

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARDO HERNANDEZ-MURILLO,

No. 34683

Appellant,

FILED

vs.

DEC 10 2001

THE STATE OF NEVADA,

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

Respondent.

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from a district court order dismissing appellant's post-conviction petition for a writ of habeas corpus.

On June 5, 1998, the district court convicted appellant Leonardo Hernandez-Murillo, pursuant to a jury verdict, of two counts of second-degree kidnapping, two counts of false imprisonment, and one count of battery. The district court sentenced Hernandez-Murillo to serve two consecutive terms of 24 to 110 months in prison for the kidnapping counts, two concurrent terms of 1 year in jail for the false imprisonment counts, and a concurrent term of 6 months in jail for the battery count.

Thereafter, Hernandez-Murillo pursued a direct appeal in this court. He argued that the erroneous admission of prior bad act evidence warranted reversal of his conviction. This court concluded that any error was harmless because the evidence of guilt was overwhelming.¹ The remittitur issued on December 22, 1998.

On April 28, 1999, Hernandez-Murillo 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 Hernandez-Murillo or to conduct an evidentiary hearing. On August 2, 1999, the district court

¹Hernandez-Murillo, Docket No. 32670 (Order Dismissing Appeal, November 30, 1998).

summarily dismissed the petition because it failed to set forth any ground that would warrant relief.² This appeal followed.

In his petition, Hernandez-Murillo contended that trial and appellate counsel provided ineffective assistance. Hernandez-Murillo claimed that trial counsel provided ineffective assistance by failing to: (1) adequately inform appellate counsel of appealable issues; and (2) file a motion for a new trial based on the guilty verdicts for charged offenses and uncharged lesser-related offense. Hernandez-Murillo also claimed that appellate counsel provided ineffective assistance by failing to: (1) request a transcript of closing arguments and raise meritorious issues regarding prosecutorial misconduct during closing argument; (2) challenge the sufficiency of the evidence to support the kidnapping convictions; and (3) argue that Hernandez-Murillo could not be convicted of second-degree kidnapping and battery because the jury was instructed on battery as a lesser related offense.

Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.³ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors prejudiced the defense.⁴ To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.⁵ To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.⁶ The court

²The district court's order does not include specific findings of fact and conclusions of law as required by NRS 34.830(1). We remind the district court that in the future any order resolving a post-conviction petition must comply with NRS 34.830(1). Nonetheless, we conclude that the deficiencies in the order in this case do not entitle Hernandez-Murillo to any relief other than that provided in this order.

³Strickland v. Washington, 466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 697.

⁵Id. at 694.

⁶Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.⁷

Based on our review of the record on appeal, we conclude that Hernandez-Murillo was entitled to relief on his claims related to the battery conviction. The State charged Hernandez-Murillo by information with two counts of second-degree kidnapping and two counts of false imprisonment. In addition to those charges, the district court instructed the jury on battery as a lesser-related offense of kidnapping and false imprisonment. The relevant instruction stated:

Battery is a lesser related charge to kidnapping and false imprisonment. In other words, you may find the defendant guilty of battery as well as kidnapping and false imprisonment. A finding of guilt to one of these charges does not prevent a finding of guilt on any other charge.

The jury then returned guilty verdicts on all four charged offenses and the uncharged, lesser-related offense of battery.

At the time of trial in this case, the district court could instruct the jury on a lesser-related offense when three conditions were satisfied: (1) the lesser offense was closely related to the charged offense; (2) a conviction on the related offense would have been consistent with the theory of defense; and (3) evidence of the related offense existed.⁸ The justification for giving instructions on lesser-related offenses was that such instructions decrease the risk that a jury might convict a defendant where the only option is conviction or acquittal and the evidence shows that the defendant is guilty of some crime but not necessarily the one charged.⁹ As we explained in Moore v. State, "[s]uch an instruction permits conviction of a defendant who is clearly guilty of a lesser related offense, and avoids acquittal because the prosecution fails to prove the charged offense."¹⁰

The instruction given in this case and the resulting verdicts are incompatible with the purpose for which lesser-related instructions are

⁷Strickland, 466 U.S. at 697.

⁸Moore v. State, 105 Nev. 378, 383, 776 P.2d 1235, 1239 (1989), overruled by Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000).

⁹Id. at 383, 776 P.2d at 1238.

¹⁰Id.

given. The theory behind such instructions does not support conviction for both the greater and the lesser offenses. We conclude that this claim would have had a reasonable probability of success on appeal because Hernandez-Murillo could not be convicted of both the greater and lesser offenses. Accordingly, we conclude that appellate counsel provided ineffective assistance by failing to raise this issue and we remand this matter for the district court to vacate the conviction and sentence for battery.¹¹

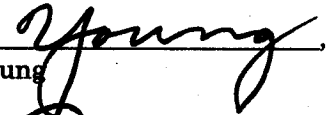
As for the remaining ineffective assistance claims raised in the petition, we conclude that they lack merit. Given our conclusion on direct appeal that the State presented overwhelming evidence of guilt, there is no reasonable probability that the insufficient evidence claim advanced by Hernandez-Murillo would have been successful on appeal. There is also no reasonable probability that the prosecutorial misconduct claim advanced by Hernandez-Murillo would have been successful on appeal. Trial counsel objected to the prosecutor's comment, after summing up the evidence, that the victim "was very truthful about everything that she said." Although the district court did not explicitly sustain or overrule the objection, it commented, "there is simply an instruction which gives the credibility of the witnesses as a job left to you as jurors. I believe the instruction speaks for itself." The prosecutor then continued his closing argument with the following statement, "As you know, nothing that I say is evidence." We conclude that to the extent that the prosecutor improperly injected his personal opinion of the victim's credibility, the error was sufficiently cured by the district court's instruction that it was for the jury alone to determine the credibility of the witnesses. Accordingly, we conclude that this claim would not have been successful on appeal. Because these claims would have had no reasonable probability of success on appeal, we conclude that Hernandez-Murillo was not prejudiced by counsel's failure to raise them.¹²

¹¹On October 23, 2001, we ordered the State to show cause why this case should not be remanded for the district court to vacate the conviction and sentence for battery. In response, the State indicates that it is not opposed to a remand for this purpose.

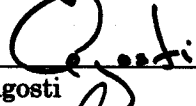
¹²We also reject Hernandez-Murillo's claim that cumulative error warrants reversal of his conviction.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹³ Accordingly, we


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁴



Young J.



Agosti J.



Leavitt J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Leonardo Hernandez-Murillo
Washoe County Clerk

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

¹⁴We have considered all proper person documents filed or received in this matter. We conclude that Hernandez-Murillo is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.