IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD BRET GONZALEZ,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN IGNACIO,

Respondent.

No. 36885

FILED

DEC 14 2001

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On November 2, 1998, appellant Harold Bret Gonzalez was convicted, pursuant to a jury verdict, of one count of battery with the intent to commit sexual assault. The district court sentenced appellant to serve a prison term of 60 to 150 months. Appellant did not file a direct appeal. On November 3, 1999, appellant filed a post-conviction petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied the petition.

In the petition, appellant presented claims of ineffective assistance of counsel.[1] The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[2] Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

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[1]In the petition, appellant also claimed that the sentence imposed constituted cruel and unusual punishment, and that the district court erred in failing to sua sponte give a lesser-included offense instruction. Although the district court order addresses the merits of these claims, such claims should have been summarily dismissed because they should have been raised in a direct appeal. See NRS 34.810(1)(b)(2).

[2]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

01-21037

Accordingly, for the reasons stated in the attached order of the district court, the order of the district court is AFFIRMED.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Richard Wagner, District Judge
Attorney General/Carson City
Humboldt County District Attorney
Robert Bruce Lindsay
Humboldt County Clerk

File No. CR 96-3743

Dept. No. 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * * *

HAROLD BRET GONZALEZ,

Petitioner,

vs.

JOHN IGNACIO, WARDEN, NEVADA STATE PRISON,

Respondent.

ORDER

On November 3, 1999 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction). On the same date points and authorities in support of said petition were also filed. On November 8, 1999 this Court ordered the State to respond. On November 12, 1999 Petitioner, through his appellant counsel, Bruce Lindsay, filed an Amended Affidavit of Trial Counsel, J. Rayner Kjeldsen. Thereafter, on December 8, 1999 Respondent, through his counsel, filed an Opposition to Writ of Habeas corpus (Post-Conviction).

Later, on March 10, 2000 the Petitioner, through his counsel, filed a reply to the opposition.

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On August 2, 2000 the Court conducted a hearing on the writ.

The Court, having reviewed the above documents and the evidence submitted at the hearing, as well as listened to the testimony of the witnesses and expert witness, finds and concludes as follows:

The thrust of Petitioner's writ is based on the contention that his attorney was ineffective based on his alleged failure to hear sufficiently during the last day of trial and his failure to investigate potential defense witnesses. The Court finds that these contentions are not supported by the record.

The Court finds that counsel was effective and heard and understood what transpired during the motion hearings, jury voir dire, opening statements, direct and cross-examination during the State's case-in-chief and during closing arguments.

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The standard of review for claims involving ineffective assistance of counsel is well stated in the case of Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). In that case the Court stated:

> Claims of ineffective assistance of counsel are reviewed under the "reasonably effective assistance" standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388, 1389 (1990). This standard requires the defendant to show that counsel's assistance was "deficient" and,

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> secondly, that the deficient assistance "prejudiced" the defense. Strickland, 466 U.S. at 687, 104. S.Ct. at 2064.
>
> More particularly, "deficient" assistance requires a showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S.Ct. at 2064. In order to eliminate the distorting effects of hindsight, courts indulge in a strong presumption that counsel's representation falls within the broad range of reasonable assistance. If the defendant shows that counsel's performance was deficient, the defendant must show that, but for counsel's errors, the result of the trial would probably have been different. Id. at 694, 104 S.Ct. at 2068; Davis v. State of Nevada, 107 Nev. 600, 601-02, 817 P.2d 1169, 1170 (1991).

In addition the standard by which a claim of ineffectiveness is to be tested is whether the performance of counsel was of such low caliber as to reduce the trial to a sham, farce, or pretense. Grondin v. State, 97 Nev. 456, 634 P.2d 458 (1981).

II. THE FAILURE TO INVESTIGATE POTENTIAL DEFENSE WITNESSES

Petitioner's counsel was a very experienced trial attorney. He obtained his law degree from Stanford. He was admitted to the Nevada Bar in April 1957. He started practicing May 1, 1958. (Habeas Corpus Trial Transcript [hereinafter referred to as H.C. TR], p. 5.) In 1987 he went to work for the State Public Defender's office. He has had many trials. (H.C. TR, p. 12.)(H.C. TR, p. 6.) He has tried 25 cases that started out as capital cases. (H.C. TR, p. 6.)

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Petitioner's counsel testified that he had two investigators at the State Public Defender's office. Habeas Corpus Transcript (H.C. TR, p. 52). Counsel used investigator NGYUEN. The investigator tried to reach the witnesses by phone from Carson City. (H.C. TR, p. 53.) The investigator may have contacted a Benjamin Real in Colorado. (H.C. TR, p. 54). The primary contact with this individual came through the Winnemucca office. (H.C. TR, p. 54.) Counsel reviewed statements from some of the witnesses. (H.C. TR, p. 55.) This review indicated what he hoped the testimony of the witnesses would be. Counsel also cross-examined the victim and one of the State's percipient witnesses during the preliminary hearing. (H.C. TR, p. 56.) Thus, prior to trial counsel knew what those witnesses' testimony would be. Counsel reviewed the preliminary hearing transcript prior to trial. The testimony presented at the preliminary hearing and the testimony presented at the time of trial was basically the same. (H.C. TR, p. 56.) Petitioner's counsel and Mr. West interviewed a witness at the jail and tried to see another witness at a casino in Winnemucca. (H.C. TR, p. 56.) Counsel called the bartender, Shantelle Woods, an eye witness to the incident to testify that nothing happened. (H.C. TR, p. 62, 63; pgs. 314-320.)

Counsel's preparation was such that he believed he was prepared and able to represent the Petitioner prior to trial (H.C. TR, p. 13; p. 58.) Counsel reviewed all the

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records, pleadings, police reports and the discovery which he had in preparation for trial. (H.C. TR, p. 8.)

III. COUNSEL'S ABILITY TO HEAR

Counsel contends that he could not hear properly on the second day of trial.

On the first day of trial, counsel did not experience any physical problems. H.C. TR, pg. 13, ll. 20-22. Counsel was wearing a hearing aid in his right ear on the first day of trial (H.C. TR, pg. 14, ll. 1-2.) Counsel claims that on the second day of trial when he was putting on a defense that he did not hear everything that was said. (H.C. TR, pg. 14, ll. 13-22.)

Throughout the second day of trial in this case, the defense counsel, J. Rayner Kjeldsen, only stated one time that he could not hear a witness. The transcript states:

> Q Will you describe what happened?
>
> A The first time he came up, we all introduced ourselves, and he seemed to be a nice gentleman.
>
> Q What did you do?
>
> MR. KJELDSEN: Could the witness speak up, please, I can't hear her.
>
> THE COURT: Pull up to the microphone just a little bit. Thank you.
>
> (Jury Trial Transcript [hereinafter referred to as TR], p. 281, ll. 19-25; p. 282, ll. 1-2.)

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On one other occasion defense counsel asked the witness immediately after starting to testify to speak up in order for the jury to hear. The transcript states:

THE COURT: You may proceed.

ALEX VIGIL

called as a witness by the Defense, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KJELDSEN:

Q Where do you live, please?

A 675 Wesso Street, Winnemucca.

Q Could you please speak up for the jury so they can all hear?

A Sure.

Q And how long have you lived in Winnemucca?

A Off and on about 15, 16 years.

Q What is your business, profession or occupation?

A I'm a bartender at the Red Lion.

(TR, p. 326, ll. 9-20.)

This is not unusual in light of the fact that the witness had just commenced his testimony.

The overwhelming evidence in this case indicates that defense counsel's hearing was adequate throughout the trial. Counsel "heard" the Court's question and immediately responded without hesitation to the presence of the jury on five separate occasions.

THE COURT:

* * *

Will counsel stipulate to the presence of the jury and the alternate?

MR. HAFEN: The State does, your Honor.

MR. KJELDSEN: So stipulated, your Honor. (TR, p. 274, ll 12-15.)

THE COURT:

* * *

Counsel stipulate to the presence of the jury and the alternate?

MR. HAFEN: The State does, your Honor.

MR. KJELDSEN: So stipulated, your Honor. (TR, p. 312, ll. 19-22.)

Counsel stipulate to the presence of the jury and the alternate?

MR. HAFEN: The State does, your Honor.

MR. KJELDSEN: So stipulated, your Honor. (TR, p. 349, l. 15; pg. 350, ll. 1-2.)

THE COURT: Counsel stipulate to the presence of the jury and the alternate?

MR. HAFEN: The State does, your Honor.

MR. KJELDSEN: So stipulated, your Honor. (TR, pg. 389, l. 1; pg. 390, ll. 1-3.

THE COURT: Counsel stipulate to the presence of the jury and the alternate?

MR. HAFEN: The State does, your Honor.

MR. KJELDSEN: So stipulated, your Honor. (TR, pg. 396, l. 25; p. 397,

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ll. 1-3.

On six separate occasions counsel "listened" and properly responded to the Court's inquiry as to whether a particular witness may be excused:

> THE COURT: May this witness be excused?
>
> MR. KJELDSEN: Yes. (TR, pg. 311, ll. 7-9.
>
> THE COURT: May this witness be excused?
>
> MR. KJELDSEN: She may. (TR, pg. 325, ll. 16-17.)
>
> THE [COURT] CLERK: May this witness be excused?
>
> MR. KJELDSEN: He may be. (TR, pg. 348, ll. 18-19.)
>
> THE COURT: May this witness be excused?
>
> MR. KJELDSEN: He may be.
>
> THE COURT: Sir?
>
> MR. HAFEN: Yes, your Honor.
>
> THE COURT: You may be excused. (TR, pg. 365, ll. 17-21.)
>
> THE COURT: All right. May this witness be excused?
>
> MR. KJELDSEN: She may be. (TR, pg. 370, ll. 19-21.)
>
> THE COURT: Now may she be excused?
>
> MR. KJELDSEN: She may be.
>
> THE COURT: Ma'am, you are excused. Thank you. (TR, pg. 391, l. 25; pg. 392, ll. 1-3.)

On nine occasions defense counsel "heard" the Court's directive to proceed on cross-examination, direct examination or redirect examination. Counsel immediately responded as the court directed:

> THE [COURT] CLERK: You may cross-examine, sir.
>
> CROSS-EXAMINATION
>
> BY MR. KJELDSEN:
>
> Q Mrs. Rice, when did you fill out your statement to Officer Bill Hill? (TR, pg. 297, ll. 14-19.)
>
> THE COURT: Thank you.
>
> You may proceed on direct examination, sir.
>
> SHONTELL WOODS
>
> called as a witness by the Defense, was examined and testified as follows:
>
> DIRECT EXAMINATION
>
> BY MR. KJELDSEN:
>
> Q And do you live here in Winnemucca? (TR, pg. 314, ll. 10-19.)
>
> THE COURT: Redirect, sir, anything further?
>
> MR. KJELDSEN: Nothing further. (TR, pg. 325, ll. 13-15.
>
> THE COURT: You may proceed.
>
> ALEX VIGIL
>
> called as a witness by the Defense, was examined and testified as follows:
>
> DIRECT EXAMINATION
>
> BY MR. KJELDSEN:

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Q Where do you live, please? (TR, pg. 326, ll. 9-16.)

THE COURT: Any redirect, sir?

REDIRECT EXAMINATION

BY MR. KJELDSEN:

Q How often do you see Bret? (TR, pg. 344, ll. 13-17.)

THE COURT: You may proceed, sir.

MR. KJELDSEN: Thank you, your Honor.

BENJAMIN REALE

called as a witness by the defense, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KJELDSEN:

Q Mr. Reale, where do you live, please? (TR, pg. 350, ll. 19-20; pg. 351, ll. 1-6.)

THE COURT: Anything further on redirect?

REDIRECT EXAMINATION

BY MR. KJELDSEN:

Q By chance did you observe the position of the bar stool that Patty had been sitting on after she left the bar? (TR, pg. 362, ll. 20-25; pg. 362, l. 1.)

THE COURT: You may proceed with direct examination.

GWENDOLYN KRUG

called as a witness by the Defense, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KJELDSEN:

Q What is your business, profession or occupation?

THE COURT: You may proceed.

GWENDOLYN KRUG

recalled as a witness by the Defense, was further examined and testified as follows:

DIRECT EXAMINATION

BY MR. KJELDSEN:

Q You've testified earlier this morning? (TR, pg. 382, ll. 12-19.)

THE COURT: You may proceed sir.

GWENDOLYN KRUG

called as a witness by the Defense, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KJELDSEN:

Q Did you and Bret contact the District Attorney's office to try get the tape preserved? (TR, pg. 390, l. 22; pg. 391, ll. 1-7.)

On five occasions Defense counsel "heard and understood" the Court's directive to call and/or recall his witnesses:

TR, pg. 313, ll. 20-24

TR, pg. 325, ll. 21-23

TR, pg. 350, ll. 3-9

TR, pg. 365, ll. 21-23

TR, pg. 390, ll. 10-15

On six occasions counsel heard and understood the testimony of the witnesses in order to make the appropriate objections during the trial:

TR, pg. 285, ll. 1-6

TR, pg. 324, l. 7

TR, pg. 337, ll. 1-4

TR, pg. 338, ll. 16-18

TR, pg. 364, ll. 12-13

TR, pg. 438, ll. 8-15

On 34 other occasions the defense counsel "listened" and responded to the questions by the Court. On each occasion he was direct and to the point with his responses:

TR, pg. 311, ll. 16-19

TR, pg. 311, ll. 22-25

TR, pg. 313, ll. 11-19

TR, pg. 328, ll. 9-14

TR, pg. 333, ll. 1-5

TR, pg. 349, ll. 1-4

TR, pgs. 349-350

TR, pg. 376, ll. 13-20

TR, pg. 376, ll. 21-25

TR, pg. 377, ll. 1-3

TR, pg. 378, ll. 13-20

TR, pg. 379, ll. 3-7

TR, pg. 379, ll. 19-24

TR, pg. 379, l. 25
TR, pg. 380, ll. 1-4

TR, pg. 384, ll. 4-9

TR, pg. 385, ll. 24-25
TR, pg. 386, ll. 1-11

TR, pg. 386, ll. 12-13

TR, pg. 386, ll. 16-25
TR, pg. 387, ll. 1-25

TR, pg. 388, ll. 2-25
TR, pg. 389, ll. 1-2

TR, pg. 391, ll. 9-12

TR, pg. 392, ll. 9-13

TR 395, ll. 13-15

TR, pg. 395, ll. 16-18

TR, pt. 395, ll. 19-22

TR, pg. 395, ll. 23-25
TR, pg. 396, ll. 1-4

TR, pg. 396, ll. 6-9

TR, pg. 396, ll. 11-14

TR, pg. 396, ll. 15-18

TR, pg. 397, ll. 5-8

TR, pg. 397, ll. 9-12

TR, pg. 424, ll. 12-16

TR, pg. 430, ll. 2-6

TR, pg. 441, ll. 24-25
TR, pg. 442, ll. 1-2

TR, pg. 446, ll. 3-9

On two occasions counsel heard and responded to opposing counsel's questions:

TR, pg. 328, ll. 5-8

TR, pg. 437, ll. 18-21

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In addition, the transcript indicates counsel heard properly on other occasions.

Counsel's cross-examination referred to what he properly heard on direct examination.

> Q But all you saw was him behind her?
>
> A Yes. (TR, pg. 301, ll. 19-20.)
>
> Q You could see you and Bret walking to your respective pool tables that you were playing and walking up to the bar, but you couldn't see the incident at all, could you? (TR, p. 304, ll. 15-18.)
>
> Q And I think you said that he didn't follow you out of the bar?
>
> A No, he did not. (TR, pg. 306, ll. 1-3.)

Petitioner through his attorney also claims that counsel failed to object to questioning of the district attorney during trial and during the district attorney's closing argument. this is not supported by the record. The transcript of the second day of trial (the day the defense counsel allegedly could not hear) indicates otherwise. It states:

> Q Jean, what was your reaction when you heard the defendant say that "all woman needed to be beat?"
>
> A It's a scary situation.
>
> MR. KJELDSEN: Objection. I don't think her reaction is part of the case. (TR, pg. 285, ll. 1-6.)
>
> MR. KJELDSEN: Objection. Asked and answered. (TR, pg. 324, ll. 7-8.)

MR. KJELDSEN: Objection, your Honor. I think that's misstating the evidence. I think Shontell said she remembers people's faces maybe, not their names. (TR, pg. 337, ll. 1-4.)

MR. KJELDSEN: Objection, your Honor. I think that's going beyond the permissible scope.

MR. HAFEN: He opened the door. I should be allowed to go into that. (TR, pg. 338, ll. 16-19.)

MR. KJELDSEN: I think that's been asked and answered, your Honor. (TR, pg. 364, ll. 12-13.)

MR. KJELDSEN: Objection, your Honor. I think that the charges that he has to prove is an intent then and there to commit a rape.

THE COURT: Ladies and gentlemen of the jury, the State has the burden to prove that at the time of the incident of the battery that the defendant intended to commit a sexual assault upon the alleged victim. That's the law. (TR, pg. 438, ll. 8-15.)

Petitioner also asserts that defense counsel failed to cross-examine the State's witnesses as to bias, his failure to speak with witnesses regarding their fear of the prosecutior and bias. He also claims that the prosecutor made an improper argument to the jury.

The Court finds that counsel is not required, in order to protect himself from an inadequacy allegation, to mak every conceivable objection, argument or cross-examination. I the case of Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708 (1978), the court stated that the role of the court presented with allegations of ineffective assistance of counsel:

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> ... is not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance. This does not mean that it should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success.

In this case the Court finds that counsel's representation was within the scope of the broad range of reasonableness. Even if for argument's sake counsel's errors were beyond the broad range of reasonableness, there is still no showing that the outcome would have been different.

Counsel also contends that the punishment does not fit the crime. Thus, he claims the punishment violates the Eighth Amendment. It is claimed that the punishment is cruel and unusual. The statutory guidelines for the punishment is imprisonment for a minimum term of not less than two years and a maximum term of not more than 15 years. NRS 200.400(4)(b). In this case the sentence which the defendant received was within the statutory guidelines. The Court sentenced the defendant to a minimum term of 60 months (five years) and a maximum term of 150 months (12-1/2 years).

In addition, counsel contends that the Court should have allowed a jury instruction on simple battery. Counsel never requested any additional instructions. (TR, pg. 395, ll. 13-22.) Furthermore, an instruction on simple battery would not comport with defendant's theory of his case. A statement

admitted into evidence from defendant's witness Benjamin Carl Reale states:

> A few minutes later Jean came in and told me that Bret had pinched Patti on the boob and said that he liked to beat his women up before screwing them. After telling me this, Jean went back out with Patti. Bret and Jeff were still playing pool, so I went over and confronted Bret with what Jean had told me. I saw total shock and disbelief on his face. His first word to me was "WHAT"! So I told him again what Jean had said. His next words were "SHE'S A LIAR! SHE'S A LYING BITCH"! At that time I went outside to talk to both Jean and Patti. I asked Patti exactly what had happened. Patti said Bret pinched my boob and made a snide remark. (See Defendant's Exhibit "E.")

Mr. Reale's testimony was in accordance with his statement. (TR, pg. 354, ll. 17-25.)

Another statement by defendant's witness Kelly Ann Heat states:

> Then "She," the other sad one ran out screaming saying he had grabbed her. I know for certain that Brett wasn't even next to her. He was standing by her friend who he was playing with.
>
> Personally, I think somebody who wrongly accuses somebody of a sexual act that never took place should be charged with the same as she has wrongly charged Brett Gonzalez. Plus slander for tarnishing his person. (See Defendant's Exhibit "D.")

An employee (Shantell Woods) at the office where the incident occurred testified that bar she did not observe any incidents during the night in question. (TR, pg. 316, ll. 2-6.)

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Defendant directed lewd and sexually oriented comments toward Patti while she was in the Office Bar. The evidence also showed that the Defendant took a step in furtherance of carrying out these comments when he grabbed the victim by her arm and stated he was going to "F" her until she was dead. The victim testified that the "F" word was the word Fuck. (TR, pg. 209, l. 10.)

At that point the victim testified she was getting scared and really thought the Defendant was going to hurt her. When she jerked away Patti told Gonzalez to leave her alone. Again, the Defendant told her that he would leave her alone when he had "F" her enough. (TR, pg. 211.) A few minutes later the Defendant walked away but returned to Patti. He grabbed her around the breasts with his hands and pulled her off the bar stool. (TR, pg. 211.) As he did so, he told Patti that he was going to "F" her until she was dead. At that point, Patti testified that she though the Defendant was going to rape her. (TR, pg. 212.) As Patti struggled with the Defendant he continued to tell her that he was going to "F" her until she was dead and was not going to leave her alone until he had "F" her enough. (TR, pg. 213.)

The State produced corroborating evidence concerning the Defendant's conduct and language. Through Clancy Wittner's testimony evidence was offered to show that Patti told him what had occurred. (TR, pg. 247.) Also, that Bret Gonzalez was the one that had committed the battery. (TR, pg. 248.) Mr. Wittner testified that he saw injuries on top of Patti's breasts which were very, very red and turning black and blue. Again, this corroborated that an attack had occurred. (TR, pg. 248.)

The State also produced an eyewitness to the incident. Jean Rice testified that she was with Patti in the Office Bar on December 14, 1995. (TR, pgs. 277-79.) Ms. Rice also corroborated Patti's testimony. (TR, pg. 282.) She heard the Defendant tell Patti that he was going to "F" her.

She also heard the Defendant tell Patti that he wanted to "F" her until she died. (TR, pg. 283.) She heard the Defendant say that all women needed to be beat which also corroborated Patti's prior testimony. (TR, pg. 384.) Finally, Jean corroborated Patti's testimony that the Defendant walked up from behind, grabbed her and pulled Patti off the bar stool. (TR, pgs. 285-87.) The State submits that the testimony, photographs, and the Defendant's own witness Alex Vigil's testimony that he saw Patti run from the bar, was sufficient for the jury, acting reasonably, to have been convinced of the Defendant's guilt beyond a reasonable doubt.

The jury determines what weight and credibility should be given to conflicting testimony. See Jefferson v. State, 108 Nev. 953 (1992); See also Bolden v. State, 97 Nev. 71, 624 P.2d 20.

The Court has reviewed the other allegations of counsel and finds them to be without merit.

THEREFORE, IT IS HEREBY ORDERED that Petitioner's Motion for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

DATED this 20th day of September, 2000.

Richard A. Wagner

RICHARD A. WAGNER, DISTRICT JUDGE