

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN A. BOWYER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42788

FILED

OCT 08 2004

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 John Bowyer's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On July 30, 2001, the district court convicted Bowyer, pursuant to a jury verdict, of one count each of sexual assault and solicitation to commit murder. The district court sentenced Bowyer to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for the sexual assault count, and a consecutive term of 26 to 120 months for the solicitation count. This court affirmed Bowyer's judgment of conviction and sentence on appeal.¹ The remittitur issued on November 5, 2002.

On October 23, 2003, Bowyer filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Bowyer v. State, Docket No. 38413 (Order of Affirmance, October 8, 2002).

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Bowyer or to conduct an evidentiary hearing. On February 6, 2004, the district court denied Bowyer's petition. This appeal followed.

In his petition, Bowyer raised numerous claims of ineffective assistance of trial counsel. 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.² A petitioner must further establish a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, Bowyer contended that his trial counsel was ineffective for failing to challenge the victim's competency to testify at trial. We conclude that this claim is without merit. Although the twenty-one year old victim suffered a brain injury when she was an infant, the record reveals that her testimony was clear, relevant, and coherent.⁵ Bowyer failed to provide any specific facts concerning the victim's alleged

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

³Id.

⁴Strickland, 466 U.S. at 697.

⁵See Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001).

incompetence.⁶ Therefore, Bowyer did not establish that his counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Second, Bowyer claimed that his trial counsel was ineffective for failing to determine whether he was competent to stand trial. A defendant is competent to stand trial if he has sufficient ability to consult with his lawyer with a reasonable degree of understanding, and comprehends the proceedings against him.⁷ Bowyer did not provide any facts to support a claim that he was unable to consult with his lawyer or that he did not understand the proceedings against him. Additionally, a review of the record reveals that Bowyer acted in a rational manner during the proceedings. We therefore conclude that Bowyer failed to establish that his counsel was ineffective on this issue, and we affirm the order of the district court in this regard.

Third, Bowyer argued that his trial counsel was ineffective for failing to request a Franks hearing.⁸ A Franks hearing is a suppression hearing conducted to examine an alleged falsehood in an affidavit supporting a search warrant.⁹ Although several search warrants were

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983).

⁸See Franks v. Delaware, 438 U.S. 154 (1978).

⁹See id.; Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990), abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

executed in Bowyer's case, he failed to describe any alleged falsehoods in the affidavits that would have necessitated a Franks hearing. Therefore, Bowyer did not demonstrate that his counsel was ineffective, and the district court did not err in denying him relief with respect to this claim.

Fourth, Bowyer contended that his trial counsel was ineffective for failing to request a directed verdict. Although the district court may enter a judgment of acquittal,¹⁰ there is no provision in Nevada law for the entry of a directed verdict in a criminal case. To the extent that Bowyer is arguing that his counsel should have requested a judgment of acquittal, a review of the record reveals sufficient evidence to sustain Bowyer's convictions for sexual assault and solicitation to commit murder.¹¹ Therefore, Bowyer did not demonstrate that his trial counsel was ineffective in this regard.

Fifth, Bowyer argued that his trial counsel was ineffective for failing to object to testimony from the State's expert that directly related to the veracity of the victim's testimony. We conclude that Bowyer failed to establish that he is entitled to relief on this claim. "[I]t is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false."¹² We initially note that Bowyer failed to provide the specific expert testimony to which he believed his counsel should have objected.

¹⁰See NRS 175.381(2).

¹¹See id.

¹²Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

However, even assuming that counsel erred with respect to this claim, in light of the substantial evidence presented against him, Bowyer failed to establish that the outcome of the trial would have been altered if counsel had objected. Thus, Bowyer did not demonstrate that his counsel was ineffective on this issue, and we affirm the order of the district court.

Sixth, Bowyer alleged that his trial counsel was ineffective for failing to object to the reasonable doubt jury instruction. First, we note that Bowyer's trial counsel did object to the reasonable doubt jury instruction, but this objection was overruled. Further, the reasonable doubt jury instruction given at Bowyer's trial correctly stated the law. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give juries in criminal cases. The language used at Bowyer's trial was identical to that found in the statute. This court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond a reasonable doubt and does not shift the burden of proof."¹³ Therefore, the district court did not err in denying this claim.

Seventh, Bowyer claimed that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offenses of sexual assault. We conclude that trial counsel's failure to request jury instructions on the lesser-included offenses of sexual assault amounted to

¹³Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991).

a tactical decision. A reasonable tactical choice is entitled to deference.¹⁴ Further, this court concluded on direct appeal that there was overwhelming evidence that Bowyer committed sexual assault. Thus, Bowyer did not establish that he was prejudiced by his trial counsel's failure to request jury instructions concerning lesser-included offenses. Consequently, the district court did not err in denying this claim.

Eighth, Bowyer contended that his trial counsel was ineffective for failing to request a jury instruction providing that the victim's testimony must be corroborated. However, such a jury instruction would not have correctly stated the law.¹⁵ A jury may convict a defendant of sexual assault based on the uncorroborated testimony of the victim.¹⁶ Thus, Bowyer failed to establish that his counsel was ineffective, and we affirm the order of the district court with respect to this claim.

Bowyer raised approximately twenty additional claims of ineffective assistance of trial counsel that were completely devoid of specific factual support.¹⁷ Because Bowyer did not adequately articulate how his counsel was ineffective with respect to these claims, the district court did not err in denying him relief.

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

¹⁵See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

¹⁶Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996).

¹⁷See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Bowyer next raised multiple claims of ineffective assistance of appellate counsel. 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.¹⁸ "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."¹⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁰

Bowyer argued that his appellate counsel was ineffective for failing to raise the following issues on appeal: (1) the prosecutor improperly vouched for the truthfulness of witnesses; (2) the prosecutor knew the alleged victim and other witnesses were lying, yet allowed them to testify; (3) the prosecutor offered documents into evidence that had no relevance to the case; (4) the prosecutor improperly expressed his opinion; (5) the prosecutor introduced cumulative testimony; (6) the prosecutor shifted the burden of proof; (7) the prosecutor misstated references to reasonable doubt; (8) the prosecutor's closing argument violated Bowyer's due process rights; and (9) the prosecutor's manipulation and solicitation of testimony cost him a fair trial. Bowyer failed to point to specific factual

¹⁸See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

¹⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

support in the record for any of the above claims.²¹ Nevertheless, we have reviewed the record on appeal and conclude that Bowyer failed to establish that an appeal of any of these issues would have had a reasonable likelihood of success. As such, Bowyer did not demonstrate that his appellate counsel was ineffective, and we affirm the order of the district court with respect to these claims.

Bowyer next claimed that: (1) the district court made disparaging remarks and was personally biased; (2) there was insufficient evidence that he committed sexual assault; (3) the district court and the prosecutor committed cumulative error; (4) the jury instructions were legally invalid and incomprehensible; (5) the testimony of an unqualified state witness was unreliable; (6) this court did not conduct a fair and adequate review of his direct appeal; (7) his constitutional rights were violated by the misconduct and bias of a juror; and (8) his rights were violated by a paid police informant. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus, and should have been raised on direct appeal.²² Further, Bowyer did not include specific facts to support these claims.²³ Thus, the district court did not err in denying him relief.

Lastly, Bowyer re-raised all of the claims he brought on direct appeal. This court already considered and rejected these claims. The

²¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.


²²See NRS 34.810(1)(b)(2).


²³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.


doctrine of the law of the case prevents further litigation of these issues.²⁴ As such, we affirm the order of the district court with respect to these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Bowyer is not entitled to relief and that briefing and oral argument are unwarranted.²⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁶


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
John A. Bowyer
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁴Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁶We have reviewed all documents that Bowyer 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.