

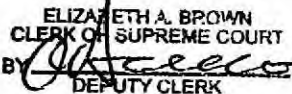
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERRY EARL JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82538-COA

FILED

OCT 07 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Jerry Earl Johnson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 21, 2019, and a supplemental petition filed on June 1, 2020. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Johnson first contends the district court erred by denying his claims of ineffective assistance of trial counsel. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 687, 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). A petitioner claiming counsel did not conduct an adequate investigation must show what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

First, Johnson claimed trial counsel failed to conduct an adequate pretrial investigation and should have retained a DNA expert to rebut the findings of the State's DNA expert regarding victim E.M. Johnson was acquitted of the sexual assault of E.M.; thus, Johnson cannot demonstrate prejudice. Therefore, we conclude the district court did not err by denying this claim.¹

Second, Johnson asserted trial counsel should have consulted other witnesses, including an expert who could explain the dynamics in alleged sexual assault cases. Johnson did not allege what the results of consulting with this expert would have been or how it would have affected the outcome of the proceedings. Additionally, to the extent Johnson claimed trial counsel should have sought and consulted with other witnesses, Johnson did not identify who the other witnesses would have been, what they would have said, or how they would have affected the outcome of the proceedings. Johnson's bare claims failed to demonstrate he was entitled to relief. Therefore, we conclude the district court did not err by denying these claims.

¹For the first time on appeal, Johnson argues trial counsel should have retained a DNA expert to challenge the State's DNA expert who testified regarding evidence collected from victim K.H. We decline to consider this argument as it was not raised in the district court in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Third, Johnson contended trial counsel was ineffective during jury selection for failing to retain an expert jury consultant and failing to seek individual, sequestered voir dire. Johnson asserted individual, sequestered voir dire and a retained jury expert would have helped discover hidden biases that jurors may have held regarding sexual abuse and prevented jurors from being prejudiced by certain questions. However, Johnson did not identify any signs of bias or prejudice that trial counsel failed to recognize or any questions trial counsel should have but failed to ask the potential jurors. Additionally, Johnson did not allege that an impartial jury was not empaneled as a result of trial counsel's failing to retain a jury consultant or request individual, sequestered voir dire. Therefore, Johnson failed to demonstrate trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had trial counsel acted differently during jury selection. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, Johnson contended trial counsel should have filed a pretrial motion to compel a psychiatric examination of the two victims. In criminal proceedings relating to the commission of a sexual offense, a district court may not order a victim or witness to submit to a psychiatric examination. NRS 50.700(1). Johnson did not argue that NRS 50.700(1) does not apply to his case. Because the trial court was prohibited from ordering the victims to undergo a psychiatric examination, filing the motion would have been futile, and counsel is not ineffective for failing to file futile motions. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, we conclude the district court did not err by denying this claim.

Fifth, Johnson argued trial counsel should have filed a motion to dismiss a charge of sexual assault due to the loss of potentially exculpatory evidence or should have sought an adverse-inference instruction in the alternative. Johnson asserted the State improperly failed to obtain surveillance footage from the crime scene. Where the State loses or destroys material evidence in bad faith, dismissal of the charges may be appropriate, and where the State is grossly negligent in losing or destroying material evidence, the defense is entitled to an adverse-inference instruction. *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). “When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution’s witnesses about the investigative deficiencies.” *Id.*

On February 16, 2017, trial counsel made an oral motion to dismiss the charges as a result of the missing surveillance footage. Thus, this portion of Johnson’s claim is belied by the record. The trial court found that the surveillance footage was not lost or destroyed by bad faith or gross negligence. Instead, the trial court found that, if anything, the footage may have been lost or destroyed through mere negligence and denied the motion. During the hearing on the motion, each of the *Daniels* remedies were discussed. Because each of the remedies were discussed, Johnson failed to demonstrate trial counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel asked separately for an adverse-inference instruction. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Johnson argued trial counsel did not properly prepare Johnson to testify. The district court found that counsel spent multiple hours preparing Johnson to testify and used role playing techniques during

trial preparation. This finding is supported by substantial evidence in the record. Thus, Johnson failed to demonstrate that counsel's actions fell below an objective standard of reasonableness. Further, Johnson did not assert how he was prejudiced by counsel's allegedly deficient performance. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Johnson claimed trial counsel should have raised a meritorious-character defense. The district court found that, had Johnson raised a meritorious-character defense, it would have opened the door for the State to admit evidence of a 2002 sexual assault that Johnson was alleged to have committed. Evidence of the 2002 sexual assault had been discussed in pretrial hearings, and the district court found it was trial counsel's strategy to prevent this evidence from being admitted. These findings are supported by substantial evidence in the record. In light of the circumstances in this case, Johnson failed to demonstrate counsel's defense strategy fell below an objective standard of reasonableness. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."). Therefore, we conclude the district court did not err by denying this claim.

Eighth, Johnson claimed trial counsel failed to prepare an adequate closing argument. Johnson asserted counsel's closing argument did not emphasize the strong points in Johnson's case or clearly establish why the State had not met its burden. The district court found that counsel's closing argument raised multiple issues regarding victim K.H.'s testimony, explained the standard of reasonable doubt, and argued the State did not satisfy its burden. These findings are supported by substantial evidence in the record. Thus, Johnson failed to demonstrate counsel's performance at closing argument fell below an objective standard

of reasonableness or a reasonable probability of a different outcome had counsel argued differently. Therefore, we conclude the district court did not err by denying this claim.

Johnson next argues the district court erred by denying his claims of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in 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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. 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.

First, Johnson claimed appellate counsel should have argued that Johnson's sentence of life in prison with a minimum parole eligibility of 918 months amounted to cruel and unusual punishment. Johnson was sentenced to life in prison with minimum parole eligibility beginning after ten years. Johnson did not allege that his sentence was outside the statutory limit. Johnson was convicted of sexual assault, and his sentence was facially legal and the minimum required pursuant to NRS 200.366(2)(b). Thus, Johnson failed to demonstrate counsel's failure to raise this claim fell below an objective standard of reasonableness or a reasonable probability of success on appeal had counsel raised it. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) ("A sentence within the statutory limits is not cruel and unusual punishment unless the statute

fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.” (internal quotation marks omitted)). Therefore, we conclude the district court did not err by denying this claim.

Second, Johnson contended appellate counsel should have argued the trial court committed plain error by allowing the prosecutor to improperly vouch for State witnesses. In rebuttal, the State responded to Johnson’s attacks on K.H.’s credibility and pointed to the facts that supported her testimony. The State’s argument did not amount to improper vouching because the State did not offer personal assurances of a witness’s veracity. *See Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). Accordingly, Johnson failed to demonstrate counsel’s failure to raise this claim fell below an objective standard of reasonableness or a reasonable probability of success on appeal had counsel raised it. Therefore, we conclude the district court did not err by denying this claim.

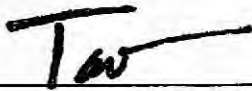
Third, Johnson contended appellate counsel should have argued the trial court committed plain error by allowing the prosecutor to improperly comment on Johnson’s custody status. The district court found that the State’s reference to Johnson’s custody status was reminding the jury that Johnson had been impeached by introducing a prior conviction. This finding is supported by substantial evidence in the record. The State did not reference whether Johnson was in custody at the time of the trial. Accordingly, Johnson failed to demonstrate counsel’s failure to raise this claim fell below an objective standard of reasonableness or a reasonable probability of success on appeal had counsel raised it. *See Haywood v. State*, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991) (prohibiting informing the

jury that a defendant is currently in jail). Therefore, we conclude the district court did not err by denying this claim.

Johnson next argues the district court erred by denying his claim that the cumulative effect of counsel's errors in this case warrants reversal. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Johnson did not demonstrate multiple instances of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk