

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHY ANN PERRAULT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70885

FILED

JUL 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Kathy Ann Perrault appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus she filed on April 19, 2016. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Perrault claims the district court erred by denying her claims she received ineffective assistance of counsel without first holding an evidentiary hearing. 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). To warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Perrault claimed counsel was ineffective for failing to investigate whether the victim's father had been accused of being abusive in the past. Perrault claimed this would explain why the child followed her. Perrault failed to demonstrate counsel was deficient or resulting prejudice. Perrault failed to demonstrate allegations contained in an application for a temporary restraining order would have been admissible at trial. See NRS 48.045(2); *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997). Therefore, the district court did not err by denying this claim without holding an evidentiary hearing.

Second, Perrault claimed counsel was ineffective for advising her to interview with sexual assault detectives without him present. Perrault failed to demonstrate she was prejudiced because she failed to demonstrate a reasonable probability of a different outcome at trial had counsel been present during the interview. Perrault's statements to the sexual assault detectives were not used at trial. Further, had Perrault testified at trial and the statements were used, she failed to point to any specific statements that would have been used against her. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Third, Perrault claimed counsel was ineffective for advising her not to testify at trial because it would have come out at trial that he

advised her to speak with the sexual assault detectives without counsel present. Perrault failed to demonstrate she was prejudiced. Perrault failed to demonstrate the fact counsel advised her to speak with detectives without counsel present would have been presented at trial or this information would have had a reasonable likelihood of affecting the outcome at trial. Further, given the evidence presented at trial and Perrault's statements to the police at the time she was arrested, she failed to demonstrate a reasonable probability of a different outcome at trial had she testified. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Fourth, Perrault claimed counsel was ineffective for failing to properly question a police officer to show there was no intent to flee. Specifically, she claims counsel should have questioned the officer regarding whether there was a different, easier exit Perrault and her friend could have taken out of the complex. Perrault claims had counsel further questioned the officer, the district court would not have given the flight instruction. Perrault failed to demonstrate prejudice. Even had counsel questioned the officer regarding the other exit, Perrault fails to demonstrate a reasonable probability of a different outcome at trial or that the district court would not have given the flight instruction. Evidence was presented at trial that when Perrault saw the police she jumped into her friend's vehicle, ducked below the dashboard, and moved her arm in a way indicating her friend should leave. The police officer also testified he had to step in front of the vehicle to get the vehicle to stop. The fact there may have been a different exit out of the complex does not negate the actions of Perrault. Therefore, we conclude the district court did not err in denying this claim without holding an evidentiary hearing.

Fifth, Perrault claimed counsel was ineffective for failing to properly object during the State's closing argument. Perrault points to three instances of prosecutorial misconduct: the prosecutor's reference to his personal experiences; the prosecutor's reference to Perrault's decision not to testify at trial; and the prosecutor's visual aids that presented two statements that were contrary to the evidence.

The district court found: the prosecutor did not improperly refer to his personal experiences and instead, merely stated that while trial was short, it was still important; the prosecutor did not reference Perrault's decision not to testify when he stated the jury may not be able to determine her motive for committing the crime; and the visual aids were a deduction or conclusion from the evidence introduced at trial. The district court also found Perrault failed to demonstrate prejudice because she failed to demonstrate a reasonable probability of a different outcome at trial had counsel properly objected to these alleged instances of prosecutorial misconduct. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying these claims without holding an evidentiary hearing.

Sixth, Perrault claimed counsel was ineffective for failing to timely object during cross-examination of her friend. Specifically, Perrault claims counsel should have objected when the prosecutor referred to Perrault's custody status when asking about phone calls. Perrault failed to demonstrate she was prejudiced. In this case, the reference by the prosecutor did not reveal her custodial status at the time of trial and the jury had already heard testimony she was transported to the jail after her arrest. Thus, Perrault failed to demonstrate a reasonable probability of a different outcome at trial had counsel contemporaneously objected to the

reference. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

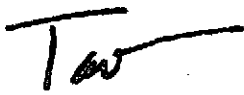
Seventh, Perrault claimed counsel was ineffective for failing to request a jury instruction for a lesser degree of kidnapping or for coercion. Perrault failed to demonstrate counsel was deficient or resulting prejudice. The district court concluded Perrault failed to demonstrate she was entitled to a jury instruction for a lesser degree of kidnapping because the victim in this case was a minor. Further, the district court concluded Perrault failed to demonstrate a jury instruction on coercion should have been given because Perrault failed to show there was any evidence she used violence, deprived the person of any tool, implement or clothing, or attempted to intimidate a person by threats or force. Substantial evidence supports the decision of the district court. See NRS 200.310; NRS 207.190(1). We also conclude Perrault failed to demonstrate coercion was a lesser included offense of kidnapping, see NRS 207.190(1); NRS 200.310; *Smith v. State*, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (defining lesser-included offense), and Perrault was not entitled to an instruction on a lesser-related offense, see *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.


Finally, we conclude the district court erred by denying the following claims without first holding an evidentiary hearing: counsel was ineffective for failing to investigate an alleged sexual assault by the victim's father on Perrault; counsel was ineffective for failing to consult and present an expert on sexual assault; counsel was ineffective for

advising her not to testify because due to the trial court's schedule; and appellate counsel was ineffective for failing to challenge the scheduling of the trial. A review of the record demonstrates Perrault alleged specific facts that, if true, would entitle her to relief. Thus, we conclude the denial of these claims should be reversed and remand these claims to the district court for an evidentiary hearing. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

¹Because Perrault's claims challenge actions of the judge, this case should be assigned to a different district court judge upon remand for the purposes of the evidentiary hearing only.

This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Chief Judge, Eighth Judicial District Court
Hon. Michelle Leavitt, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk