

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY DON BROWN,  
Appellant,  
vs.  
WARDEN, LOVELOCK  
CORRECTIONAL CENTER AND THE  
STATE OF NEVADA,  
Respondents.

No. 39475

FILED

NOV 21 2003

JANETTE W. LUCAS  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of Troy Don Brown's post-conviction petition for a writ of habeas corpus.<sup>1</sup> On appeal, Brown argues that his appellate counsel was ineffective for failing to: (1) object to the jury's observation of Brown in jail garb and shackles; (2) file a motion to exclude the DNA evidence; (3) require the defense DNA expert to be present during the DNA testing; (4) investigate or present evidence of an alternative suspect; (5) investigate possible defenses, interview various witnesses or discuss trial strategy with Brown; and (6) file a motion to dismiss or a motion to suppress evidence based on the loss of the victim's teeth scrapings. Because all of Brown's arguments lack merit, we affirm the district court's order dismissing the post-conviction petition for a writ of habeas corpus.

We review a claim of ineffective assistance of counsel independently.<sup>2</sup> To prevail, Brown must show that: (1) counsel's

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<sup>1</sup>Brown was convicted, pursuant to a jury verdict, of two counts of sexual assault of a child under fourteen years of age, one count resulting in substantial bodily harm.

<sup>2</sup>See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

performance was deficient, i.e., it fell below an objective standard of reasonableness and (2) such deficiencies prejudiced Brown and the ultimate outcome of his trial.<sup>3</sup> If Brown fails to establish one of the two prongs, we need not consider the other.<sup>4</sup> Judicial review of a lawyer's representation is highly deferential, and Brown must overcome the presumption that a challenged action might be considered sound strategy.<sup>5</sup>

First, Brown claims that his trial counsel, David Lockie, was ineffective for failing to raise the issue of whether the jurors observed Brown in jail garb and shackles. This court has held that a defendant has the right to appear before the jury "in the apparel of an innocent person."<sup>6</sup> If this right is violated, this court will reverse "unless it is clear that the defendant was not prejudiced thereby."<sup>7</sup> When reviewing whether the error was harmless, this court reviews the entire record.<sup>8</sup>

As the district court noted in its findings of fact, the testimony regarding whether the jurors observed Brown in jail garb and shackles was inconsistent. Based on these inconsistencies, the district court found that Brown and his family's testimony was not credible. We defer to the district court's finding that Brown failed to demonstrate that the jurors

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<sup>3</sup>See Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

<sup>4</sup>See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland, 466 U.S. at 697).

<sup>5</sup>State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).

<sup>6</sup>Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980).

<sup>7</sup>Id. (emphasis added).

<sup>8</sup>Dickson v. State, 108 Nev. 1, 4, 822 P.2d 1122, 1123-24 (1992).

observed him in jail garb and shackles.<sup>9</sup> We also defer to the district court's finding that Lockie was not informed by Brown or his family that the jurors had seen Brown in jail garb and shackles.<sup>10</sup> Accordingly, we conclude that Lockie's failure to raise the issue to the district court did not fall below an objective standard of reasonableness.

Second, Brown contends that Lockie was ineffective for failing to file a motion to exclude the DNA evidence. More specifically, Brown challenges the collection and testing of the DNA evidence and the fact that Lockie stipulated at the preliminary hearing to Renee Romero's, the State's DNA expert, qualifications despite her lack of expertise. On post-conviction, the district court found that Brown failed to establish that the DNA evidence was contaminated. Although Brown contends otherwise, Jennifer Mihalovich, Brown's DNA expert, testified that she was satisfied with the collection of the DNA evidence. Additionally, the district court found that Lockie's reliance on Mihalovich's assertion that Romero was qualified as a DNA expert was reasonable. Accordingly, we conclude that Lockie's decision not to file a motion to exclude the DNA evidence was tactical and did not fall below an objective standard of reasonableness.<sup>11</sup>

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<sup>9</sup>See Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001) (noting that this court gives deference to the district court's findings regarding credibility).

<sup>10</sup>See id.

<sup>11</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

Third, Brown argues that since Lockie failed to require Mihalovich to be present during the DNA testing, he failed to comply with stipulated DNA procedure, and was thereby ineffective. Although the State and the defense stipulated to certain DNA procedures, the stipulation did not mandate that Mihalovich be present during DNA testing, but only required that she be present at all stages that she deemed critical. Lockie testified that Mihalovich informed him that she did not need to be present during the DNA testing, since she would review the test results. Because Lockie was in full compliance with the stipulation in deferring to Mihalovich's determination that she did not need to be present during the DNA testing, we conclude that Brown has failed to show that Lockie was ineffective for failing to require her presence.

Fourth, Brown contends that Lockie was ineffective for failing to investigate and present evidence that Wayne, the victim's stepfather, was the perpetrator. Brown also argues that Lockie's failure to present evidence of an alternative suspect was unreasonable. Lockie testified that he considered alternative suspects during his trial strategy. He also testified that although he was aware that Wayne was previously charged with sexual assault and that there were discrepancies regarding Wayne's alibi, he decided for tactical reasons not to present evidence that Wayne was the perpetrator. We conclude that Lockie's decision not to investigate and present evidence that Wayne was the perpetrator was a reasonable tactical decision and that he was not ineffective in this regard.<sup>12</sup>

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<sup>12</sup>See id.

Fifth, Brown contends that Lockie was ineffective when he failed to investigate, interview witnesses, and discuss trial strategies with Brown. Specifically, Brown maintains that Lockie failed to interview Brown's girlfriend and to investigate the animosity between him and Officer Michael Terry, who Brown claims contaminated the evidence. Lockie testified that he had his investigator interview several witnesses. Lockie also testified that he met with Brown several times and discussed the evidence, the arguments, and the trial strategies. Although Lockie admitted that he did not interview Brown's girlfriend, we conclude that Brown did not suffer any prejudice because there was overwhelming DNA evidence connecting Brown to the crime.<sup>13</sup> Finally, aside from Brown's mere allegation, Brown failed to present any evidence regarding any animosity between him and Officer Terry. Thus, we conclude that Brown's argument lacks merit.

Finally, Brown contends that Lockie was ineffective for failing to file a motion to dismiss, or in the alternative, a motion to suppress evidence based on loss of exculpatory evidence - the victim's teeth scrapings. We have stated, "A conviction may be reversed when the State loses evidence if (1) the defendant is prejudiced by the loss or, (2) the evidence was 'lost' in bad faith by the government."<sup>14</sup>

Here, the district court found that Brown failed to establish that the loss of the victim's teeth scrapings was in bad faith or that he was

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<sup>13</sup>Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 179, (1990) (observing that overwhelming evidence of guilt is a consideration of whether a client had ineffective counsel).


<sup>14</sup>Leonard v. State, 114 Nev. 1196, 1206, 969 P.2d 288, 294 (1998) (quoting Sparks v. Sparks, 104 Nev. 316, 319, 759 P.2d 180, 182 (1998)).

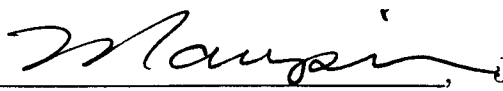
prejudiced by the loss. Indeed, the only evidence Brown presented at the post-conviction hearing was his mother's testimony that she remembered that the victim's teeth scrapings had been lost. Additionally, Lockie testified that he considered filing such a motion, but concluded that it was not justified under the law. Thus, we conclude that Lockie's decision not to file a motion regarding the loss of evidence did not fall below an objective standard of reasonableness.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

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

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. J. Michael Memeo, District Judge  
David M. Schieck  
Attorney General Brian Sandoval/Carson City  
Elko County District Attorney  
Elko County Clerk