

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE RENCHER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59289

FILED

JUN 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Vulture*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on March 4, 2010, appellant alleged that he received ineffective assistance of counsel.² To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²We note that the district court below appointed counsel to represent appellant in the post-conviction proceedings. Counsel filed a supplemental petition on January 28, 2011. On appeal, appellant indicated that he wanted to proceed in proper person by filing a motion to rescind the order of limited remand for the appointment of counsel. This court granted that motion.

would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, “[t]actical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances.” Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). We give deference to the district court’s factual findings regarding ineffective assistance of counsel but review the court’s application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that trial counsel was ineffective for failing to object to statements by the State that constituted prosecutorial misconduct. The underlying claim was raised and rejected on direct appeal. Rencher v. State, Docket No. 52355 (Order of Affirmance, November 5, 2009). Because this court already concluded that appellant’s underlying claim lacked merit, appellant necessarily failed to demonstrate prejudice from trial counsel’s failure to object to the statements by the State. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to investigate the fact that the victim may have had knowledge of sexual terms and actions because her friend was the victim of sexual assault by another man. Further, he claimed that trial counsel was ineffective for failing to investigate the man who assaulted the victim’s friend. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing

that she tried repeatedly to get information regarding the victim's friend but was unable to do so until shortly before trial. Further, trial counsel testified at the evidentiary hearing that the victim and her friend gave different descriptions of the sexual actions committed against them, which would have demonstrated that they both had their own experiences and with different perpetrators. Trial counsel made a tactical decision not to present this evidence to the jury. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to adequately cross-examine the victim. Appellant failed to support this claim with specific facts that, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to obtain an expert opinion regarding the victim's mental competence and whether it affected her veracity. Appellant failed to demonstrate that trial counsel was deficient. Appellant failed to demonstrate that the motion would have been successful, see Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000) (holding that a defendant must demonstrate a compelling need exists for the examination); see also Abbott v. State, 122 Nev. 715, 728, 138 P.3d 462, 471 (2006) (reaffirming the test set forth in Koerschner), and trial counsel is not deficient for failing to file futile motions, Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to retain or call a medical expert to refute testimony by a nurse

that a hymen can regrow. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant gave notice to the State that an expert would testify at the evidentiary hearing that a hymen cannot regrow; however, this expert was not called at the hearing. Therefore, appellant failed to demonstrate by a preponderance of the evidence that the evidence provided at trial was false or that there was an expert who would have testified to refute the testimony of the nurse. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to confront a witness with his prior statements denying being assaulted by appellant in the past. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that she did not impeach the witness with his prior statement because the statement was that he did not disclose being assaulted rather than he denied being assaulted. Trial counsel made a tactical decision not to present this evidence to the jury. Further, appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial because trial counsel did impeach this witness with several of his other statements, including statements that he would lie and that he wanted to please other people. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for making herself a witness in the case. Specifically, trial counsel asked a witness about what was discussed between trial counsel and the witness at a meeting prior to trial. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel not asked this witness about

that meeting. Therefore, the district court did not err in denying this claim.


Eighth, appellant claimed that trial counsel was ineffective for failing to call an expert witness to testify regarding false allegations and suggestibility of child victims. Appellant failed to demonstrate that trial counsel was deficient. Trial counsel testified at the evidentiary hearing that she was worried that if the expert testified, evidence of appellant's past criminal history, which included convictions that required appellant to register as a sex offender, would be disclosed to the jury. Trial counsel made a tactical decision not to present this evidence to the jury. Therefore, the district court did not err in denying this claim.


Ninth, appellant claimed that trial counsel was ineffective for failing to preserve objections made during bench conferences by placing those objections on the record. Appellant failed to allege specific facts that, if true, entitled him to relief. He failed to specify what the objections were, how the failure to preserve them prejudiced him, or where they were located in the record. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that the prosecutor committed misconduct, that the imposition of consecutive life sentences violated double jeopardy, that the district court abused its discretion regarding a claim of juror misconduct, and that the district court erred in dismissing a juror when deliberations had already begun. These claims should have been raised on direct appeal and were therefore procedurally barred because appellant failed to demonstrate good cause and prejudice for raising them in this petition. NRS 34.810(1)(b). Further, some of the claims of prosecutorial misconduct were raised on appeal and were

rejected. Rencher v. State, Docket No. 52355 (Order of Affirmance, November 5, 2009). Thus, they were barred by the doctrine of law of the case. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Therefore, the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. David B. Barker, District Judge
Eddie Rencher, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk