IN THE SUPREME COURT OF THE STATE OF NEVADA

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FREDERICK H. HARRIS, JR.,)
)
Appellant,)
)
v.)
)
STATE OF NEVADA,)
)
Respondent.)
)

CASE NO.: 81255/ 81257
E-FILE

REPLY TO RESPONDENT'S ANSWERING BRIEF
Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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REPLY TO RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF ISSUES

I. DEFENSE COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PREPARING PRETRIAL;

II. DEFENSE COUNSEL WAS INEFFECTIVE IN THE JURY SELECTION PROCESS;

III. DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE COUNSEL FAILED TO FILE A MERITORIOUS MOTION FOR PRETRIAL PSYCHOLOGICAL EXAMINATIONS OF THE ALLEGED VICTIMS;

IV. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE AT TRIAL;

V. DEFENSE COUNSEL WAS INEFFECTIVE AT SENTENCING;

VI. THE AGGREGATE SENTENCE OF SIXTY YEARS WAS UNDULY HARSH AND DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT;

VII. DEFENSE COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND IN ARGUING THE NEW TRIAL MOTION;

VIII. CUMULATIVE ERROR REQUIRES DEFENDANT'S CONVICTION BE REVERSED.

ARGUMENT

I. DEFENSE COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PREPARING PRETRIAL.

The State in Respondent's Answering Brief cites *Molina v. State,* 120 Nev. 185, 87 P.3d 533 (2004), in arguing that the Defendant's Petition, which claimed ineffective assistance of counsel, was not specific enough in showing how a better investigation by the defense would have rendered a more favorable outcome for Defendant. [Respondent's Answering Brief, hereinafter RAB, p. 21]

The State then suggests counsel had no duty to seek her own expert witness to

assist in preparing Defendant's case, citing dicta from *Harrington v. Richter,* 562 U.S. 86, 111(2011): . . . "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." (RAB, p. 22)

What Strickland does require is a pretrial investigation by counsel that is adequate to provide a reasonable defense. *Strickland v. Washington,* 466 U.S. 668 at 687 (1984). *See, Sanborn v. State,* 107 Nev. 399 (1991).

In this case it is again respectfully submitted counsel's pretrial investigation and preparation was inadequate. Better investigation could have revealed weaknesses in the State's case sufficient to raise a reasonable doubt. Even subtle evidence of bias or motive could have discredited the State's witnesses. The defense counsel did not need to show the jury video tape evidence of another suspect, or uncontradicted exculpatory evidence obtained by the defense investigator's pretrial work, to establish a reasonable doubt.

Small points about the background of a witness may have influenced the jury. Minor discrepancies or contradictions in a witness' account may have been enough to raise a reasonable doubt. The lack of <u>any</u> meaningful pretrial investigation in this case however must be considered ineffectiveness that likely influenced the verdict.

II. DEFENSE COUNSEL WAS INEFFECTIVE IN THE JURY SELECTION PROCESS.

The State argued counsel was not ineffective during the jury selection process suggests that there is nothing unique or complex in this trial which involved the sexual assault of children. The State, in Respondent's Answering Brief, then argues that defense counsel therefore didn't need to take any special precautions to get a fair and impartial jury in this case. (RAB, p. 24-28) The State apparently did not even think that the fact potential jurors had themselves been traumatized by sexual abuse was a significant fact affecting the dynamics of the jury selection. (RAB, p. 26, 27)

Even though defense counsel did not file a Motion for Individual Sequestered Voir Dire, or seek an expert to assist her in selecting the jury in this case, the State argued defense counsel was not ineffective. (RAB, p. 24-29) The State concluded counsel's voir dire strategy was not unreasonable and that Defendant was not prejudiced. (RAB, p. 29)

The State then argued just because the trial jury heard about other jurors' trauma during the voir dire, when they were instructed on the presumption of innocence, no jurors would still be prejudiced. (RAB, p. 27) It is respectfully submitted that the State blissfully ignored the effect of many jurors discussing how

they had been the victim of sexual crimes on the entire jury panel. (RAB, p. 27) The State also totally discounted the likely possibility that many of the jurors may have been too inhibited to discuss intimate matters of sexual abuse in open court in front of other jurors. The State suggested this was true, because one juror had sought to approach the bench and discuss such "sensitive" matters out of the presence of the other jurors. The State wrongly concluded it would have therefore been easy for all the other jurors to have done the same thing. (RAB, p. 28)

Finally, the State argued that no juror came forward after the trial and admitted any concealed bias. (RAB, p. 29) This is also not true. What actually happened in this case is that one trial juror, Y. L., apparently did feel compelled to discuss her statements she made during jury deliberations about her sexual abuse. (See Motion for New Trial (AA, p. 110-111)(AA, p. 2400-2404) Whether she actually broke down sobbing during deliberations, or admitted she was biased, is unclear. The witness to her statement, Kathleen Smith, did not sign her affidavit prepared by defense investigator Mr. Mayo, however she did orally acknowledge the facts were true. (AA, p. 2400) Defendant respectfully submits a more competent jury selection would have better protected the Defendant's rights in this difficult case.

III. DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE COUNSEL FAILED TO FILE A MERITORIOUS MOTION FOR A PRETRIAL PSYCHOLOGICAL EXAMINATIONS OF THE ALLEGED VICTIMS.

It is respectfully submitted that the facts were more than sufficient in this case to establish a compelling need for an independent psychological or psychiatric examination of the alleged victims. The victims had the diagnosis of "cognitive delay" and of "anxiety disorder" and therefore needed to be very carefully evaluated by a neutral court appointed expert.

Although it cannot be certain that a court ordered psychiatric evaluation of the victims could have established that one, or both of them, had such mental or psychiatric disabilities that their credibility was suspect, it is very possible such an exam would have raised doubts as to each of their credibility. It is clear the State was concerned such an examination would have lead to sufficient evidence to cause a reasonable jury serious concerns.

It is respectfully submitted the existing diagnoses provided the trial court more than enough factual information in this case to order psychological examinations of each victim pretrial. The failure of counsel to seek such a motion pretrial was therefore error under *Strickland* that requires reversal of the conviction.

The State, citing *Koerschner v. State,* 116 Nev. 111, 13 P.3d 451 (2000), argued that a trial judge should have only ordered a psychiatric or psychological examination of the child victim if there was a compelling reason to do so. (RAB, p.30) The State then listed several factors the court should weigh in deciding such a motion including:

(1) whether the State calls an expert or obtains an expert;

(2) whether the evidence is supported by little or no corroboration;

(3) whether there is a reasonable basis for believing the victim's mental or emotional state may have affected her veracity. *Koerschner, Id.* 116 Nev. at 116-17. (RAB, p. 30)

Even though the State recognized that the three *Koerschner* factors are not necessarily given equal weight, the State claimed because they had not called an expert and also claimed there was little corroboration, the court would not likely have granted such a defense motion. (RAB, p. 30)

Defendant however submits that the third factor weighs strongly in Defendant's favor. The State in its argument makes a "bare naked" claim that the "anxiety disorder" suffered by the victim M.D. and the "learning disability" suffered by the victim T.D. would not have affected either of the witnesses' ability to discern reality

or caused them to testify falsely. (RAB, p. 31) It is respectfully submitted that claim by the State was pure speculation which defies logic.

Recognizing the weakness of their argument, the State actually tried to argue a statute that did not exist when Defendant went to trial. NRS 50.700(1) was pushed through the legislature by the District Attorney's Office one year after the Defendant's trial. The State's argument seems to be that because a year after the trial the legislature changed the law, and enacted NRS 50.700(1) the court should now find that defense counsel should not have filed a meritorious Motion for a Psychiatric Examination of the victims in this case. The District Attorney's Office attempt to deem such a motion would be frivolous, based upon a non-existing statute at the time of trial is ludicrous.

Defendant respectfully disagrees with all the State's arguments and submits the court must find it was ineffective assistance of counsel not to file a meritorious Motion for a Psychiatric Examination of victims in this case. There was a much more than reasonable chance such a motion would have been granted if filed and a significant chance, if granted, such a motion would have altered the result of the trial.

IV. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE AT TRIAL.

A. Defense Counsel was Ineffective in Cross-Examining Key Prosecution Witnesses.

It is respectfully submitted that defense counsel was unable to competently cross-examine important State witnesses because counsel was unable to deal with numerous objections by the prosecutor. Whether the objections were valid, or merely made for the purpose of harassment, is not relevant. The question is whether counsel's cross-examination was altered or affected in any significant way.

Defendant submits that because counsel lost control at the beginning of cross-examination (AA, p. 1832-1848) and counsel was thereafter less effective and the Defendant was prejudiced thereby. Timing is a key factor in cross-examination because counsel may have made his best points when the jury was distracted and the prejudice to Defendant was great.

B. Defense Counsel's Failure to Object to Prejudicial Misconduct was Ineffective Assistance under *Strickland*.

Defense counsel failed in her duty to object to obvious prejudicial misconduct. (AA, p. 2276-77), (AA, p. 2303), (AA, p. 2349), (AA, p. 2357), (AA, p. 2364) The State claimed that none of the prosecutor's statements were misconduct, stating that . . . "there was no misconduct for counsel to object to." (RAB, p. 35) The State then

in their Respondent's Answering Brief examines one prosecutorial comment that Defendant alleged was improper vouching: . . .

"You heard from the Dukes. Do you really think they would have concocted all this, those people you heard on the stand? There is no way." (Emphasis added) The State claimed: . . . "this was not vouching." (RAB, p. 35, 36)

The State's insistence this is not improper vouching is incorrect. The State itself defines vouching as: placing "the prestige of the government behind the witness' by providing personal assurance of the witness' veracity." *Browning v. State,* 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (RAB, p. 36) The State then asserts that counsel is not required to make futile objections or arguments and cannot be ineffective for failing to do so. *Ennis v. State,* 122 Nev. 694, 700, 137 P.3d 1095, 1103 (2006). Counsel had a duty to object to apparent instances of prosecutorial misconduct. *Howard v. State,* 106 Nev. 713, 719 (1990)

Defendant respectfully submits that the definition of improper vouching cited by the State in *Browning, supra,* clearly establishes that comments of the prosecutor in this case were improper. The prosecutor clearly tried to suggest to the jury that the jury should accept his personal assurance of the Defendant's guilt. This was the type of misconduct that required reversal. The failure of counsel to object was also

reversible error under *Strickland* because this prevented Defendant from raising this issue on appeal.

V. DEFENSE COUNSEL WAS INEFFECTIVE AT SENTENCING.

Sentencing is a critical phase, if not the most critical phase of any case. In this case where the Defendant faced the possibility of never being released from prison, the sentencing's importance was magnified.

The State argued that Defendant, who received a sentence of sixty (60) years, received effective assistance of counsel at sentencing. (RAB, p. 40-41)

Effective assistance of counsel at sentencing should mean more than just showing up for a ten minute court hearing. It is representation that requires zealous advocacy. It is respectfully submitted defense counsel failed to do the necessary preparation for a difficult sentencing. Counsel failed to prepare any presentence motions and failed to prepare the Defendant adequately for sentence. The result was a sentence of 60 years!

Although the facts of this case were difficult, the defense counsel must nevertheless be found ineffective at sentencing because counsel failed to fulfill the role of counsel by preparing and zealously arguing for mitigation and a less cruelly disproportionate sentence.

Compare the State counsel's sentencing actions in which the State presented numerous witnesses speaking against the Defendant. This carefully prepared presentation by the prosecutor resulted in an extraordinarily lengthy sentence for the Defendant. Defense counsel offered no adequate response to the State's highly compelling live witnesses. (AA, p. 2462-2473) This ineffectiveness requires reversal.

VI. THE AGGREGATE SENTENCE OF SIXTY YEARS WAS UNDULY HARSH AND DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT.

The aggregate sentence of 720 months or sixty years does not realistically allow Defendant any chance of ever being paroled. Even assuming total guilt on all counts with no mitigation whatsoever, it is respectfully submitted that such a sentence for a non-homicide charge is 'shocking to the conscience' and it should be reduced. The Defendant appeared at sentencing at age 49 without a single prior felony conviction. The State's argument that because his sentence is within statutory guidelines the sentence is not cruel and unusual in violation of the Eighth Amendment and ignores changes in the law reflecting evolving standards of decency. Defendant respectfully urges the court to reverse for the Eighth Amendment violation.

VII. DEFENSE COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND IN ARGUING THE NEW TRIAL MOTION.

It is respectfully submitted the Motion for a New Trial could have been easily won. That however would have required defense counsel to have prepared effectively before the new trial motion. If counsel had adequately prepared her investigator, it is respectfully submitted the investigator could have completed the investigation by getting the witness, Kathleen Smith, to sign the affidavit when she was ready to sign it. This oversight led to failure of the District Court to grant the new trial Motion.

The State argues this omission or lack of action by defense counsel, did not amount to ineffectiveness by defense counsel, claiming Appellant's counsel could not force someone to sign an affidavit. (RAB, p. 44) Defendant respectfully disagrees with the State's conclusion. Defense counsel did not need to force the witness to do anything. At one time she stated the content of the affidavit was true. (AA, p. 2403, 2404) She could not give any ascertainable reason why she wouldn't sign the affidavit. She just said: . . . "she didn't want to get involved." (AA, p. 110, 111) Since defense counsel was ineffective in preparing the Motion for New Trial by not getting the witness to sign the affidavit when she was ready, the Petition for Writ of Habeas Corpus should have been granted.

VIII. CUMULATIVE ERROR REQUIRES DEFENDANT'S CONVICTION BE REVERSED.

The State of Nevada first argues in Respondent's Answering Brief that the Nevada Supreme Court has never expressly held that ineffective assistance of counsel claims in a Petition for Habeas Corpus may be aggregated to determine prejudice in post-conviction proceedings (RAB, p. 49) The Nevada Supreme Court has however, in a concurring/dissenting opinion by Justice Cherry and Justice Saitta, acknowledged the existence of cumulative error in habeas litigation in the case of *Nika v. State,* 124 Nev. 1302, 198 P.3d 839 (2008). In that opinion which cited *Harris by and through Ramseyer v. Wood,* the Supreme Court noted: . . . "Although each of the deficiencies described above do not warrant a new penalty hearing, their cumulative effect prejudiced *Nika* and rendered his penalty hearing unfair." *Id*. 1307 (Emphasis added)

The State in Respondent's Answering Brief continued their argument rather simplistically, arguing since there was no error in this case, the cumulative error doctrine does not apply. *United States v. Rivera,* 900 F.2d 1462, 1471 (10th Cir. 1996). (RAB, p. 50) Defendant cannot dispute such a tautology, however Defendant respectfully submits that he has demonstrated multiple errors on the record, both pretrial and during trial in his Opening Brief and this Reply Brief.

Therefore, because there existed multiple errors and because the question of guilt or innocence was close in this case and the quantity of errors were large and the gravity of the crimes charged were extremely serious, the cumulation of errors mandate reversal of the conviction in this case. *Mulder v. State,* 116 Nev. 1, 992 P.2d 845 (2000).

CONCLUSION

For all the reasons raised in all prior pleadings, the Opening Brief and in this Reply Brief, Defendant respectfully submits his counsel was ineffective under *Strickland* because she did not provide effective assistance of counsel and Defendant was prejudiced thereby.

Defendant submits therefore his Petition for Writ of Habeas Corpus should have been granted. This Honorable Court must overrule the District Court's denial of the Petition for Post Conviction Relief. The case should then be remanded for further proceedings consistent with the Petition being granted.

DATED this 10th day of December, 2020.

Respectfully submitted,

//s// Terrence M. Jackson
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply to Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,826 words, which is within the word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of December, 2020.

Respectfully submitted,
/s/ Terrence M. Jackson
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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 10th day of December, 2020, I served a copy of the foregoing: Appellant's Reply to Respondent's Answering Brief, as follows:

[X] Via Electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant and the Attorney General as follows:

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