IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD HOLLEN PRUITT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39998

FILED

JUN 27 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Hollen Pruitt appeals from the district court's order dismissing his post-conviction petition for a writ of habeas corpus based upon newly discovered evidence and alleged ineffective assistance of counsel. Pruitt was convicted of three counts of sexual assault against his minor daughter. After this court upheld Pruitt's conviction on direct appeal, Pruitt filed the instant petition before the district court, arguing that the discovery of new evidence warranted a new trial. Pruitt also argued that the new evidence demonstrated that his previous counsel had rendered ineffective assistance. We conclude that Pruitt's arguments are without merit and, accordingly, we affirm the district court's dismissal of his post-conviction petition for a writ of habeas corpus.

First, the district court did not err when it concluded that NRS 176.515(3) barred consideration of Pruitt's petition based upon newly discovered evidence. NRS 176.515(3) states that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt." Here, since Pruitt was found guilty on November 27, 1995, and his petition for post-conviction relief was filed more than two years later on May 14, 1999, the district court correctly concluded that it was not obligated to consider the newly discovered evidence. Moreover, Pruitt's reliance upon the narrow exception articulated

in Snow v. State[1] is misplaced because it is not applicable to non-capital cases, such as this one. In Snow, we stated:

> [W]e are prepared to rule that where a prisoner who has been sentenced to death discovers new evidence tending to prove that his conviction was illegally obtained, such evidence may be brought before the court for consideration, even after the two-year time limit imposed by NRS 176.515(3) has run, in a petition for writ of habeas corpus.[2]

Therefore, Pruitt's petition is barred by NRS 176.515(3).

Second, even if Pruitt's newly discovered evidence claim were not barred by the two-year time limit in NRS 176.515(3), the district court did not abuse its discretion when it concluded that Pruitt's petition was without merit because the alleged newly discovered evidence was cumulative with the evidence that had been produced at trial. We have held that before newly discovered evidence can justify a new trial, the evidence must be:

> [N]ewly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.[3]

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[1]105 Nev. 521, 779 P.2d 96 (1989).

[2]Id. at 523, 779 P.2d at 97 (emphasis added).

[3]Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (footnote omitted).

Contrary to Pruitt's assertions, the fact that newly discovered evidence comes from another witness,[4] or from a different type of evidence altogether,[5] does not make that evidence non-cumulative. Evidence is cumulative if it is offered to prove a point that has already been proven by other evidence.[6] Here, Pruitt produced evidence at the evidentiary hearing to demonstrate that: (1) Pruitt's prior conduct with two other girls was merely "non-sexual horseplay"; (2) his daughter had independently acquired sexual knowledge prior to the time she made her formal accusations to the police in 1993, but not before the time she told a friend during a camping trip in late July 1991 of her alleged molestation by Pruitt; (3) his daughter and her teenage boyfriend hated Pruitt; and (4) inconsistencies existed between his daughter's testimony and the physical evidence and other witness testimony.

However, all of this evidence is cumulative because other evidence was admitted at trial to prove the same propositions. For instance, at trial: (1) Pruitt's former wife testified about how Pruitt liked to "roughhouse" and "tease" children and family members; (2) there was testimony regarding the tension between Pruitt and his daughter, and about how angry his daughter's teenage boyfriend was at being separated from her; and (3) Pruitt's trial counsel offered extensive evidence, such as a blueprint of

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[4]See Batson v. State, 113 Nev. 669, 677-78, 941 P.2d 478, 484 (1997) (holding that a witness's testimony was cumulative with the testimony of two other witnesses because it merely reiterated their testimony).

[5]See Owens v. State, 96 Nev. 880, 882, 620 P.2d 1236, 1237-38 (1980) (holding that physical evidence admitted at trial to establish the defendant's identity was cumulative with eyewitness testimony elicited for the same purpose).

[6]Black's Law Dictionary 343 (5th ed. 1979).

Pruitt's house and a video and aerial map of Fort Churchill Road and other witness testimony to highlight the inconsistencies in the testimony of Pruitt's daughter.

With regard to the evidence of the sexual knowledge Pruitt's daughter allegedly acquired during the August 1991 camping trip, this evidence would not be admissible because his daughter had already told a friend prior to this camping trip that Pruitt had molested her. Accordingly, as this court concluded with regard to the evidence of sexual knowledge Pruitt's daughter allegedly acquired from her teenage boyfriend, there would be no proper purpose for admitting this evidence other than to impermissibly impeach her character and chastity.[7] Additionally, the district court acted within its discretion when it concluded that Pruitt's daughter's alleged recantation to another girl was unlikely to lead to a different result because the alleged recantation was denied by all but one of the alleged witnesses to the conversation.[8]

Third, the district court did not err when it concluded that Pruitt's ineffective assistance claim was without merit because his counsel acted with diligence and competence. When reviewing a claim of ineffective assistance, we generally adhere to the "reasonably effective assistance"

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[7]See Summit v. State, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985) (holding that evidence of a victim's prior sexual experiences was admissible to demonstrate sexual knowledge in connection with alleged fabrication, not to impeach the witness's character for chastity).

[8]See State v. Crockett, 84 Nev. 516, 519, 444 P.2d 896, 897-98 (1968) (recognizing that "[c]redibility is not the test of the motion for new trial, instead the trial judge must review the circumstances in their entire light, then decide whether the new evidence will probably change the result of the trial").

standard articulated in Strickland v. Washington.[9] Under this standard, a defendant claiming ineffective assistance must demonstrate that:

> (1) counsel's performance was deficient, i.e., counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[10]

We will defer to a district court's factual findings as to claims of ineffective assistance; however, since ineffective assistance claims present mixed questions of law and fact, we will still exercise independent review.[11] Nonetheless, "[c]ounsel's strategy decisions are not subject to challenge absent extraordinary circumstances."[12]

While Pruitt alleges that his counsel rendered ineffective assistance by permitting the admission of his prior bad acts, his counsel opposed the admission of Pruitt's prior conduct as to the other girls at every opportunity. Ultimately, this court concluded that the evidence was admissible, and accordingly, Pruitt's minor criticisms regarding his counsel's strategic decisions do not support a viable claim of ineffective assistance.[13] With regard to the admission of the prior consistent statements of Pruitt's daughter, these statements were admissible to show a lack of recent

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[9]466 U.S. 668 (1984).

[10]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (quoting Strickland, 466 U.S. at 694).

[11]Id.

[12]Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000).

[13]See id.

fabrication[14] and, accordingly, Pruitt was not prejudiced by his counsel's failure to oppose the admission of this evidence. Pruitt's remaining allegations as to his counsel's strategic decisions are without merit.

Finally, the district court did not err when it declined to appoint a psychologist to testify as to Pruitt's disposition towards committing sexual crimes. Pruitt was not convicted based upon his profile, but upon eyewitness testimony. Accordingly, evidence of Pruitt's psychological profile, assuming such evidence would be favorable to Pruitt, would be of little value. Moreover, Pruitt's arguments as to his counsel's failure to produce this evidence are too speculative to support a claim of ineffective assistance.

Based on the foregoing, we conclude that the district court did not err when it denied Pruitt's post-conviction petition for a writ of habeas corpus.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

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[14]See NRS 51.035(2)(b) (allowing the admission of prior consistent statements to rebut a charge of recent fabrication).

[15]We conclude that Pruitt's remaining arguments are without merit.

cc: Hon. Archie E. Blake, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk