

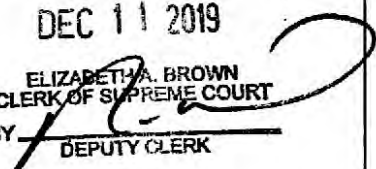
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID JAY DIAZ,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN,  
Respondent.

No. 77862-COA

**FILED**

DEC 11 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

David Jay Diaz appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Diaz argues the district court erred by denying his July 5, 2018, postconviction petition for a writ of habeas corpus. In his petition, Diaz claimed his trial counsel was ineffective for failing to file a motion to suppress evidence obtained from his residence. Diaz acknowledged the officers entered the residence based upon statements made by the victim, but asserted they should have obtained a search warrant prior to the entry.

To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

To the extent Diaz claimed counsel should have argued the victim did not have the authority to consent to entry of the residence, his claim lacked merit. At trial, the victim testified she lived with Diaz in the residence and paid a portion of the rent. A police officer also testified that the victim informed him that she had recently been attacked in her apartment. The officer also stated the victim described the residence and the attack. That officer and another then walked to the residence where the door was open and they discovered Diaz together with items consistent with the description provided by the victim.

The trial testimony demonstrated either the victim had the actual authority to permit the officers to enter the residence, *see Lastine v. State*, 134 Nev. 538, 542, 429 P.3d 942, 947 (Ct. App. 2019) (“Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property.”), or the officers reasonably believed she did, *see id.* at 544-45, 429 P.3d at 949 (explaining that under the apparent authority doctrine a search is valid if the officer reasonably believes that the third party has actual authority to consent). Given the record, Diaz failed to demonstrate his counsel’s performance fell below an objectively unreasonable standard.

Diaz also failed to demonstrate a reasonable probability of a different outcome had counsel moved to suppress evidence obtained from his residence. The record demonstrated the jury was presented with overwhelming evidence of Diaz’ guilt even excluding evidence collected from his residence. This evidence included the victim’s testimony, photographs depicting her injuries, police officers’ descriptions of the victim’s injuries and her demeanor, and Diaz’ statements admitting he “snapped” and was

sorry. Therefore, the district court did not err by denying Diaz' petition.  
Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

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

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

cc: Hon. Barry L. Breslow, District Judge  
David Jay Diaz  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk