

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HOWARD SKOLNIK, DIRECTOR OF
THE NEVADA DEPARTMENT OF
CORRECTIONS,
Appellant,
vs.
RONALD CHARLES WHEELER,
Respondent.

No. 84481-COA

FILED

FEB 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Howard Skolnik, Director of the Nevada Department of Corrections (State), appeals from an order of the district court granting a postconviction petition for a writ of habeas corpus, vacating a judgment of conviction, and discharging petitioner. Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Ineffective assistance of trial counsel

The State argues that the district court erred by granting Ronald Charles Wheeler's March 27, 2012, petition and later-filed supplement. Wheeler claimed that his trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 687, 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). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous 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).

Wheeler claimed that his trial counsel was ineffective because counsel did not understand the implications stemming from the district court's appointment of an independent expert witness, Dr. Lippert, to conduct a psychological evaluation of the victim. Wheeler also contended that, as a result of counsel's failure to understand the implications stemming from the appointment of an independent expert witness, counsel was not properly prepared for trial.

The district court conducted an evidentiary hearing and made the following findings. Trial counsel explained that he had requested appointment of a defense expert witness to conduct a psychological examination of the victim. However, the trial court decided to appoint an independent expert witness so that it would have independent information regarding the victim and do so in a manner that would be fair to both parties. Counsel stated that he was disappointed with that decision because he wished for a defense expert, which would have permitted him to first ascertain whether the expert would provide favorable information to the defense. Counsel acknowledged that he should have protested the trial court's decision or performed different actions after the trial court decided to appoint an independent expert witness. Counsel stated he did not realize until shortly before the start of trial that the trial court's decision to appoint Dr. Lippert as an independent expert witness allowed the State to utilize her testimony and report against Wheeler.

Counsel stated that he believed he had provided material to Dr. Lippert to review for the evaluation but was unsure why she did not have the recordings of the victim's interviews to use in the creation of her report. Counsel also acknowledged that he discovered shortly before trial that the victim had made additional statements concerning this matter to a counselor but that he did not obtain those records for use at trial. In addition, counsel stated that he had been a defense attorney for a long time and ultimately came to the conclusion that he had made mistakes concerning the utilization of Dr. Lippert.

Wheeler called Dr. Zelig to testify at the evidentiary hearing as an expert witness. The district court made the following findings regarding Dr. Zelig's testimony. Dr. Zelig is board certified in clinical psychology and forensic psychology. Dr. Zelig reviewed Dr. Lippert's report, the preliminary hearing and trial transcripts, and recordings depicting interviews with the victim. Dr. Zelig noted that Dr. Lippert did not utilize the victim's interviews with law enforcement when creating her report and that the failure to utilize that information was not consistent with standard practices in psychology. Dr. Zelig testified to his opinion that Dr. Lippert's report contained errors as it did not include all of the available information concerning the victim's psychological profile and behavior. Dr. Zelig stated that after reviewing the relevant information, he believed that the victim had not provided consistent stories and noted that the victim had a reputation for stating falsehoods. Dr. Zelig also explained that the victim had been asked leading questions regarding Wheeler and that those questions may have tainted her memory.

The district court also reviewed other evidence submitted at the evidentiary hearing and made findings concerning that evidence. The

district court noted that information regarding the victim's meetings with a counselor was available to trial counsel for more than a month prior to the beginning of trial and that counsel did not adequately explain why he waited until the eve of trial to investigate that material. The district court also noted that the trial transcript revealed trial counsel was not adequately prepared to cross-examine Dr. Lippert concerning her report or the inconsistencies in the victim's versions of events.

The district court ultimately found that trial counsel and Dr. Zelig were credible witnesses and that the testimony and evidence presented at the evidentiary hearing demonstrated that trial counsel did not understand the implications of the trial court's decision to appoint Dr. Lippert as an independent expert witness or that the State could utilize her testimony and report. The district court also found that trial counsel was not prepared for Dr. Lippert's trial testimony and was not prepared to cross-examine her concerning the accuracy of her report and her conclusions regarding the victim. In addition, the district court found that the testimony and evidence showed that the victim had a history of lying and that, but for counsel's error in not understanding the implications of the appointment of the independent expert and in cross-examining Dr. Lippert, the result of the trial would have been "drastically different."

Substantial evidence supports the district court's findings. In light of the testimony and evidence presented at the evidentiary hearing, Wheeler demonstrated that trial counsel's performance regarding the appointment of Dr. Lippert as an independent expert witness and his preparation for trial fell below an objective standard of reasonableness. In addition, Wheeler demonstrated a reasonable probability of a different outcome had counsel performed alternative actions concerning the

appointment of an expert witness and in his preparation for trial. Accordingly, we conclude that the district court did not err by granting relief to Wheeler based on this claim.

Admission of evidence at the evidentiary hearing

Next, the State argues that the district court erred by permitting Dr. Zelig to provide expert witness testimony during the evidentiary hearing. The State notes that Dr. Zelig was not a licensed psychologist in Nevada in 2011 when the trial in this matter took place, and it asserts that he would therefore not have been permitted to testify at the trial. In addition, the State contends that the majority of Dr. Zelig's testimony bore upon the victim's veracity and asserts that experts are not permitted to comment on the veracity of other witnesses.

Expert testimony may be admissible if it satisfies three requirements:

- (1) [H]e or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement);
- (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and
- (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (alteration in original) (quoting NRS 50.275). We review a district court's admission of expert testimony for abuse of discretion. *Perez v. State*, 129 Nev. 850, 856, 313 P.3d 862, 866 (2013).

Dr. Zelig testified concerning his background, training, and education. As stated previously, he testified that he is board certified in clinical psychology and forensic psychology. As part of the postconviction

proceedings, Dr. Zelig reviewed the relevant information concerning the psychological report and expert testimony that was presented at trial and offered his opinion concerning the relevant report and testimony. Dr. Zelig did not comment on the veracity of the victim but rather noted that the information he reviewed during the postconviction proceedings indicated that she provided inconsistent versions of events, had a reputation for fabricating statements, and leading questions by authority figures may have tainted her memory.

The testimony at the evidentiary hearing demonstrated that Dr. Zelig was qualified to testify concerning psychological matters, his specialized knowledge was of assistance to the district court in understanding the evidence, and his testimony was limited to matters within his specialized knowledge. And the State does not demonstrate that Dr. Zelig was required to have been licensed in Nevada at the time that the trial took place in order for the district court to consider his testimony at the evidentiary hearing. Therefore, we conclude that the district court did not abuse its discretion by permitting expert testimony from Dr. Zelig. Accordingly, the State is not entitled to relief based on this claim.

Finally, the State argues that the district court erred by considering portions of Dr. Zelig's testimony because those portions encompassed the victim's sexual conduct and therefore would have been barred from admission at trial by NRS 50.090. "It is within the district court's sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (internal quotation marks and footnote omitted).

NRS 50.090 bars use of evidence of a victim's prior sexual conduct to challenge the victim's credibility during a prosecution. However, in certain situations, a defendant may introduce evidence to show that a minor victim "has the experience and ability to contrive a [sexual offense] against him." *Summitt v. State*, 101 Nev. 159, 164, 697 P.2d 1374, 1377 (1985) (quoting *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981)).

At the evidentiary hearing, Dr. Zelig noted that the relevant information showed that the victim was sexually active and sexually preoccupied and had an earlier sexual debut compared to other girls. And he also stated his opinion that she was angry at Wheeler in part because he did not want her saying sexually provocative things. The testimony concerning the victim's sexual history bore upon whether she had the ability to fabricate the allegations against Wheeler. Because the victim's sexual experience bore upon whether she had the ability to contrive the allegations against Wheeler, the State fails to demonstrate that the district court abused its discretion by admitting the challenged testimony at the evidentiary hearing. Therefore, the State fails to demonstrate it is entitled to relief based upon this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kriston N. Hill, District Judge
Attorney General/Carson City
Elko County District Attorney
Kirsty E. Pickering Attorney at Law
Elko County Clerk