IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES H. PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37203

FILED

OCT 22 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus and motion for an evidentiary hearing and appointment of counsel.

On July 14, 1997, the district court convicted appellant, pursuant to a jury verdict, of first degree kidnapping and sexual assault. The district court adjudicated appellant a habitual criminal and sentenced him to serve concurrent terms of life in the Nevada State Prison with the possibility of parole, and life without the possibility of parole. This court affirmed appellant's conviction on direct appeal.[1]

On September 11, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a motion for an evidentiary hearing and the appointment of counsel in the district court. The State filed an opposition. Pursuant to NRS 34.750 and 34.770, the

[1]Porter v. State, Docket No. 30680 (Order Dismissing Appeal, September 24, 1999).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 7, 2000, the district court denied appellant's petition and motion. This appeal followed.

In his petition, appellant raised multiple claims of ineffective assistance of counsel.[2] Under Strickland v. Washington, a viable claim of ineffective assistance of counsel must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense.[3] The court need not consider both prongs of Strickland if an insufficient showing is made on either one.[4]

First, appellant claimed his trial counsel was ineffective for failing to argue that the information was defective because it charged the crime of sexual seduction and did not support that charge with sufficient facts. Appellant's claim is belied by the record.[5] The information charged

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[2]To the extent that appellant raised any of his claims as independent constitutional violations, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We address appellant's claims as they relate to the effective assistance of counsel.

[3]Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, (1996).

[4]Strickland, 466 U.S. at 697.

[5]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

appellant with first degree kidnapping and sexual assault, not sexual seduction.

Second, appellant claimed his trial counsel was ineffective for failing to file a motion to dismiss the criminal complaint because appellant was held for eight days after arrest without a probable cause determination and the district court was thereby divested of jurisdiction. Even assuming that some delay occurred, a defendant who has been denied a timely probable cause determination or initial appearance is not entitled to relief unless he or she demonstrates that the delay prejudiced the defense.[6] Appellant did not allege that he suffered any prejudice, nor do we perceive any prejudice in this case.

Third, appellant claimed his trial counsel was ineffective for failing to fully and effectively cross-examine the State's forensic examiner, David Welch. Specifically, appellant claims that Welch's testimony that appellant could not be eliminated as the semen donor was contradicted by the lab report. Appellant's claim is belied by the record. The lab report does not contradict Welch's testimony, but rather sets forth Welch's conclusion that appellant cannot be eliminated as a possible donor of the semen found on the victim's vaginal swabs. Thus, appellant failed to show that his counsel was ineffective in cross-examining this witness.

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[6]See Powell, 113 Nev. 41, 930 P.2d 1123 ; Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987).

Fourth, appellant claimed his trial counsel was ineffective for not knowing that the Nevada rape shield law did not prevent him from referring to the victim as "promiscuous" in order to advance the theory that the victim consented to intercourse with appellant. This claim is frivolous. At trial, counsel advanced the theory that the victim may have consented to intercourse with appellant. Counsel did not act unreasonably by declining to refer to the victim as "promiscuous."

Fifth, appellant claimed his trial counsel was ineffective for failing to move for a directed verdict based on insufficient evidence. Although the district court may enter a judgment of acquittal pursuant to NRS 175.381(2), there is no provision in Nevada law for the entry of a directed verdict in a criminal case. Additionally, we note that the evidence presented at trial, including the testimony of the victim and forensic examiner Welch was more than sufficient to support appellant's conviction beyond a reasonable doubt.[7]

Sixth, appellant claimed his trial counsel was ineffective for failing to file a motion for a new trial based on newly discovered evidence concerning the jury's decision making process. Specifically, appellant claimed that after his counsel allegedly told him about some post-trial comments made by the jurors, appellant was convinced that "at least three jurors" were unduly influenced by evidence of appellant's bad character in

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[7]See Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) (stating that that the uncorroborated testimony of a victim of sexual assault, without more, is sufficient to uphold a conviction).

reaching their verdict. Appellant's claim is a bare allegation that has no basis in the record. Moreover, "[a]s a general rule, jurors may not impeach their own verdict."[8] Additionally, NRS 50.065(2), "prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict."[9] The district court did not err in rejecting this claim.

Next, appellant claimed that trial counsel provided ineffective assistance by failing to object to three instances of alleged prosecutorial misconduct. First, appellant claimed his trial counsel was ineffective for failing to object to the prosecution's reference to appellant as a "sexual predator." We are not persuaded that under the circumstances of this case, the prosecutor's remark was misconduct. Further, appellant failed to demonstrate that the result of his trial would have been different had counsel made such an objection. Thus, we conclude that the district court did not err in denying this claim.

Second, appellant claimed his trial counsel was ineffective for failing to object when the prosecution allegedly alluded to appellant's propensity to commit sex offenses by referring to appellant's prior and subsequent bad acts. On direct appeal, this court concluded that the district court did not err by admitting evidence of appellant's prior and

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[8]Tinch v. State, 113 Nev. 1170, 1174-75, 946 P.2d 1061, 1064 (1997); Pinana v. State, 76 Nev. 274, 288, 352 P.2d 824, 832 (1960).

[9]Echavarria v. State, 108 Nev. 734, 741-42, 839 P.2d 589, 594 (1992).

subsequent bad acts because the acts were relevant to prove intent, plan, and absence of consent.[10] Moreover, the jury was expressly instructed that it could not consider appellant's prior bad acts as proof of appellant's disposition to commit crimes. Appellant failed to establish that the prosecutor attempted to improperly argue to the jury that appellant had a propensity to commit sex offenses. Thus, the district court did not err in denying this claim.

Third, appellant claims his trial counsel should have objected when the prosecution (1) suborned perjured testimony from Jill Whitesell, and (2) asked Whitesell irrelevant and highly prejudicial questions about whether she knew two women that had been subjected to sexual assault and attempted sexual assault by appellant. There is nothing in the record indicating that the prosecution suborned perjury from Whitesell. The record does indicate, however, that appellant's counsel did object to the prosecution's line of questioning concerning Whitesell's familiarity with two of appellant's previous victims, and the trial judge sustained the objection. Thus, appellant failed to demonstrate that his counsel's performance was deficient or that he suffered any prejudice.

Next, appellant raised three claims that his trial counsel rendered ineffective assistance with regard to the jury instructions. First, appellant claimed his trial counsel was ineffective for objecting to the jury instruction on consent. At trial, appellant's counsel raised the defense

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[10]See NRS 48.045(2).

that the victim may have consented to intercourse with appellant. Appellant's counsel also objected to the portion of the jury instruction on consent that stated that the jury could consider the victim's mental disability in determining whether the victim was able to consent. Counsel's objection to this portion of the jury instruction on consent was reasonable and consistent with the theory of defense that had been pursued at trial. Thus, the district court properly rejected appellant's claim of ineffective assistance.

Second, appellant claimed his trial counsel was ineffective for failing to (1) object to an allegedly confusing jury instruction limiting the use of prior bad act evidence and (2) by failing to offer an alternate instruction proposed by appellant. The instruction given at trial substantially conformed to the language of NRS 48.045(2) and correctly limited the use of prior bad act evidence to intent, motive, opportunity or the absence of mistake or accident. Thus, the district court did not err in denying this claim.

Third, appellant claimed his trial counsel was ineffective for failing to object to an allegedly unconstitutional jury instruction, stating that there is no requirement that the testimony of a victim of sexual assault be corroborated. This court has held that the uncorroborated testimony of a victim of sexual assault, without more, is sufficient to

uphold a conviction.[11] Thus, the jury was properly instructed and that counsel was not ineffective in this regard.

Next, appellant claimed his appellate counsel was ineffective for failing to sufficiently argue that the district court erred in sentencing appellant as a habitual criminal and that appellant's prior convictions had not been proven beyond a reasonable doubt. Appellant failed to demonstrate how these issues should have been argued differently or that they would have had a reasonable probability of success on appeal.[12] Thus, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the district court abused its discretion and denied appellant due process by denying appellant's motion for an order to transcribe the opening and closing statements for use in preparing his post-conviction petition. Appellant must first make a threshold showing that "the points [he intends to raise] have merit and such merit will tend to be supported by a review of the record before he may have trial records supplied at state expense."[13] Appellant failed to make such a threshold showing and, therefore, the district court did not err in denying this claim.

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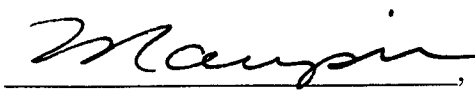
[11]See Hutchins, 110 Nev. at 109, 867 P.2d at 1140 (citing May v. State, 89 Nev. 277, 279, 510 P.2d 1368, 1369 (1973)).

[12]Strickland, 466 U.S. at 687; Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[13]Peterson v. Warden, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]



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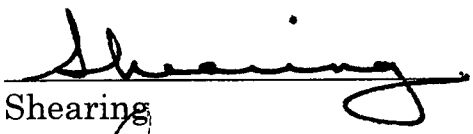

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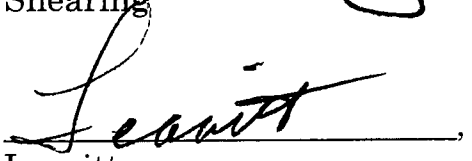

_____, J.
Leavitt

cc: Hon. Kathy A. Hardcastle, District Judge
Charles H. Porter
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[14]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[15]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.