

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN CHARLES HART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37376

FILED

MAY 30 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.

On June 18, 1998, the district court convicted appellant, pursuant to a jury verdict, of first degree kidnapping with the use of a deadly weapon (count I), assault with the use of a deadly weapon (count IV), and three counts of sexual assault with the use of a deadly weapon (counts II, III, and V). The district court sentenced appellant to serve the following terms in the Nevada State Prison: on count I, a term of life with a minimum parole eligibility of five years plus an equal and consecutive term for the deadly weapon enhancement; on counts II, III, and V, for each count, a term of life with a minimum parole eligibility of ten years plus an equal and consecutive term of life for the deadly weapon enhancement and lifetime supervision; and on count IV, seventy-two months with a minimum parole eligibility of twenty-eight months. Count II was ordered to run consecutive to count I, and counts III, IV, and V were ordered to run concurrently with count II. This court dismissed appellant's direct appeal.<sup>1</sup>

<sup>1</sup>Hart v. State, Docket No. 32651 (Order Dismissing Appeal, March 2, 2000).

On October 16, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 18, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the proceeding would have been different.<sup>2</sup> There is a presumption that counsel provided effective assistance unless petitioner demonstrates "strong and convincing proof to the contrary."<sup>3</sup> Further, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>4</sup>

First, appellant contended that his counsel was ineffective for providing defective and insufficient consultation, and for failing to form any meaningful working relationship with appellant throughout the district court proceedings. Specifically, appellant claimed his counsel (1) failed to adequately interview and inform appellant as to the charges against him, (2) failed to comply with appellant's request to provide appellant with discovery and disclosure, and (3) assumed a "prosecutorial

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1994).

<sup>3</sup>Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

<sup>4</sup>Strickland, 466 U.S. at 697.

role” in advising appellant to accept a plea bargain and not to testify on his own behalf. Initially, we note that the United States Supreme Court has held that the Sixth Amendment guarantee of counsel does not require a "meaningful relationship" between the defendant and his counsel.<sup>5</sup> Appellant indicated to the district court that he had discussed the charges he was facing with counsel, and further stated that he understood them. Additionally, with regard to counsel’s alleged failure to provide discovery, appellant failed to provide facts indicating how and when he requested discovery, or what specifically counsel failed to provide to him.<sup>6</sup> Lastly, in light of the substantial physical and circumstantial evidence implicating appellant in the crimes, we are unable to conclude that appellant was prejudiced by counsel’s advice that appellant should not testify on his own behalf at trial. We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance.

Second, appellant contended that his counsel was ineffective at the preliminary hearing for failing to call witnesses on appellant’s behalf and failing to cross-examine the victim. Appellant failed to indicate the names of witnesses that should have been called or specifically what the witnesses would have testified to at the preliminary hearing.<sup>7</sup> Further, at the preliminary hearing, appellant’s counsel interrupted the victim’s testimony prior to cross-examination because appellant had expressed his desire to waive the hearing and enter a guilty plea at that

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<sup>5</sup>Morris v. Slappy, 461 U.S. 1, 14 (1983).

<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>7</sup>Id.

time.<sup>8</sup> Therefore, we are unable to conclude that counsel was ineffective in this regard.

Third, appellant contended that his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the sufficiency of the evidence after appellant had entered his plea of not guilty. Appellant failed to demonstrate that there was insufficient evidence against him to establish probable cause. At the preliminary hearing, the victim testified that appellant was a friend of her boyfriend, Randall Rollins, and that appellant coaxed her into his vehicle and took her back to his mobile home so they could discuss a recent argument between the victim and Rollins. While the two were in appellant's mobile home, appellant told the victim that she was a "drug whore" and that if she kept doing drugs, she was going to get raped. When the victim attempted to leave, appellant forced her onto the couch, retrieved a gun from the kitchen, pointed the gun at her head and ordered her to remove her clothes. When the victim refused, appellant fired a gunshot that grazed the back of the victim's neck and left a gunpowder mark on her shirt. Appellant then forcibly removed the victim's clothes and made her perform oral sex and intercourse. Afterwards, in an attempt to conceal the evidence, appellant made the victim shower and get dressed. Subsequently, Randall Rollins arrived at the mobile home in search of the victim. Upon the arrival of Rollins, the victim asked appellant if she could leave, and ran from the mobile home. Rollins followed the victim outside where she told him she had been sexually assaulted by appellant. Immediately thereafter, the victim ran to a residence across the street and the residents there called police. In light of

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<sup>8</sup>Appellant subsequently changed his plea to "not guilty" at the arraignment.

this, we are unable to conclude that there was insufficient evidence against appellant to establish probable cause. Thus, counsel was not ineffective in this regard.

Fourth, appellant contended that his trial counsel was ineffective in failing to adequately investigate, search for, subpoena, prepare, present, or examine potential witness Travis Furey. Appellant contended that Travis Furey should have been presented as a possible donor of the semen evidence because there had been speculation that Furey and the victim had previously been sexually intimate. At trial, criminalist David Welch testified that the semen found on the victim's shorts did not contain any spermatozoa, and that this could have meant that the donor had been vasectomized. Subsequently, appellant's girlfriend, Joy Reid, testified that prior to the crimes, appellant had mentioned several times to her that he had undergone a vasectomy. Appellant argued that it was rumored that Travis Furey may have contracted genital warts from the victim sometime prior to the crime, and that this could have made Furey's semen aspermic. Appellant provided no credible scientific basis for this assertion. Further, the record indicates that appellant's counsel hired a private investigator who thoroughly researched the background and whereabouts of Travis Furey by searching public records and questioning individuals familiar with him. The search revealed among other things, that Travis Furey had no prior criminal record, and that he no longer resided at his last known address. Appellant failed to demonstrate that even if his counsel had presented Travis Furey as a possible donor of the aspermic semen evidence and produced evidence that Travis Furey had been sexually intimate with the victim in the past that it would have produced a different result at trial. Thus, we are unable to conclude that counsel was ineffective in this regard.

Fifth, appellant contended that his trial counsel was ineffective in failing to formalize discovery and file meaningful discovery motions for the production and testing of physical evidence. Specifically, appellant claimed his counsel should have filed a discovery motion (1) for a physical examination of appellant to determine if appellant had a vasectomy and was therefore aspermic, (2) requiring Travis Furey to undergo a medical evaluation and blood test, and (3) to establish a pre-existing medical condition of the victim. We conclude that the district court did not err in denying these claims. Appellant failed to demonstrate that his counsel did not conduct proper discovery regarding the facts of the case. As discussed above, appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced by the fact that Travis Furey was not presented as a possible donor of the semen evidence. Appellant's theory that Travis Furey allegedly contracted genital warts from the victim which may have caused his semen to be aspermic has not been shown to have a credible basis in science or the record. Further, there was testimony at trial that the appellant had been vasectomized. Thus, we are unable to conclude that counsel was ineffective in this regard.

Sixth, appellant contended that his trial counsel was ineffective in failing to file meaningful and proper motions to suppress. Specifically, appellant claimed that his counsel failed to file motions to suppress numerous statements, including a statement to police that was partially written by the victim but signed by Randall Rollins. To establish prejudice based upon counsel's failure to file a motion to suppress evidence, appellant must show that the motion to suppress was meritorious and that there was a reasonable likelihood that the exclusion

of the evidence would have changed the result of the trial.<sup>9</sup> Appellant failed to demonstrate that a motion to suppress Randall Rollins' statements to police would have been meritorious or that the result of appellant's trial would have been different as a result of the motion. Randall Rollins testified at trial that his police statement was accurate and explained that he had dictated a portion of it to the victim simply because he had become "jittery" and too upset to write. Additionally, the record indicates that appellant's counsel successfully filed a motion to suppress evidence that was illegally seized from appellant's mobile home. Finally, appellant failed to provide sufficient facts to support his claims that counsel should have filed additional motions, and failed to demonstrate prejudice.<sup>10</sup>

Seventh, appellant contended that his trial counsel was ineffective in failing to research and file a meaningful, proper, and timely "motion to pierce the Nevada rape shield law with an offer of proof." Appellant failed to demonstrate that counsel's actions were deficient or that such action would have produced a different result at trial. Appellant did not demonstrate that such a motion would have been successful, or provide sufficient facts indicating how such action would have assisted the defense.<sup>11</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Eighth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose witnesses Kathleen Smith, Josephine Smith, Herschel

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<sup>9</sup>See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

<sup>10</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222; see Strickland, 466 U.S. 668.

<sup>11</sup>Id.

Trucks, and Ellen Van Ert. The record indicates that prior to trial, appellant's counsel employed a private investigator who interviewed all of these witnesses as to the facts of the case. Further, appellant's counsel chose to present Josephine Smith and Thomas Smith as witnesses for appellant at trial. Thus, appellant failed to demonstrate that counsel's actions were deficient with regard to these witnesses or that handling these witnesses differently would have produced a different result at trial.

Ninth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witness Tanya Howard. Appellant claimed that Tanya Howard could have revealed the fact that the victim and Randall Rollins conspired to fabricate their police reports as part of a plan to steal appellant's vehicles. Appellant failed to demonstrate that counsel's actions were deficient with regard to this witness or that such action would have produced a different result at trial. Appellant failed to credibly demonstrate that there was any conspiracy against him. As discussed above, Randall Rollins verified at trial that the portion of his police statement that he had dictated to the victim was accurate. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Tenth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witness Tanya Avery as to the validity of the case, credibility, and the motive of the victim and Randall Rollins to fabricate accusations against appellant. Appellant failed to demonstrate that counsel's actions were deficient with regard to this witness or that such action would have produced a different result at trial. Appellant did not demonstrate what specific facts about the validity of the case, credibility, and the motive of the victim and Randall Rollins that Tanya Avery might have revealed or that those facts would have been helpful or



material to the defense.<sup>12</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Eleventh, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witness Stephen Whitfield as to the actual time of the 911 call and the motive of the victim and Randall Rollins to fabricate accusations against appellant. Appellant failed to demonstrate that counsel's actions were deficient with regard to this witness or that such action would have produced a different result at trial. The evidence at trial showed that after the victim had been sexually assaulted, she ran from appellant's mobile home to Ellen Van Ert's residence across the street. Van Ert and her sons, Jeremiah Hill and Stephen Whitfield, were present at Van Ert's residence. Hill made the initial call to police, and Van Ert subsequently also called police. Van Ert testified that the victim arrived at her residence "about ten'ish [sic] in the evening," and Hill testified that the victim arrived "late evening, around 9:30, 10:00." Appellant did not demonstrate what specific additional facts Stephen Whitfield might have revealed about the actual time of the 911 call or the motive of the victim and Randall Rollins to fabricate accusations against appellant, or that those facts would have been helpful or material to the defense.<sup>13</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twelfth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose witness Officer Robert Keiser. Appellant claimed that Officer Keiser could have revealed information about the reports that

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<sup>12</sup>Id.

<sup>13</sup>Id.

appellant's vehicles were stolen. Appellant failed to demonstrate that counsel's actions were deficient with regard to this witness or that such action would have produced a different result at trial. Appellant did not demonstrate what specific facts Officer Keiser might have revealed about the reports, or that these facts would have assisted the defense. Further, appellant's counsel thoroughly cross-examined Officer Keiser at trial. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Thirteenth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witnesses Pat Bass, Debbie Rose, and John Jackson as to "time." Appellant failed to demonstrate that counsel's actions were deficient with regard to these witnesses or that such action would have produced a different result at trial. Appellant did not indicate with sufficient specificity what facts these witnesses would have revealed or how these facts would have assisted the defense.<sup>14</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Fourteenth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witness Jacqueline Beeson as to "motive to fabricate." Appellant failed to demonstrate that counsel's actions were deficient with regard to this witness or that such action would have produced a different result at trial. Appellant claims that Beeson was present with the victim, Travis Furey, Tina Theurer, and Randy Rollins at Furey's residence immediately prior to the crimes. However, appellant did not demonstrate with sufficient specificity what facts this witness would have revealed as to "motive to fabricate" or that these facts would have

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<sup>14</sup>Id.

