

IN THE SUPREME COURT OF THE STATE OF NEVADA

CURT MCLELLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64012

FILED

SEP 30 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

First, appellant Curt McLellan argues that the district court erred in applying a more onerous standard to his claims of ineffective assistance of counsel than provided in *Strickland v. Washington*, 466 U.S. 668 (1984). We conclude that the district court applied the two-pronged test set forth in *Strickland*. The district court's citations to *Harrington v. Richter*, 562 U.S. 86 (2011), involved discussion of the *Strickland* test and did not suggest that the district court gave any more deference and latitude to the actions of counsel than is required by *Strickland*.

Next, McLellan argues the district court erred in denying various 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*, 466 U.S. at 687-88; *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in

Strickland). The performance inquiry examines whether trial counsel's assistance was reasonable considering all the circumstances and under the prevailing professional norms. *Strickland*, 466 U.S. at 688, 690. Both components of the inquiry must be shown, *id.* 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.¹ *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

McLellan argues that trial counsel was ineffective for failing to adequately interview McLellan's ex-wife and children and present them as defense witnesses to paint a different picture of McLellan than that presented by the victim and her mother. We conclude that McLellan fails to demonstrate that his trial counsel's performance was deficient. Trial counsel chose not to call M. McLellan because of past incidents involving physical violence or altercations with McLellan.² Trial counsel, uncertain about what he remembered about R. McLellan, testified that if he had known about physical altercations between McLellan and R. McLellan he would not have called R. McLellan to testify. R. McLellan confirmed at the evidentiary hearing that there was periodic physical discipline. Trial

¹We note that although McLellan frames the arguments in grounds II and III(A)(1) in his opening brief as challenges to the factual findings of the district court, McLellan's challenges were actually to the district court's legal conclusions regarding the deficiency prong.

²We note that at the evidentiary hearing M. McLellan testified that McLellan had physically assaulted her in the past.

counsel chose not to call B. McLellan because she was young at the time of the offenses. The district court heard testimony from each of these witnesses at the evidentiary hearing and determined that trial counsel was not objectively unreasonable for failing to further interview or present their testimony at trial. Based upon our review of the record, we conclude that McLellan has failed to demonstrate that this conclusion was in error.

Related to this claim, McLellan argues that trial counsel was ineffective in failing to conduct a more complete investigation. McLellan specifically argues that the district court erred in its finding that trial counsel did not hire an investigator because an employee in trial counsel's office performed much of the investigation. We conclude that McLellan fails to demonstrate that his trial counsel's performance was deficient. At the evidentiary hearing, conducted years after trial, trial counsel had trouble recollecting aspects of the case, but he did remember that someone from his office performed the investigation. The district court's factual finding is thus supported by trial counsel's testimony at the evidentiary hearing.³ McLellan fails to demonstrate that trial counsel was objectively unreasonable in not hiring an investigator because he fails to demonstrate what evidence a more thorough investigation would have uncovered aside from the family members discussed above. See *Molina v. State*, 120 Nev.

³McLellan erroneously attempts to cast the vague recollections of counsel years after the trial as evidence of a failure to investigate and argues that trial counsel was ineffective because he did not name a specific witness who was interviewed or enunciate a single fact discovered in the investigation. Trial counsel's vague recollections years after the trial are not demonstrative evidence of ineffective assistance of counsel, and the burden of proof remains with the petitioner seeking to overturn a conviction.

185, 192, 87 P.3d 533, 538 (2004). Further, although the district court did not reach the issue of prejudice, the State argues that the district court's denial of these claims should be affirmed because McLellan fails to demonstrate prejudice. McLellan has failed to respond to the State's prejudice argument, and we conclude that he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel conducted further investigation.

Next, McLellan argues that trial counsel was ineffective in failing to file pretrial motions and that the district court erroneously found numerous motions had been filed. We conclude that McLellan fails to demonstrate that his trial counsel's performance was deficient as he fails to indicate what other motions should have been filed and how not filing additional motions was objectively unreasonable. Further, although the district court did not reach the issue of prejudice, the State argues that the district court's denial of this claim should be affirmed because McLellan fails to demonstrate prejudice. McLellan has failed to respond to the State's prejudice argument, and we conclude that he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel filed further motions.

Next, McLellan argues that trial counsel failed to conduct an adequate voir dire and failed to object when the district court limited voir dire. McLellan fails to demonstrate that his trial counsel's performance was deficient. The trial court canvassed the potential jurors as a group and later individually (after peremptory challenges had begun) about the potential jurors' knowledge of the defendant's right not to testify and the

State's burden of proof at trial.⁴ Given the trial court's inquiry, McLellan fails to demonstrate that it was objectively unreasonable for counsel not to ask the potential jurors additional questions on those topics. The trial court allowed counsel to ask one of the potential jurors whether that juror would give more credibility to the victim because of her status as a child. And counsel objected to limits placed on this line of questioning. McLellan fails to demonstrate that it was objectively unreasonable for trial counsel not to further object to the district court's limitations on voir dire or to ask additional similar questions of other potential jurors. McLellan also has failed to demonstrate a reasonable likelihood of a different outcome at trial had trial counsel questioned every potential juror as indicated above because he has not demonstrated that the jury empaneled was not fair or

⁴In particular, before individual juror voir dire, the district court canvassed the panel of potential jurors as follows:

District Court: A person accused of committing a crime is presumed to be innocent in a criminal trial.

Does everyone agree and understand that concept?

[Affirmative indication.]

Does anyone not?

[Negative indication.]

District Court: Are you aware that the Defendant doesn't have to take the witness stand and testify or offer any evidence if he chooses not to and you can still find him [] not guilty and that's because the burden is upon the State to prove his guilt beyond a reasonable doubt?

Does everyone understand and agree with that concept as well?

[Affirmative indication.]

impartial. *See Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125-26 (2005).

Next, McLellan argues that trial counsel was ineffective for failing to obtain and present expert testimony about cutting behavior to impeach the victim's testimony. The attachment to the petition below indicated that an expert opined that there was no exclusive link between cutting behavior and sexual abuse. McLellan fails to demonstrate that trial counsel's performance was deficient. McLellan's trial counsel testified that he had not considered hiring an expert on cutting behavior as the victim did not testify about cutting herself during the preliminary hearing. Trial counsel further agreed that even if he was aware of this prior to trial that it was not likely to be helpful to the defense and that he would be concerned that an expert on cross-examination would state that sexual abuse can cause cutting behavior. McLellan fails to demonstrate that it was objectively unreasonable to not present testimony from an expert on cutting behavior. Further, although the district court did not reach the issue of prejudice, the State argues that the district court's denial of this claim should be affirmed because McLellan fails to demonstrate prejudice. McLellan has failed to respond to the State's prejudice argument, and we conclude that he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel presented expert testimony on cutting behavior.

Next, McLellan argues that trial counsel was ineffective for failing to conduct an adequate cross-examination. McLellan argues that trial counsel should have elicited testimony that the victim's aunt and uncle were not present during the pretextual phone call, thereby rendering the subsequent recording illegal. McLellan fails to demonstrate

that his trial counsel's performance was deficient. The investigator for Orange County testified at trial that he had the victim's and guardian's consent for the phone call. There was no testimony at trial that the aunt and uncle were present during the phone call, and the fact that they were not present during the phone call would not diminish their prior consent. McLellan failed to provide any evidence to the contrary during the proceedings on the petition below. McLellan further fails to demonstrate that there is a reasonable probability of a different outcome had trial counsel asked additional questions during trial.

Next, McLellan argues that trial counsel was ineffective for failing to cross-examine Detective Darr regarding the fact that the only formal interview ever conducted with the victim was by the Orange County Sheriff's Office. McLellan fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced as Detective Darr testified to this on direct examination.

Next, McLellan argues that trial counsel was ineffective in failing to establish on cross-examination that the victim's interview in Orange County was done on behalf of Detective Darr in order to establish that there was no California prosecution contemplated and the pretextual phone call was improperly admitted. McLellan fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The investigator for the Orange County Sheriff's Office testified that his office was investigating abuse allegations as they had been contacted by social services for Orange County, who had begun an investigation of the abuse allegations and interviewed the victim, and a multidisciplinary team in Orange County was assembled for the investigation and formal

interview.⁵ The pretextual phone call was admissible in Nevada pursuant to NRS 48.077 because it was lawfully recorded in California. McLellan provided no evidence in the proceedings below that California was not conducting an investigation of McLellan. McLellan further fails to demonstrate a reasonable probability of a different outcome had trial counsel asked additional questions on cross-examination.

Next, McLellan argues that trial counsel was ineffective for failing to argue that he could not be convicted of both lewdness and sexual assault. McLellan argues that counts 21-30 (lewdness with a minor) were incidental to counts 1-10 (sexual assault). McLellan fails to demonstrate that his trial counsel's performance was deficient because he did not show that the multiple convictions involved the same acts. Notably, the victim testified that the same type of sexual acts (cunnilingus, fellatio, digital penetration, rubbing of his penis against her vagina, and licking her breasts) occurred at least one time per week over a more than three-year period, indicating that appellant could have been charged with far more than the 42 counts that he was charged with and convicted of at trial.⁶

⁵Detective Darr testified that she was contacted by the Orange County Sheriff's Office regarding conduct that may have occurred in Las Vegas and she asked that a formal interview with the victim be conducted. This was after the California investigation had begun and after the victim had been interviewed by social services. Notably, Detective Darr further testified that in executing a search warrant of McLellan's house the police found paperwork from the Orange County Sheriff's Office and social services indicating that McLellan was the subject of an investigation in California.

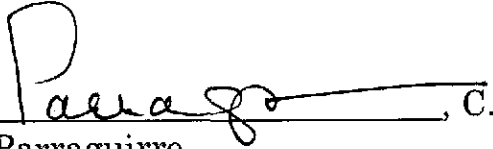
⁶We further note that contrary to McLellan's arguments on appeal, counts 26-30 did not involve McLellan placing his mouth on the victim's genital area, but instead involved McLellan touching the genital area of the victim with his penis.

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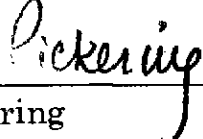
Thus, McLellan fails to demonstrate that it was objectively unreasonable for trial counsel to not object to the lewdness convictions.

Finally, McLellan argues that cumulative error rendered his trial and appeal fundamentally unfair. As McLellan fails to demonstrate any error, there are no errors to cumulate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Parraguirre


_____, J.
Hardesty


_____, J.
Pickering

cc: Hon. Kathleen E. Delaney, District Judge
Law Office of Patricia M. Erickson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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To the extent that McLellan argues that his appellate counsel was ineffective for failing to challenge the multiple convictions, we conclude that this argument likewise lacks merit. See *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).