IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY HEFLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37915

FILED

SEP 10 2002

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a petition for a post-conviction writ of habeas corpus. A jury convicted appellant Troy Heflin of one count of sexual assault and one count of false imprisonment. The district court sentenced Heflin to life with the possibility of parole after ten years for sexual assault and one year in the Carson City jail for false imprisonment, sentences to run concurrently. The court entered the judgment of conviction on July 15, 1997. Heflin appealed claiming prosecutorial misconduct. This court dismissed the appeal because the petitioner's claims of misconduct were unsubstantiated.[1]

Following the dismissal of his appeal, Heflin filed a petition for a writ of habeas corpus challenging the performance of his trial and appellate counsel. On May 1, 2001, the district court denied the petition for failure to offer "strong and convincing" evidence that petitioner received ineffective assistance of counsel. Heflin timely appealed the

[1]Heflin v. State, Docket No. 30849 (Order Dismissing Appeal, July 6, 1999).

dismissal and asserts that the district court erred in denying his petition based on ineffective assistance of counsel and that it erred in failing to hold an evidentiary hearing on his petition. We disagree.

Heflin alleges several instances of ineffective assistance of counsel. He contends that his attorney provided ineffective assistance in the handling of his prior uncharged domestic battery as well as the handling of his prior acts relating to a driving under the influence (DUI) arrest. Specifically, Heflin contends that his attorney provided ineffective assistance of counsel by failing to object to the admission of evidence of bruises on the victim resulting from the prior uncharged domestic battery, failing to object to a jury instruction on prior bad acts, and failing to object to instances of prosecutorial misconduct. He further contends that his attorney was ineffective by failing to raise these issues on appeal. Additionally, Heflin argues that, at trial, his attorney should have inquired as to whether the victim had access to a loaded gun at her apartment but did not. Finally, he argues that his attorney's closing argument was ineffective.

The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review by this court.[2] In reviewing the district court's decision, however, this court gives deference to the district court's findings of fact regarding

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[2]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

claims of ineffective assistance of counsel.[3] The petitioner must overcome the presumption that trial counsel was effective by "strong and convincing proof to the contrary."[4] This court reviews a claim of ineffective assistance of counsel under the two-prong test set forth in Strickland v. Washington.[5]

To establish ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness" and that counsel's "deficient performance prejudiced [him]."[6] To establish prejudice, the petitioner must show that but for counsel's mistakes, "there is a reasonable probability that . . . the result of the proceeding would have been different."[7] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[8] A court may consider the two prongs in any order and need not consider both "if the defendant makes an insufficient showing on one."[9]

Heflin argues that trial counsel was ineffective for failing to answer the State's motion in limine to admit his prior uncharged domestic

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[3]Id.

[4]Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

[5]466 U.S. 668, 687, 691 (1984).

[6]McNelton, 115 Nev. at 403, 990 P.2d at 1268.

[7]Strickland, 466 U.S. at 694.

[8]Id.

[9]Id. at 697.

battery against the victim in this case. The record shows, and as the district court points out in its dismissal, "that [Heflin's] trial counsel vigorously contested the admission of the Petitioner's prior violence toward the victim." Furthermore, this evidence falls within the exception of NRS 48.045(2) to show motive or common plan or scheme. We, therefore, conclude that trial counsel's representation did not fall below an objective standard of reasonableness and Heflin has not shown that, but for his counsel's action, there is a reasonable probability that the results of his trial or his appeal would have been different. Because the petitioner's claims are belied by the record, he is not entitled to an evidentiary hearing.[10]

Heflin also argues that his trial counsel was ineffective because he conceded the issue of Heflin's prior acts relating to a DUI arrest. Although the district court should have held a Petrocelli[11] hearing on this issue, because there was no ineffective assistance of counsel, the failure to hold the evidentiary hearing was not prejudicial. The record shows that Heflin's attorney allowed into evidence the fact that the victim took Heflin to a DUI arraignment a few days before the alleged sexual assault and false imprisonment occurred. Heflin's attorney objected, however, to any further testimony on the DUI arraignment or its outcome. Accordingly, trial counsel's representation did not fall below an objective standard of reasonableness. In addition, because the victim's testimony

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[10]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[11]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

did not detail any particular facts regarding the arrest or any subsequent prosecution of the DUI offense, there was no prejudice.[12]

Heflin also argues that his trial counsel was ineffective because he allowed photographs and medical records to be entered into evidence showing the victim's injuries from a prior domestic battery. We conclude that Heflin's contention lacks merit. The record shows that, although Heflin's attorney did not object to their admission, both parties agree on appeal that he extensively cross-examined the victim on this evidence. Therefore, his representation did not fall below an objective standard of reasonableness. Moreover, Heflin has not shown how admission of the photographs prejudiced him.

Heflin further argues that his counsel was ineffective because he failed to object to a jury instruction on prior bad acts evidence and did not raise the issue on appeal. The instruction, however, was correct as a matter of law, and therefore, counsel's failure to object to or appeal the legality of the instruction cannot be construed as ineffective.[13] Additionally, Heflin's counsel was not ineffective for failing to object to and raise alleged instances of prosecutorial misconduct. This court, in its

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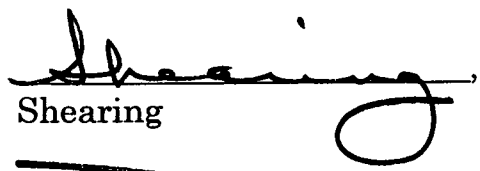
[12]Cf. Cunningham v. State, 113 Nev. 897, 908, 944 P.2d 261, 267-68 (1997) (holding that a prosecutor's reference to the defendant's presence in prison did not "rise to the level of a reasonable inference regarding Cunningham's prior criminal history"). Id. at 908, 944 P.2d 268.

[13]Cf. Jones v. Barnes, 463 U.S. 745, 754 (1983) (an appeal need not raise each and every non-frivolous issue in order to be effective).

order dismissing Heflin's direct appeal has already addressed the prosecutorial misconduct issue and need not do so again here.[14]

Having considered all of Heflin's other arguments on appeal and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.



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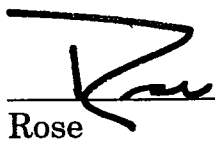

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Becker

cc: Hon. William A. Maddox, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

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[14]Hall V. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). "The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Id. at 315, 535 P.2d 798 (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34 (1969)). This doctrine cannot be avoided by later proffering a more detailed argument. Id., at 316, 535 P.2d at 799.