assisted the defense.<sup>15</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Fifteenth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose witness Randall Rollins and potential witnesses Tina Theurer and Keith Grimes as to the victim's credibility, truthfulness, and drug use. Appellant failed to demonstrate that counsel's actions were deficient with regard to these witnesses or that such action would have produced a different result at trial. Appellant did not demonstrate with sufficient specificity what facts these witnesses would have revealed or how these facts would have assisted the defense.<sup>16</sup> Further, Randall Rollins testified at trial that the victim was his girlfriend, that he believed the victim's account of the events, and that the victim smoked marijuana often. Moreover, appellant's counsel thoroughly cross-examined Rollins at trial. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Sixteenth, appellant contended that his trial counsel was ineffective in failing to adequately interview, subpoena, prepare, present, examine, or depose potential witnesses Debbie Furey and Ken Kennedy. Appellant failed to demonstrate that counsel's actions were deficient with regard to these witnesses or that such action would have produced a different result at trial. Appellant did not demonstrate with sufficient specificity what facts these witnesses would have revealed or how these facts would have assisted the defense.<sup>17</sup> Thus, we are unable to conclude that counsel was ineffective in this regard.

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<sup>15</sup>Id.

<sup>16</sup>Id.

<sup>17</sup>Id.

Seventeenth, appellant contended that his trial counsel was ineffective in failing to adequately interview and investigate any the medical staff that came into contact with the victim about the victim's truthfulness and "regards to a weapon." Appellant failed to demonstrate that counsel's actions were deficient with regard to these witnesses or that such action would have produced a different result at trial. Appellant did not indicate with sufficient specificity the names of the medical staff personnel or what facts these witnesses would have revealed.<sup>18</sup> Further, appellant did not demonstrate that these facts would have assisted the defense. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Eighteenth, appellant contended that his trial counsel was ineffective in failing to develop and pursue a viable theory of defense. Specifically, appellant claimed counsel failed to protect, preserve, and present evidence to support appellant's theory of actual innocence. Appellant's counsel developed and presented a theory of defense that appeared to suggest that the victim had attempted to shoot herself or appellant and was falsely accusing him of sexual assault because appellant had threatened to reveal the victim's drug use to her mother and police. While it is true that the State undermined this theory by presenting the victim's mother, Nancy James, as a witness to testify that the victim had no experience with firearms and already knew of her daughter's drug use prior to the crimes, we are unable to conclude that counsel's conduct was unreasonable or that appellant suffered any prejudice. Further, we conclude that counsel did not act unreasonably in declining to present appellant's generally unsubstantiated and implausible theory that the victim and Randall Rollins were motivated to

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<sup>18</sup>Id.

falsely accuse appellant as part of a conspiracy to steal his vehicles. Moreover, appellant failed to demonstrate that the result at trial would have been different had this theory of defense been presented. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Nineteenth, appellant contended that his trial counsel was ineffective for erroneously suppressing relevant evidence from appellant's mobile home that would have assisted the defense. Appellant failed to demonstrate that counsel acted unreasonably or that he suffered any prejudice. Counsel successfully filed a motion in limine to suppress evidence seized from appellant's mobile home during an illegal search. Appellant failed to demonstrate how the suppressed evidence from the mobile home, including the semen-stained sheets, ballistic evidence, and fingerprints, was more likely to have been exculpatory or helpful to the defense rather than inculpatory. Even if appellant had been excluded as the donor of the semen on the sheets, appellant failed to demonstrate that this fact would have been exculpatory, material, or helpful to the defense. Further, even if the ballistic evidence may have revealed information about the trajectory of the bullet, appellant again failed to provide sufficient facts demonstrating that this evidence would have been helpful to the defense.<sup>19</sup> With regard to the fingerprint evidence, appellant claims he was denied fingerprinting analysis of the living room coffee table where the firearm was kept. However, appellant failed to provide sufficient facts demonstrating that such evidence existed or that this evidence would have assisted the defense. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twentieth, appellant contended that his trial counsel was ineffective for failing to cast doubt on the State's witnesses and failing to

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<sup>19</sup>Id.

rebut evidence of the victim's wet hair, the victim's gunpowder burn, and the semen evidence by contacting ballistic and DNA experts for the defense. Appellant failed to demonstrate that counsel acted unreasonably or that he suffered any prejudice. Appellant's counsel extensively cross-examined the State's witnesses about the victim's appearance immediately after the incident, the ballistic evidence, and the biological evidence. Appellant claimed that counsel should have consulted with the gunmaster and subpoenaed expert witnesses to rebut the testing procedures of the State's witnesses, but failed to specify what these individuals would have revealed about the testing procedures.<sup>20</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twenty-first, appellant contended that his trial counsel was ineffective for failing to present the victim's examining physician, Dr. Mark O'Connor, as an expert witness for the defense. Appellant claimed that Dr. O'Connor could have testified to the validity of the forensic test results and corroborate the medical reports of his examination of the victim. Appellant failed to demonstrate with sufficient specificity what facts Dr. O'Connor would have testified to or how those facts would have assisted the defense and produced a different result at trial.<sup>21</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twenty-second, appellant contended that his trial counsel was ineffective for inadequately questioning defense witness Josephine Smith, appellant's 86-year-old friend and neighbor. Appellant refers to the defense's investigation report, and claims that counsel should have questioned Smith at trial about comments she made to the investigator indicating (1) she believed that the victim and Randall Rollins were

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<sup>20</sup>Id.

<sup>21</sup>Id.

engaged in a conspiracy to steal appellant's vehicles; (2) that Travis Furey may have had a sexual relationship with the victim and contracted genital herpes from her; and (3) that she had an opinion of the victim as "troublesome" and "not a kind person." In light of the substantial physical and circumstantial evidence implicating appellant in the crimes, we are unable to conclude that appellant was prejudiced by counsel's performance. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twenty-third, appellant contended that his trial counsel was ineffective in failing to adequately investigate an allegedly false prior allegation of sexual assault by the victim which led to the denial of counsel's motion to introduce evidence of the prior allegation.<sup>22</sup> Appellant failed to demonstrate that counsel acted unreasonably or that he suffered any prejudice. The record indicates that counsel hired a private investigator who thoroughly investigated the circumstances of the prior allegation. The investigator interviewed Herschel Trucks, who disclosed that approximately eight years prior to the instant events, when the victim was approximately ten or eleven years old, she had filed a complaint with police stating that Trucks had fondled her in his van. The investigator determined that Trucks denied the accusation and charges were never filed. Counsel attempted to have this evidence introduced, but the motion was denied. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

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<sup>22</sup>To the extent that appellant attempts to challenge the district court order denying his motion to present evidence regarding the victim's allegedly false prior allegations of sexual assault, this issue was substantially raised on direct appeal and rejected. The doctrine of the law of the case prevents further litigation of this issue. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Twenty-fourth, appellant contended that his trial counsel was ineffective for failing to object throughout the proceedings in a timely manner to preserve the record on appeal. We conclude that the district court did not err in denying this claim. Appellant failed to specify what objections counsel should have raised.<sup>23</sup> Moreover, appellant's claim is belied by the record.<sup>24</sup> Appellant's counsel raised multiple timely objections throughout the proceedings. Thus, appellant failed to demonstrate counsel was ineffective in this regard.

Twenty-fifth, appellant contended that his trial counsel was ineffective for failing to "poll the jury, knowing the possibility of intimidation of the jury." Appellant failed to allege sufficient facts to support his assertion that the jury had been intimidated or that his counsel was aware that the jury had been intimidated.<sup>25</sup> Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Twenty-sixth, appellant contended that his trial counsel was ineffective at sentencing for failing to investigate, prepare, or present any evidence or witnesses in mitigation. Although appellant claimed that potential witnesses Herschel Trucks, Tanya Howard, Josephine Smith, Kathleen Smith, Keith Grimes, and Joy Reid were available to testify at sentencing, appellant failed to specify what mitigating testimony they would have given.<sup>26</sup> Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

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<sup>23</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>24</sup>Id.

<sup>25</sup>Id.

<sup>26</sup>Id.



Next, appellant raised several claims of ineffective assistance of appellate counsel.<sup>27</sup> “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).” Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>28</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>29</sup> “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”<sup>30</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the State improperly introduced “bad character” evidence. While questioning the victim at trial about the facts underlying the sexual assault charge, the State elicited testimony from the victim that appellant ejaculated inside the victim without the use of a contraceptive or condom. The determination of whether evidence is relevant and, by implication, whether the evidence is admissible, lies within the sound discretion of the trial judge, and that

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<sup>27</sup>To the extent that appellant raised any of the same issues underlying his claim that his appellate counsel was ineffective 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 nevertheless address appellant’s claims in connection with his contention that appellate counsel should have raised the claims on direct appeal.

<sup>28</sup>*Jones v. Barnes*, 463 U.S. 745 (1983).

<sup>29</sup>*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>30</sup>*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

determination will not be disturbed unless manifestly wrong.<sup>31</sup> The record does not indicate that the district court's decision to admit this evidence was manifestly wrong. Therefore, appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal.<sup>32</sup>

Second, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the district court improperly admitted scientific evidence "by looking outside the techniques relied upon to support the expert opinions." Appellant specifically argued that the district court improperly allowed (1) the crime scene analyst who photographed the firearms and the victim's neck to mention the merits of a color scale in his testimony when only a gray scale was used, (2) the police officer that assisted the examining nurse in collecting the samples for the rape kit to testify as to how the samples were collected, and (3) the examining nurse to testify as to the protocol for collecting the samples in the rape kit and the content of the patient report that she wrote. Our review of the record does not indicate that the district court's decision to allow this testimony was manifestly wrong. We therefore conclude that appellant failed to demonstrate that his counsel was ineffective because these claims would not have had a reasonable probability of success on appeal.<sup>33</sup>

Third, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the State lost, mishandled,

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<sup>31</sup>See Woods v. State, 101 Nev. 128, 696 P.2d 464 (1985); see also Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

<sup>32</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>33</sup>Id.

failed to gather, and failed to adequately test valuable exculpatory evidence. Appellant specifically argued that (1) the police failed to gather potential evidence of gunshot residue from the hands of the victim and appellant, (2) the police allegedly mishandled the .22 caliber firearm, resulting in the loss of potentially exculpatory fingerprint evidence, (3) the police failed to gather fingerprint evidence from the .45 caliber and .357 caliber firearms, (4) the police used a gray scale instead of a color scale while gathering the photographic evidence, (5) appellant was improperly allowed to pull out his own head and pubic hair samples to submit to the rape kit, and (6) although the semen evidence did not contain spermatozoa for DNA testing, the semen should have undergone blood-typing. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he suffered prejudice. We conclude that appellant's contention lacks merit because appellant failed to establish that the evidence would have assisted the defense or that the State's alleged loss or failure to properly gather the evidence was attributable to negligence, gross negligence, or bad faith.<sup>34</sup> Further, the State's expert, criminal David Welch, testified that most laboratories no longer subject semen samples to blood-typing. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective because this claim would not have had a reasonable probability of success on appeal.<sup>35</sup>

Fourth, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the State improperly introduced false extra-judicial statements made by Randall Rollins.

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<sup>34</sup>See Mortensen v. State, 115 Nev. 273, 283, 986 P.2d 1105, 1111-12 (1999) (citing Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996)); see also Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

<sup>35</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellant claims that Randall Rollins gave false extra-judicial statements against appellant as part of a conspiracy between Rollins and the victim to steal three vehicles belonging to appellant. As discussed above, we conclude that appellant failed to demonstrate that his counsel was ineffective because this claim would not have had a reasonable probability of success on appeal.<sup>36</sup>

Fifth, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the State improperly allowed the victim to testify falsely at the preliminary hearing and at trial, and that the district court improperly admitted the victim's extra-judicial statements. In his petition, appellant appeared to have challenged the credibility of the victim's testimony by attempting to point out alleged inconsistencies between her testimony and various prior extra-judicial statements. Based upon our review of the record, we are unable to conclude that the district court abused its discretion in this regard. We therefore conclude that appellant failed to demonstrate that his counsel was ineffective because this claim would not have had a reasonable probability of success on appeal.<sup>37</sup>

Sixth, appellant claimed that his appellate counsel was ineffective for failing to properly prepare, preserve and present other meritorious issues unknown to appellant on direct appeal. Appellant did not specify what other meritorious issues his appellate counsel should have raised or how he suffered prejudice. Thus, appellant failed to support his claim with specific facts, which if true, would entitle him to

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<sup>36</sup>Id.

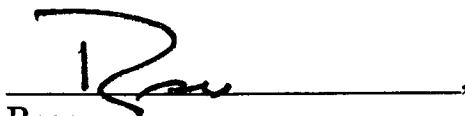
<sup>37</sup>Id.

relief.<sup>38</sup> Therefore, we conclude that counsel was not ineffective in this regard.

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.<sup>39</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>40</sup>

  
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Shearing J.

  
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Rose J.

  
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Becker J.

cc: Hon. Sally L. Loehrer, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Stephen Charles Hart  
Clark County Clerk

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<sup>38</sup>Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>39</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>40</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.