IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS ROY GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54971

FILED

SEP 09 2010

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under 14 years of age. Fifth Judicial District Court, Nye County; John P. Davis, Judge. Appellant Dennis Garcia raises five issues.

First, Garcia argues that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when it withheld notes taken by the victim's therapist. Garcia speculates that these notes may reveal that the victim was abused in the past and appends an affidavit from a woman who asserts that the victim was indeed abused previously. Garcia's claim raises fact-intensive issues which require consideration by a fact-finding tribunal and are not properly before this court in the first instance. See NRS 177.025 (providing that "appeal to the Supreme Court from the district court can be taken on questions of law alone"). We therefore decline to consider this claim and note that Garcia's remedy was in filing an appropriate post-conviction action in the district court. See, e.g., NRS 176.515 (stating that district court may consider motion for new trial based upon newly-discovered evidence within two years of guilty verdict).

Second, Garcia argues that he is entitled to a new trial because he was not present for the exercise of peremptory challenges. Because he did not object and the only prejudice Garcia articulates is speculation that his presence might have led his counsel to strike different jurors, we conclude that he is not entitled to relief. See Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996).

Third, Garcia argues that he was deprived of a fair trial when the name of a witness excluded from testifying at trial was erroneously included on a witness list. The record reflects that a member of the venire—a middle school teacher—claimed to have had this witness as a pupil. Garcia posits that failing to immediately remove the venireperson may have contaminated the jury pool. The record does not show any objection from Garcia and does not support his speculation.

Fourth, Garcia claims that the district court erred in permitting a child witness to relate Garcia's statement asking the witness who would lose her virginity first: the witness or the victim. Even accepting Garcia's contention that this statement is a bad act within the meaning of NRS 48.045(2), we conclude that because the statement occurred so close in time to the alleged crimes and showed his prurient interest in the minors, it was admissible to show his mental state, such as motive, intent, or plan. The district court did not, therefore, manifestly err in admitting it. See Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

Fifth, Garcia claims that he was denied effective assistance of counsel, based on various instances in which his counsel failed to object, failed to investigate, was deficient in questioning, and failed to file motions. If, as here, the district court has not held an evidentiary hearing,

claims of ineffective assistance of counsel will not be considered on direct appeal, Elvik v. State, 114 Nev. 883, 893, 965 P.2d 281, 288 (1998), and we likewise decline to consider them in this instance.

Having considered Garcia's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. John P. Davis, District Judge
Nancy Theresa Lord
Attorney General/Carson City
Nye County District Attorney/Pahrump
Nye County Clerk