

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CHAVEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60549

**FILED**

JAN 16 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Charles M. McGee, Senior Judge.

Appellant James Chavez argues that the district court erred by denying his post-conviction petition because trial counsel was ineffective. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings 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. We give deference to the district court's factual findings 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, Chavez argues that counsel was ineffective for failing to object to the mention of an incident that occurred on tribal land. During

opening statements, the prosecutor relayed the victim's description of an incident in which Chavez tore her vagina during a sexual assault and convinced her to tell the family that she injured it on a fence. Chavez asserts that because the jury asked multiple questions about the incident, which the State had no authority to prosecute because it occurred on tribal land, it likely found him guilty of that act rather than an act which was charged. Chavez failed to demonstrate deficiency or prejudice. In finding Chavez guilty, jurors found that each act was committed in Washoe County beyond a reasonable doubt. Further, counsel testified at the evidentiary hearing that had the State not referenced the act, he would have because Chavez's claim that the victim fell on a fence explained how she sustained vaginal injuries and was the crux of his defense. Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (noting that counsel's strategy on how to proceed at trial is a decision that is "virtually unchallengeable absent extraordinary circumstances." (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)) abrogated on other grounds by Harte v. State, 116 Nev. 1054 n.6, 13 P.3d 420, 432. n.6 (2000)). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object on this ground.

Second, Chavez argues that counsel was ineffective for failing to object to prejudicial statements made by the prosecutor and a witness. Chavez failed to demonstrate deficiency or prejudice. The statements that Chavez asserts counsel should have objected to were direct quotes from the victim describing what happened to her and the language used accurately described the incidents as alleged and were not inflammatory. Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object on this ground.

Third, Chavez argues that counsel was ineffective for opening the door for an expert witness to vouch for the victim's veracity. Chavez failed to demonstrate deficiency or prejudice. On direct appeal, this court stated that the expert's testimony did not go to the veracity of the victim's allegations and was not vouching. Chavez v. State, 125 Nev. 328, 343 n.2, 213 P.3d 476, 487 n.2 (2009). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to preclude the admission of this testimony.

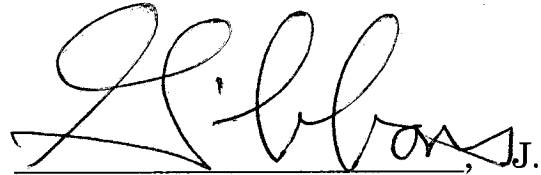
Fourth, Chavez argues that counsel was ineffective for failing to object to the introduction of photographs of the victim's vagina taken during her autopsy because it allowed the jury to infer that he was responsible for the victim's death. Chavez failed to demonstrate deficiency or prejudice. Jurors were already informed that the victim was unavailable because she was deceased and were instructed not to draw any inferences from her death. See McConnell v. State, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004) (presuming that jurors follow the instructions they are given). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object to the autopsy photographs on this ground.

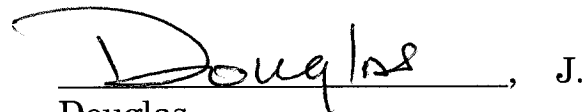
Fifth, Chavez argues that counsel was ineffective for failing to present witnesses to testify to his character and his close connection with his family. Chavez failed to demonstrate deficiency or prejudice. Counsel testified that he and Chavez discussed every witness who could testify and together they selected the witnesses that they believed would present Chavez in the best light. The witnesses that Chavez now asserts should have testified offered nothing substantively new and merely reinforced the evidence that was presented at trial. It is unlikely that the result at trial

would have been different had any of these witnesses testified. Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to present additional character evidence.

Having considered Chavez's claims, and concluded that none warrant relief, we

ORDER the judgment of the district court AFFIRMED.

  
Gibbons

  
Douglas

  
Saitta

cc: Chief Judge, Second Judicial District Court  
Hon. Charles M. McGee, Senior Judge  
Sally S. deSoto  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk