

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERNANDO ROBLES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74834-COA

FILED

JAN 17 2019

ELIZABETH A. BROWN
CLERK OF THE SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Fernando Robles appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Robles argues the district court erred by denying the claims of ineffective assistance of counsel he raised in his June 21, 2017, petition. 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).

First, Robles argued his trial counsel was ineffective for failing to object to the trial proceeding after a late disclosure of the victim's medical records. Robles failed to demonstrate his counsel's performance was

deficient or resulting prejudice. The record demonstrated the State attempted to obtain the victim's medical records prior to trial, but only received the records during jury selection. The record further demonstrated the State disclosed those records to the defense during jury selection. Robles' counsel stated she had reviewed the records and the parties explained that the medical examination of the victim had not revealed any evidence that she had been sexually assaulted. Robles' counsel later cross-examined the victim's examining physician concerning the exam and the lack of medical evidence that she had been sexually assaulted. Robles did not demonstrate such actions by counsel fell below an objective standard of reasonableness. As the evidence contained in the medical records was presented to the jury, that evidence was favorable to Robles' defense, and counsel questioned the examining physician concerning the exam, Robles also did not demonstrate a reasonable probability of a different outcome had counsel attempted to halt the trial due to the late disclosure of the victim's medical records. Therefore, we conclude the district court did not err by denying this claim.

Second, Robles argued his trial counsel was ineffective for failing to independently obtain the victim's medical records. Robles failed to demonstrate his counsel's performance was deficient or resulting prejudice. As discussed previously, the record demonstrated the parties obtained the records and presented the information contained in the records to the jury. Moreover, Robles' counsel questioned the examining physician concerning the records. Given this record, Robles did not demonstrate his counsel's performance fell below an objectively reasonable standard. As the records were introduced into evidence during trial and counsel appropriately posed questions concerning the records, Robles also failed to

demonstrate a reasonable probability of a different outcome at trial had counsel obtained the records at an earlier time. Therefore, we conclude the district court did not err by denying this claim.

Third, Robles argued his trial counsel was ineffective for failing to fully present a consent defense. Robles acknowledged that his ability to utilize a consent defense was limited by the trial court's ruling that he would open the door to admission of prior-bad-act evidence involving the sexual abuse of a minor. However, Robles asserted the trial court incorrectly decided that issue and counsel should have made further attempts to introduce evidence the victim consented to the sexual acts. Robles failed to demonstrate his counsel's performance was deficient or resulting prejudice.

The record before this court reveals that the trial court concluded Robles would open the door to admission of prior-bad-act evidence concerning the grooming and sexual abuse of a minor if he sought to introduce statements he made to a police detective indicating the victim consented to the sexual activity. As acknowledged by Robles, counsel discussed with the trial court how its ruling concerning the prior-bad-act evidence limited her ability to utilize Robles' statements in presenting a consent defense. Given the trial court's ruling concerning the prior-bad-act evidence, counsel's decision to not risk introduction of information concerning Robles' prior sexual relationship with a minor was reasonable. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). To the extent Robles argued his trial counsel should have raised further arguments concerning the admissibility of his out-of-court statements, the Nevada Supreme Court concluded on direct appeal that

Robles could not introduce his own out-of-court statements to the police because they were inadmissible hearsay. *Robles v. State*, Docket No. 66593 (Order Affirming in Part, Reversing in Part and Remanding, October 17, 2016).

Moreover, the record demonstrated the defense was not precluded from presenting a consent defense. Counsel questioned the victim concerning her feelings for Robles and the victim acknowledged she had not resisted many of his sexual advances. During closing arguments, counsel asserted the victim was mentally capable of resisting, yet she was a willing participant in the majority of the sexual acts. Given the record demonstrating counsel's actions concerning a consent defense, Robles failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. In addition, Robles failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented additional information or argument in support of a consent defense. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Robles argued his trial counsel was ineffective for failing to recall the victim to testify following an officer's testimony concerning the victim's prior inconsistent statements. Robles failed to demonstrate his counsel's performance was deficient or resulting prejudice. Counsel questioned the victim during her testimony concerning her prior inconsistent statements and Robles did not demonstrate any failure by counsel to recall the victim to pose additional similar questions fell below an objective standard of reasonableness. The record reveals the victim's prior inconsistent statements were presented to the jury and, therefore, Robles failed to demonstrate a reasonable probability of a different outcome had counsel sought to recall the victim to testify concerning those

statements. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Robles argued his trial counsel was ineffective for failing to object when the State denigrated his defense by arguing he had shifted the blame to the police and their lack of a thorough investigation. Robles failed to demonstrate his counsel's performance was deficient or resulting prejudice. Robles raised the underlying claim on direct appeal under a plain error standard and the Nevada Supreme Court concluded he was not entitled to relief because "the State reasonably responded to Robles' challenge to the quality of the police investigation." *Robles v. State*, Docket No. 66593 (Order Affirming in Part, Reversing in Part and Remanding, October 17, 2016). As the Nevada Supreme Court has already concluded the State's argument was reasonable given the circumstances of this matter, Robles did not demonstrate his counsel's failure to object fell below an objectively reasonable standard or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Robles argued his trial counsel was ineffective for failing to object during rebuttal argument when the State improperly inflamed the jury by stating the victim was "messed up" by the abuse and "we don't" commit such acts, but Robles does. Robles failed to demonstrate resulting prejudice. Robles raised the underlying claim on direct appeal under a plain error standard and the Nevada Supreme Court concluded Robles did not demonstrate the State's comment amounted to error "causing actual prejudice or miscarriage of justice." *Id.* Given the Nevada Supreme Court's conclusion that Robles did not suffer actual prejudice from the challenged statement, and Robles confessed to committing sexual acts with the young

victim, we conclude Robles failed to demonstrate a reasonable probability of a different outcome at trial had counsel raised an objection to this comment. Therefore, we conclude the district court did not err by denying this claim.

Next, Robles argued his appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford*, 105 Nev. at 853, 784 P.2d at 953. Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697.

Robles argued his appellate counsel was ineffective for failing to properly argue that the trial court erred by limiting his ability to introduce the statements he made to a police detective indicating the victim consented to the sexual activity. Robles contended the trial court's ruling improperly limited his ability to present a consent defense and his appellate counsel did not properly raise this issue on appeal. Robles failed to demonstrate his counsel's performance was deficient or resulting prejudice. Robles' appellate counsel presented the underlying claim in a substantially similar manner as was raised by Robles in his postconviction petition. However, as stated previously, the Nevada Supreme Court concluded on direct appeal that Robles' statements to the police were inadmissible hearsay and the trial court properly excluded the statements. *Robles v.*

State, Docket No. 66593 (Order Affirming in Part, Reversing in Part and Remanding, October 17, 2016). As appellate counsel raised this issue and it was rejected, Robles cannot demonstrate appellate counsel's performance fell below an objectively reasonable standard or a reasonable likelihood of success had counsel further addressed this issue. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹



Tao

J.



Gibbons

J.

cc: Hon. Valerie Adair, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹The Honorable Michael L. Douglas did not participate in the decision in this matter.