

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS RAUL LABORI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39279

FILED

DEC 16 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On October 30, 1996, the district court convicted appellant, pursuant to a jury verdict, of first degree kidnapping with the use of a deadly weapon, two counts of sexual assault with the use of a deadly weapon, and possession of a controlled substance. The district court sentenced appellant to serve in the Nevada State Prison a total of two consecutive terms of life with the possibility of parole for the first three counts. This court affirmed appellant's conviction.¹

On April 20, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

¹Labori v. State, Docket No. 29551 (Order of Affirmance, October 5, 2000).

conduct an evidentiary hearing. On March 6, 2002, the district court denied appellant's petition.² This appeal followed.

In his petition, appellant raised eight claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.³ To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.⁴ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁵ A court may

²The January 30, 2002 reporter's transcript shows that the district court received and reviewed affidavits in response to appellant's claims of ineffective assistance of trial and appellate counsel. These affidavits are not part of the record on appeal. This court has recently held that a petitioner's statutory rights are violated when the district court improperly expands the record with the use of an affidavit in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the responses submitted by appellant's former trial and appellate counsel, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

³Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 431, 683 P.2d 504, 505 (1984).

⁴Strickland, 466 U.S. at 694.

⁵Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) (abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁶

First, appellant claimed that trial counsel was ineffective for failing to file motions to suppress evidence. Specifically, appellant argued that: (1) he was not properly Mirandized,⁷ and therefore counsel should have filed a motion to suppress statements he made to the police prior to his arrest; and (2) he was subjected to a improper search, and therefore counsel should have filed a motion to suppress a rolled up dollar bill that was recovered from appellant's wallet. When an ineffective assistance claim is based upon counsel's failure to file a motion to suppress evidence, to establish prejudice the petition must show that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of the trial.⁸ Appellant's claim that had counsel made the motions to suppress "the result would have been the exclusion" of the statements and the evidence, and "the outcome would definitely been different" does not establish that the claim was meritorious or that it would have changed the result of the trial. Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to question jurors regarding out-of-court statements made by the prosecutor. Appellant raised this issue on direct appeal, and this court

⁶Strickland, 466 U.S. at 697.

⁷See Miranda v. Arizona, 384 U.S. 436 (1966).

⁸See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)).

determined that there is no evidence in the record to suggest that appellant's substantial rights were affected by the statement at issue. Appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument made after reflection upon the previous proceedings."⁹ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to object, move for a mistrial, or request a cautionary instruction regarding statements made by the prosecutor during the opening statement and closing argument. Specifically, appellant complained of the fact that during the State's opening statement, the prosecutor referred to the testimony of a witness that was never called. Appellant raised this issue on direct appeal, and this court determined that the record did not reflect bad faith on the part of the State or that appellant was prejudiced by any statements made by the prosecutor. Appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument made after reflection upon the previous proceedings."¹⁰ Further, appellant failed to specify what was objectionable about the State's closing argument.¹¹ Therefore, the district court did not err in denying this claim.

⁹Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

¹⁰See id.

¹¹See Hargrove, 100 Nev. 498, 686 P.2d 222 (1984).

Fourth, appellant claimed that trial counsel was ineffective for failing to make an opening statement.¹² "The purpose of the opening statement is to acquaint the jury and the court with the nature of the case."¹³ Appellant failed to discuss how counsel's tactical decision not to present an opening statement prejudiced the defense.¹⁴ Accordingly, appellant failed to show a reasonable probability that, but for counsel's decision not to make an opening statement, the result of the trial would have been different. Therefore, counsel was not ineffective in this regard, and the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to offer evidence, present witnesses, and cross-examine witnesses, either effectively or at all. Appellant failed to state what evidence and which witnesses should have been presented, or how counsel's cross-examination of certain witnesses was defective.¹⁵ Appellant's claim that counsel failed entirely to cross-examine certain witnesses is unsupported by factual allegations of sufficient specificity to entitle him to relief.¹⁶ Accordingly, appellant failed to show a reasonable probability that, but for counsel's decision not to cross-examine certain witnesses, the result of the trial would have been different. Therefore, counsel was not ineffective in this regard, and the district court did not err in denying this claim.

¹²Counsel reserved making an opening statement, and ultimately did not present one.

¹³Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962).

¹⁴See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁵See id.

¹⁶See id.

Sixth, appellant claimed that trial counsel was ineffective for failing to employ an expert witness. Specifically, appellant argued that an expert would have been able to better prepare counsel for cross-examination of the State's expert witness, and could have challenged her testimony and credibility. To the extent that appellant's claim is supported by specific factual allegations, it is belied by the record.¹⁷ The record reflects that counsel conducted an extensive cross-examination of the State's expert. Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to move for a "directed acquittal" following the jury verdict, based on insufficient evidence to support the kidnapping and sexual assault convictions. It is for the jury to assess the weight of the evidence and determine the credibility of the witnesses, and the jury's verdict will not be disturbed where substantial evidence supports the verdict.¹⁸ This court has previously determined that the jury could reasonably infer from the evidence that the victim was sexually assaulted by appellant. This court has also previously noted that the victim's testimony regarding the incident was detailed, and included a description of how she was taken to the desert against her will. Appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument made after

¹⁷See id.

¹⁸Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

reflection upon the previous proceedings."¹⁹ Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to propose, and to object to, certain jury instructions. Appellant argued that counsel should have objected to jury instruction numbers 13 and 28. Specifically, appellant argued that: (1) jury instruction number 13 violated his right to due process and was incompatible with jury instruction number 24; and (2) jury instruction number 28 violated NRS 175.191 and unconstitutionally shifted the burden of proof from the State to appellant. These arguments are without merit. Jury instruction number 13 provides that "There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." A sexual assault victim's testimony alone is sufficient to uphold a conviction as long as the victim testifies, as she did in this case, with some particularity regarding the incident.²⁰ Further, we conclude that jury instruction number 13 in no way conflicts with jury instruction number 24.²¹ Jury instruction number 28 is a correct statement of the law

¹⁹Hall, 91 Nev. at 316, 535 P.2d at 799.

²⁰See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56 58 (1992).

²¹Jury instruction number 24 provides that:

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the

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regarding the burden of proof,²² and does not in any way violate NRS 175.191.²³ Finally, appellant failed to state what additional jury

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evidence which you feel are justified in light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

²²See NRS 175.211.

²³Jury instruction number 28 provides that:

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

NRS 175.191 provides that "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a
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instructions counsel should have provided.²⁴ Therefore, counsel was not ineffective in this regard, and the district court did not err in denying this claim.

Appellant also raised four claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.²⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.²⁶ This court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."²⁷ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.²⁸

First, appellant claimed appellate counsel was ineffective for failing to file a petition for rehearing following this court's order of affirmance. NRAP 40(c) provides that rehearing may be warranted when the court has overlooked or misapprehended a material fact or question of

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reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted."

²⁴See Hargrove, 100 Nev. 498, 686 P.2d 222.

²⁵Strickland, 466 U.S. at 687.

²⁶Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

²⁷Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

²⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

law, or when the court has overlooked, misapplied or failed to consider controlling authority. Appellant's claim that "[i]t is not possible" this court could determine from the record that the State did not act in bad faith or that appellant was not prejudiced, does not demonstrate that rehearing was appropriate under these criteria. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to raise the issue of trial counsel's failure to file motions to suppress evidence. As discussed, trial counsel was not ineffective in this regard, and accordingly, this issue would not have had a reasonable probability of success on appeal. Moreover, appellant cannot raise a claim of ineffective assistance of counsel on direct appeal.²⁹ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to raise the issue of trial counsel's failure to move for a "directed acquittal." As discussed, trial counsel was not ineffective in this regard, and accordingly, this issue would not have had a reasonable probability of success on appeal. Moreover, appellant cannot raise a claim of ineffective assistance of counsel on direct appeal.³⁰ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of trial counsel's failure to propose, or object to, certain jury instructions. As discussed, trial counsel was not

²⁹See Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

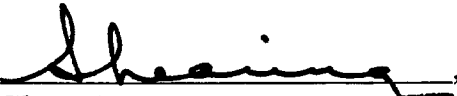
³⁰See id.

ineffective in this regard, and accordingly, this issue would not have had a reasonable probability of success on appeal. Moreover, appellant cannot raise a claim of ineffective assistance of counsel on direct appeal.³¹ Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that the district court abused its discretion by failing to advise the jury that it should acquit appellant due to insufficient evidence. This issue is without merit for the reasons discussed.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.³² Accordingly, we

ORDER the judgment of the district court AFFIRMED.³³


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

³¹See id.

³²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Luis Raul Labori
Clark County Clerk