IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
STANFORD DEWITT GREENLEE, JR.,
Respondent/Cross-Appellant.

No. 68624

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is the State's appeal and Stanford Dewitt Greenlee, Jr.'s cross-appeal from a district court order granting in part and denying in part the postconviction petition for a writ of habeas corpus Greenlee filed on October 14, 2013. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Greenlee was convicted pursuant to a jury verdict of first-degree kidnapping, battery with the intent to commit a crime, and sexual assault. The Nevada Supreme Court affirmed his judgment of conviction on appeal. *Greenlee v. State*, Docket No. 62170 (Order of Affirmance, September 18, 2013). The district court granted his postconviction habeas petition, in part, after conducting an evidentiary hearing. This appeal and cross-appeal followed; they both challenge the district court's rulings on Greenlee's ineffective-assistance-of-counsel claims.

Ineffective assistance of counsel

To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency

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prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (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. 170, 189 (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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 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).

The State's appeal

The State claims the district court erred by finding defense counsel's opening statement was deficient and Greenlee was prejudiced by the deficiency to such a degree as to require a new trial. The following excerpt from defense counsel's opening statement was central to the district court's decision in this matter:

> Mr. Greenlee, my client, is operating under the presumption of what every person knows of no means no. You will hear testimony that will show that when [the victim] -- Ms. Lavell even used the word, the State said -- wakes up. She says, what are you -- what's going on and I stop. [Greenlee]

> stops. Big [Greenlee] stops. No means no. We get that.

The district court found Greenlee's sole defense against the charges of first-degree kidnapping, battery with the intent to commit a crime, and sexual assault was consent. Defense counsel's opening statement destroyed this defense by informing the jury the victim was either asleep or unconscious when the sexual encounter began. This concession eliminated any chance Greenlee had of holding the State to its burden to prove the case beyond a reasonable doubt, and it had the effect of preventing the jury from separating the admission made at the beginning of the trial from any other information that was presented during the remainder of the trial.

Even assuming substantial evidence supports the district court's conclusion that defense counsel's performance was deficient, substantial evidence does not support the district court's conclusion that defense counsel's deficient performance was prejudicial. The district court relied upon *United States v. Cronic*, 466 U.S. 648, 667 (1984), and *Jones v. State*, 110 Nev. 730, 737-38, 877 P.2d 1052, 1057 (1994), to support its proposition that "some types of counsel error are so likely to prejudice the accused that there is no need to show actual prejudice." However, here, the record does not demonstrate "[defense] counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, or his closing argument "undermined his client's testimonial disavowal of guilt," *Jones*, 110 Nev. at 739, 877 P.2d at 1057 (limiting its holding to the facts of the case). Accordingly, Greenlee had the burden to demonstrate he was prejudiced by defense counsel's deficient performance.

The record demonstrates that despite defense counsel's shoddy opening statement, he subjected the State's case to meaningful adversarial testing and pursued Greenlee's theory of defense. Defense counsel cross-examined the victim as to whether she was unconscious in the back of the taxicab, whether she kicked and fought when Greenlee was on top of her, and as to why Greenlee suddenly stopped and got off of her. Defense counsel presented Greenlee's testimony that the victim said she wanted to have sex, she was wide awake when he entered the back of the taxicab, she pulled her underwear down to her knees, and he stopped when she pulled away. And defense counsel argued during closing argument the victim's testimony was incredible, Greenlee's testimony was credible, and the evidence supported Greenlee's testimony the sexual encounter was consensual. The record also reveals the State presented testimony the victim was intoxicated and a video which depicted her asleep or unconscious in the back of the taxicab—this evidence suggested the victim was not able to consent to the sexual encounter.

Given this record, we conclude Greenlee failed to demonstrate a reasonable probability the trial result would have been different but for defense counsel's deficient opening statement, the district court erred by finding that defense counsel was ineffective, and the district court's orders granting the habeas petition and vacating the judgment of conviction must be reversed.

Greenlee's cross-appeal

Greenlee claims the district court erred by rejecting the following claims:

First, defense counsel was ineffective for failing to communicate the State's lowest plea offer to Greenlee. The district court

found defense counsel had discussed all of the State's plea offers with Greenlee. The record supports this factual finding, and we conclude the district court did not err in rejecting this claim. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his factual allegations are belied by the record).

Second, defense counsel was ineffective for failing to propose jury instructions on the issue of consent based on *Honeycutt v. State*, 118 Nev. 660, 670, 56 P.3d 362, 369 (2002); *McNair v. State*, 108 Nev. 53, 825 P.2d 571 (1992); and *Owen v. State*, 96 Nev. 880, 620 P.2d 1236 (1980). The district court found the jury was properly instructed on consent, defense counsel reasonably concluded no other instructions on consent were necessary, and Greenlee was not prejudiced by the lack of additional instructions on consent. The record supports these factual findings, and we conclude the district court did not err in rejecting this claim.

Third, defense counsel was ineffective for failing to object to jury instructions 19 and 21 because they improperly instructed the jury on the amount of movement necessary to prove the charge of kidnapping and effectively relieved the State of its burden of proof for that charge.[1] We

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[1]Instruction 19 stated,

> A charge of kidnapping and an associated offense will lie only where movement of the victim is over and above that required to complete the associated crime charged.
>
> When associated with a charge of sexual assault, kidnapping does not occur if the movement is incidental to the sexual assault and does not increase the risk of harm over and above that necessarily present in the commission of such offense.

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conclude Greenlee has not demonstrated these instructions were incorrect statements of the law, and, therefore, he has not demonstrated defense counsel was ineffective for failing to object to them. *See Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006); *Hutchins v. State*, 110 Nev. 103, 108-09, 867 P.2d 1136, 1139-40 (1994) (observing the movement of a victim to a more secure setting, for the purpose of committing sexual assault, where the victim is less likely to be heard by a passerby, is sufficient to support a kidnapping conviction), *modified on other grounds by Mendoza*, 122 Nev. at 273-75, 130 P.3d at 180-81.

Fourth, defense counsel was ineffective for failing to object to Sexual Assault Nurse Examiner (SANE) Jeri Dermanelian's testimony regarding Nurse Marian Adams' examination of the victim. The district court found defense counsel made a reasoned strategic decision to stipulate to the admission of Nurse Dermanelian's testimony because some of it was favorable to the defense, the SANE examination report itself contained information beneficial to the defense, and defense counsel was able to use this information to discredit the victim's testimony during closing argument. The record supports these factual findings, and we conclude the district court did not err in rejecting this claim. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (observing "trial

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Instruction 21 stated,

> The movement of the victim to a more secure setting, for the purpose of committing sexual assault, where the victim is less likely to be heard by a passerby, is sufficient to prove the charge of kidnapping.

counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)).

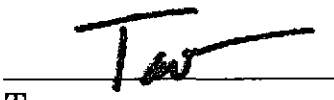
Fifth, defense counsel was ineffective for failing to object to incriminating video and photographic evidence. The district court found defense counsel made "a reasoned strategic decision not to object to the admission of [the] video and photographic evidence without requiring the testimony of a custodian of records" and Greenlee was not prejudiced by this decision. The record supports these factual findings, and we conclude the district court did not err in rejecting this claim. *See id.*

Sixth, defense counsel was ineffective for failing to object to a sentencing recommendation error in the presentence investigation report (PSI). The district court found Greenlee was not prejudiced by this error because the district court did not follow the PSI's sentencing recommendation. The record supports this factual finding, and we conclude the district court did not err in rejecting this claim.

Seventh, defense counsel was ineffective for failing to object to the illegal sentence he received for first-degree kidnapping. The district court found Greenlee's first-degree kidnapping sentence was facially illegal and Greenlee should have been sentenced to a prison term of life with the possibility of parole after 5 years. The district court further found this claim was rendered moot by its decisions to grant Greenlee's habeas petition and order a new trial. We conclude defense counsel's performance was deficient and Greenlee was prejudiced by this deficiency. Accordingly, the district court must resentence Greenlee for first-degree kidnapping on remand. *See* NRS 200.320(2) (setting forth the penalties for first-degree kidnapping where the victim has not suffered substantial bodily harm as a result of the kidnapping).

For the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to reinstate the original convictions, resentence Greenlee on his first-degree kidnapping conviction, and enter a corrected judgment of conviction.[2]



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Attorney General/Carson City
Clark County District Attorney
Joel M. Mann, Chtd.
Eighth District Court Clerk

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[2]In light of our decision, we decline to address the State's claim that the district court erred by vacating the first-degree-kidnapping and battery-with-intent-to-commit-a-crime convictions.

The Honorable Abbi Silver, Chief Judge, did not participate in the decision in this matter.