

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY LEE GRUNDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43104

FILED

JAN 12 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Ricky Grundy's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

In 2000, the district court convicted Grundy, pursuant to a jury verdict, of second-degree kidnapping with the use of a deadly weapon, battery with the use of a deadly weapon, battery with intent to commit sexual assault, sexual assault with a deadly weapon, and sexual assault with a deadly weapon causing substantial bodily harm. The district court sentenced Grundy to two consecutive prison terms of 38 to 156 months for kidnapping, one prison term of 30 to 96 months for battery, one prison term of 35 to 156 months for battery with intent to commit sexual assault, two prison terms of 10 to 25 years for sexual assault with the use of a deadly weapon, and two prison terms of 15 to 40 years for sexual assault with a deadly weapon causing substantial bodily harm. The district court imposed the kidnapping and battery charges to run consecutively and the sexual assault charges to run concurrently. On direct appeal, we reversed

and remanded for a new trial Grundy's convictions for sexual assault with a deadly weapon and sexual assault with a deadly weapon causing substantial bodily harm.¹ The remittitur issued on July 25, 2002.

On May 7, 2003, Grundy filed a proper person petition for a writ of habeas corpus. The district court appointed counsel, heard argument, and on March 31, 2004, denied Grundy's petition. This appeal follows.

Grundy first claims that his conviction is unconstitutional because the district court erroneously instructed the jury that a baseball bat is a deadly weapon instead of allowing the jury to make this factual determination on its own. He concedes that trial counsel failed to object to the jury instruction 12 during the trial and that appellate counsel failed to properly raise the instruction as an issue on direct appeal.² Nonetheless, Grundy suggests that the issue was preserved because it was discussed

¹Grundy v. State, Docket No. 35569 (Order Affirming in Part, Reversing in Part and Remanding, May 10, 2002).

²Jury instruction 12 provided:

A deadly weapon is any weapon, device, instrument, material, or substance which under the circumstances in which it was used, attempted to be used, or threatened to be used is readily capable of causing substantial bodily harm or death.

You are instructed that a baseball bat is a deadly weapon.

during oral argument on direct appeal and this court did not decide its merits. Whether Grundy preserved this claim directly or not, our analysis of the claim as a basis for his assertions of ineffective counsel reveals that it warrants no relief.

Grundy claims that trial counsel was ineffective for failing to object to jury instruction 12. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."³ "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."⁴ To demonstrate prejudice, the petitioner must show that but for counsel's mistakes there is a reasonable probability that the result of the trial would have been different.⁵ "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."⁶

Grundy committed his crimes after October 1, 1995, and is therefore subject to the provisions of the 1995 amendment to NRS

³Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

⁴Id. (citing Strickland, 466 U.S. at 697).

⁵See Strickland, 466 U.S. at 694; Riley v. State, 110 Nev. 638, 650 n.7, 878 P.2d 272, 280 n.7 (1994).

⁶Strickland, 466 U.S. at 690.

193.165.⁷ These provisions include the functional test that the district court included in jury instruction 12.⁸ Grundy has not shown that at the time of trial counsel's representation it was an error for a district court to determine that an instrument is a deadly weapon under the functional test.⁹ Therefore, Grundy has not demonstrated that trial counsel was deficient for failing to object to the instruction. Moreover, Grundy has failed to show that he was prejudiced by trial counsel's failure to object to the instruction. He has not demonstrated a reasonable probability that the jury would have determined that a baseball bat is not a deadly weapon if it had been instructed to make the determination. The evidence showed that Grundy severely abused and substantially harmed the victim with a bat. Thus, we conclude that Grundy failed to demonstrate that trial counsel was ineffective.

Grundy also claims that appellate counsel was ineffective for failing to argue in his opening brief that jury instruction 12 was improper. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance test' set forth in Strickland v. Washington."¹⁰ Appellate counsel is not required to raise every

⁷See 1995 Nev. Stat., ch. 455, § 2, at 1431.

⁸See NRS 193.165(5)(b).

⁹Cf. Buff v. State, 114 Nev. 1237, 1243, 970 P.2d 564, 568 (1998) ("Generally, it is the district court's duty to determine whether the instrument is an inherently dangerous weapon.").

¹⁰Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

nonfrivolous issue on direct appeal.¹¹ Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.¹² "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹³ This court presumes that counsel fully discharged their duties; "[t]his presumption can only be overcome by strong and convincing proof to the contrary."¹⁴

Our review of the record reveals that at trial Grundy affirmatively waived any objections he had to the jury instructions. The failure to raise an objection with the district court precludes appellate consideration of an issue unless the appellate can demonstrate plain error affecting his substantial rights.¹⁵ We presume that appellate counsel recognized that issues regarding jury instructions had little chance of being considered by this court and focused instead on issues he felt had a reasonable probability of success. Grundy has failed to overcome the presumption that appellate counsel fully discharged his duties or to show

¹¹Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

¹²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹³Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁴Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (internal quotations omitted).

¹⁵NRS 178.602; Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

that the outcome of his direct appeal would have been different if appellate counsel raised the issue in his opening brief.

Grundy also asserts that counsel was ineffective in failing to argue that instruction 12 violated Apprendi v. New Jersey, where the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."¹⁶ This rule applies to Grundy because Apprendi was decided while Grundy's case was pending on direct review.¹⁷ But even assuming that the instruction offended Apprendi, we conclude that appellate counsel still could not establish plain error. Harmless-error review of an Apprendi error is appropriate,¹⁸ and any error here was harmless and hardly plain because, as discussed, Grundy was not prejudiced. We conclude that Grundy has failed to demonstrate that appellate counsel was ineffective.

Fourth, Grundy claims that he was convicted as a result of false testimony proffered by the State. Grundy raised a substantially similar issue on direct appeal, and the doctrine of the law of the case prevents further litigation of this issue.¹⁹

Fifth, Grundy claims that his arrest was unconstitutional and therefore the trial court never properly established jurisdiction over him.

¹⁶530 U.S. 466, 490 (2000).

¹⁷Powell v. Nevada, 511 U.S. 79, 84 (1994).


¹⁸See Johnson v. State, 118 Nev. 787, 800, 59 P.3d 450, 459 (2002).

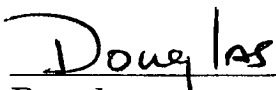
¹⁹Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

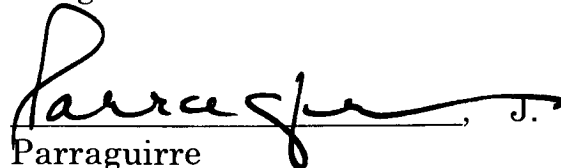
Grundy failed to raise this issue at trial or on direct appeal, and we conclude that he has not shown good cause for this failure or prejudice.²⁰

Sixth, Grundy claims that he is entitled to a new trial due to the cumulative effect of these constitutional errors. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."²¹ However, because we have determined that none of Grundy's claims have merit, we conclude that he was not deprived of a fair trial and due process of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

²⁰See NRS 34.810(1)(b).

²¹Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

cc: Hon. Nancy M. Saitta, District Judge
Longabaugh Law Offices
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