

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON CASTRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39760

FILED

APR 25 2003

ORDER OF AFFIRMANCE

BY JANEITA M. LILLY
CLERK OF SUPREME COURT
J. P. RILEY

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

On September 8, 1999, the district court convicted appellant Aaron Castro, pursuant to a jury verdict, of one count of sexual assault of a minor under sixteen years of age, one count of attempted sexual assault of a minor under sixteen years of age, four counts of lewdness with a child under fourteen years of age, and two counts of child abuse and neglect. The district court sentenced Castro to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years, and lifetime supervision. The district court also sentenced Castro to consecutive and concurrent terms totaling an additional twenty to fifty years in prison, and one year confinement in county jail. This court affirmed Castro's conviction.¹

On January 29, 2002, Castro filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and Castro filed a response. Pursuant to NRS

¹Castro v. State, Docket No. 34686 (Order of Affirmance, January 26, 2001).

34.750 and NRS 34.770, the district court declined to appoint counsel to represent Castro or to conduct an evidentiary hearing. On May 22, 2002, the district court denied Castro's petition. This appeal followed.

In his petition, Castro raised numerous 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.² 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.³ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴ A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁵

First, Castro claimed that counsel was ineffective for failing to: (1) file pretrial motions for an investigation, psychological evaluations of the victims, a psychological evaluation of himself, and discovery; (2) "gain [sic] appellant's concerns, or any possible defense theories or ask about possible witnesses;" (3) research "pertinent law dealing with sexual assault crimes" or conduct "a gathering of facts [which] would have produced exculpatory results;" (4) "prepare a trial strategy and/or

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

³Strickland, 466 U.S. at 694.

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

⁵Strickland, 466 U.S. at 697.

cognizable defense;" (5) call witnesses; and (6) offer jury instructions. These claims are unsupported by any specific factual allegations regarding what such pretrial motions, assuming they had been granted, would have revealed to benefit the defense, what concerns of his were ignored, what defense theories should have been discussed, what law should have been researched, what facts should have been gathered, how the defense was deficient and how it should have been different, the names of any potential witnesses and what they would have testified to, or what additional jury instructions should have been offered.⁶ Therefore, Castro failed to establish that counsel was ineffective in these instances.

Second, Castro claimed that counsel was ineffective for failing to: (1) make an opening argument; (2) making only a "futile attempt" at a closing argument; (3) conduct adequate cross-examination of the State's witnesses; (5) make objections; and (6) conduct an adequate direct examination of Castro. To the extent that these claims are supported by any specific factual allegations, they are belied by the record.⁷ Counsel did make an opening and closing argument, cross-examined all but one of the State's witnesses, made objections, and conducted a direct examination of Castro. Castro failed to provide any specific factual allegation as to how any of this was deficient.⁸ Therefore, Castro failed to establish that counsel was ineffective in this regard.

Third, Castro claimed that counsel was ineffective for failing to call an expert witness to refute testimony regarding the "physical state

⁶See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁷See id.

⁸See id.

of the victims." According to Castro, this would have shown that the boys were lying and supported his theory that they had been "coached." A pediatric nurse practitioner with fifteen years experience who examined Phillip and Nicolas testified for the State. She testified that it was common for children who had been sexually assaulted not to show physical signs of the assault unless they were examined within seventy-two hours of the assault. Four of the victims testified. Their testimony was consistent as to how Castro used the boy he was living with to meet other young boys, and how he ingratiated himself with the children and their families by taking the boys places and buying them things. Though the boys could not remember all of the details regarding where, when and how often the sexual assaults took place, their testimony was compelling and there is nothing in record to indicate that the boys had been coached. The nurse and all of the victims were thoroughly cross-examined. Additionally, at a status hearing held prior to the selection of the jury, Castro informed the district court of some of his concerns. At that time Castro's attorney stated that he had discussed with Castro the possibility of calling an expert to respond to the nurse's testimony, and he had made a tactical decision that any testimony by an expert called by the defense would be cumulative. Thus, Castro failed to show that had the defense called an expert witness, the result of the trial would have been different.

Castro also raised several 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.⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.¹⁰ This court has noted that appellate counsel is most effective when every conceivable issue is not raised on appeal.¹¹ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.¹²

First, Castro claimed that appellate counsel was ineffective for failing to argue that the victims were coached. According to Castro, as a result of this, the preliminary hearing violated due process, and all of the evidence against him was inadmissible or unreliable. As previously discussed, there is nothing in the record which indicates the victims were coached. Castro's claim that the fact that the interviews of the victims were not tape-recorded "so contaminated the investigative process through suggestive, leading, coercive questioning . . . shaping of stories, coaching, intimidation, repetitive questioning and inadequate/unethical recording practices along with questionable interview techniques" as to violate his due process rights and render the evidence inadmissible is not of sufficient factual specificity to entitle him to relief.¹³ Therefore, Castro failed to establish that counsel was ineffective in this regard.

⁹Strickland, 466 U.S. at 687.

¹⁰Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

¹¹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

¹²Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

Second, Castro claimed that appellate counsel was ineffective for failing to argue that the district court abused its discretion by allowing the victims to testify without first assessing their competency and reliability. At a status hearing prior to the selection of the jury, Castro told the district court that he believed the victims should be subjected to psychological evaluations in order to "determine the reliability and trustworthiness" of their statements. The district court stated that although it was a "close call," the reliability of the boys testimony was not as uncertain as it would have been had they been very young children.¹⁴ Thus, Castro failed to show that this issue would have had a reasonable probability of success on appeal.

Third, Castro claimed that appellate counsel was ineffective for failing to argue that there was insufficient evidence to support his conviction. "The standard of review in a criminal case is '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.'"¹⁵ Based on our review of the record, we conclude that there is substantial evidence to support the verdict. Therefore, Castro failed to show that this issue would have had a reasonable probability of success on appeal.

¹⁴See Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000) (holding that whether a "defendant presents a compelling reason for such an examination" is a judicial determination) (quoting Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980)).

¹⁵McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Fourth, Castro claimed that appellate counsel was ineffective for failing to argue that the district court exhibited bias during the sentencing phase of the trial. Castro argued that bias at sentencing was "indicat[ed]" because the "trial judge made unfair comments prior to trial, made questionable interruptions and rulings during trial, and made comments during sentencing." Castro failed to state specifically what comments were unfair and which interruptions questionable.¹⁶ Even assuming he had, and assuming we concluded that the district court had made such comments and interruptions, Castro failed to state how this would signify bias at sentencing. Therefore, Castro failed to show that this issue would have had a reasonable probability of success on appeal.

Finally, Castro claimed that the prosecution committed misconduct by "tainting" the witnesses, and misrepresenting to the district court that the State did not intend to call any expert witnesses. Castro waived these claims by failing to raise them on direct appeal.¹⁷ As a separate and independent reason to deny relief, these claims are without merit. As discussed previously, there is nothing in the record to indicate that the witnesses were tainted. Castro's claim regarding the expert witness is belied by the record.¹⁸ Apparently, Castro is referring to the fact that the State informed the district court that it was not going to call as an expert during its case-in-chief FBI agent Roger Young. The State had listed Young as a potential rebuttal witness. The State's representation took place in the context of the discussion as to whether

¹⁶See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁷See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

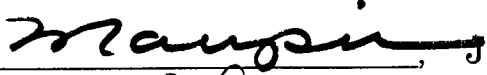
¹⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

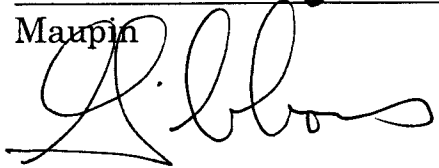
the district court should grant, pursuant to Keeney,¹⁹ Castro's request to have the victims examined by an expert in psychiatry or psychology. The State argued, as part of the Keeney analysis, that it had not employed such an expert. The record reflects that the State did not employ such an expert, and Young was not called as a witness.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Castro is not entitled to relief and that briefing and oral argument are unwarranted.²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
David T. Brown
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁹See Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311, 315 (1993) overruled by Koerschner, 116 Nev. 1111, 13 P.3d 451.

²⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).