

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY JAY DELGADO,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 38909

FILED

APR 08 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOW,  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

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. Appellant was originally convicted, pursuant to a jury verdict, of one count each of aggravated stalking (Count I), burglary (Count II), first degree kidnapping with the use of a deadly weapon (Count III), misdemeanor battery, first degree kidnapping of a minor (Count VI), and battery with the use of a deadly weapon (Count VII). The district court sentenced appellant: (1) for Count I, to a prison term of 18 to 72 months; (2) for Count II, to a prison term of 26 to 120 months; (3) for Count III, to a prison term of 5 years to life, with an equal and consecutive term for the use of a deadly weapon; (4) for Count VI, to a prison term of 5 years to life; and (5) for Count VII, to a prison term of 26 to 120 months. The district court further ordered that Counts I, II, III, and VI run concurrently, and Count VII run consecutive to the other counts.

On direct appeal, appellant argued that that his convictions should be reversed on four grounds: (1) the trial court abused its discretion by admitting evidence that Delgado intimidated witnesses; (2) the prosecutor engaged in misconduct by intimidating witnesses; (3) there

was insufficient evidence to support the conviction of first degree kidnapping of a minor; and (4) there was insufficient evidence of intent to kill and/or inflict substantial bodily harm to support the conviction of first degree kidnapping with the use of a deadly weapon. This court rejected appellant's contentions, and affirmed the judgment of conviction.<sup>1</sup> The remittitur issued on December 12, 2000.

On August 24, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State filed an opposition on November 1, 2001. The district court declined to appoint counsel or conduct an evidentiary hearing. On December 13, 2001, the district court entered an order denying the petition. This appeal followed.

In his petition, appellant alleged numerous instances of ineffective assistance of trial and appellate counsel. 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.<sup>2</sup> 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.<sup>3</sup> To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted

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<sup>1</sup>Delgado v. State, Docket No. 34689 (Order of Affirmance, November 14, 2000).

<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Strickland, 466 U.S. at 694.

issue would have a reasonable probability of success on appeal.<sup>4</sup> The court need not consider both prongs of the ineffective-assistance test if the defendant makes an insufficient showing on either prong.<sup>5</sup>

Appellant claimed that trial counsel provided ineffective assistance by: (1) falsely informing the court that appellant did not wish to be present at the preliminary hearing; (2) failing to make an objection based on Batson v. Kentucky,<sup>6</sup> when the State exercised a single peremptory challenge; (3) failing to object to a reference to a comment by witness Laura Anderson that may have referred to prior bad acts by appellant; (4) failing to object to the State's use of perjured testimony; (5) failing to object to the jury instruction which defined a deadly weapon; (6) failing to object when appellant recognized one of the jurors; (7) failing to call witnesses at sentencing; (8) failing to communicate with appellant; (9) failing to object to the State's references to appellant's criminal history at sentencing; (10) failing to object to prosecutorial misconduct during closing argument; and (11) failing to object to the charge in Count III of the information, which alleged the use of a firearm and/or an ice pick. Based on our review of the record, we conclude that the district court did not err in rejecting these claims. Claims 7 and 8 were unsupported by specific factual allegations, and appellant was therefore not entitled to an evidentiary hearing.<sup>7</sup> As to the remainder of the claims, the district court

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<sup>4</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>476 U.S. 79 (1986).

<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

did not err because the record demonstrates that trial counsel was either not deficient or appellant was not prejudiced as a result of counsel's alleged failures.

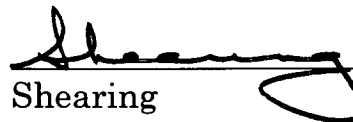
Appellant further alleged numerous instances of ineffective assistance of appellate counsel. Specifically, appellant argued that appellate counsel was ineffective for failing to argue: (1) that the preliminary hearing should have been continued; (2) appellant had a right to be present at the preliminary hearing, despite his inability to remain quiet during the proceeding; (3) the district court impermissibly interfered in the attorney-client relationship by requesting that the Clark County Detention Center terminate appellant's calling privileges; (4) the trial court allowed the introduction of inadmissible evidence; (5) the testimony of Geri Luna was impermissible vouching; (6) juror Emily Garay intentionally concealed that she knew appellant; (7) the venire did not represent a cross-section of the community; (8) there was insufficient evidence to support appellant's conviction; (9) the prosecutor argued prior bad acts at sentencing in violation of Apprendi v. New Jersey<sup>8</sup>; (10) prosecutorial misconduct was committed during closing argument; (11) the prosecutor admitted during rebuttal that he used perjured testimony to convict appellant; and (12) the prosecutor intimidated the witnesses. Based on our review of the record, we conclude that Appellant cannot demonstrate prejudice. Issues 8 and 12 were actually raised on direct appeal, and none of the remainder of the issues omitted by appellate counsel would have had a reasonable probability of success on appeal.

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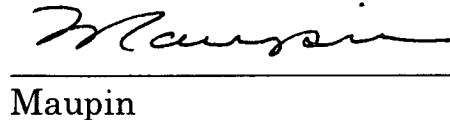
<sup>8</sup>530 U.S. 227 (1999).

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.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>10</sup>

 \_\_\_\_\_, C.J.  
Shearing

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

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

cc: Hon. Jackie Glass, District Judge  
Jerry Jay Delgado  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>10</sup>Although appellant has not been granted leave to file documents in proper person, we have considered all proper person documents filed or received in this matter in this court, and we conclude that the relief requested is not warranted.