

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MANUEL MELENDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65526

FILED

JUL 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; James M. Bixler, Senior Judge.

Appellant Manuel Melendez argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his April 20, 2012, petition and supplemental petitions. To prove ineffective assistance of counsel, a petitioner must demonstrate 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, 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). 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, Melendez argues his trial counsel was ineffective for failing to properly challenge admittance of the child victim's out-of-court statements pursuant to NRS 51.385. Melendez argues the statements were not trustworthy because there were inconsistencies between the various statements and because the victim's grandmother was not credible. Melendez also argues counsel should have sought further testimony from the child victim after the adult witnesses testified regarding her statements. Melendez fails to demonstrate his trial counsel's performance was deficient or resulting prejudice.

Preliminarily, we note Melendez did not question his trial counsel at the evidentiary hearing regarding counsel's decisions relating to the admission of the victim's out-of-court statements. Rather, the trial counsel's testimony related to cross-examination of the victim generally. As Melendez failed to pursue this claim at the evidentiary hearing, he did not meet his burden to demonstrate that counsel was deficient with respect to admission of the child's statements. *See Means*, 120 Nev. at 1012, 103 P.3d at 33 (explaining a petitioner has the burden to establish the factual allegations underlying a claim of ineffective assistance of counsel); *see also Strickland*, 466 U.S. at 690 (recognizing "counsel is strongly presumed to have rendered adequate assistance").

Moreover, at the evidentiary hearing, trial counsel testified his pretrial investigation revealed information that caused him to conclude there was a likelihood that one or more of the victim's allegations were truthful. In addition, the victim was only three years old when the incidents occurred and only seven at the time of trial. For those reasons, counsel testified that he had to proceed cautiously regarding the victim's version of events. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Melendez does not demonstrate.

Further, the child victim had made multiple statements to multiple persons regarding the abuse, not merely to her grandmother. Those persons included a police detective and a social worker. The district court concluded that counsel acted appropriately regarding the admission of the child's out-of-court statements and counsel appropriately challenged the inconsistencies in the victim's version of events. The district court further concluded Melendez failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions with respect to admission of the child's out-of-court statements. Substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Second, Melendez argues his trial counsel was ineffective for failing to interview the victim's mother before trial. Melendez fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, trial counsel testified he and

Melendez had multiple discussions regarding potential witnesses and Melendez had informed him that the victim's mother did not possess relevant information. For those reasons, counsel did not interview the victim's mother. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which Melendez does not demonstrate.

In addition, at the evidentiary hearing, the victim's mother testified that she was incarcerated during the time period at issue during this case and did not have personal knowledge of the incidents in this matter. Based on that testimony, the district court concluded Melendez failed to demonstrate there was a reasonable probability of a different outcome at trial had counsel interviewed the victim's mother prior to trial. Substantial evidence supports that decision. Therefore, the district court did not err in denying this claim.

Third, Melendez argues his trial counsel was ineffective for failing to obtain the paperwork relating to the eviction of the victim's grandmother from her home. Melendez asserts this information would have undermined the grandmother's credibility because she stated that she left the residence after discovering Melendez abusing the child victim. Melendez fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he and Melendez had had many discussions regarding the case and Melendez had not informed him about the eviction. Accordingly, Melendez fails to demonstrate counsel acted in an objectively unreasonable manner. See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (concluding

counsel was not ineffective for failing to investigate statements when counsel was not informed of those statements ahead of trial). Melendez fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought the eviction documentation as this information had no bearing on the victim's own statements regarding the abuse. Therefore, the district court did not err in denying this claim.

Fourth, Melendez argues his trial counsel was ineffective for failing to withdraw from representing him after counsel learned information that caused counsel to believe the victim's allegations were truthful. This claim was not raised in the petition before the district court, and therefore, we decline to consider this claim in the first instance on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.2d at 33.


Next, Melendez argues the district court erred during the post-conviction proceedings by denying Melendez's request for access to the victim's recent psychological records. This court will not overturn a district court's decision regarding the relevance of evidence unless the district court clearly abused its discretion. *See Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004). The district court concluded the child victim's recent psychological records were so far removed from the incidents in this matter, approximately seven years after the abuse, that they were irrelevant to the post-conviction proceedings. Given that lengthy passage of time, Melendez fails to demonstrate the district court clearly abused its discretion.

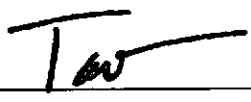
Next, Melendez argues the district court erred by failing to consider James Conklin's testimony regarding the victim's recent recantation of the sexual abuse allegations. Melendez fails to demonstrate this claim had merit. "Any conflicts and inconsistencies within the testimony of individual witnesses are to be resolved by the fact-finding authority." *Doggett v. Warden*, 93 Nev. 591, 594, 572 P.2d 207, 209 (1977). Following the evidentiary hearing, the district court concluded that the victim did not recant her prior allegations; rather she stated she was three when the abuse occurred, she was ten at the hearing, and that she did not remember the abuse due to the passage of time. A review of the evidentiary hearing transcript reveals that substantial evidence supports that conclusion. *See id.*

Finally, Melendez asserts the State improperly lost or destroyed the recordings of police interviews with the victim's grandmother and aunt. This claim could have been raised on direct appeal and Melendez did not demonstrate cause for the failure to do so. *See* NRS 34.810(1)(b). In addition, the district court concluded Melendez failed to establish actual prejudice for this claim. *See id.*; *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005) ("Actual prejudice requires [petitioner] to show not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.") (internal quotation marks and emphasis omitted). The court concluded Melendez failed to demonstrate the recordings contained favorable evidence. Moreover, the district court

concluded that Melendez's trial counsel knew of the lost recordings prior to trial and was able to obtain transcripts of the interviews. Substantial evidence supports this conclusion. Therefore, Melendez fails to demonstrate that the district court erred in denying this claim as procedurally barred.

Having concluded Melendez was not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Hon. James M. Bixler, Senior Judge
Potter Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk