IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLAN FRED ALTERGOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38474

FILED

SEP 30 2002

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

ORDER OF AFFIRMANCE

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.

On August 27, 1999, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in the possession of a firearm, robbery with the use of a deadly weapon, sexual assault with the use of a deadly weapon, and first degree kidnapping with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms in the Nevada State Prison of life with the possibility of parole for the sexual assault and kidnapping charges, enhanced for the use of a deadly weapon, as well as concurrent terms for the other charges. This court dismissed appellant's direct appeal.[1]

On June 12, 2001, 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

[1]Altergott v. State, Docket No. 34802 (Order Dismissing Appeal, August 11, 2000).

conduct an evidentiary hearing. On August 21, 2001, the district court denied appellant's petition. This appeal followed.

Appellant raised three claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.[2] To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[3] "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[4] A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.[5]

First, appellant claimed that trial counsel was ineffective for failing to challenge the sufficiency of evidence regarding: (1) the burglary charge; (2) the kidnapping charge; and (3) the sexual assault charge. Appellant did not indicate what counsel should have done to challenge the sufficiency of the State's evidence. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness or that the defense was prejudiced, and counsel was not ineffective in this regard.

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[2]Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 694.

[4]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

[5]Strickland, 466 U.S. at 697.

Second, appellant claimed that trial counsel was ineffective for failing to ensure that the jury was properly instructed regarding kidnapping. Specifically, appellant argued that the jury should have been instructed that in order to find him guilty of both robbery and kidnapping, it must find that the movement of the victim was incidental to the commission of the robbery.[6] We conclude that the jury should have been so instructed.[7] However, we conclude that any error resulting from the omission of such an instruction was harmless.[8] In light of the overwhelming evidence that appellant kidnapped the victim, we conclude that it is clear beyond a reasonable doubt a rational jury would have found

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[6]Appellant also argued that the jury should have been instructed that in order to find him guilty of both robbery and kidnapping, it must find that the movement of the victim increased the risk of harm to the victim beyond that necessarily present in the robbery. Jury instruction number 29 did instruct the jury that any movement of the victim must substantially increase the risk of significant physical harm over and above that to which the person would have been exposed in the commission of a sexual assault or robbery. Therefore, appellant's claim in this regard is belied by the record. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[7]See Wright v. State, 106 Nev. 647, 648-49, 799 P.2d 548, 549 (1990); (holding that "where the accused is convicted of first degree kidnapping and an associated offense, the kidnapping conviction would not lie if the movement of the victim was incidental to the associated offense and did not increase the risk of harm to the victim beyond that necessarily present in the associated offense. . . . 'Whether the movement of the victim is incidental to the associated offense and whether the risk of harm is increased thereby are questions of fact to be determined by the trier of fact in all but the clearest of cases.'") (quoting Curtis D. v. State, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982)); see also Langford v. State, 95 Nev. 631, 638, 600 P.2d 231, 236 (1979).

[8]See Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000) (holding that generally, "improper instructions omitting, misdescribing, or presuming an element of an offense" are subject to a harmless error analysis).

the defendant guilty even had it been instructed that in order to do so, it must find that the movement of victim was not incidental to the robbery.[9] Therefore, appellant did not show that he was prejudiced, and counsel was not ineffective in this regard.

Third, appellant claimed that trial counsel was ineffective for conceding appellant's guilt to all of the charges except sexual assault. Under some circumstances, concession of a client's guilt without first obtaining the client's consent, can constitute ineffective assistance of counsel.[10] We conclude, however, that appellant failed to overcome the presumption that his counsel's actions could be considered sound trial strategy.[11] In light of the overwhelming evidence against him, appellant failed to show that but for counsel's error the result of the trial would have been different, and counsel was not ineffective in this regard.[12]

Finally, appellant raised five claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.[13] Appellate

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[9]See Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000) (citing Neder v. United States, 527 U.S. 1, 18 (1999) ("An error is harmless when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'").

