking the trial court's questions and, while this choice may not have been the best option, it was reasonable and did not place counsel's representation "outside the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690.

Prosecutorial misconduct

Fritsche claimed that counsel was ineffective for failing to object to pervasive prosecutorial misconduct. Fritsche asserted that the

prosecutor committed misconduct when she (1) told the victim to "grab the microphone in your hand like you're a famous singer on TV;" (2) asked the victim, "are you okay? Just take a minute, Honey" when the victim described her vaginal area; (3) repeatedly called the victim "Honey;" (4) stated, "Honey, don't be ashamed, okay? Does this make you feel bad to talk about" during the victim's direct testimony; (5) argued to the jury that she "victimized" the victim by having her testify to body parts; (6) argued that the victim "cried on the stand" because she had to be subjected to cross-examination and that "she's had to go through this now for almost a year;" (7) argued, "Trust me, folks, this defense attorney—you saw him fighting here in court. He is viciously defending his client;" and (8) closed with, "Do not let this little girl be the perfect victim." Fritsche argued this misconduct deprived him a fair trial because the prosecutor made it sound like he victimized the victim by demanding a trial and her maternalistic style created sympathy for the victim.

Although the prosecutor's comments may have constituted misconduct, the district court found that counsel made strategic decisions as to when to interpose objections to the prosecutor's questions and arguments and that Fritsche failed to prove that counsel's performance was deficient and fell below an objective standard of reasonableness in light of the circumstances associated with this case. The record supports the district court's findings and we conclude that Fritsche failed to demonstrate that counsel's performance was deficient in this regard. *See Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that counsel's decision to object to prosecutorial misconduct is a strategic decision which "must take into account the possibility that the court will

overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds").

Double jeopardy

Fritsche claimed that counsel was ineffective for failing to seek dismissal of the lewdness count on the basis of a double jeopardy violation. He asserted that the lewdness count was based on the exact same acts that formed the basis for the sexual assault count and was essentially a lesser-included offense of the sexual assault count. However, the district court found that counsel testified credibly that he did not consider asking for a lesser-included offense jury instruction because he did not feel that it was applicable to the facts and circumstances of this case, and he did not consider arguing for merger at sentencing because the lewdness count was a separate allegation that involved a different location, date, and time. The record supports the district court's findings and we conclude that Fritsche failed to demonstrate that counsel's performance was deficient in this regard. *See generally Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) ("The crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand. However, separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time." (internal quotation marks and footnote omitted)).

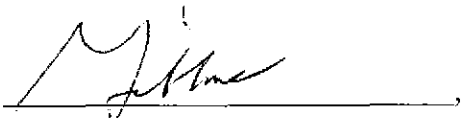
Jury instruction

Fritsche claimed that counsel was ineffective for failing to seek a jury instruction on the lesser-included offense of statutory sexual

seduction because the victim testified that sexual activity felt good. The district court found that counsel considered the concept of statutory seduction but rejected it because the victim was eight years old and not competent to give consent. The record supports the district court's findings and we conclude that Fritsche failed to demonstrate that counsel's performance was deficient in this regard. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance by a preponderance of the evidence).

Having concluded that the district court did not err by denying Fritsche's petition for a writ of habeas corpus, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Janet J. Berry, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk