

IN THE SUPREME COURT OF THE STATE OF NEVADA

LULA PEARL LEVINGSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39996

FILED

NOV 21 2002

ORDER OF AFFIRMANCE

JACQUELINE F. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On May 25, 2000, Levingston was convicted, pursuant to a jury verdict, of one count of child neglect causing death.¹ The district court sentenced Levingston to serve a prison term of 24-90 months. On appeal, Levingston's conviction was affirmed by this court.²

On September 7, 2001, with the assistance of counsel, Levingston filed a post-conviction petition for a writ of habeas corpus in the district court.³ The State opposed the petition. The district court

¹The two-month-old victim died, while in the care of Levingston, from severe dehydration due to prolonged exposure to a heating pad located in her crib.

²Levingston v. State, Docket No. 36227 (Order of Affirmance, February 21, 2001).

³It appears from a review of the evidentiary hearing transcript that Levingston also filed a supplemental habeas petition. In violation of NRAP 3C(e)(2) and NRAP 30(b), the joint appendix submitted in this appeal does not include the supplemental petition.

conducted an evidentiary hearing, and on July 12, 2002, denied Levingston's petition. This timely appeal followed.

Levingston contends the district court erred in not finding that she received ineffective assistance of counsel at trial.⁴ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁵ The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.⁶ A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁷ Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."⁸

First, Levingston contends that counsel's performance was deficient for failing to impeach the mother of the victim with her allegedly

⁴In her petition below, Levingston raised several arguments regarding the ineffective assistance of trial counsel, however, all but the two addressed in this order were abandoned at the evidentiary hearing on the petition and not raised again on appeal.

⁵See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 697.

⁷Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁸Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

exculpatory preliminary hearing testimony on the subject of her own negligence and habit of always leaving a heating pad on the high setting on the side of the infant-victim's crib.

Initially, we note that the gist of Levingston's argument below was different from that on appeal. In her habeas petition, Levingston stated that the mother of the victim was the person who actually placed the heating pad inside the crib, and that her counsel was ineffective for not impeaching her at trial with that allegedly exculpatory preliminary hearing testimony. As the district court noted in its order denying Levingston's petition, however, the mother testified credibly and unequivocally at both the preliminary hearing and evidentiary hearing that she left the heating pad outside the crib; and therefore, the district court found Levingston's argument repelled by the record.⁹ This court has stated that an appellant "cannot change her theory underlying an assignment of error on appeal."¹⁰

Moreover, Levingston cannot demonstrate that she was prejudiced by counsel failing to impeach the mother with her preliminary hearing testimony. The mother's previous testimony was that she often left the heating pad on the high setting, and that when she left the infant with Levingston, the heating pad was outside the crib. It was not unreasonable for counsel to decide against introducing prior testimony that was not exculpatory. Additionally, to the extent that Levingston is challenging the sufficiency of the evidence against her in the guise of an ineffective assistance claim, we note that this court determined when

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁰Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995).

considering her direct appeal that Levingston was responsible for the victim's safety and permitted her to suffer unjustifiable physical pain as a result of neglect culminating in death.¹¹ Therefore, we conclude the district court did not err in rejecting this claim.

Second, Levingston contends that (1) trial counsel's performance was deficient for failing to investigate and locate a corroborating witness to the mother's negligence, and (2) the district court erred during the evidentiary hearing on the petition by not continuing the hearing when the same subpoenaed witness failed to appear.¹² The ineffective assistance argument was not raised in Levingston's habeas petition. This court need not consider arguments raised on appeal that were not presented to the district court in the initial petition.¹³

When the witness failed to appear at the evidentiary hearing, the district court allowed counsel to make an offer of proof as to what her testimony would have been, despite the fact that the petition did not allege that counsel was ineffective for not calling her at trial. After hearing the arguments of counsel, the district court concluded that even with the witness' possible testimony that she witnessed the mother of the victim occasionally put the heating pad in the crib, Levingston was still unable to demonstrate prejudice. Counsel for Levingston subsequently submitted the case to the district court for a decision on the merits, and

¹¹See NRS 200.508.


¹²Levingston also contends the district court erred during the evidentiary hearing by not issuing a bench warrant for the subpoenaed witness' arrest.

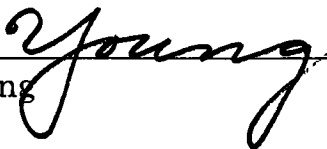
¹³See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

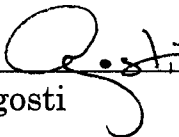
did not argue for a continuance. Therefore, we conclude that the district court did not err in either rejecting this claim or in not continuing the evidentiary hearing.

Having considered Levingston's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

¹⁴Although the parties have submitted documentation sufficient for the disposition of this appeal, we note that neither party has complied with the requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(b). Specifically, the parties have not provided this court with a copy of the supplemental habeas petition filed by appellant. Counsel for the parties are cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Mary Lou Wilson
Washoe District Court Clerk