

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRYL LLOYD WHITE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41011

**FILED**

APR 19 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Darryl Lloyd White's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On November 23, 1999, the district court convicted White, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon (count I) and child abuse and neglect (count III). The district court sentenced White to serve two consecutive terms of 58 to 145 months in the Nevada State Prison for count I, and a concurrent term of one year for count II. This court affirmed White's judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on September 5, 2001.

On August 28, 2002, White filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>White v. State, Docket No. 35225 (Order of Affirmance, August 8, 2001).

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent White or to conduct an evidentiary hearing. On March 28, 2003, the district court denied White's petition. Pursuant to an order of this court,<sup>2</sup> the district court entered specific findings of fact and conclusions of law on September 3, 2004.<sup>3</sup> This appeal followed.

In his petition, White raised numerous claims of ineffective assistance of trial counsel.<sup>4</sup> To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>5</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results

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<sup>2</sup>White v. State, Docket No. 41011 (Order of Limited Remand, August 12, 2004).

<sup>3</sup>See NRS 34.830(1).

<sup>4</sup>To the extent that White raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal and White did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

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

of the proceedings would have been different.<sup>6</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>7</sup>

First, White contended that his trial counsel was ineffective for failing to locate Shonda Carlton. Carlton testified at White's preliminary hearing, but could not be located prior to White's trial and her preliminary hearing testimony was read to the jury.<sup>8</sup> White asserted in his petition that while in prison, he was able to determine Carlton's whereabouts, and his attorney's performance was therefore deficient for failing to do so at the time of his trial.

We conclude that White did not establish that he was prejudiced by his counsel's failure to locate Carlton. White did not demonstrate that Carlton's expected trial testimony would have been sufficiently different from her preliminary hearing testimony, such that the results of his trial would have been different if she had been available to testify. Therefore, we affirm the district court's denial of this claim.<sup>9</sup>

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<sup>6</sup>Id.

<sup>7</sup>Strickland, 466 U.S. at 697.

<sup>8</sup>See NRS 51.325.

<sup>9</sup>White additionally argued that his trial counsel was ineffective for failing to cross-examine the State's investigator concerning his attempts to locate Carlton. We conclude that White did not establish that the results of his trial would have been different if his counsel had cross-examined the State's investigator, and we therefore affirm the order of the district court in this regard.

Second, White argued that his trial counsel was ineffective for failing to procure trial testimony from Wayne Wike. However, the record reveals that Wike testified at White's trial. Therefore, this claim is belied by the record.<sup>10</sup> To the extent that White contended that his trial counsel should have questioned Wike concerning conversations he overheard between Las Vegas Metropolitan Police Department (LVMPD) Officers and White at the time of White's arrest, we conclude that White did not establish that this testimony would have been admissible,<sup>11</sup> or that it would have altered the outcome of his trial. Consequently, the district court did not err in denying this claim.

Third, White claimed that his trial counsel was ineffective for failing to interview and subpoena LVMPD Officers Sandy Raschke, Richard Lanave, and Jason Darr. These officers were the first to arrive at the scene and White contended that their testimony would have supported his defense that his ex-wife, Joya Shelton, and their children were lying about White's use of a knife. Specifically, White contended that these officers would have testified that White's daughter did not inform police that White had a knife.

We conclude that this claim is without merit. First, we note that contrary to White's assertion, Officer Darr did testify during the State's case-in-chief. Officer Darr testified that although he did not see a

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<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>11</sup>See NRS 51.035; NRS 51.065.

knife at the scene, White's daughter indicated to him that a knife was used in the crime. White did not establish that Officers Raschke and Lanave would have provided differing testimony. Even assuming Officers Raschke and Lanave had testified that White's daughter did not indicate that White had a knife, in light of the substantial evidence presented against him at trial, we conclude that White did not establish that the outcome of his trial would have been different. As such, White failed to demonstrate that his counsel was ineffective in this regard.

Fourth White contended that his trial counsel was ineffective for failing to interview or subpoena the following witnesses: Carlton's boyfriend Greg; a woman named Debbie that White's daughter mentioned during her preliminary hearing testimony; "witnesses" that were referenced in a police report; and the various "people up on balconies and people down in the courtyard" mentioned by Officer Darr during his testimony. However, White failed to support this claim with specific facts, such as the expected testimony of these individuals;<sup>12</sup> instead, White merely speculated that they "might have observed the incident." Because White did not adequately support this claim, the district court did not err in denying him relief.

Fifth, White claimed that his trial counsel was ineffective for failing to obtain Shelton's employment records. White argued that although Shelton testified that she had worked the day of the incident, as

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<sup>12</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

well as the day Detective Laura Anderson came to her apartment, she had not. White asserted that Shelton's employment records would have verified this. However, assuming Shelton did not work these days, White failed to demonstrate that the outcome of his trial would have been different if this information had been presented to the jury. Because White did not establish that he was prejudiced by his counsel's actions, we affirm the district court's denial of this claim.

Sixth, White alleged that his trial counsel was ineffective for failing to obtain his daughter's birth certificate and school attendance records. White contended that his daughter lied about her name and whether she attended school on August 4, 1998. White did not establish that these documents would have cast doubt on his daughter's credibility, such that the outcome of his trial would have been different.<sup>13</sup> Accordingly, the district court did not err in denying this claim.

Seventh, White claimed that his trial counsel was ineffective for failing to obtain his medical records from the Clark County Detention Center (CCDC). White contended that Shelton struck him in the mouth with a phone the day of the incident, and medical records from the CCDC would have corroborated this. However, the record reveals that defense witness Wike testified that White was injured after the incident. White did not establish that additional evidence concerning his injuries would

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<sup>13</sup>We note that during White's preliminary hearing, his daughter testified that she uses two different last names.

have altered the outcome of his trial. Therefore, White failed to demonstrate that his counsel was ineffective, and we affirm the order of the district court in this respect.

Eighth, White argued that his trial counsel was ineffective for failing to obtain his medical records from California. White contended that once in 1994 and once again in 1995, Shelton cut him with a steak knife and he required medical attention. White asserted that this evidence would have bolstered his defense that Shelton was threatening him with the knife, not the reverse. We conclude that White failed to establish that he would not have been convicted of attempted murder with the use of a deadly weapon if his counsel had procured these alleged records. There was substantial evidence presented against White at trial—Shelton and two of her children all provided testimony that White retrieved a steak knife from the kitchen and threatened Shelton. As such, we affirm the district court's denial of this claim.

Ninth, White contended that his trial counsel was ineffective for failing to file a motion in limine to suppress the admission of the knife allegedly used in the crime. However, a review of the record reveals that trial counsel strenuously objected to the admission of the knife, but the district court overruled the objection. We therefore conclude that White did not establish that he was prejudiced by his counsel's failure to file a motion in limine, and the district court did not err in denying the claim.

Tenth, White claimed that his trial counsel was ineffective for questioning him during trial about a 1996 incident in which he allegedly

kicked Shelton in the stomach while she was pregnant. White argued that his attorney asked him about this incident to punish him for testifying on his own behalf. We conclude that White is not entitled to relief on this claim. Prior to trial, the district court ruled that the State could question White about the 1996 incident in the event he testified. Trial counsel's attempt to lessen the impact of this evidence by questioning White about it prior to the State doing so was a reasonable tactical choice, and as such, was entitled to deference.<sup>14</sup> Consequently, White failed to demonstrate that his counsel was ineffective in this regard.

Eleventh, White alleged that his trial counsel was ineffective for failing to impeach Detective Anderson with a police report written by another officer. Specifically, White wanted Detective Anderson to read aloud the following portion of a police report: "Shelton stated that White attempted to stab her with a knife, but there were no witnesses to this fact."

A review of the record reveals that at the conclusion of Detective Anderson's testimony, White directly addressed the district court and requested that Detective Anderson read the police report in front of the jury. The State objected on the grounds of hearsay.<sup>15</sup> The district court denied White's request, noting, "in the context of things . . . it's of very little consequence." We conclude that White did not establish

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<sup>14</sup>See Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-82 (1994).

<sup>15</sup>See NRS 51.035.



that he was prejudiced by his counsel's failure to attempt to impeach Detective Anderson with the police report, as he did not demonstrate that it was admissible. Moreover, in view of the significant amount of evidence presented against him, White did not demonstrate the outcome of his trial would have been different if the jury had been given this information. Therefore, we affirm the district court's denial of this claim.

Twelfth, White argued that his trial counsel was ineffective for failing to adequately impeach his daughter. Specifically, White alleged that his counsel should have questioned her about several inconsistencies among her statement to Detective Anderson, preliminary hearing testimony, and trial testimony. We have reviewed the various areas in which White contended that his trial counsel should have impeached his daughter, and conclude that he did not demonstrate that his counsel was ineffective. The alleged inconsistencies are relatively minor in light of the considerable evidence presented against him at trial. We further note that trial counsel conducted a vigorous cross-examination of White's daughter. We therefore conclude that White failed to establish that he was prejudiced by his counsel's actions, and the district court did not err in denying this claim.

Thirteenth, White argued that his trial counsel was ineffective for failing to impeach both Detective Anderson and Shelton with prior inconsistent statements concerning whether Shelton personally handed Detective Anderson the knife. We conclude that White did not demonstrate that the outcome of his trial would have been different if his

counsel had questioned the witnesses in this regard, and we therefore affirm the order of the district court.

Fourteenth, White argued that his trial counsel was ineffective for: failing to consult with him on important defense strategy issues; failing to familiarize herself with the facts of the case; and failing to review the State's discovery. White did not include specific facts to support these claims, however, or adequately articulate how he was prejudiced by his counsel's actions.<sup>16</sup> Consequently, the district court did not err in denying these claims.

Next, White contended that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.<sup>17</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>18</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>19</sup>

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<sup>16</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>17</sup>See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>18</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>19</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

First, White alleged that his appellate counsel was ineffective for failing to raise the following issues on appeal: the prosecutor was aware his daughter was committing perjury during trial; Detective Anderson suborned perjury and rendered his daughter incompetent to testify; and the prosecutor should have corrected Detective Anderson's erroneous testimony. White did not demonstrate that an appeal of these issues had a reasonable probability of success, or that his counsel acted objectively unreasonable in failing to pursue them. We therefore affirm the district court's denial of these claims.

Second, White argued that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. We disagree.

Evidence is sufficient to uphold a conviction when a reasonable jury could have been convinced of the defendant's guilt beyond a reasonable doubt.<sup>20</sup> "[T]he test . . . is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept."<sup>21</sup> We conclude that sufficient evidence was presented at White's trial from which a rational jury could find him guilty of attempted

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<sup>20</sup>Nika v. State, 113 Nev. 1424, 1434, 951 P.2d 1047, 1054 (1997), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002).

<sup>21</sup>Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997) (quoting Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974)).

murder with the use of a deadly weapon and child abuse and neglect, such that he did not establish that his counsel was ineffective for failing to argue this on appeal. The State presented evidence that White attacked Shelton and chased her out of the apartment with a knife, pushing his ten-year old daughter out the way in the process. Once outside, White attempted to stab Shelton while his daughter was watching. We therefore conclude that the district court did not err in denying White relief on this claim.

Third, White alleged that his appellate counsel was ineffective for failing to communicate with him. White failed to demonstrate the existence of an issue that had a reasonable likelihood of success on appeal, and he therefore did not establish that he was prejudiced by his counsel's alleged failure to communicate. Thus, we affirm the district court's denial of this claim.


Finally, White claimed that the district court err in admitting evidence of a prior threat he made to Shelton. This court already considered and rejected this claim on direct appeal, however. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."<sup>22</sup> Thus, the district court did not err in denying this claim.

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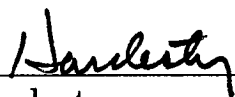
<sup>22</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that White is not entitled to relief and that briefing and oral argument are unwarranted.<sup>23</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>24</sup>

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

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge  
Darryl Lloyd White  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>23</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>24</sup>We have reviewed all documents that White has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that White has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.