[10]See Jones v. State, 110 Nev. 730, 739, 877 P.2d 1052, 1057 (1994).

[11]See Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

[12]See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) ("overwhelming evidence of guilt is relevant to the question whether a client had ineffective counsel") (citing Strickand, 466 U.S. at 697).

[13]Strickland, 466 U.S. at 687.

counsel is not required to raise every non-frivolous issue on appeal in order to be effective.[14] In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."[15] To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[16]

First, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the district court erred in denying defense counsel's challenge to exclude prospective juror number 219 for cause. Appellant argued that the defense was forced to use all of its peremptory challenges which resulted in "unacceptable jurors" remaining on the panel. A trial court has broad discretion in ruling on challenges for cause, which involve factual findings of credibility; if a potential juror's responses are equivocal or conflicting, this court defers to the trial court's determination of the juror's state of mind.[17] After carefully reviewing the record, we conclude that the district court did not abuse its discretion by denying the defense's motion to excuse potential juror number 219 for cause. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

Second, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of the sufficiency of the evidence regarding the burglary charge. Specifically, appellant argued that the State failed to prove that he had the requisite intent to commit

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[14]Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

[15]Ford, 105 Nev. at 853, 784 P.2d at 953 (citing Jones, 463 U.S. at 752).

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

[17]See Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

larceny at the time he entered the victim's home.[18] When the sufficiency of the evidence is challenged on appeal, "'[t]he relevant inquiry for this court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"'[19] The State presented evidence that appellant, along with two unidentified companions, entered the victim's home wearing ski masks, brandished firearms and ransacked the house while demanding money. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt from this evidence that appellant had the requisite intent to commit larceny.[20] Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

Third, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of the sufficiency of the evidence regarding the kidnapping charge. Specifically, appellant argued that the State failed to prove that: (1) the victim sustained substantial bodily harm; (2) appellant held the victim for ransom; and (3) any movement of the victim was not incidental to the robbery. That the victim sustained substantial bodily harm is not a required element of the crime of kidnapping.[21] Thus, the State was not required to prove beyond a

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[18]See NRS 205.060(1) ("A person who, by day or night, enters any house . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony, is guilty of burglary.").

[19]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 145, 250, 681 P.2d 44, 47 (1984)).

[20]See NRS 205.220; NRS 205.240.

[21]See 200.310(1) ("A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any

continued on next page . . .

reasonable doubt that the victim sustained substantial bodily harm. The State did present evidence that appellant took the victim from her home and drove her around in her car at gunpoint in an attempt to elicit money in exchange for her release. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt from this evidence that appellant held the victim for ransom and that taking the victim from her home was not incidental to the robbery.[22] Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

Fourth, appellant claimed that appellant counsel was ineffective for failing to raise on direct appeal the issue of the sufficiency of the evidence regarding the sexual assault charge. Appellant's contention that, because the victim was being held against her will for the purpose of robbing her rather than sexually assaulting her, he could not have committed sexual assault is an incorrect statement of the law. The offense of sexual assault does not require that the victim be held for the purpose of committing the sexual assault.[23] In addition, this court has previously determined on direct appeal that there was sufficient evidence to support

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means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon him, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person . . . is guilty of kidnapping in the first degree.").

[22]See NRS 205.060(1).

[23]See NRS 200.366(1) ("a person who subjects another person to sexual penetration . . . is guilty of sexual assault.").

the jury's conviction for sexual assault. Accordingly, further litigation on this issue is prohibited by the doctrine of the law of the case.[24] Therefore, appellant failed to that this issue would have had a reasonable probability of success on appeal, and counsel was not ineffective in this regard.

Fifth, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the jury was properly instructed regarding kidnapping. As discussed, any error was harmless. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and counsel was not ineffective in this regard.

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.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[26]

_____, J.
Rose

_____, J.
Young

_____, J.
Agosti

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[24]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[25]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[26]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Allan Fred Altergott
Clark County Clerk