

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT PAUL SPANGLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41064

FILED

AUG 16 2005

ORDER OF AFFIRMANCE

JANET L. JONES
CLERK OF THE SUPREME COURT
BY *J. Richards*
CLERK

This is an appeal from a district court order denying appellant Robert Spangler's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis.

In 1998, the district court convicted Spangler, pursuant to a jury verdict, of six counts of sexual assault on a minor under fourteen years of age. The district court adjudicated Spangler a habitual criminal pursuant to NRS 207.012 and sentenced him to serve twelve consecutive prison terms of life without the possibility of parole. On direct appeal, we determined that Spangler had been improperly sentenced and remanded the case to the district court so that it could enter a proper sentence.¹

On December 22, 2000, Spangler filed a proper person petition for a writ of habeas corpus. The district court appointed counsel, conducted an evidentiary hearing, and on February 3, 2003, denied Spangler's petition. This appeal follows.

Spangler contends that the district court erred when it denied six of his claims of ineffective assistance of counsel. To state a claim of

¹Spangler v. State, Docket No. 32730 (Order of Remand, January 26, 2000).

ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."² "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."³ To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."⁴ Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.⁵ However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."⁶

In his supplemental habeas petition, Spangler first claimed that counsel was ineffective because he did not seek a continuance when the trial court endorsed the State's additional witnesses just prior to trial. Spangler further contended that appellate counsel was ineffective for failing to challenge the district court's decision on appeal. However, Spangler failed to demonstrate that a motion for a continuance would

²Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

³Id. (citing Strickland, 466 U.S. at 697).

⁴Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

⁵Riley, 110 Nev. at 647, 878 P.2d at 278.

⁶Id.

have been granted, that the trial result might have been different if he had received a continuance, or that a challenge to the district court's decision to grant the motion to endorse "would have a reasonable probability of success on appeal."⁷ Accordingly, we conclude that the district court did not err in denying this claim.

Second, Spangler claimed that trial counsel was ineffective because he did not object to the admission of the sexual abuse investigative team report. Counsel's "[t]actical decisions are virtually unchallengeable absent extraordinary circumstances."⁸ During the evidentiary hearing, trial counsel testified that he did not object to the admission of the report because some of its contents contradicted the victim's testimony and benefited the defense. As evidenced by this testimony, trial counsel's decision to allow the admission of the report was tactical in nature. Spangler failed to show that extraordinary circumstances existed for challenging trial counsel's decision, and he did not demonstrate that the trial result might have been different if the report had not been admitted. Accordingly, we conclude that the district court did not err in denying this claim.

Third, Spangler claimed that trial counsel was ineffective because he failed to have the victim evaluated by a psychologist and did not hire a psychologist to aid in the defense. The district court found that

⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁸See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

the defense, given its theory of the case, would not have benefited by using a psychological expert to counter the State's evidence, and the district court was unwilling to second-guess trial counsel's strategy. We agree that this claim lacks merit. Spangler failed to demonstrate that the trial result might have been different if a psychologist had evaluated the victim or been hired to aid in the defense. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, Spangler claimed that trial counsel was ineffective because he failed to move for a mistrial after the district court admitted into evidence the judgments of conviction of two of Spangler's associates. The district court found that these judgments should not have been entered into evidence, as their sole purpose was to impeach a witness on collateral issues, but concluded that Spangler failed to demonstrate prejudice. We agree with this conclusion. Spangler failed to demonstrate that a motion for mistrial would have been granted or that the trial result might have been different if the judgments of conviction were not admitted into evidence. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, Spangler claimed that trial counsel was ineffective because he failed to object and request a mistrial when the State solicited improper character evidence during a direct examination. During the trial, the State asked Spangler's mother, "Have you had the opportunity to confront your son regarding allegations of sexual improprieties in the past?" The district court found that this question was improper and that trial counsel's failure to object to the question was deficient performance. It concluded, however, that Spangler did not demonstrate prejudice. We agree. Spangler failed to demonstrate that a motion for mistrial would

have been granted or that the trial result might have been different if the State had not asked the witness that question. Accordingly, we conclude that the district court did not err in denying this claim.

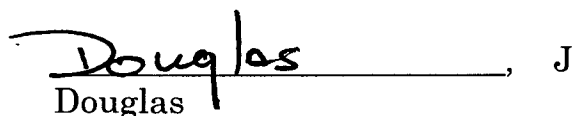
Finally, Spangler claimed that the cumulative effect of trial and appellate counsel's mistakes denied him a fair trial. The district court, having found all of Spangler's claims to be without merit, disagreed with his "broad assertion." We agree and conclude that Spangler was not deprived of a fair trial.

Accordingly, we

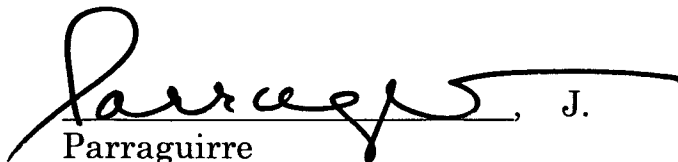
ORDER the judgment of the district court AFFIRMED.



Maupin



Douglas



Parraguirre

cc: Hon. John P. Davis, District Judge
Carl M. Joerger
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk