IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 79752

ANSWER TO PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, TALEEN PANDUKHT, and files this Answer to Petition for Review pursuant to Rule 40B of the Nevada Rules of Appellate Procedure and this Court's Order Directing Answer to Petition for Review, filed January 21, 2021.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 2nd day of February, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
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MEMORANDUM
POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On October 18, 2013, the State filed a Second Amended Information charging Mazen Alotaibi (hereinafter "Appellant") with the following: Count 1 – Burglary (Category B Felony – NRS 205.060); Count 2 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 3 – Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Count 4 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 5 – Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Count 6 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 7 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 8 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); and Count 9 – Coercion (Sexually Motivated) (Category B Felony – NRS 207.190, 207.193, 175.547). I AA 001-004.

On October 23, 2013, following a nine-day jury trial, the jury returned a verdict finding Appellant guilty of the following: Count 1 – Burglary; Count 2 – First Degree Kidnapping; Count 3 – Sexual Assault with a Minor Under Fourteen Years of Age; Count 5 – Sexual Assault with a Minor Under Fourteen Years of Age; Count 7 – Lewdness with a Child Under the Age of 14; Count 8 – Lewdness with a

Child Under the Age of 14; and Count 9 – Coercion (Misdemeanor). VI AA 1056-1059. The jury found Appellant not guilty of Counts 4 and 6 – Lewdness with a Child Under the Age of 14. VI AA 1057-1058.

On January 28, 2015, the district court adjudicated Appellant guilty and sentenced him to the Nevada Department of Corrections (NDC) as follows: Count 1 – a minimum term of twelve (12) months and a maximum term of forty eight (48) months; Count 2 – a definite term of fifteen (15) years with eligibility for parole beginning when a minimum of five (5) years have been served, Count 2 to run concurrent with Count 1; Count 3 – Life imprisonment with eligibility for parole beginning when a minimum of thirty five (35) years have been served, Count 3 to run concurrent with Count 2; Count 5 – Life imprisonment with the eligibility for parole beginning when a minimum of thirty five (35) years have been served, Count 5 to run concurrent with Count 3; Count 7 – Life imprisonment with eligibility for parole beginning when a minimum of ten (10) years have been served, Count 7 to run concurrent with Count 5; Count 8 – Life imprisonment with eligibility of parole beginning when a minimum of ten (10) years have been served, Count 8 to run concurrent with Count 7; and Count 9: credit for time served. VI AA 1087. Appellant received 758 days credit for time served. VI AA 1087. Appellant was also subject to a special sentence of lifetime supervision, which would commence upon his release from any term of probation, parole, or imprisonment. VI AA 1087. Additionally,

pursuant to NRS 179D.460, Appellant would have to register as a sex offender within forty-eight (48) hours of sentencing or release from custody. VI AA 1087. The Judgment of Conviction was filed on February 5, 2015. VI AA 1087.

On October 26, 2015, Appellant filed a Notice of Appeal and his Opening Brief with this Court. VI AA 1088. This Court affirmed Appellant's conviction on February 28, 2017. VI AA 1088. The Opinion was filed on November 9. 2017. VI AA 1088.

Appellant filed a Petition for Certiorari on February 7, 2018. VI AA 1088. The United States Supreme Court denied certiorari on April 16, 2018. VI AA 1088.

On November 28, 2018, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). V AA 918-951. The State filed its Response on December 31, 2018. VI AA 1088. Appellant filed a Reply on January 14, 2019. VI AA 1088.

On June 6, 2019, the district court held an evidentiary hearing, where Appellant's trial counsel, Don Chairez, Esq., testified. VI AA 1085-1086. Following the evidentiary hearing, the district court found trial counsel's testimony credible, and denied Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). VI AA 1085-1097. The district court filed its Decision & Order on September 6, 2019. VI AA 1085-1097.

Appellant filed a Notice of Appeal on September 30, 2019. VI AA 1099. Appellant filed his Opening Brief on March 17, 2020. The State filed its Respondent's Answering Brief on April 16, 2020. On May 20, 2020, Appellant filed his Amended Reply Brief. On October 16, 2020, the Nevada Court of Appeals affirmed the district court's denial of the Petition.

On November 3, 2020, Appellant filed a Petition for Rehearing. The Court of Appeals denied the Petition for Rehearing on December 18, 2020. On January 5, 2021, Appellant filed the instant Petition for Supreme Court Review (hereinafter "Petition"). This Court filed an Order Directing Answer to Petition for Review on January 21, 2021.

STATEMENT OF FACTS

The State hereby incorporates its Statement of the Facts from its original Respondent's Answering Brief in the instant case.

ARGUMENT

Appellant's complaints do not warrant review by this Court. A judgment of the Court of Appeals is a final decision that may not be examined by this Court except on a petition for review. NRAP 40(B)(a). In exercising such supervisory authority this Court considers, " (1) [w]hether the question presented is one of first impression of general statewide significance; … (2) [w]hether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme

Court, or the United States Supreme Court; … [and/or] (3) [w]hether the case involves fundamental issues of statewide public importance." NRAP 40(B)(a)(1)-(3).

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S RULING THAT APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS BECAUSE HE CANNOT DEMONSTRATE PREJUDICE

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263,

1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). This Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 23, 33 (2004).

Appellant claims that requiring a petitioner to prove "affirmation that the petitioner would have exercised any particular option had proper advice been given by counsel" allows the district court to use it as an excuse to not apply the second prong of Strickland. Petition, at 10. Appellant completely overlooks that this is exactly how the prejudice prong of Strickland works—Appellant must show, but for counsel's errors, there is a reasonable probability that the outcome would have been different.

In the instant case, Appellant cannot demonstrate that had counsel discussed the jury instructions at issue with him, the outcome would have been different. First, as the Court of Appeals determined, Appellant did not state at his evidentiary hearing on the matter that he would have agreed to request the jury instruction if his counsel had presented it to him. The Court of Appeals found:

> Alotaibi argued his trial counsel was ineffective for failing to discuss with him whether they should have requested a jury instruction for a lesser-related offense. At the evidentiary hearing conducted in this matter, Alotaibi did not present

> evidence regarding whether he would have agreed to request such an instruction. Thus, Alotaibi did not demonstrate by a preponderance of the evidence that he would have agreed to request such an instruction. Therefore, he did not demonstrate a reasonable probability of a different outcome at trial but for counsel's failure to discuss this issue with him. Accordingly, we conclude the district court did not err by denying this claim, and we
> ORDER the judgment of the district court AFFIRMED.

Order of Affirmance, No. 79752-COA, October 16, 2020, at2.

The Court of Appeals specifically determined that the burden was on Appellant to demonstrate by a preponderance of the evidence that he would have agreed to such an instruction and the outcome of trial would have been different. Instead, Appellant presented no evidence that he would have even requested the instruction, or that requesting the instruction would have changed the outcome of trial. Therefore, the Court of Appeals correctly found that Appellant did not demonstrate prejudice by a preponderance of the evidence.

Second, even had counsel informed Appellant of the jury instruction, Appellant was not entitled to a jury instruction on Statutory Sexual Seduction because Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault with a Minor under Fourteen Years of Age. In its Order of Affirmance, this Court explicitly found that Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault with a Minor Under Fourteen Years of Age:

> In this appeal, we are asked to determine whether, under the statutory definitions existing in 2012, the offense of

statutory sexual seduction is a lesser-included offense of sexual assault when that offense is committed against a minor under 14 years of age. Under the elements test, for an uncharged offense to be a lesser-included offense of the charged offense so that the defendant is entitled to a jury instruction on the lesser offense, all of the elements of the lesser offense must be included in the greater, charged offense. In applying the elements test in this case, we must resolve two issues related to the elements that make up the charged and uncharged offenses. First, we consider whether a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is an element of the offense for purposes of the lesser-included-offense analysis. We hold that it is not. Second, we consider how to apply the elements test when a lesser offense may be committed by alternative means. We hold that the elements of only one of the alternative means need be included in the greater, charged offense to warrant an instruction on the lesser offense.

Applying these principles to the statutes at issue, we conclude that statutory sexual seduction, as defined in NRS 200.364(5)(a) (2009), is not a lesser-included offense of sexual assault even where the victim is a minor, NRS 200.366(1) (2007), because statutory sexual seduction contains an element not included in the greater offense. Thus, the district court did not err in refusing to give a lesser-included-offense instruction on statutory sexual assault.

…

Here, the elements necessary to convict a defendant of sexual assault are contained solely in subsection 1 of NRS 200.366, whereas the age of the victim set forth in subsection 3 is a factor for determining the appropriate sentence for the offense. As clearly indicated by the statute's structure and language, the age of the victim is not essential to a conviction for sexual assault; it serves

> only to increase the minimum sentence that may be imposed. Thus, it is a sentencing factor and not an element of the offense for purposes of the elements test.
>
> …
>
> Here, neither of the alternatives in NRS 200.364(5) is necessarily included in the offense of sexual assault. Both alternatives include the age of the victim (under 16 years of age) as an element of the offense that is required for conviction. 2009 Nev. Stat., ch. 300, § 1.1, at 1296. As explained above, the age of the victim is not an element required for a conviction for the greater offense (sexual assault). The alternative set forth in NRS 200.364(5)(b) also includes an intent element that is not included in the greater offense – that the sexual act was committed "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [the defendant or the victim]." *Id*. **Therefore, under the elements test, statutory sexual seduction is not a lesser-included offense of sexual assault, and Alotaibi was not entitled to an instruction on sexual statutory seduction**. As such the district court properly refused to instruct the jury on statutory sexual seduction. We therefore affirm the judgment of conviction.

V AA 933-935, 942-945 (emphasis added).

This Court found that Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault and Appellant was not entitled to an instruction on Statutory Sexual Seduction. Additionally, the district court determined that the outcome of the trial was not prejudiced because the jury chose to convict Appellant on the greater charge, Sexual Assault with a Minor Under Fourteen Years of Age instead of the lesser-included charge of Lewdness with a Child Under the Age of 14.

It reasoned that counsel's actions did not prejudice Appellant because the jury rejected Lewdness with a Child Under the Age of 14 and found Appellant guilty of Sexual Assault with a Minor Under Fourteen Years of Age.

The district court found as follows:

> This court does not recognize that when a jury is left to decide between complete acquittal or conviction that it might be ineffective assistance for counsel to fail to request a lesser-related offense instruction; however, that is not the case in this matter. Here, the jury already had a lesser-related offense instruction of Lewdness. An additional lesser-related offense instruction of Statutory Sexual Seduction would not have resulted in a different outcome because the jury rejected the lesser-related offense of Lewdness when they convicted the Petitioner of Sexual Assault.
>
> Finally, COURT FINDS, the decision not to request the lesser-related charge of Statutory Sexual Seduction did not prejudice the outcome of the jury.
>
> Regarding the anal and oral penetration of A.J., the jury had the option to (1) convict Petitioner of a ***category A Felony*** for Sexual Assault, (2) convict Petitioner of a ***category A Felony*** for Lewdness, or (c) exonerate the Petitioner. Even if an instruction of a ***category C Felony for Statutory Sexual Seduction*** was included, this court fails to see how said instruction would have changed the outcome of this trial since the jury chose to convict on the greater charge of Sexual Assault instead of the lesser-related charge of Lewdness.
>
> To convict the Petitioner, of Sexual Assault, the jury had to consider whether or not A.J. consented to the sexual penetration. The jury was instructed on the definition of Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to Sexual Assault

> (Instruction 13). Additionally, the jury was instructed that any lewd or lascivious act, ***other than acts constituting the crime of sexual assault***, upon or with the body, of a child under the age for 14 years is Lewdness with a child. (Instruction 14) and told that consent is not a defense to Lewdness (Instruction 16).
>
> Therefore, COURT FINDS, if the jury had determined that A.J. had consented to the penetration, and therefore not a sexual assault, they could have still convicted Petitioner of Lewdness, which is still a lascivious act upon the body of a child under the age of 14 that ***does not constitute the crime of sexual assault***. However, COURT FINDS, the jury chose to convict the Petitioner on the greater charge of Sexual Assault regarding the anal and oral penetration of A.J. Verdict at 2. COURT THEREFORE FINDS, adding another instruction for Statutory Sexual Seduction, which is a lesser charge then Lewdness, would not have had any effect on the outcome of this case.

VI AA 1095-1097.

While the district court found that counsel was ineffective for failing to request the Statutory Seduction jury instruction, it reasoned that it did not prejudice Appellant because the jury rejected Lewdness with a Child Under the Age of 14 and found Appellant guilty of Sexual Assault with a Minor Under Fourteen Years of Age. It found that Count 4's Lewdness with a Child Under the Age of 14 charge coincided with Count 3's Sexual Assault with a Minor Under Fourteen Years of Age charge for the anal touching and penetration, just as Count 6's Lewdness with a Child Under the Age of 14 charge coincided with Count 5's Sexual Assault with a Minor Under Fourteen Years of Age charge for the oral touching and penetration.

VI AA 1094. Based on the verdict, the jury considered and rejected that the sexual penetration that occurred in Counts 3 and 5 was consensual. VI AA 1094-1096. Thus, the district court found that the outcome of the trial was not prejudiced because there was not a reasonable probability that the outcome would have been different. VI AA 1095-1097.

Moreover, Appellant cannot demonstrate prejudice because there was overwhelming evidence of his guilt. A.J. testified that Appellant prevented him from leaving the bathroom, began removing his clothes, and started to touch and kiss him. I AA 088-091. A.J. told Appellant he wanted to leave and kept telling Appellant to stop, but Appellant forced A.J. to bend over and forced his penis in A.J.'s mouth. I AA 090-092. A.J. also testified that Appellant forced him face down onto the bathroom floor, took a green bottle from the hotel bathroom and put a substance onto his penis and A.J.'s buttocks, and Appellant forced his penis into A.J.'s anus. I AA 092-093. Additionally, Appellant's friends testified that they were knocking on the door telling Appellant to "let the kid go." III AA 536. Appellant himself admitted to putting his penis into both A.J.'s mouth and anus. III AA 472. A.J. also had severe injuries to the back of his throat and rectal trauma and tears. IV AA 690-694. Thus, there was overwhelming evidence of Appellant's guilt.

Appellant compares the instant case to McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018), to demonstrate that counsel was ineffective. Petition, at 8-

10. In McCoy, the Supreme Court held that "counsel's admission of guilt **over the client's express objection** is error structural in kind." Id. at 1511, 200 L.Ed.2d at 821(emphasis added). The key point in this language is the qualifier, "over the client's express objection." Id. In McCoy, the defendant "vociferously insisted he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. Further, the defendant "testified in his own defense, maintaining his innocence." Id. at 1507.

The Supreme Court's ruling was clearly limited to instances where a defendant expressly objects to his counsel's concessions. In fact, the Supreme Court expressly stated that McCoy did not overrule its holding in Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551 (2004). McCoy, 138 S. Ct. at 1509, 200 L.Ed.2d at 821. The Court carefully distinguished the two cases by noting that "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon 'was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested' counsel's proposed approach.'" Id. at 1509.

This standard has been upheld by courts across the country. See People v. Burns, 38 Cal. App. 5th 776, 784, 251 Cal. Rptr. 3d 442, 449 (Ct. App. 2019) (stating: "*McCoy* is thus predicated on a client's express objection to defense counsel's concession strategy."); see also People v. Lopez, 31 Cal. App. 5th 55, 66,

242 Cal. Rptr. 3d 451, 459–60 (Ct. App. 2019), review denied (Apr. 17, 2019) (stating: "In sum, we have found no authority, nor has appellant cited any, allowing extension of *McCoy's* holding to a situation where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense."); State v. Clark, 2012-0508 (La. 6/28/19), reh'g denied, 2012-00508 (La. 9/6/19), 278 So. 3d 364 (stating: "The record shows that appellant and counsel were aligned in their strategy to deny involvement in the murder while admitting participation in the attempt to escape. While the nature of their disagreement is not clear, it is clear that this record does not reflect an intractable disagreement about the fundamental objective of the representation."); State v. Barker, 2017-0469 (La. App. 4 Cir. 5/30/18) (holding that a McCoy issue was not ripe where the record did not adequately demonstrate the extent to which defendant disagreed with his counsel's strategy.).

In the instant case, Appellant never specifically requested a Statutory Sexual Seduction instruction on the record, and Appellant fails to apply the facts of McCoy to the instant case. Appellant claims that, based on "McCoy and Strickland together, both Strickland prongs are thus satisfied." Petition, at 10. However, Appellant, once again, completely overlooks the second prejudice prong of Strickland. The district court and the Court of Appeals both correctly found that Appellant cannot demonstrate that counsel's actions prejudiced him and there would have been a

different outcome at trial. Therefore, Appellant's argument applying McCoy to the instant case is without merit because Appellant cannot demonstrate prejudice.

The Court of Appeals ruling did not issue a decision that was inconsistent "with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court[.]" NRAP 40(B)(a)(2). In fact, the Court of Appeals strictly followed long-standing United States Supreme Court precedent by applying the standard of Strickland and finding that Appellant has failed to demonstrate the required second prejudice prong. Appellant claims that the Court of Appeals erred by finding sua sponte that there was no prejudice pursuant to Strickland and reaching its conclusion for a different reason than the district court. Petition, at 2. Instead of arguing the Court of Appeals found a ruling that was inconsistent with the Court of Appeals, the Nevada Supreme Court, or the United States Supreme Court as required by NRAP 40(B)(a)(2), Appellant argues that the Court of Appeals found a ruling inconsistent with the *district court*. It does not matter how the Court of Appeals reached its conclusion. The Court of Appeals and the district court both reached the same conclusion—Appellant cannot demonstrate prejudice pursuant to Strickland.

Finally, Appellant requests a new trial or a second evidentiary hearing to remedy this "novel proposition relied upon by the Court of Appeals." Petition, at 11. After the decision of the Court of Appeals that Appellant was not prejudiced because he did not testify at his evidentiary hearing that he would have requested a Statutory

Sexual Seduction jury instruction, Appellant now wants a second evidentiary hearing so he can testify he would have requested this instruction. The Court of Appeals decision found that Appellant could have demonstrated prejudice if he testified that he wanted the jury instruction and would not have waived it. Appellant should not be allowed to now provide additional testimony at this point in the proceedings in an attempt to refute the Court of Appeals' decision, as such testimony would most certainly be self-serving and unreliable.

As such, the Court of Appeals clearly considered the correct law and jurisprudence in determining that Appellant's argument lacked merit. No matter which way this Court interprets the merits of this case, the outcome is still the same that Appellant was not prejudiced by the lack of the Statutory Sexual Seduction jury instruction pursuant to Strickland. Appellant cannot, and has failed to demonstrate, that there is any reasonable probability the result of the trial would have been different pursuant to Strickland. Therefore, this Court should allow the decision of the Court of Appeals to stand.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Petition for Review be DENIED.

/ / /

/ / /

Dated this 2nd day of February, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points, contains 4,055 words.

Dated this 2nd day of February, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 2, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY */s/ J. Garcia*
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