IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSSELL C. CALLAHAN,
Appellant,
vs.
WILLIAM GITTERE, ACTING WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 88699-COA

FILED

JUN 03 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Russell C. Callahan appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on November 9, 2016, and supplemental pleadings. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Callahan argues the district court erred by denying his claims of ineffective assistance of trial and appellate 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*). 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, 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).

First, Callahan claimed appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. Callahan contended the State failed to prove he acted with the requisite specific intent. When reviewing the sufficiency of the evidence supporting a conviction, the court considers "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[A] lewdness victim's testimony need not be corroborated" in order to sustain a conviction. *Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757 (2019); *see also Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005).

Callahan was convicted of three counts of lewdness with a child under the age of 14 years that were alleged to have occurred on or about July 3, 2012. At that time, NRS 201.230 provided:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

2005 Nev. Stat., ch. 507, § 33, at 2877. To obtain a conviction, the State was required to prove that Callahan committed a lewd or lascivious act with the

specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or the victim. *See Moore v. State*, 136 Nev. 620, 623, 475 P.3d 33, 36 (2020).

At trial, which began on June 18, 2013, and concluded on June 21, 2013, the three victims—N.K. (born June 2007), J.P. (born February 2005), and K.R. (born July 2002)—testified similarly that Callahan tickled them in their private areas in or near Callahan's apartment on the same day they went to Callahan's apartment and watched videos after playing together with water. N.K. testified that Callahan pulled her pants down and tickled her on her "pee pee." J.P. testified that Callahan tickled his "pee pee" over his clothing. And K.R. testified that Callahan tickled her "lower privates." Although Callahan testified he tickled the victims but did not touch them "anywhere remotely close to" their pelvis, groin, or buttocks, and his trial strategy included highlighting inconsistencies in the victims' accounts of the events, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that Callahan committed a lewd or lascivious act upon the victims' bodies with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or the victims. *See Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."). Accordingly, Callahan failed to demonstrate appellate counsel was deficient or a reasonable probability of a different outcome on appeal had appellate counsel challenged the sufficiency of the evidence. Therefore, we conclude the district court did not err by denying this claim.

Callahan next claimed trial counsel was ineffective for failing to object to the admission of a music video during trial. The jury heard evidence that Callahan played the music video for the victims on the day of the crimes. The district court conducted an evidentiary hearing regarding Callahan's petition where Callahan and trial counsel testified. The district court found that counsel made a tactical decision not to object to the video because he believed it showed Callahan knew about "pop culture" and had a normal sex life with his wife. The record supports the conclusion of the district court. Therefore, Callahan failed to demonstrate counsel's performance was deficient. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("[C]ounsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances." (internal quotation marks omitted)).

Further, Callahan failed to demonstrate he was prejudiced. While Callahan alleged the music video was irrelevant and prejudicial because it "clearly contains suggestive sexual lyrics and images which would arguably be inappropriate to show minor children," he failed to provide the video on appeal for our review. We thus presume the video supports the district court's decision to deny Callahan's claim. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 30(b)(3) (requiring an appellant to include in his appendix "any . . . portions of the record necessary to determination of issues raised in [the] appeal"); NRAP 30(d) (providing for when exhibits cannot be reproduced in the appendix). Accordingly, Callahan failed to demonstrate a reasonable probability of a different outcome at trial had counsel challenged the admission of the music video. Therefore, we conclude the district court did not err by denying this claim.

Callahan next claimed trial and appellate counsel were ineffective for failing to challenge multiple instances of prosecutorial

misconduct during the State's closing argument. Statements alleged to be prosecutorial misconduct "should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014) (internal quotation marks omitted) (quoting *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). A "prosecutor may argue inferences from the evidence and offer conclusions on contested issues." *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted). "The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); *see also Taylor v. State*, 132 Nev. 309, 324, 371 P.3d 1036, 1046 (2016) (stating that a prosecutor's comments expressing opinions or beliefs are not improper when they are reasonable conclusions or fair comments based on the presented evidence). Rebuttal arguments may permissibly respond to issues raised by the defense's closing argument, and "[t]he strongest factor against reversal on the grounds that the prosecutor made an objectionable remark is that it was provoked by defense counsel." *Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

First, Callahan contended the prosecutor vouched for the child victims by arguing they had no motive to lie and provided assurances to that effect in his rebuttal argument. "The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks and brackets omitted). Here, Callahan's closing argument pointed out inconsistencies in the victims' accounts of the

events and argued the jury could disregard the whole of their testimony if it found they had lied. In response, the prosecutor made no personal assurances about the victims' veracity; instead, he rebutted Callahan's argument regarding the credibility of the victims' testimony and argued their lack of motivation to lie by expressing his views on the evidence presented. Accordingly, Callahan failed to demonstrate trial or appellate counsel's performance was deficient or a reasonable probability of a different outcome at trial or on appeal had counsel challenged these statements by the prosecutor. Therefore, we conclude the district court did not err by denying this claim.

Second, Callahan contended the prosecutor improperly implied N.K.'s parents must not have influenced her because they allowed her to go forward with the allegations against Callahan, which meant the loss of someone who was willing to babysit for them. On this issue, the prosecutor stated in part, "Why would they follow through with this if they're thinking their daughter's lying? They would get some time back to themselves." Callahan further contended the prosecutor improperly commented on J.P.'s demeanor by stating he was "scared," hid his face, and "wouldn't look to the defendant." Callahan contended this information was not in evidence and the prosecutor improperly imposed his personal opinion.

In closing argument, "a prosecutor may not make statements unsupported by evidence produced at trial." *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). Moreover, prosecutors may not "inject their personal beliefs and opinions into their arguments to the jury." *Aesoph v. State*, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986). However, as noted above, it is for the jury to weigh the evidence and to determine the credibility of the witnesses. And the jury can consider the witnesses' demeanors in determining the credibility of the witnesses. *See Newson v. State*, 139 Nev. 88, 93-94, 526 P.3d 717, 722 (2023) (commenting on the

jury's ability "to observe the witnesses' demeanor and judge their credibility" in considering whether remote testimony was reliable); *cf. Cox v. Copperfield*, 138 Nev. 235, 240, 507 P.3d 1216, 1223 ("Conduct, equally with words, can constitute evidence.").

As to the statement about N.K.'s parents, the jury heard testimony that N.K.'s father was working a lot, that he wanted more alone time with his wife, and that N.K. had previously spent time at Callahan's apartment without N.K.'s father being present. Therefore, the prosecutor's statements regarding N.K.'s parents' motive to influence her was a reasonable inference drawn from the evidence. As to the prosecutor's statement regarding J.P.'s demeanor, Callahan offered no evidence at the evidentiary hearing conducted on his petition that the prosecutor's description of J.P.'s demeanor was false or that the jury was unable to observe J.P.'s demeanor. Thus, he has not shown that the prosecutor's comments about J.P.'s demeanor were improper. Accordingly, Callahan failed to demonstrate trial or appellate counsel's performance was deficient or a reasonable probability of a different outcome at trial or on appeal had counsel challenged the prosecutor's statements. Therefore, we conclude the district court did not err by denying this claim.

Third, Callahan contended the prosecutor made improper statements regarding the defense expert, Dr. O'Donohue, when the prosecutor referenced the "reader's caveat" in Dr. O'Donohue's report and noted the doctor did not say the victims were lying. Callahan argued the report was not entered into evidence and the prosecutor's comments about it amounted to personal opinion. Further, Callahan argued the prosecutor disparaged the defense by describing the report's caveat as "Latin for what comes after this warning is a load of crap that I disguised as something useful."

Comments that disparage legitimate defense tactics constitute misconduct. *See Butler v. State*, 120 Nev. 879, 898-99, 102 P.3d 71, 84-85 (2004). Although the prosecutor may not disparage legitimate defense tactics, comments which focus "on the truth of the defense's version of events" do not amount to misconduct. *Burns v. State*, 137 Nev. 494, 502, 495 P.3d 1091, 1101 (2021). "An expert may not comment on the veracity of a witness." *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992).

Dr. O'Donohue testified that he reviewed the majority of the interviews with the victims and their preliminary hearing testimony. Dr. O'Donohue pointed out inconsistencies in the interviews and testimony and opined on the existence of biasing factors in the interviews that could lead to the creation of false memories. While Dr. O'Donohue's report was not admitted into evidence, the prosecutor cross-examined Dr. O'Donohue about the "reader's caveat" portion of his report.[1] Regarding the caveat, Dr. O'Donohue explained that his evaluations of the interviews were not evaluations of the veracity of the information provided within the interviews and that he offered no opinion about whether the crimes occurred. During the State's closing argument, the prosecutor argued that, even if bias existed in the interviews, it did not mean the victims lied and that a child's testimony could be true even if an interview contained

[1]During the State's closing argument, the prosecutor attempted to read from the "reader's caveat" portion of the report but was stopped by the trial court because the report was not in evidence. Later, outside the presence of the jury, the court explained it interrupted the prosecutor because it did not want the prosecutor to quote from a report that was not admitted into evidence. However, the court found that Dr. O'Donohue referenced the caveat in his testimony and thus "it wasn't an unfair avenue to go into." Callahan offered no evidence that contradicted the court's findings about the admitted evidence regarding the caveat.

evidence of bias. Further, the State explained that Dr. O'Donohue "is not here to tell you" the victims lied and "he did not tell you that."

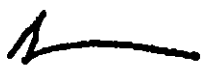
In context, the prosecutor's statements were argument that Dr. Donohue's testimony, even if accepted as true, was not conclusive evidence about the veracity of the victims. Generally, the prosecutor's statements did not disparage the defense tactic of calling Dr. O'Donohue to testify, and the prosecutor correctly stated that Dr. O'Donohue could not and did not offer testimony about whether the victims were lying. However, the prosecutor's reference to Dr. O'Donohue's report, and consequently his testimony, as a "load of crap" that the doctor "disguised" as useful was an inappropriate comment as it disparaged a legitimate defense tactic. *Cf. Commonwealth v. Slaughter*, 408 A.2d 1141, 1142-43 (Pa. 1979) (considering the prosecutor's remarks that the psychiatrist witness was a "prostitute" and "huckster" and that his testimony was "a lot of crap" and concluding such remarks "were intended to disparage and discredit" the witness).

Although the prosecutor's conduct was improper with regard to the above-identified statement, Callahan failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected or a reasonable probability of success on appeal had appellate counsel challenged the conduct. *See Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008) (discussing when a showing of improper conduct warrants relief); *Byars*, 130 Nev. at 865, 336 P.3d at 950 (providing that a prosecutor's statement is prejudicial when it "so infected the proceedings with unfairness as to result in a denial of due process"). The jury heard testimony that all three child victims had been tickled on their private parts by Callahan on the same day and under similar circumstances. In his defense, Callahan offered evidence in addition to Dr. O'Donohue's testimony—including his own testimony—that he did not

commit the crimes. During closing argument, the prosecutor's improper comment was not repeated or emphasized, and Callahan was able to argue the value of Dr. Donohue's testimony after the improper comment. In light of these circumstances, we conclude that Callahan failed to demonstrate ineffective assistance of trial or appellate counsel. Therefore, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



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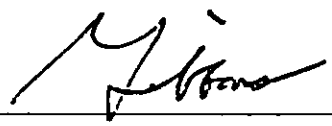

_____, J.
Gibbons

_____, J.
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cc: Hon. Leon Aberasturi, District Judge
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