

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEWAN BLACKBURN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49944

**FILED**

MAR 28 2008

TRACIE W. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Dewan Blackburn's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Blackburn was convicted, pursuant to a jury verdict, of burglary while in the possession of a firearm (counts I, VI), first-degree kidnapping with the use of a deadly weapon (counts II-III, VIII-IX), robbery with the use of a deadly weapon (counts IV-V, XI-XII), first-degree kidnapping of a victim 60 years of age or older with the use of a deadly weapon (count VII), robbery of a victim 60 years of age or older with the use of a deadly weapon (count X), and possession of stolen property (counts XIV-XVI). The district court sentenced Blackburn to serve two prison terms of 2-5 years for counts I and VI, five prison terms of 2-5 years plus equal and consecutive prison terms for counts IV-V and X-XII, three prison terms of 1-3 years for counts XIV-XVI, and five prison terms of 5-15 years plus equal and consecutive prison terms for counts II-III and VII-IX;

all of the counts were ordered to run concurrently. This court affirmed Blackburn's judgment of conviction and sentence on direct appeal.<sup>1</sup>

On March 27, 2006, Blackburn filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and Blackburn filed a reply to the opposition. The district court appointed counsel to represent Blackburn, and counsel filed a supplement to the petition and a motion for a new trial based upon new evidence. The State opposed the supplemental petition and motion and Blackburn filed a reply. The district court heard arguments from counsel and, on June 29, 2007, entered an order denying Blackburn's petition and motion. This timely appeal followed.

First, Blackburn contends that the district court erred by finding that trial counsel was not ineffective for failing to file a motion to sever his trial from his co-defendant's. Blackburn argues that there was "significant amount evidence connecting [his co-defendant] with the alleged crimes," and that he was convicted "merely due to" sitting next to him during the trial. Blackburn also claims that he was prejudiced by the failure to sever because he was unable to call his co-defendant to the stand to testify on his behalf. We disagree.

Blackburn's co-defendant made an oral motion to sever and Blackburn actually opposed the motion. The district court denied the

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<sup>1</sup>Blackburn v. State, Docket No. 44831 (Order of Affirmance, January 19, 2006).

motion. While resolving his direct appeal, this court stated that, in light of the evidence of Blackburn's guilt, any error was harmless beyond a reasonable doubt.<sup>2</sup> At the hearing on the habeas petition, the district court recalled that trial counsel for Blackburn "persuaded and argued vociferously" against severing the case, and that "[i]t was his tactical and strategic position that he wanted this case tried with the other guy," who would have, possibly, appeared more culpable and violent than Blackburn.<sup>3</sup> In rejecting Blackburn's contention, the district court found that trial counsel made a strategic decision to oppose severance "because he thought it was going to work to his client's advantage."

We conclude that the district court did not err by finding that counsel was not ineffective. The district court's factual findings regarding

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<sup>2</sup>See Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342-43 (1989) (denial of a motion to sever is subject to harmless error analysis); see also Honeycutt v. State, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002) (reversal is warranted only if joinder is manifestly prejudicial and renders the trial fundamentally unfair), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

<sup>3</sup>Blackburn has not provided this court with the portion of the trial transcript where the issue of severance was discussed. The appellant has the burden to provide this court with an adequate record enabling this court to review assignments of error asserted on appeal. See Greene v. State, 96 Nev. 555, 612 P.2d 686 (1980); see also Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("[a]ppellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal'" (quoting NRAP 30(b)(3))).

a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>4</sup> Blackburn has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Blackburn has not demonstrated that the district court erred as a matter of law.<sup>5</sup>

Second, Blackburn contends that the district court erred by finding that appellate counsel was not ineffective for failing to file a motion for a new trial based upon newly discovered evidence. Blackburn's co-defendant allegedly provided appellate counsel with an affidavit stating that Blackburn "was not a knowingly and willing participant" in the second of the two robberies and that he, initially, falsely implicated Blackburn because he "was scared." We conclude that Blackburn is not entitled to relief.

NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." In order to grant a motion based on newly discovered evidence, the district court must find that the evidence was, in fact, "newly discovered; material to the defense; such that even with the

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<sup>4</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>5</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (stating that the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances" (citing Strickland v. Washington, 466 U.S. 668, 691 (1984))), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; [and] such as to render a different result probable upon retrial.”<sup>6</sup> “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.”<sup>7</sup>

At the hearing on Blackburn’s petition and motion, the district court found as follows:

As to the affidavit sworn out by [Blackburn’s co-defendant], I find it unbelievable on its face, and I don’t find [the co-defendant] to have any credibility whatsoever.

In rejecting his request for a new trial, the district court also found that the State presented a “strong” case against Blackburn and that appellate counsel was not ineffective for failing to file a motion for a new trial. We agree and conclude that Blackburn has failed to demonstrate that the omitted issue had a reasonable probability of success on appeal, and therefore, that appellate counsel was ineffective for failing to raise it. Accordingly, we conclude that the district court did not err by rejecting this claim.

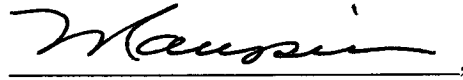
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<sup>6</sup>Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).

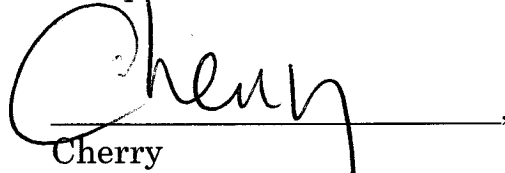
<sup>7</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Having considered Blackburn's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, J.

Maupin

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

cc: Hon. Lee A. Gates, District Judge  
Law Offices of Cynthia Dustin, LLC  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk