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IN THE SUPREME COURT OF THE STATE OF IDAHO

SONNY ROME,	)	
	)	**No. 45140**
Petitioner-Appellant,	)	
	)	**Kootenai County Case No.**
v.	)	**CV-2016-2158**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Sonny Rome appeals from the denial of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Rome filed a petition for post-conviction relief from his conviction for burglary. (R., pp. 5-11, 25-37.) Two counts relevant to this appeal were that trial counsel was ineffective for not seeking an aiding and abetting jury instruction (Count VI) and appellate counsel was ineffective for failing to raise a claim of cumulative error (Count X). (R., pp. 31-32, 34-35.)

At the evidentiary hearing on the petition Rome called Jay Logsdon, who had represented Rome both in the trial and the appeal of the criminal case. (Tr., p. 9, L. 16 – p. 10, L. 5; p. 23, Ls. 8-10.) Logsdon testified that, "in hindsight" he could have presented a theory that Rome was an accessory after the fact but that he did not present that theory or request jury instructions on that theory. (Tr., p. 21, L. 17 – p. 22, L. 3.) Logsdon was not asked about raising a cumulative error theory on appeal. (Tr., p. 61, Ls. 2-20.)

At the conclusion of the evidentiary hearing the district court granted a directed verdict denying Rome post-conviction relief. (R., pp. 102-03; Tr., p. 64, L. 5 – p. 79, L. 3.) The district court found the evidence insufficient as to Count VI, failure to seek an aiding and abetting instruction, because there was no evidence of deficient performance or prejudice. (R., pp. 102-03; Tr., p. 58, L. 20 – p. 60, L. 16.) The district court found the evidence insufficient as to Count X, failure to raise a claim of cumulative error, because "there is no evidence in this record that appellate counsel failed to raise the issue of cumulative error." (Tr., p. 75, L. 15 – p. 76, L. 3.)

Rome filed a timely appeal from the entry of judgment. (R., pp. 105, 109-11, 121, 123-27.)

ISSUES

Rome states the issues on appeal as:

I. Whether the district court erred by not taking judicial notice of the documents in the underlying criminal case record as requested by Mr. Rome based on its clearly erroneous determination that he had not requested it to take judicial notice.

II. Whether the district court's decision to deny Mr. Rome's lesser-included instruction claim fails to apply the proper standards for evaluating a claim of ineffective assistance of counsel at an evidentiary hearing.

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Rome failed to show error in the district court's grant of a directed verdict on the basis of failure to support the claims with evidence?

ARGUMENT

Rome Has Failed To Show The District Court Erred By Granting A Directed Verdict On The Basis Of Failure To Support The Claims With Evidence

A. Introduction

The district court granted the state's motion for directed verdict on Counts VI and X for failing to support those claims with evidence. (R., pp. 102-03; Tr., p. 58, L. 20 – p. 60, L. 16; p. 75, L. 15 – p. 76, L. 3.) Rome contends that the district court erred by granting a directed verdict on Count X on the basis of lack of evidence because he asked the court to take judicial notice of evidence that would have supported that claim. (Appellant's brief, pp. 6-9.) He contends the district court applied an erroneous legal standard when it directed a verdict on Count VI. (Appellant's brief, pp. 9-20.) Rome does not, however, apply the legal standards relevant to review of the granting of a motion for a directed verdict. Application of the relevant and correct legal standards to the record shows Rome's claims of error to be without merit.

B. Standard Of Review

"When reviewing a decision to grant or deny a motion for a directed verdict, this Court applies the same standard the trial court applied when originally ruling on the motion." Enriquez v. Idaho Power Co., 152 Idaho 562, 565, 272 P.3d 534, 537 (2012). "In doing so, this Court exercises free review and does not defer to the findings of the trial court." Powers v. Am. Honda Motor Co., 139 Idaho 333, 335, 79 P.3d 154, 156 (2003). "This Court must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury." Waterman v. Nationwide

Mut. Ins. Co., 146 Idaho 667, 672, 201 P.3d 640, 645 (2009). "The 'substantial evidence' test does not require the evidence be uncontradicted. It requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper." Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 27, 105 P.3d 676, 687 (2005) (internal quotations omitted).

C. The Record Shows There Is No Substantial Evidence To Support The Claim That Counsel Was Ineffective For Not Raising A Claim Of Cumulative Error On Appeal

In order to establish a claim of ineffective assistance of counsel, a post-conviction petitioner must prove both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). To show deficient performance a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." Harrington v. Richter, 562 U.S. 86, 104 (2011). The court "must apply a strong presumption" that counsel's performance was not deficient. Id. To overcome this presumption the petitioner must "show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Id.

Strategic decisions by counsel will not be second-guessed "unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Dunlap v. State, 141 Idaho 50, 60, 106 P.3d 376, 386 (2004) (citation omitted). Where the claim is that counsel's performance was deficient for failing to file a motion, the court employs a two-step process of first determining "whether or not the motion should have been granted," and second, if the motion would have been

granted, "the petitioner is still required to overcome the presumption that the decision not to file the motion was within the wide range of permissible discretion and trial *strategy*." Wurdemann v. State, 161 Idaho 713, 718, 390 P.3d 439, 444 (2017) (emphasis original, internal citations and quotations omitted).

"[W]e use the same test to evaluate ineffective assistance of appellate counsel on direct appeal as we use to evaluate ineffective assistance of trial counsel." Dunlap v. State, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015).

In this case there was no evidence that, when making the tactical decision of what issues to raise on appeal, counsel was ignorant of the law or the record, was inadequately prepared, or had any other objective shortcoming. To the contrary, the record shows Mr. Logsdon was asked no questions about not raising a claim of cumulative error on appeal. (E.g. Tr., p. 61, Ls. 2-20.) There is no evidence in this record that counsel's performance was deficient for failure to claim cumulative error.

Nor was there any evidence presented that Rome could have prevailed on an appellate claim of cumulative error. "The cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." State v. Draper, 151 Idaho 576, 594, 261 P.3d 853, 871 (2011) (citations, quotations and alteration omitted). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Rome presented no evidence that the court in his appeal found two errors, but that the errors were

individually harmless. Without evidence of two harmless errors to cumulate, there was no evidence of deficient performance or prejudice.

On appeal Rome contends the district court should have taken judicial notice of the evidence that would have supported his claim. (Appellant's brief, pp. 6-9.) He points out that he asked for judicial notice of certain exhibits in response to the state's motion for summary dismissal (Appellant's brief, p. 6 (citing R., pp. 49-50, 80)), and included items he intended to admit by judicial notice at the hearing in his lists of witnesses and exhibits (Appellant's brief, p. 6 (citing R., pp. 85, 88)).[1] Rome's claim that he presented sufficient evidence to avoid a directed verdict by requesting judicial notice at a prior summary dismissal hearing and mentioning potential exhibits in pre-hearing notices is specious. He has pointed to nothing in the record suggesting he presented substantial evidence supporting his claim of ineffective assistance of counsel for not asserting cumulative error on appeal.

D. The Record Shows There Is No Substantial Evidence To Support The Claim That Counsel Was Ineffective For Not Requesting An Aiding And Abetting Instruction

Rome alleged that trial counsel was ineffective for not seeking a "proper" aiding and abetting jury instruction (Count VI). (R., pp. 31-32.) In Idaho an aider and abettor is a principal. I.C. § 18-204. The "proper" jury instruction on aiding and abetting is ICJI 311 (the "law makes no distinction" between principals and aider and abettors). Rome

[1] Although there is no legal basis for this Court doing so, the state does not object to this Court's consideration of the appellate record from the criminal case, State v. Rome, Docket No. 43213. It shows that the Idaho Court of Appeals found no error, much less two errors that were harmless individually. The claim of ineffective assistance of appellate counsel for failing to claim cumulative error is frivolous and without a good faith basis in fact.

presented no evidence of what aiding and abetting instruction was given at trial or how it was deficient performance or prejudicial to not request a "proper" one.

On appeal Rome contends there was sufficient evidence to support a claim of ineffective assistance of counsel for failing to seek a jury instruction for accessory after the fact. (Appellant's brief, pp. 9-20.) This argument fails because Rome has failed to show that he raised such a claim in his petition. Even if he had presented evidence of an unpled claim, such would not show error in granting a directed verdict against him on an unpled claim.

Even if Rome had made a claim of ineffective assistance of counsel for failing to request a jury instruction on accessory after the fact, he presented no substantial evidence to support such a claim. He did present the testimony of Mr. Logsdon that, "in hindsight," he believed he could have argued the theory of accessory after the fact, but that he did not do so. (Tr., p. 21, L. 17 – p. 22, L. 3.) This is not substantial evidence that counsel's decision to not pursue an accessory after the fact theory at trial was the result of an objective shortcoming or that Rome was prejudiced.

On appeal Rome argues that trial counsel's "uncontradicted testimony" was sufficient to meet a burden of proof by a preponderance of the evidence. (Appellant's brief, pp. 10-11.) While it is true that Mr. Logsdon's testimony is sufficient to establish the facts he testified to, merely establishing that (a) trial counsel believes in hindsight that he would have been able to argue for the giving of such an instruction and (b) that he did not do so does not come close to establishing a claim of ineffective assistance of counsel.

Rome next argues that a district court is statutorily obligated to present a jury instruction when both requested and supported by evidence. (Appellant's brief, p. 11.)

First, Mr. Logsdon's *opinion* that the evidence supported the giving of an instruction is not proof that such an instruction would have been given if requested. More importantly, however, this argument bears little if any relevance to the question of whether counsel was ineffective for not requesting the instruction. It certainly shows no objective shortcoming of counsel, and even if the court would have given the instruction there is no evidence that the jury would have acquitted on the greater charge if only the accessory instruction had been given.

Rome finally argues that the district court's reasoning, that the fact of conviction on the greater offense in combination with the "acquittal first" instruction, is not a legally valid basis for rejecting his claim of prejudice from lack of an accessory after the fact instruction. (Appellant's brief, pp. 12-20.) This argument is irrelevant insofar as it invites this Court to review whether the district court employed the correct legal standard. Powers, 139 Idaho at 335, 79 P.3d at 156 ("this Court exercises free review and does not defer to the findings of the trial court"). It is also irrelevant insofar as there is no evidence of deficient performance or prejudice. Regardless of whether the "acquittal first" doctrine is determinative, there is no evidence of prejudice under any theory.

Rome's theories of error are all predicated on an incorrect articulation of the standard of review. Because this Court reviews the directed verdict motion de novo and without deference, Rome's arguments that the district court employed incorrect legal standards, even if true, are irrelevant. Application of the correct legal standards to the record in this case show no error because Rome failed to support his claims with substantial evidence.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 5th day of March, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of March, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd