

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ARTEAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38363

FILED

JUN 26 2002

ORDER OF AFFIRMANCE

JANEITE W. BLOCH  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Jose Arteaga's post-conviction petition for a writ of habeas corpus.

On January 13, 1999, Arteaga was convicted, pursuant to a jury trial, of trafficking in a controlled substance. The district court sentenced Arteaga to serve a life prison term with parole eligibility in 10 years. Arteaga did not file a direct appeal.<sup>1</sup>

On December 17, 1999, Arteaga filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel, and Arteaga filed a supplemental petition. After conducting an evidentiary hearing, the district court denied the petition. Arteaga filed the instant appeal.

Arteaga claims that the district court erred in denying his petition because his counsel was ineffective. Specifically, Arteaga claims his counsel was ineffective in failing to: (1) request a jury instruction on

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<sup>1</sup>We note that the district court properly found that Arteaga was deprived of his right to effective assistance of counsel on appeal, and therefore considered issues that could have been raised on direct appeal in the context of Arteaga's post-conviction proceeding pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

the reliability of the confidential informant; (2) object to the introduction of prior bad act evidence; and (3) argue for a lesser sentence.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that but for counsel's deficient performance, the outcome of the proceedings would have been different.<sup>2</sup> Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a particular action might be considered sound trial strategy.<sup>3</sup>

Arteaga first contends that his trial counsel was ineffective in failing to request a cautionary jury instruction with respect to police informant Dewanna Hart's testimony pursuant to Champion v. State.<sup>4</sup> We conclude that the district court did not err in finding that a cautionary instruction would not have resulted in a different outcome at trial.<sup>5</sup> Unlike the informant in Champion, there is no indication in the record that Hart was known to be unreliable.<sup>6</sup> Further, unlike the

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<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>3</sup>Strickland, 466 U.S. at 689.

<sup>4</sup>87 Nev. 542, 490 P.2d 1056 (1971) (holding that cautionary instruction was required where State's informant-witness was known to be unreliable and witness' testimony was uncorroborated).

<sup>5</sup>To the extent that Arteaga contends that the district court erred in not sua sponte instructing the jury pursuant to Champion, we conclude that Arteaga's contention lacks merit.

<sup>6</sup>See King v. State, 116 Nev. 349, 355-56, 998 P.2d 1172, 1176 (2000) (holding that cautionary instruction is not required where informant is reliable and testimony is corroborated by substantial evidence); Buckley v.

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uncorroborated witness testimony in Champion, several narcotics detectives corroborated Hart's testimony and Hart's interactions with Arteaga were tape-recorded and monitored by narcotics detectives who testified at trial. Additionally, a substantial amount of methamphetamine was found in Arteaga's residence and the marked buy-money paid to Arteaga by Hart was found in Arteaga's possession. Finally, the jurors in Arteaga's trial were instructed that in weighing a witness' credibility, they should consider "his or her character, conduct, . . . fears, bias, impartiality" and "[i]f the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness." Accordingly, even assuming defense counsel acted below an objective standard of reasonableness in not requesting a cautionary instruction, Arteaga has failed to show that such an instruction would have changed the outcome of the trial.

Arteaga next contends that his counsel was ineffective in failing to object to the introduction of prior bad act evidence or request a Petrocelli hearing.<sup>7</sup> Specifically, Hart testified, without objection, that she had been purchasing drugs from Arteaga for the past two years, and she

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State, 95 Nev. 602, 604-05, 600 P.2d 227, 228-29 (1979) (holding that it is harmless error not to give cautionary instruction where defendant fully cross-examined informant and informant's testimony was corroborated).

<sup>7</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985); Tinch v. State, 113 Nev. 1170, 1175-76, 946 P.2d 1061, 1064-65 (1997) (in order to admit prior bad act evidence, district court must conduct a Petrocelli hearing, and determine that the incident is relevant to crime charged, proven by clear and convincing evidence, and its probative value is not substantially outweighed by the dangers of unfair prejudice).

owed Arteaga \$150.00 for prior drug purchases.<sup>8</sup> We conclude that the district court did not abuse its discretion in finding that counsel was not ineffective in failing to object to the prior bad act evidence because that evidence was admissible.<sup>9</sup> Hart's testimony that Arteaga sold methamphetamine to her prior to the charged incident was admissible to prove the identity of Arteaga, who denied selling methamphetamine to Hart.<sup>10</sup>

Alternatively, assuming the prior bad act evidence was inadmissible, we conclude the result of the trial would have been the same without the evidence because there was overwhelming evidence of Arteaga's guilt.<sup>11</sup> In particular, Hart testified that Arteaga sold methamphetamine to her on the date at issue, and Hart's interactions with Arteaga were tape-recorded and monitored by narcotics detectives

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<sup>8</sup>In a related argument, Arteaga contends that the district court erred in admitting this character evidence, and in failing to hold a Petrocelli hearing. We reject Arteaga's contention and conclude that the district court did not err in ruling that any error committed with regard to the introduction of the prior bad act evidence was harmless. See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998) (holding that failure to conduct a Petrocelli hearing does not warrant reversal where record is sufficient for the court to determine that the evidence was admissible or where the result would have been the same if the district court had not admitted the evidence).

<sup>9</sup>See id.

<sup>10</sup>See NRS 48.045(2); King, 116 Nev. at 354-55, 998 P.2d at 1175-76 (evidence of prior drug transactions admissible to prove identity and absence of mistake of defendant charged with drug trafficking).

<sup>11</sup>See King, 116 Nev. at 354-55, 998 P.2d at 1175-76 (applying harmless error analysis where prior bad act evidence erroneously admitted).

who testified at trial. Additionally, as noted above, a substantial amount of methamphetamine was found in Arteaga's residence and the marked buy-money paid to Arteaga by Hart was found in Arteaga's possession. Accordingly, we conclude that counsel was not ineffective for failing to object to the admission of prior bad act evidence.<sup>12</sup>

Arteaga also contends that his counsel was ineffective in failing to argue for the minimum prison term at sentencing. To establish prejudice based on the deficient assistance of counsel at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different.<sup>13</sup> Here, although the district court found that counsel was deficient in failing to argue for a twenty-five year prison term, the district court also found that Arteaga was not prejudiced by his counsel's deficient conduct. Specifically, the district court found that there was no reasonable probability that it would have imposed a lighter sentence in light of Arteaga's criminal history and the nature of the charged offense. The district court's finding with respect to sentencing is entitled to deference.<sup>14</sup> Therefore, under the circumstances, we conclude that Arteaga failed to demonstrate prejudice and, as a result, the district court did not err in finding that counsel was not ineffective.

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<sup>12</sup>Arteaga for the first time on appeal raises the issue of whether the district court erred in failing to give a limiting instruction pursuant to Tavares v. State, 117 Nev. \_\_\_, 30 P.3d 1128 (2001). We need not consider this issue because it was not raised in the petition below. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

<sup>13</sup>See Strickland, 466 U.S. at 694.

<sup>14</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Additionally, Arteaga claims that reversal of his conviction is warranted because the district court erred in failing to give the jury information it requested during deliberations. Specifically, Arteaga argues that NRS 175.451 requires the district court to provide the jury with transcripts upon request. We disagree.

In the instant case, during deliberations, a juror wrote a note to the judge informing him that the jurors had a question about some of the testimony and requesting the trial transcripts. Because trial transcripts were not available, the district court informed the jurors: "A trial transcript cannot be prepared for your review. I encourage you to rely on the collective memory of all the jurors to accurately and expeditiously recall the testimony." Thereafter, the jury returned a guilty verdict.

We conclude that the district court was not required to give the jurors the trial transcripts requested. "The trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation."<sup>15</sup> The mandatory language in NRS 175.451 does not require the district court to provide the jury with all information requested, instead, that mandatory language merely requires the presence of counsel if the information requested by the jury is given.<sup>16</sup> Here, the district court complied with NRS 175.451 and met in chambers with counsel to discuss the juror's note and the appropriate response. Because the district court acted within its broad discretion in responding to the note, we conclude that it properly complied with the mandates of NRS 175.451.

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<sup>15</sup>Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968).


<sup>16</sup>Varner v. State, 97 Nev. 486, 634 P.2d 1205 (1981).

Having considered Arteaga's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Steven P. Elliott, District Judge  
Scott W. Edwards  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk