

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LAMAR RHYMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48410

FILED

MAY 24 2007

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

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

On December 6, 2004, the district court convicted appellant, pursuant to a jury verdict, of two counts of sexual assault. The district court sentenced appellant to serve two consecutive terms of 10 to 25 years in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on October 19, 2005.

On July 31, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

¹Rhymes v. State, Docket No. 44463 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, September 23, 2005).

conduct an evidentiary hearing. On October 19, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

Appellant's convictions resulted from his digitally penetrating the two victims while giving them massages as part of his massage therapy training. Appellant claimed counsel was ineffective for failing to locate patrons and other massage students and obtain their testimony that testify that appellant had massaged them without incident, that other people were nearby when the victims were massaged, that sexual contact was sometimes expected by clients, and that each massage concludes with a visit by the student's supervisor with the client. Appellant failed to support this claim with any specific factual allegations.⁴ Further, even had these witnesses been located and so

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 697.

⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on
continued on next page . . .

testified, appellant failed to explain how it might have changed the outcome of the proceedings given the two victims' testimony that appellant digitally penetrated⁵ them without their consent and of another young woman whom appellant touched inappropriately while telling her he was studying massage therapy.⁶ We conclude the district court did not err in denying these claims.

Appellant also claimed counsel was ineffective for failing to locate patrons who had "shushed" victim Carolyn Crawford during her massage, apparently to rebut Crawford's testimony that no one was nearby when she was assaulted and to establish that Crawford consented or appellant reasonably believed she consented. Appellant failed to support this claim with any specific factual allegations.⁷ Further, appellant failed to explain how such testimony would have changed the result of the proceedings in light of the evidence noted above.

Appellant next claimed counsel was ineffective for failing to investigate Crawford's psychiatric history and move for a psychiatric

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"bare" or "naked" claims for relief that are unsupported by any specific factual allegations).

⁵See NRS 200.364, which defines sexual penetration as including intrusion into the "genital" openings, not necessarily vaginal openings, of another.

⁶Admission of this testimony was held to be proper in appellant's direct appeal. *Rhymes v. State*, Docket No. 44463 (Order of Affirmance, September 23, 2005).

⁷See *Hargrove*, 100 Nev. at 502, 686 P.2d at 225.

evaluation of Crawford. Appellant claimed Crawford disclosed in her paperwork at the massage therapy clinic that she was taking "certain psychotropic (sic) medication." Appellant failed to provide any factual support for these claims,⁸ and we conclude the district court did not err in denying them.

Appellant also claimed counsel was ineffective for failing to investigate and obtain expert testimony that appellant could have touched each victim's clitoris without actually penetrating her. Appellant failed to support this claim with any specific factual allegations.⁹ We conclude the district court did not err in denying this claim.

Appellant next claimed counsel was ineffective for failing to challenge the State's argument in closing that appellant's acts were without the victims' consent, which appellant argued is not the same as against the victim's will, the language of the sexual assault statute, NRS 200.366(1). Appellant provided no citation to legal authority for this proposition. This court has frequently discussed the elements of sexual assault using the terms "consent" and "lack of consent,"¹⁰ as does appellant in his next claim. We conclude the district court did not err in denying this claim.

Appellant also claimed counsel was ineffective for failing to request a jury instruction on the defense of reasonable mistaken belief of the victims' consent. "[A] proposed instruction on reasonable mistaken

⁸See id.

⁹See id.

¹⁰See, e.g., Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

belief of consent must be given when requested as long as some evidence supports its consideration."¹¹ Appellant argued Crawford's consent was suggested by her failure to object or cover herself when her breasts and lower body became exposed during the massage and "ma[king] no objection to the Petitioner massaging the intimate areas immediately adjacent to her vagina and . . . voic[ing] no objection even after Petitioner had placed his finger inside her." Appellant argued victim Granik's consent to digital penetration was suggested by her failing to object to her breasts becoming exposed during the massage and by her removing her jeans after telling appellant to massage her feet. Based on appellant's argument, we conclude that appellant failed to establish that such an instruction would have been given if requested or could have changed the outcome of the proceedings. We therefore conclude the district court did not err in denying this claim.

Appellant also claimed he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.¹²

Appellant claimed appellate counsel was ineffective for not arguing that the evidence was insufficient to support his convictions.

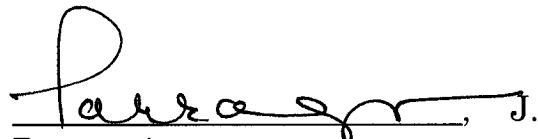
¹¹Honeycutt v. State, 118 Nev. 660, 670, 56 P.3d 362, 369 (2002), overruled in part on other grounds by Carter, 121 Nev. 759, 121 P.3d 592.

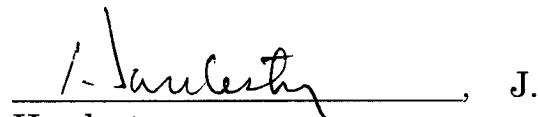
¹²Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).


Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Our review of the record on appeal reveals that both victims testified that appellant digitally penetrated them and they did not want him to. We therefore conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹³ However, this court remanded appellant's direct appeal, instructing the district court to enter an amended judgment of conviction stating that appellant was convicted pursuant to a jury verdict, not a guilty plea. The record contains no corrected order. We again direct the district court to correct this clerical error. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the clerical error in the judgment of conviction.


Parraguirre


Hardesty


Saitta

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge
Michael Lamar Rhymes
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk