

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL CHARLES MANCUSO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40506

FILED

DEC 21 2004

ORDER OF AFFIRMANCE

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

This is an appeal from an order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Daniel Mancuso was convicted of three counts of lewdness with a child under the age of fourteen years. The district court sentenced Mancuso to three concurrent terms of life imprisonment with the possibility of parole after ten years.

Mancuso was accused of sexually abusing his twelve-year-old stepdaughter, R.M., on three separate occasions between December 1997 and June 1998. R.M. alleged that on two occasions, while she was in bed, Mancuso mounted her, rubbed his penis against her, and touched various parts of her body. On a third occasion, R.M. alleged that Mancuso licked a private area of her body. R.M. gave consistent statements regarding the crimes during a police videotaped interview and in her testimony during the preliminary hearing. However, when the State interviewed R.M. within a week of trial, she claimed lack of recollection. Trial counsel was aware of the interview, but did not attend, and the State did not disclose R.M.'s lack of recollection to trial counsel. Prior to trial, Mancuso did not

make a Brady v. Maryland¹ request for exculpatory or impeaching evidence.

During a three-day jury trial in May 1999, R.M. testified she lacked recollection regarding the allegations against Mancuso. The State relied on the testimony of other witnesses and R.M.'s previous statements as evidence of the allegations.

Mancuso's defense centered upon arguments that R.M. was falsely accusing Mancuso and that the police, specifically Detective Cheryl Beltron, employed suggestive interview techniques during her interview of R.M. At trial, trial counsel extensively cross-examined Detective Beltron about the interview techniques. After two bench conferences, where the State argued that Mancuso was opening the door to the admission of the videotape, Mancuso stipulated to admit the videotape into evidence. The videotape was played in its entirety, including a portion where R.M. was left alone, crying and holding onto a teddy bear.

Sherry Mancuso, R.M.'s mother, testified that, although she was divorced from Mancuso at the time of the incident, they lived together with her two daughters. On June 14, 1998, Sherry discovered Mancuso coming out of R.M.'s room, wearing only a towel. The following morning, R.M. told Sherry about Mancuso's actions and they went to the police. The following day, Sherry obtained a temporary protective order against Mancuso.

However, Sherry also testified that, although she initially believed R.M., she later changed her mind and she is hopeful that her family will get back together. Sherry stated that, aside from the divorce, her relationship with Mancuso had been pretty good. During cross-

¹373 U.S. 83 (1963).

examination, trial counsel asked Sherry, "Do you have an opinion as to [Mancuso's] character?" to which she replied that she thinks he is a good man. On redirect, Sherry testified that, about eleven years earlier, Mancuso had an affair and that they had pornographic videotapes in their bedroom, which belonged to Mancuso's friend.

The jury returned a guilty verdict on three counts of lewdness with a child under the age of fourteen. Mancuso filed a direct appeal, but he voluntarily withdrew it based on advice from appellate counsel.

Mancuso filed a petition for a post-conviction writ of habeas corpus, asserting, among other claims, that: (1) the State failed to provide exculpatory evidence favorable to the defense in violation of Brady by not disclosing that R.M. claimed lack of recollection a few days prior to trial, (2) Mancuso's trial counsel was ineffective for failing to make a Brady request or interview R.M. prior to trial, (3) Mancuso's trial counsel was ineffective for failing to advise Mancuso that probation was a sentencing option, (4) Mancuso's trial counsel was ineffective for stipulating to admit the videotape into evidence, and (5) Mancuso's trial counsel was ineffective for failing to object to prior bad act evidence.

During a three-day habeas hearing, trial counsel testified that his strategy for stipulating to admit the videotape into evidence was to use it to impeach Detective Beltron by showing her flawed interview techniques. He testified that this was not a last-minute trial decision and that he had viewed the videotape before trial. During a bench conference, the State informed him that it would seek to admit the videotape if he continued on the line of attacking Detective Beltron's investigation techniques, which he did not find terribly distressing, but said "go ahead" and "bring it on." He testified that, although he had viewed the videotape

at home prior to trial, when the jury viewed R.M. crying and holding a teddy bear on the videotape, he knew that he had lost the case.

Trial counsel also testified that, based upon R.M.'s testimony at the preliminary hearing and information he had from other sources, he did not see any necessity for interviewing R.M. prior to trial or that she would allege a lack of recollection. Trial counsel testified that he believed he fell below his standard of providing effective trial representation, pursuant to Strickland v. Washington,² by proactively enabling the State to admit its evidence into court.

Tom Gregory, the Deputy District Attorney, testified that within a week of trial he interviewed R.M., who claimed to not remember the specific facts and allegations. He testified that he did not tell trial counsel, who was outside of the interview room, that R.M. was claiming a lack of recollection because he did not believe her claim was inconsistent with what she had said before. He testified that he believed she was feigning her lack of recollection, which he did not believe to be exculpatory or inconsistent. It was very clear to him that she just did not want to talk about it. He testified that he did not believe that Brady required him to inform Mancuso about R.M.'s lack of recollection.

Daniel Mancuso testified that trial counsel told him that he had not seen the videotape prior to trial, that its contents were a surprise, but not to worry as all trials have at least one surprise.

Following the habeas hearing, the district court denied Mancuso's petition. The district court concluded that the State's failure to disclose R.M.'s lack of recollection prior to trial did not violate Brady. The district court pointed out that, because R.M. did not testify at the habeas

²466 U.S. 668 (1984).

hearing, what R.M. would have told trial counsel in a pre-trial interview was pure speculation. The district court found that trial counsel had no reason to suspect that R.M. would later claim lack of recollection, and he made a reasonable decision to devote his efforts to proving up his theory of the case based on the assumption that R.M. would testify as she had before.

The district court also found that, prior to trial, trial counsel had watched the videotape, which was the principle evidence of Mancuso's guilt. The district court determined that, regardless of whether trial counsel stipulated to admit the videotape, R.M.'s prior recorded statements, including the videotape, could have been admitted under NRS 51.125 as a recorded recollection based on her lack of recollection at trial.

The district court further found that there was no convincing evidence showing that the State ever extended a specific plea bargain offer. The district court determined that trial counsel's frank advice that, if the prosecutor offered a plea bargain, probation would be theoretically possible but so remote that he should anticipate going to prison, was reasonable. The district court also found that Mancuso's testimony that trial counsel never mentioned that probation was theoretically possible until after trial was not credible.

Mancuso now appeals.

Brady violation

Mancuso contends that the State's failure to disclose R.M.'s lack of recollection materially affected the outcome of the trial and violated his constitutional rights. Mancuso also argues that "materiality" and "prejudice," for purposes of Brady, properly include a consideration of the impact of the withheld evidence upon the trial strategy and tactics of

the defense. In response, the State argues that Brady does not require it to disclose R.M.'s lack of recollection.

Brady holds that the prosecution has a due process duty to disclose exculpatory, impeaching, and material evidence favorable to the defendant regardless of whether the defendant requests the evidence.³ A Brady violation occurs when the State's nondisclosure is so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.⁴ A Brady violation has three prongs: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) the State suppressed the evidence "either willfully or inadvertently;" and (3) "prejudice must have ensued."⁵

The United States Supreme Court has rejected a standard of materiality that focuses on the impact of the undisclosed evidence on the

³Brady, 373 U.S. at 87 (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). See also Strickler v. Greene, 527 U.S. 263, 280 (1999) (holding that a Brady violation occurs only where there is a reasonable probability that the suppressed evidence would have produced a different verdict); United States v. Bagley, 473 U.S. 667, 676 (1985) (holding that the prosecution's due process duty includes not only exculpatory evidence but also impeaching evidence).

⁴Strickler, 527 U.S. at 281.

⁵Id. at 281-82.

defendant's ability to prepare for trial; instead, the Brady materiality standard focuses on the issue of guilt or innocence.⁶

In United States v. Bagley, the Supreme Court held that a prosecutor's failure to disclose evidence that could have been used to impeach government witnesses only warrants reversal if the evidence was material.⁷ "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁸ While a majority of the court agreed upon the judgment and this definition of "material,"⁹ Justice Blackmun, joined only by Justice O'Connor, went on to elaborate:

[U]nder the Strickland formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.¹⁰

⁶United States v. Agurs, 427 U.S. 97, 112 n.20 (1976) (indicating that the nondisclosure must be evaluated in the context of the entire record).

⁷473 U.S. at 678.

⁸Id. at 682.

⁹See id. at 685.

¹⁰Id. at 683.

Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred with the judgment, but declined to join Justice Blackmun's elaboration on materiality, finding that a Brady inquiry is "inherently factbound" and the materiality standard "is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused."¹¹

We conclude that, while the State should have informed Mancuso that R.M. was claiming a lack of recollection after the courthouse interview, Mancuso has not shown prejudice. R.M.'s sudden lack of recollection rendered her prior videotaped statements, in which she remembered what had happened, admissible. Although Mancuso asserts that he would not have stipulated to admit the videotape if he had known about R.M.'s lack of recollection, when R.M. testified that she did not recollect what happened, the videotape or cross-examination of its contents was admissible as a prior inconsistent statement or past recollection recorded.¹² As a result, we conclude that even if trial counsel had interviewed R.M. and had prior knowledge of her lack of recollection, the evidence would still have been presented to the jury and there is no reasonable probability that the jury would have returned a different verdict.¹³

¹¹Id. at 685 (White, J., concurring in result) (citation omitted).

¹²NRS 51.035(2); NRS 51.125.

¹³In his opening brief Mancuso implies that trial counsel's failure to make a Brady request prejudiced him because had a request been made the standard of review would be a reasonable possibility that the jury would have returned a different verdict, not a reasonable probability. This issue appears to be raised for the first time on appeal, nevertheless, even if considered, the argument would be without merit as the videotape would

continued on next page . . .

Regarding Mancuso's contention that "materiality" and "prejudice" include a consideration of the impact of the withheld evidence upon the trial strategy and tactics of the defense, we decline to adopt this view. Indeed, none of the cases Mancuso cites for this proposition so hold.

In Kansas v. Lewis,¹⁴ the Supreme Court of Kansas granted a new trial when the prosecutor failed to disclose his intention to introduce a corrected report into evidence, thus breaching a legislature-imposed duty. The initial report indicated a knife contained no blood. Prior to trial, the prosecutor was told that the report was incorrect and in fact blood was found on the knife. The prosecutor failed to disclose this information and instead waited until trial to solicit the information in the form of a new report. The trial court struck the evidence and instructed the jury to disregard the evidence. The Supreme Court of Kansas never even discussed Brady because the case did not involve exculpatory evidence, but a violation of a state statute. Ultimately, the Kansas Court determined that striking and a curing instruction was insufficient to satisfy due process, reversing the conviction and remanding for a new trial.

In Idaho v. Avelar,¹⁵ the Court of Appeals of Idaho examined what impact a prosecutor's nondisclosure had on the preparation or presentation of defendant's case only in dictum and when referring to one of the general principles underlying Brady. The withheld evidence that a

... continued

have been admissible and there is not reasonable possibility of a different verdict.

¹⁴708 P.2d 196 (Kan. 1985).

¹⁵859 P.2d 353 (Idaho Ct. App. 1993).

witness could not identify the defendant was never presented to the jury and, in fact, the prosecution cleverly presented its case to give the misimpression that the witness could identify the defendant. In examining the totality of the circumstances, the Idaho appellate court noted that the state's proof on the matter was "weak indeed," and concluded that there was reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.¹⁶ Accordingly, the court vacated the judgment of conviction and remanded the case for a new trial. The Idaho appellate court never adopted or utilized a materiality test involving trial counsel's inability to properly strategize in its holding.

In Kyles v. Whitley,¹⁷ the Supreme Court overturned a defendant's capital murder conviction after finding a Brady violation; specifically, because the prosecution had not disclosed a range of evidence favorable to the defendant. Again, the evidence was never disclosed to the jury. After a thorough dissection of the evidence, the Court concluded, "[D]isclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable."¹⁸ The issue did not involve the ability of trial counsel to prepare a strategy, but rather the difference the undisclosed evidence would have made if admitted before the jury.

Neither of these cases, nor any of the additional cases cited in his brief, support Mancuso's contention that materiality should be based on the impact the withheld information has on defense strategy or trial

¹⁶Id. at 359.

¹⁷514 U.S. 419 (1995).

¹⁸Id. at 441.

tactics. Rather, they simply utilize the same Brady analysis we have employed regarding the reasonable probability of a different verdict had the withheld information been disclosed to the jury.

Trial counsel's stipulation to admit videotaped interview into evidence

Mancuso argues that his trial counsel's stipulation of R.M.'s videotaped interview into evidence was ineffective assistance of counsel because the decision was objectively unreasonable. In reply, the State asserts that this court should defer to the district court's factual findings, which are supported by the evidence admitted in the habeas hearing. The State contends that once R.M. denied any recollection at trial, the videotape would have been admissible as a past recollection recorded.

"The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review."¹⁹ However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference.²⁰

To establish a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that: (1) trial counsel's representation was deficient; and (2) trial counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the result of the trial would have been different.²¹ To satisfy the second element, a defendant must demonstrate prejudice by showing "a reasonable probability that, but for counsel's errors, the result

¹⁹State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

²⁰Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

²¹See Strickland, 466 U.S. at 687.

of the trial would have been different.”²² In addition, trial counsel’s strategic or tactical decisions will be “virtually unchallengeable absent extraordinary circumstances.”²³ An insufficient showing on either prong eliminates the necessity of appellate consideration of the other.²⁴

Here, the district court found that trial counsel reviewed the videotape prior to trial. Furthermore, the district court found that trial counsel’s decision to attack the detective’s interview techniques by stipulating to its admission was a reasonable strategic decision. The findings are supported by substantial evidence. Therefore, we conclude that Mancuso did not receive ineffective assistance.²⁵

Prior acts evidence

Mancuso asserts that the district court violated his constitutional rights by admitting prior acts evidence of his extramarital affair, pornography in the marital bedroom, having once kicked one of his daughters, and temporary and extended protective orders. He contends that, even if he opened the door to character evidence, the extremely prejudicial prior acts evidence was not relevant to the crime charged. He

²²Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

²³Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), overruled on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

²⁴Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

²⁵Mancuso also asserts that even if portions of the tape was admissible, those sections displaying R.M. crying and holding the teddy bear would have been excluded as more prejudicial than probative and that trial counsel was ineffective for not seeking a redaction. We find this argument to be without merit.

asserts that the error was exacerbated by trial counsel's failure to request a limiting instruction.

In response, the State contends that Mancuso's claim is procedurally barred because he did not raise the issue on direct appeal. Furthermore, the State argues that there was no ineffective assistance of counsel because Mancuso was not prejudiced. The State also argues that the specific incidents of conduct were properly admitted as rebuttal evidence to Mancuso's character evidence.

"[T]rial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal."²⁶

NRS 34.810 states:

1. The court shall dismiss a petition if the court determines that:

....

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

....

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief

NRS 48.055(1) states:

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination,

²⁶Pellegrini v. State, 117 Nev. 860, 883-84, 34 P.3d 519, 535 (2001).

inquiry may be made into specific instances of conduct.

It is not clear whether Mancuso is making claims of trial court error or whether he is couching them in claims of ineffective assistance of counsel. Insofar as he is making claims of trial court error, NRS 34.810(1)(b) procedurally bars him as he could have raised these alleged errors on direct appeal, which he withdrew. However, insofar as these claims of trial court error were made in the context of ineffective assistance of counsel claims, they are appropriately raised here and shall be addressed.

Regarding Mancuso's affair and the pornography evidence, we conclude that Mancuso did not receive ineffective assistance of counsel. Trial counsel objected to this evidence, causing the court to conduct a hearing outside the presence of the jury. Furthermore, we conclude that this evidence was not improper prior acts evidence and was properly admitted. After the State questioned Sherry Mancuso on direct, trial counsel elicited character evidence from her on cross-examination to the effect that she thought he was a good man. This opened the door to rebuttal evidence. On redirect, the State then properly elicited from Sherry testimony evidence of specific instances of conduct: Mancuso's affair and possession of pornography. Thus, we conclude that these were not prior bad acts, but proper rebuttal evidence.


Regarding Mancuso kicking one of his daughters, we conclude that trial counsel's failure to object did not constitute ineffective assistance of counsel. The evidence constituted only a small amount of the testimony and was not referred to again. Trial counsel's failure to object to this evidence did not prejudice Mancuso.


Regarding the temporary and extended protective orders on behalf of Sherry Mancuso, we conclude that trial counsel's failure to object did not constitute ineffective assistance of counsel. Most of the testimony concerned the application of the order, which was offered in rebuttal to Sherry's testimony that her husband was a good man. As to the order itself, its admission was not prejudicial because it was only referred to in passing.

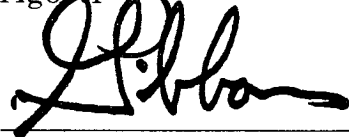
Finally, as to Mancuso's claim that trial counsel was ineffective regarding his pre-trial discussions with Mancuso regarding the improbability that Mancuso would receive probation and allegations that trial counsel failed to pursue negotiations that would lead to probation, we find them to be without merit. Substantial evidence supports the district court's findings that trial counsel's comments were an honest evaluation of Mancuso's likelihood to receive prison if he pleaded guilty and that no negotiation for probation or any more favorable result was ever offered.

Therefore, having considered Mancuso's contentions and concluded that they are either not properly raised or without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Dennis E. Widdis
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk