

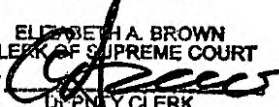
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY A. FRITZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84469-COA

FILED

JAN 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Gregory A. Fritz appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Fritz argues that the district court erred by denying his March 28, 2017, postconviction petition and later-filed supplement without first conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Ineffective assistance of trial counsel

In his petition, Fritz first contended that his trial counsel was ineffective. 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. 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).

First, Fritz claimed that his trial counsel was ineffective for failing to argue that a count of lewdness (Count 9) was redundant to a count of sexual assault (Count 4) because the improper contact was incidental to and part of the same episode. Fritz also contended that counsel should have objected to the jury instruction that explained the circumstances in which multiple acts during a single encounter can constitute separate offenses.

"The crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (quotation marks omitted). In a jury trial involving charges of lewdness and sexual assault, part of the State's "burden is to show that the lewdness was an act other than a sexual assault." *Id.* at 653, 119 P.3d at 1235. To put it another way, the State must "show that the lewdness was not incidental to the sexual assault." *Id.*

The State can establish that an act of lewdness is not incidental to a subsequent sexual assault, and obtain convictions for both crimes, by presenting evidence of an interruption between the two acts. *See, e.g., Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (where evidence indicated that the defendant stopped fondling the child's breasts

before digitally penetrating her, the acts were separate and distinct); *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990) (where evidence indicated that defendant stopped an attempted sexual assault when a car passed and then resumed the sexual assault after the car was gone, the acts were separate and distinct).

On the other hand, when the State fails to present evidence of any interruption between an act of lewdness and a subsequent sexual assault, a defendant may not be convicted of both crimes. *See, e.g., Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) (reversing redundant lewdness conviction where there was no interruption between defendant's acts of touching and rubbing the victim's penis and the subsequent fellatio); *Ebeling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (reversing redundant lewdness conviction where defendant's act of rubbing his penis against victim's buttocks was incidental to penetration and not a separate act); *Gaxiola*, 121 Nev. at 652, 119 P.3d at 1235 (reversing redundant lewdness conviction where there was no "evidence regarding the sequence of events and under what circumstances the lewdness occurred. The child only indicated Gaxiola fondled the child's penis" and "did not indicate if this occurred on a separate day or time frame from the child's statement that Gaxiola placed the child's penis in Gaxiola's mouth").

In this case, the victim testified at trial that Fritz touched her breasts while they were sitting next to each other on the bed. When the State asked her what happened next, the victim testified that she performed fellatio when Fritz asked her to do so. Because the victim did not testify that there was any interruption between the two acts, "we cannot tell from [her] testimony whether the touching was separate and distinct as in

Wright and *Townsend* or a continuous act merged with a sexual assault as in *Crowley* or *Ebeling*.” *Gaxiola*, 121 Nev. at 652, 119 P.3d at 1235.

The district court denied Fritz’s claim of ineffective assistance of counsel based on counsel’s failure to argue redundancy without an evidentiary hearing based on a misunderstanding of *Gaxiola* and the cases cited therein. The district court concluded that *Gaxiola* required the State to prove only that “the lewdness was an act other than a sexual assault,” without also establishing an interruption between the two acts. Thus, the district court found that the State met its burden in this case because the victim “testified to Petitioner’s fondling of her breasts (a lewd act), followed by a separate and distinct demand that [the victim] perform fellatio on Petitioner (a sexual assault).” But to satisfy *Gaxiola*, the State must also present evidence of an interruption between an act of lewdness and a subsequent sexual assault that occurs during the same episode. Had trial counsel challenged Count 9 as redundant to Count 4, Fritz may have been entitled to relief from the redundant conviction. *See id.* Because Fritz supported his redundancy argument with specific facts that are not belied by the record and, if true, would have entitled him to relief, the district court erred when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we reverse the district court’s denial of this claim and remand for the district court to conduct an evidentiary hearing on counsel’s failure to argue redundancy.

Relatedly, Fritz argues that trial counsel was ineffective for failing to object to Jury Instruction 12, which advised the jury: “Where multiple sexual acts occur as part of a single criminal encounter a defendant

may be found guilty for each separate or different act of Sexual Assault and/or Lewdness.” Fritz contends that this instruction was misleading because it indicated the jury could find Fritz guilty of Count 4 and Count 9 merely because the offenses constituted separate acts.

The district court is required to ensure that a jury is fully and correctly instructed on the law. *Crawford v. State*, 121 Nev. 744, 755, 121 P.3d 582, 589 (2005); NRS 175.161. As explained in *Gaxiola*, “the State has the burden, at trial, to show that the lewdness was not incidental to the sexual assault.” 121 Nev. at 653, 119 P.3d at 1235. While the language in Jury Instruction 12 may have been correct had it applied *solely* to acts constituting sexual assault¹ or *solely* to acts constituting lewdness, the “and/or” language invited the jury to convict Fritz of *both* lewdness and sexual assault, as long as the acts which constituted the lewdness differed in nature from the acts constituting the sexual assault, regardless of whether there was any interruption between those acts.

There is a reasonable probability that the jury would not have convicted Fritz of the redundant count of lewdness (Count 9), had it been properly instructed. Because Fritz supported his jury instruction argument with specific facts that are not belied by the record and, if true, would have entitled him to relief, the district court erred when it denied this claim without conducting an evidentiary hearing. *See Hargrove*, 100 Nev. at 502-

¹*See Gaxiola*, 121 Nev. at 651, 119 P.3d at 1234 (“[S]eparate and distinct acts of *sexual assault* may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time.” (emphasis added) (internal quotation marks omitted)).

03, 686 P.2d at 225. Therefore, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing addressing counsel's failure to challenge Instruction 12.

Second, Fritz claimed that his trial counsel was ineffective for failing to ensure that there was an adequate hearing concerning Fritz's motion to dismiss counsel. "Absent a showing of adequate cause, a defendant is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense." *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." *Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). In conducting a review of a trial court's denial of a request for substitute counsel, this court considers the extent of any conflict, the adequacy of the trial court's inquiry, and the timeliness of the defendant's motion. *Young*, 120 Nev. at 968-69, 102 P.3d at 576.

Fritz filed a pretrial motion requesting the appointment of substitute counsel. In his motion, Fritz contended that he had disagreements with counsel concerning the preparation for trial and their level of communication. Fritz also stated in his motion that counsel assured him that counsel would be prepared for trial. The trial court conducted a hearing concerning the motion. The trial court noted that the scheduled trial date was a little more than one month away and stated that it had reviewed the motion and did not see anything that would cause it to consider granting it at that time.

Fritz failed to demonstrate that the hearing was inadequate as he failed to show that he and counsel were so at odds that they could not present an adequate defense. Thus, Fritz did not demonstrate that counsel's performance fell below an objective standard of reasonableness by any failure to request additional consideration of the motion to appoint substitute counsel. Fritz also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Fritz claimed that his counsel was ineffective for failing to timely request to introduce an other-bad-act witness's prior, allegedly false accusations of sexual abuse. The State called the witness at trial, and she testified that Fritz had previously sexually abused her. Fritz sought to question the witness regarding prior accusations she had made that her brother had also sexually abused her. Fritz believed the accusations against her brother were false, but he was precluded by the trial court from asking about those accusations. Fritz challenged the trial court's decision on direct appeal, and this court concluded that any error committed by the trial court by declining to permit Fritz to question the witness concerning the prior, allegedly false accusations was harmless "because the evidence of Fritz's guilt was overwhelming and did not depend upon [the witness's] testimony." *Fritz v. State*, No. 64770-COA, 2016 WL 3941460, *7 (Nev. Ct. App. June 11, 2016) (Order of Affirmance). In light of the overwhelming evidence of

Fritz's guilt presented at trial,² Fritz failed to demonstrate a reasonable probability of a different outcome at trial had counsel made an earlier request to introduce the witness's prior accusations. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Fritz claimed that his trial counsel was ineffective for failing to timely request to cross-examine the victim concerning her knowledge of sexual activity. NRS 50.090 prohibits a defendant from introducing evidence of a victim's prior sexual conduct to challenge the victim's credibility. Such evidence may be admissible, however, to show a child-victim's prior independent knowledge of sexual acts. *Summitt v. State*, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985).

Prior to trial, Fritz's counsel requested to introduce evidence of the victim's knowledge of sexual activity, including her prior statements discussing her sexual partners. The State opposed the request but acknowledged that it would introduce some of the information concerning the victim's sexual activity during its presentation of evidence. The trial court subsequently denied the motion because it was untimely. The victim later testified at trial that she was 21 years old at the time of trial and was the mother of a 3-year-old son. A doctor also testified that the victim reported the abuse as a teenager and that in an interview conducted shortly

²This court's conclusion that Count 9 may have been redundant does not affect the conclusion that there was overwhelming evidence of Fritz's guilt of the remaining offenses.

after she reported being abused by Fritz, the victim acknowledged that she had engaged in consensual sexual activity with other teenagers.

Because the jury was apprised that the victim was not a young child when she testified and she had independent knowledge of sexual acts, Fritz did not demonstrate a reasonable probability of a different outcome had counsel moved earlier to introduce evidence of the victim's sexual activity. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Fritz claimed that his trial counsel was ineffective for failing to object to testimonial hearsay when an expert witness utilized another expert's sexual assault examination report during the trial testimony. "[A] medical professional conducting [a sexual assault] examination would reasonably believe that his or her report and findings regarding the examination would be available for use at a later trial," and therefore, such reports are testimonial in nature and their admission violates the Confrontation Clause unless the creator of the report is available at trial for cross-examination. *Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). In addition, expert testimony regarding the content of a testimonial statement in a written report may function as the equivalent of a testimonial statement. *Id.* However, an expert witness may testify concerning an independent opinion reached as a result of reliance upon reports generated by others without violating the Confrontation Clause. *Id.*

The doctor that conducted the examination of the victim was unavailable to testify, and another doctor testified concerning the report stemming from the examination. Counsel objected to the introduction of

the portions of the report containing the victim's statements concerning the abuse allegations, but the trial court overruled that objection. The testifying doctor subsequently testified concerning the examination report, the first doctor's findings, and her own relevant opinions.

The second doctor expressed independent opinions concerning this matter, and those opinions did not violate Fritz's right to confrontation. However, the first doctor's findings and portions of the victim's statements contained within the report were read directly to the jury. Admission of those parts of the report violated Fritz's right to confrontation. Because counsel objected to the admission of the statements contained within the report, Fritz failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness in that regard. In addition, there was overwhelming evidence of Fritz's guilt presented at trial, and therefore, Fritz failed to demonstrate a reasonable probability of a different outcome had counsel raised additional objections to the admission of information stemming from the sexual assault examination report. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Fritz claimed that his trial counsel was ineffective for failing to request redaction of the portion of the victim's mother's guilty plea agreement that required her to testify truthfully. The victim's mother entered into a guilty plea agreement stemming from her conduct surrounding the abuse suffered by the victim. Under NRS 175.282(1), the court must allow the jury to inspect a plea agreement of a testifying former codefendant and should excise the truthfulness provision from the document provided to the jury "unless [that provision is] admitted in

response to attacks on the witness's credibility attributed to the plea agreement." *Sessions v. State*, 111 Nev. 328, 334, 890 P.2d 792, 796 (1995).

Even if it was procedurally improper for the State to have introduced the unredacted guilty plea agreement into evidence, we agree with the district court that any such error would have been harmless in light of this court's prior finding that the evidence of Fritz's guilt was overwhelming. Thus, Fritz did not demonstrate a reasonable probability of a different outcome had counsel requested redaction of that portion of the plea agreement. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Next, Fritz asserted that his appellate counsel was ineffective. 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 v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Fritz claimed that his appellate counsel was ineffective for failing to argue that a count of lewdness was redundant to a count of sexual assault because the improper contact was incidental to and part of the same episode. Fritz also contended that counsel should have argued

that the jury instruction explaining the circumstances in which multiple acts during a single encounter can constitute separate offenses was erroneous.

The district court erred in denying this claim without an evidentiary hearing. As explained previously, because there may have been insufficient evidence to sustain Fritz's conviction of the redundant count of lewdness (Count 9), and because Jury Instruction 12 was misleading, appellate counsel may have had a reasonable probability of success on appeal had these issues been raised.³ We therefore reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on whether appellate counsel was ineffective.

Second, Fritz claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence to support the third sexual assault count. Fritz contended that the victim did not testify with sufficient specificity concerning the third count and, therefore, that count should have been vacated.

For a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (internal quotation marks and emphasis omitted). It has been established under Nevada law that "in

³Because appellate counsel did not raise this issue on direct appeal, this court's previous finding of overwhelming evidence does not impact this particular claim.

sexual assault cases, . . . the victim's testimony alone is sufficient to uphold a conviction." *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). "However, the victim must testify with some particularity regarding the incident" such that the victim needs to provide more than just "speculation" or "mere conjecture." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (emphasis omitted). "We do not require that the victim specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred." *Id.*

The victim testified that she recalled Fritz forcing her to engage in sexual intercourse three times. The victim testified concerning the first two incidents, described the sexual acts, and stated that he committed them when they were alone. She also testified that he committed the third act in a manner similar to the first two incidents and did it at their residence in Las Vegas. The victim testified with sufficient particularity regarding the third incident, and based on the victim's testimony, the jury could reasonably find that Fritz committed sexual assault of a minor under the age of 16 years. See NRS 200.366(1)(a), (3). Accordingly, Fritz failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to raise the underlying claim on direct appeal or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Fritz claimed that his appellate counsel was ineffective for failing to argue that he did not receive an adequate hearing on his motion to dismiss counsel. As discussed previously, Fritz failed to demonstrate that the hearing was inadequate as he failed to show that he

and counsel were so at odds that they could not present an adequate defense. Thus, Fritz did not demonstrate that counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying claim on direct appeal. Fritz also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Fritz claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by declining to permit him to question the victim concerning her knowledge of sexual activity. As stated previously, because the jury was apprised that the victim was not a young child when she testified and that she had independent knowledge of sexual acts, Fritz did not demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim on direct appeal. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Fritz claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by admitting testimonial hearsay when an expert witness utilized another expert's report during her trial testimony. As explained previously, there was overwhelming evidence of Fritz's guilt presented at trial, and therefore, Fritz failed to demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim on direct appeal. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Fritz claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by failing to redact the portion of the victim's mother's plea agreement that required her to testify truthfully. As explained previously, any error in failing to request redaction of this guilty plea agreement was harmless in light of the overwhelming evidence of Fritz's guilt. Accordingly, Fritz failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

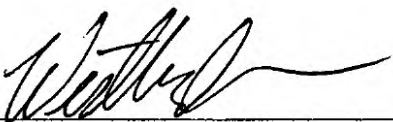
Cumulative error

Finally, Fritz claimed that the cumulative errors of trial and appellate counsel warranted relief. Even assuming any such errors could be cumulated, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), we conclude Fritz is not entitled to any additional relief beyond that granted in this order. 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.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Tierra Danielle Jones, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk