IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. FRIEDMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48390

FILED

MAR 24 2008

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Kenneth A. Friedman was convicted, pursuant to a jury verdict, of aggravated stalking, four counts of indecent exposure, and seven counts of open or gross lewdness. He was adjudicated a habitual criminal and sentenced to serve a term of life in prison without the possibility of parole for aggravated stalking and eleven concurrent terms of twelve months in prison for the remaining convictions. This court affirmed Friedman's convictions and sentence on appeal.[1] Subsequently, Friedman filed a timely post-conviction petition for a writ of habeas corpus, which the district court summarily denied. This appeal followed.

The charges stem from the following events. Friedman contacted by telephone various businesses in Las Vegas pretending to be a woman named Paula who represented a local neighborhood watch group.

[1]Friedman v. State, Docket No. 43260 (Order of Affirmance, November 16, 2005).

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Friedman informed the recipients of the calls that a sexual predator, wearing a certain type of clothing, was in the area. Shortly thereafter Friedman appeared at these businesses wearing the described clothing and engaged in lewd conduct in the presence of employees. Several employees from a Subway sandwich shop, Grumpy's and a 7-11 convenience store unequivocally identified Friedman as the individual who committed various acts of indecent exposure and lewdness at their respective businesses in their presence. One night, Friedman followed April Gagen, a Subway employee, after she left work. Friedman yelled obscenities at Gagen and threatened to harm her.

Friedman argues that the district court erred in denying his numerous claims of ineffective assistance of trial and appellate counsel and allegations of trial error.

Claims of ineffective assistance of trial counsel

To establish ineffective assistance of trial counsel, Friedman must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different."[2] For the reasons set forth below, we conclude that Friedman failed to establish ineffective assistance of trial counsel and that the district court did not err in denying his claims.

First, Friedman contended that counsel was ineffective in failing to adequately prepare for trial and for not filing several pretrial

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[2]Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see Strickland v. Washington, 466 U.S. 668 (1984).

motions. Friedman asserted that he was unaware prior to his preliminary hearing of the existence of a police statement by April Gagen, the victim identified in the aggravated stalking charge. According to Friedman, the police used suggestive tactics to secure Gagen's statement. He argued that if counsel was aware of Gagen's statement prior to the preliminary hearing, counsel was ineffective for not challenging at the preliminary hearing Gagen's credibility or law enforcement tactics in obtaining her statement. If counsel had done so, Friedman contended, he would not have been bound over for trial on the aggravated stalking charge. However, the probable cause necessary to bind a defendant over for trial may be based on slight or marginal evidence.[3] Here, as sufficient evidence supported a probable cause determination, counsel was not ineffective for not seeking pretrial habeas relief, assuming counsel was aware of Gagen's police statement prior to the preliminary hearing.

Friedman further complained that counsel refused to use the results of two polygraphs Friedman purportedly passed to obtain the services of special units within the District Attorney's Office. However, he failed to identify the special services to which he refers or to sufficiently explain how counsel's omission in this regard prejudiced him in light of the overwhelming evidence of his guilt.

Friedman also argued that his counsel should have filed a motion to sever charges related to events that occurred at Subway from those charges related to events that transpired at two other business

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[3]Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).

locations. However, he failed to explain any viable basis upon which counsel could have sought severance.

We conclude that Friedman failed to show that his counsel was ineffective on these grounds and that the district court did not err in denying this claim.

Second, Friedman argued that counsel was ineffective due to a variety of conflicts of interest. He contended that the Public Defender's Office refused to adequately fund an investigation of his case. However, Friedman failed to adequately explain what additional investigation he desired or what helpful evidence further investigation would have revealed.

Friedman further claimed that counsel failed to challenge the district court's overly broad search warrant. However, counsel filed a motion to suppress items collected from various searches of Friedman's home, vehicle and person and successfully excluded some items from being introduced into evidence. Although Friedman characterizes counsel's attempt to suppress seized evidence as "half-hearted," he failed to explain how additional efforts by counsel in this regard would have resulted in additional evidence being suppressed.

Friedman also complained that counsel failed to vigorously challenge search warrants issued by district court judge Jackie Glass because Judge Glass was married to counsel's employer and that "in effect, he'd paid money that eventually ended up being part of the community income of Steven Wolfson and Judge Jackie Glass." Even assuming this allegation was true, Friedman failed to explain why counsel's representation was improper on this basis. Friedman further contended that counsel had borrowed money from Judge Glass "and in effect had a

personal and financial interest in not taking potentially embarrassing or aggravating defense actions against Judge Glass." Friedman, however, asserted nothing more than a bare allegation and provided no support whatsoever for this claim.[4]

Friedman further argued that counsel failed to challenge certain state witnesses or call defense witnesses because, according to an affidavit Friedman submitted in support of this claim, counsel "'didn't want to piss off the judge' and that he has 'got other cases he has to try before this judge.'" Counsel also purportedly described himself as ineffective. Even assuming counsel made these comments at some point during his representation, the full context in which they were made is unclear. And the trial transcript shows that counsel was engaged at trial as evidenced by his vigorous cross-examination of witnesses, successful objections to improper testimony, and challenges to the sufficiency of the evidence.

Friedman also contended that counsel's friendship with Las Vegas Metropolitan Police Department (LVMPD) Detective Dolphus Boucher caused counsel to refrain from challenging Detective Boucher's "overt acts to contaminate, lead and influence the state's witnesses." However, nothing in the record on appeal suggests that Detective Boucher acted improperly in this regard.

Friedman further asserted that counsel's personal problems, including substance abuse and "deteriorating lifestyle," rendered counsel ineffective. However, Friedman failed to adequately explain how counsel's

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[4]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

alleged personal difficulties prejudiced him. As noted above, the trial transcript reflects an engaged and prepared counsel.

We conclude that Friedman failed to show that his counsel was ineffective on these grounds and that the district court did not err in denying this claim.

Third, Friedman asserted that counsel was ineffective for failing to challenge prosecutorial delays, the State's alleged tampering and withholding of evidence, and the admission of prejudicial hearsay testimony.[5] Friedman contended that counsel was ineffective for failing to press the prosecution to turn over an audiotape of a phone call Friedman made to the police, wherein Friedman was allegedly advised that he had a right to come and go in the area of Subway. Friedman argued that this evidence would have shown that he honestly believed that he was not breaking the law by being in the area. Even assuming this evidence had been presented, Friedman failed to show how its absence prejudiced him. Friedman was not charged with merely being present in the area. Rather, he was charged with indecent exposure and committing lewd acts.

In a related matter, Friedman asserted that counsel failed to compel the police to explain the absence of "what should have been literally some dozens of telephone calls from Subway employees to the police" regarding Friedman's activities. Friedman argued that without access to these phone calls, it was impossible for the defense to pinpoint

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[5]To the extent Friedman argued that appellate counsel was ineffective for not challenging on appeal the admission of prejudicial hearsay testimony, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

specific times and dates when he was in the area and hindered his ability to develop an alibi defense. However, Friedman admitted to the police that he was frequently in the area of the Subway parking lot. He also admitted that he had made phone calls to Subway employees pretending to be "Paula" from a neighborhood watch group and warning the employees of a sexual predator in the area, after which he appeared at Subway dressed in his "scary persona."

Friedman also complained that counsel should have challenged the tactics of LVMPD Officer Beth Swift, who, according to Friedman, attempted to improperly influence 7-11 employee Brandi Nilson. Friedman specifically referred to Nilson's testimony at his preliminary hearing to support his claim. Nilson testified during the preliminary hearing that Officer Swift interviewed her after Nilson received a neighborhood watch call warning her that a sexual predator was in the area and saw a man lurking around the 7-11. Nilson testified that Officer Swift "told her a little bit about the predator" and that she would return the next day to have Nilson complete a report. Officer Swift also informed Nilson that she would be shown a photographic lineup. Nilson informed Officer Swift that she did not see the man's face. Nothing in Nilson's testimony suggests that Officer Swift's interaction with her was improper. Friedman articulated no basis for objecting to Officer Swift's conduct.

Friedman argued that his counsel was ineffective for failing to compel the prosecution to turn over an unedited copy of Gagen's statement to police. Friedman contended that the unedited statement was helpful to the defense because it revealed an alleged history of abuse in Gagen's family, "which leads her to know if someone is intending a sexual assault."

At trial, Gagen described an incident where Friedman followed after she left Subway one night. This incident formed the basis, in part, for the aggravated stalking charge. Friedman moved in and around buildings along the way, attempting to conceal his presence. Gagen testified that she thought Friedman was "going to just take me, kill me and rape me." Even assuming evidence of Gagen's alleged family history of abuse was admissible, Friedman failed to adequately explain how it would have impeached Gagen's testimony. Nothing in her testimony suggested that her fear during the event she described resulted from past abuse.

Friedman also complained that counsel should have introduced evidence showing that the State encountered difficulties in compelling Gagen to appear at trial. Even assuming such evidence was admissible, Friedman did not adequately explain how counsel's failure to introduce it prejudiced him.

Friedman further argued that counsel was ineffective for failing to object to prejudicial hearsay and fabricated evidence. He complained that LVMPD Detective Timothy Moniot's testimony was improper because he discussed stalking events unrelated to Friedman's case. However, counsel objected to this testimony as violative of NRS 48.035. Further, we concluded in Friedman's direct appeal that Detective Moniot's testimony was improper, but that the error was harmless in light of the overwhelming evidence of Friedman's guilt.

Friedman next complained that Officer Swift testified falsely about the number of witnesses who had observed him masturbating and

that she had conducted an "excessive detention and search of him." However, Friedman advances nothing more than a bare allegation.[6]

Friedman also complained that LVMPD Officer Robert Pettit's testimony that "Pettit claimed to have heard, from another police officer, that he had 'seen' binoculars in Mr. Friedman's vehicle" was inadmissible hearsay. He further contended that the binoculars were irrelevant because they were not connected in any way to the charged crimes. However, Pettit testified at trial that he observed a pair of binoculars in the front seat of Friedman's vehicle. And Friedman failed to explain how he was prejudiced even assuming the binoculars were unconnected to his crimes.

Friedman asserted that counsel should have objected to Cassie Leffner's testimony that the police authorized her and other Subway employees to accost Friedman when no such authority existed. Friedman misstated Leffner's testimony in this regard. Leffner testified that the police "didn't tell us to necessarily chase him down, they said if you catch him while he's here," call the police. We discern nothing in Leffner's testimony suggesting that the police granted Leffner or any other Subway employee permission to commit any illegal act against Friedman. In fact, counsel used Leffner's testimony to the defense's advantage by pointing out the fact that, incredibly, Leffner and other employees chased Friedman, whom they all feared.

Friedman further complained that counsel was ineffective for not objecting to Ruth Garn's testimony as inadmissible hearsay.

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[6]Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Specifically, Friedman argued that Garn improperly testified about events reported to her by other Subway employees. Garn was the manager of the Subway where Friedman committed the offenses. Her testimony centered on what she did in her capacity as manager when she received reports from her employees about Friedman's activities. Counsel objected to Garn's testimony as inadmissible hearsay when Garn began to testify to what her employees told her. In response, the district court gave the jury a cautionary instruction.[7]

We conclude that Friedman failed to show that his counsel was ineffective for the reasons discussed above and that the district court did not err in denying this claim.

Fourth, Friedman argued that counsel was ineffective in allowing the use of perjured, coached, or coerced testimony at trial. Friedman complained that the prosecution and police officers improperly coached, coerced, and solicited numerous eyewitnesses to alter their testimony to enhance the severity of Friedman's conduct, resulting in the admission of perjured testimony. Friedman cites a plethora of alleged discrepancies between various witnesses' police statements, preliminary hearing testimony, and trial testimony as evidence of the prosecution's and the police's improper influence over the eyewitnesses. We have carefully reviewed the police statements, preliminary hearing testimony and trial testimony at issue, and we conclude that Friedman failed to

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[7]To the extent Friedman argued that appellate counsel was ineffective for not raising this matter on appeal, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

demonstrate that counsel was ineffective. On the critical points at issue in this case, each eyewitness' trial testimony was substantially consistent with their prior statements and preliminary hearing testimony. Counsel vigorously cross-examined each of the eyewitnesses respecting their perceptions of the events and any deficiencies in that regard. Further, we discern no overt attempt on the part of the prosecution or the police to improperly influence or coerce any witness' statements or testimony. Based on our careful review of the record on appeal and Friedman's arguments, we conclude that the district court did not err in denying this claim.[8]

Fifth, Friedman contended that counsel was ineffective for failing to secure funds and complete crucial investigations. Friedman chided counsel for failing to expend funds to investigate and present witnesses who would have testified that stalking victim April Gagen was a vindictive, vengeful person and suffered an abusive past. Even assuming such character evidence had been introduced, Friedman failed to demonstrate that the outcome of his trial would have been different in light of the testimony of other eyewitnesses who corroborated Gagen's description of Friedman's acts. And Friedman failed to explain on what basis testimony regarding Gagen's alleged abusive past would have been admissible.[9]

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[8]To the extent Friedman argued that appellate counsel was ineffective for not raising this matter on appeal, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[9]See NRS 50.085.

Friedman also asserted that counsel should have secured and introduced evidence of all telephone calls to the police made by Subway employees. Friedman's argument regarding the relevance of this evidence is unclear; however, it appears that he contended that the employees' repeated calls to the police suggested that the witnesses had fabricated the allegations of sexual misconduct against him to justify their aggressive behavior in chasing him from the area. We conclude that Friedman failed to adequately explain why his counsel was ineffective for not introducing this evidence.

Sixth, Friedman complained that counsel was ineffective for not challenging alleged improper pretrial photographic lineup procedures. In essence, he argued that the photographic lineups were improper because his photograph was always placed in the fifth position, the other individuals pictured were overtly dissimilar to him, and the photographic lineup was repeatedly shown to witnesses in an effort to influence witnesses to select him as the perpetrator. Friedman pointed particularly to the photographic lineup procedure used with witness Brandi Nilson. However, Nilson testified that she was unable to select a suspect from the photographs presented and did not identify Friedman at trial as the perpetrator. Respecting the other witnesses who were presented photographic lineups, we conclude that the record does not show that the procedure used was impermissibly suggestive such that counsel was ineffective for failing to object in this regard. Therefore, we conclude that the district court did not err in denying this claim.[10]

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[10]Simmons v. U.S., 390 U.S. 377, 384 (1968) ("[C]onvictions based on eyewitness identification at trial following a pretrial identification by

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Seventh, Friedman argued that counsel was ineffective for failing to call several witnesses and for inadequately cross-examining and impeaching numerous witnesses' testimony at trial. We carefully reviewed Friedman's arguments on this claim and conclude that counsel was not ineffective. Counsel vigorously cross-examined the State's eyewitnesses respecting any deficiencies in their perception of the events. Counsel also thoroughly cross-examined the police officers who testified respecting their involvement in investigating Friedman's activities.

Friedman further argued that counsel inadequately questioned defense witness Daniel Waymack, who worked at an adult video store located near the Subway. Specifically, Friedman contended that counsel should have questioned Waymack about "the aggressive uses [sic] of deadly weapons, obtained from his shop," by Subway employees and their "inappropriate uses of his establishment." Waymack testified that on three occasions Subway employees walked into the video store and asked Waymack, or another video store employee, for a stick because "they were in pursuit of an individual who was harassing them." Friedman failed to identify what additional information counsel should have obtained from Waymack on this matter. And Friedman failed to explain what "inappropriate uses" Subway employees made of the video store.

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photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."); see Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997).

We conclude that Friedman failed to show that the impeachment evidence Friedman desired counsel to use, assuming counsel was aware of its existence, would have changed the outcome of the trial. Consequently, we conclude that the district court did not err in denying this claim.

Eighth, Friedman asserted that counsel was ineffective for not adequately challenging evidence seized during police searches of his residence and vehicle.[11] Counsel sought to suppress items seized from the search of Friedman's vehicle, which constituted the bulk of the physical evidence against him. In a pretrial hearing on the motion, counsel did not specifically address items seized from Friedman's residence, including a pair of binoculars, various papers, and pictures of semi-nude women. However, Friedman failed to show how counsel's failure to address these items in the hearing prejudiced him in light of the overwhelming evidence of his guilt. During trial in a hearing outside the jury's presence, counsel objected to the admission of evidence seized during police searches on the grounds that it was irrelevant and unduly prejudicial. Counsel also posed a continuing objection to the admission of all of the evidence seized during police searches. We conclude that Friedman failed to sufficiently explain what additional challenges to the evidence counsel should have taken that

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[11]To the extent Friedman argued that appellate counsel was ineffective for not challenging on appeal the admission of evidence obtained during allegedly illegal searches, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

would have led to the exclusion of evidence.[12] Friedman also claimed that illegal evidence was obtained through an improper police interrogation. However, he failed to explain why the interrogation was improper. We conclude that Friedman did not establish that his counsel was ineffective in this regard and that the district court did not err in denying this claim.

Ninth, Friedman contended that counsel was ineffective for failing to understand and argue the elements of aggravated stalking as defined in NRS 200.575(2). Friedman argued that counsel failed to understand that aggravated stalking required that "one specific person . . . must be shown to have been the targeted victim" and that "something more than someone's subjective interpretation must be proven to constitute the requisite threat of death or substantial bodily injury."

Friedman's argument on this issue is not entirely clear, but he apparently contended that because all Subway employees received neighborhood watch calls about an alleged sexual predator in the area and his appearances near the Subway were not directed toward a particular person, he could not be convicted of stalking. However, NRS 200.575 provides that "[a] person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that actually causes the victim to feel terrorized, frightened, intimidated or harassed, commits the crime of stalking." Nothing in this statute suggests

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[12]We note that in Friedman's direct appeal, this court concluded that the district court erred in admitting "items such as the used condom and dildo . . . because of their minimal relevance and prejudicial nature." However, we concluded that the error was harmless in light of the overwhelming evidence of guilt.

that the conduct must be targeted toward one victim. Further, the charging document clearly alleged that Friedman stalked April Gagen, setting forth the course of conduct constituting aggravated stalking. Nothing in the record on appeal suggests that counsel misunderstood the elements of aggravated stalking or the evidence supporting the charge.

Friedman further argued that counsel failed to understand that aggravated stalking required proof that the victim be placed in reasonable fear of death or substantial bodily harm. Again, Friedman's argument is not entirely clear. However, he apparently contended that an aggravated stalking charge cannot be supported by the subjective perceptions of the alleged victim and that the victim's testimony that she feared death or substantial bodily harm is insufficient to sustain a conviction. Gagen testified that Friedman followed her after she left Subway one night alone, attempted to hide the fact that he was following her, and at one point, yelled obscenities at her, including a threat to hurt her. NRS 200.575(2) requires proof that the course of conduct caused the victim "to be placed in reasonable fear of death or substantial bodily harm." (Emphasis added.) The jury was properly instructed on the elements of aggravated stalking and substantial bodily injury. Based on the evidence presented, the jury apparently concluded that Friedman's course of conduct placed Gagen in reasonable fear of death or substantial bodily injury. Nothing in the record on appeal suggests that counsel misunderstood the elements of aggravated stalking.

Friedman also contended that counsel failed to advance defense theories such as lack of intent, alibi, self-defense, "protected expression," "legal business activity," and "estoppel by entrapment." To the extent any of these concepts constitute theories of defense, Friedman

failed to adequately explain what evidence supported any of these theories or that presenting these theories would have changed the outcome of the trial in light of the overwhelming evidence of his guilt.

We conclude that Friedman failed to establish that his counsel was ineffective on the foregoing grounds. Therefore the district court did not err in denying this claim.

Tenth, Friedman asserted that counsel was ineffective for failing to challenge allegedly improper language in charging documents and instructions read to the jury that contained references to him as a convicted sex offender, where none of the victims testified that the neighborhood watch caller referred to Friedman as a convicted sex offender. Friedman cites three documents to support his claim; however he identified these documents only by exhibit number, and it is unclear to which documents he is referring. The amended information, which was read to the jury as an instruction stated that Friedman appeared at the Subway dressed like the convicted sexual offender described in his calls impersonating Paula from a neighborhood watch group. None of the eyewitnesses indicated that the neighborhood watch caller used the term convicted sex offender. To the extent that the amended information mischaracterized the evidence, we conclude that Friedman did not show any prejudice from counsel's failure to object. Several eyewitnesses testified to the neighborhood watch caller's description of the alleged sexual predator and the use of the phrase convicted sex offender in the jury instruction was brief.

Friedman further complained that counsel failed to object to charging documents alleging that Friedman had committed acts of indecent exposure in April Gagen's presence when no evidence was

presented to support the allegations. Gagen testified that she observed Friedman on two occasions look at her, grab his erect penis, and yell obscenities at her. Friedman was charged and convicted of one count of open or gross lewdness involving Gagen. Her testimony supports not only the conviction for open and gross lewdness, but also the acts described in the aggravated stalking charge. Friedman failed to advance any basis for objecting in this regard.

Eleventh, Friedman argued that counsel was ineffective for not objecting to alleged prosecutorial misconduct. Specifically, Friedman contended that the prosecutor committed misconduct during opening statement by asserting that Gagen "fought back" when Friedman followed her from Subway one night. Friedman asserted that the prosecutor's statement implied, without any supporting evidence, that Friedman had attacked her. Friedman further argued that the prosecutor's statement, "God Bless [Gagen] . . . she fought back," was an improper religious reference. Friedman also contended that the prosecutor mislead the jury by arguing that Gagen was on her way home during the stalking incident, when the evidence showed that Gagen was on her way to meet friends.

A prosecutor may not argue inferences not supported by the evidence.[13] In determining if prosecutorial misconduct constitutes reversible error, the relevant inquiry is whether the prosecutor's comments were so unfair as to have deprived the defendant of due

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[13]Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

process.[14] Here, the prosecutor did not comment in opening statement that Gagen fought back during the aggravated stalking incident. Rather, the prosecutor stated that Gagen yelled at Friedman, which was supported by Gagen's later testimony. To the extent that the prosecutor's reference to God was improper, we conclude that Friedman failed to show that counsel's failure to object prejudiced him. Gagen's destination on the night of the aggravated stalking incident was somewhat unclear from her testimony. However, Friedman failed to explain the significance of this matter. To the extent that the prosecutor's statement regarding Gagen's destination that night was in error, Friedman failed to demonstrate that counsel's failure to object prejudiced him.

Friedman next contended that counsel should have objected to the prosecutor's attempts to have State witnesses refer to Friedman as having a criminal record. To support his claim, Friedman referenced preliminary hearing testimony. However, he failed to explain how preliminary hearing testimony not presented at trial prejudiced him. Friedman's citations to the trial transcript did not support his claim. Therefore, we conclude that he failed to show that counsel was ineffective in this regard.

Friedman further complained that counsel failed to object to the prosecutor's comments to jurors to place themselves in Gagen's position as the aggravated stalking victim. This court has held as improper arguments that ask jurors to "place themselves in the shoes of

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[14]Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

the victims."[15] Here, the prosecutor argued, "But back to the phone calls. Somebody calls you while you're at work, you're a young girl, you're working at night . . . ." The prosecutor proceeded to argue that the Subway employees were young girls who believed that the phone calls they received were from a person affiliated with a reputable organization who warned them that a sexual predator was loose in the neighborhood. The prosecutor then asked the jury to imagine how frightened the young women must have been when the predator about whom they were warned appeared at the Subway shortly thereafter. Considering these comments in context, we conclude that they did not constitute an improper "Golden Rule" argument.[16]

Friedman next argued that pretrial publicity prejudiced him, but he failed to explain what action he desired his counsel to take and failed to show, other than asserting general allegations of prejudice, how any pretrial publicity rendered his trial unfair.

Friedman further asserted that counsel was ineffective for failing to object to the prosecutor's comments that items recovered from various searches, including used condoms, jock straps, women's clothing, and dildos, constituted a rape kit. Although the prosecutor did not specifically refer to these items in closing argument as a rape kit, she argued that these items constituted evidence of "what ultimately he could have done to the girls." The prosecutor reiterated this message in rebuttal argument. The Subway employees testified that they were afraid of

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[15]Id. at 1020, 945 P.2d at 445.

[16]Id.

Friedman; however, there is no indication that they were aware that Friedman possessed any of the above-listed items. To the extent that the prosecutor's argument stretched beyond any permissible inference from the evidence or was inflammatory, we conclude that Friedman suffered no prejudice in light of the overwhelming evidence of guilt.[17]

We conclude that he failed to show that counsel was ineffective on any of the foregoing grounds and that the district court did not err in denying this claim.

Twelfth, Friedman contended that counsel was ineffective for not requesting several jury instructions.[18] He argued that counsel should have requested an instruction on lesser-included offenses respecting the aggravated stalking charge. However, even assuming a lesser-included offense instruction had been given, we conclude that there was no reasonable probability that the result of his trial would have been different in light of the overwhelming evidence against him on this charge.[19]

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[17]See Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004).

[18]To the extent Friedman argued that his appellate counsel was ineffective for failing to address plain error resulting from the absence of instructions trial counsel should have requested, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[19]Friedman also asserted that counsel should have requested appropriate instructions concerning transitional findings and an "acquittal standard." As the jury was not instructed on lesser-included offenses, a transition instruction was inappropriate. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that "[a] 'transition' instruction

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Friedman contended that counsel should have sought specific instructions on the requisite burden of proof as to each essential element of each offense charged. However, the district court instructed the jury on the elements of each offense and that the State was required to prove beyond a reasonable doubt every material element of the crimes charged. Friedman failed to explain what additional instructions he desired or to cite any authority suggesting that additional instructions were required.

Friedman next claimed that counsel should have objected to an improper reasonable doubt instruction. However, the district court advised the jury on reasonable doubt in accordance with the mandatory instruction provided in NRS 175.211.

Friedman also argued that counsel should have requested an instruction advising the jury that to secure a conviction for aggravated stalking the State was required to prove beyond a reasonable doubt that the course of conduct alleged must be focused on a specific individual and that evidence used to support other allegations could not be used to prove the essential elements of the aggravated stalking charge. However, the district court instructed the jury on the elements of aggravated stalking, including detailing specific actions the State alleged showed a course of action perpetrated against April Gagen. The district court further instructed the jury that each charge and the evidence pertaining to it should be considered separately.

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guides jurors in proceeding from the consideration of a primary charged offense to the consideration of a lesser-included offense").

Friedman also asserted that counsel was ineffective for not requesting an instruction advising the jury that "an essential element of stalking necessarily excludes acts initiated or continued by the alleged victim." However, he provided no legal basis for such an instruction or that it was necessary in light of the other instructions given.

Friedman argued that counsel should have sought instructions defining "course of conduct over time," "credible threat," and "substantial bodily injury," as they pertained to the aggravated stalking charge, and what constituted gross lewdness and masturbation. He contended that in the absence of such instructions, the jurors were free to apply their own standards rather than legal definitions. However, as noted above, the district court identified several actions the State alleged constituted a course of conduct. The district court also instructed the jury on the type of threat necessary for an aggravated stalking conviction and on the meaning of substantial bodily harm. The jury was also instructed on the specific acts the State alleged as constituting gross lewdness and defined indecent exposure.

Friedman further contended that counsel should have sought instructions on defenses including entrapment, self-defense, and alibi. However, he failed to allege sufficient factual allegations to support this claim.[20] Friedman also argued that counsel was ineffective for not seeking instructions regarding lack of criminal intent and lack of evidence. However, the district court instructed the jury respecting criminal intent

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[20]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

and the State's burden of proof. Friedman failed to show that any additional instructions were necessary.

We conclude that trial counsel was not ineffective for failing to seek the instructions Friedman desired and that the district court did not err in denying this claim.

Thirteenth, Friedman asserted that counsel was ineffective for not objecting to alleged jury misconduct. Specifically, Friedman contended that two jurors attempted to follow and eavesdrop on a conversation between him and trial counsel during a lunch recess and that the jury foreman made comments and gestures in response to a police officer's testimony regarding pornography found in Friedman's backpack. Friedman also asserted that a female juror mouthed words and made head motions to one of the victims during her testimony. Friedman did not identify or describe the alleged comments and gestures or how he was prejudiced, and he speculated that counsel must have been aware of the alleged misconduct. We conclude that there is no reasonable probability that the result of the trial would have been different even if counsel had known and objected to the alleged jury misconduct.

Fourteenth, Friedman contended that counsel was ineffective for not objecting to the exclusion of prospective jurors with prior felony convictions. The trial transcript shows that two jurors were excused after informing the district court that they were convicted felons.[21] Friedman

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[21]See NRS 6.010 (providing that "[a] person who has been convicted of a felony is not a qualified juror of the county in which he resides until his civil right to serve as a juror has been restored" pursuant to one of several statutory provisions). The trial transcript is silent as to whether either prospective juror's rights had been restored.

speculated that convicted persons "might add a more educated experience of having dealt with law enforcement as an accused, and not [be] so susceptible to presuming an accused as guilty." We conclude, however, that such conjecture was insufficient to demonstrate that counsel was deficient in this regard.

Friedman also argued that the prosecutor exercised peremptory challenges to exclude African-American jurors. He asserted that there were only three prospective African-American jurors and that the prosecutor excluded two jurors, leaving one African-American juror on the panel.[22] Friedman identified Timothy Irby as an African-American juror who had been improperly peremptorily challenged by the prosecutor; however, he neglected to identify the other two African-American individuals, one of whom was empanelled. We conclude that Friedman did not allege sufficient factual allegations to support a claim of ineffective assistance on this basis.[23]

We conclude that the district court did not err in denying his claim that counsel was ineffective for not challenging the above jury-related issues.

Fifteenth, Friedman argued that counsel was ineffective for failing to object to alleged errors committed during sentencing.[24]

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[22]See Batson v. Kentucky, 476 U.S. 79 (1986).

[23]Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[24]To the extent Friedman contended that appellate counsel was ineffective for failing to challenge alleged errors committed during sentencing, we conclude that the district court did not err in denying this claim because this claim had no reasonable probability of success on

continued on next page . . .

Friedman asserted that counsel did not adequately communicate with him prior to sentencing, but he failed to explain how this alleged circumstance prejudiced him. He further contended that counsel was ineffective for not introducing any mitigating evidence; however, he failed to identify what mitigating evidence he desired counsel to introduce. Friedman next complained that counsel should have objected to the prosecutor's "presentation of a mass of prejudicial illegally acquired items as evidence of uncharged crimes and referred to such items as a rape kit." Presumably Friedman was referring to the items recovered in the search of his vehicle and residence. However, this evidence was admitted at trial and proper evidence to consider in sentencing Friedman. Friedman further contended that counsel was ineffective for not arguing his prior convictions as stale. However, counsel did challenge his Ohio convictions as stale and requested the district court not to consider them.

Friedman also complained that counsel was ineffective for not objecting to the district court's failure to impose a sentence for the aggravated stalking charge, rendering the imposition of habitual criminal status improper because "there was no actual sentence for the underlying felony." However, due to the habitual criminal adjudication, Friedman's sentence for aggravated stalking was enhanced to a life term in prison.[25]

. . . continued

appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[25]See Schneider v. State, 97 Nev. 573, 575, 635 P.2d 304, 305 (1981) (stating that an "adjudication under the habitual criminal statute

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The district court did not improperly sentence Friedman. Therefore, counsel had no basis upon which to object in this regard.

Friedman next asserted that counsel was ineffective for not objecting to the district court's failure to make specific findings supporting the habitual criminal adjudication. In deciding criminal habituality, the district court is not required to make particularized findings that it is just and proper to impose habitual criminal status.[26] Rather, "this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion" and "was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication."[27] Here, the district court determined that habitual criminal status was appropriate because Friedman's history and actions in the instant case proved him to be a continuing danger to the community. We conclude that counsel had no basis to object in this regard.

Friedman also argued that counsel was ineffective for failing to object to misinformation considered by the district court in sentencing him. The district court noted that Friedman was given the opportunity to attend sexual offender treatment in Florida after his 1982 Montana convictions for rape and aggravated assault but that he was rejected by the program as "not being amenable to treatment." Friedman contended

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. . . continued

constitutes a status determination and not a separate offense"); see also Parkerson v. State, 100 Nev. 222, 224, 678 P.2d 1155, 1156 (1984).

[26]Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

[27]Id. at 333, 996 P.2d at 893-94.

that he "had in fact completed SOTP programming in 1989-90." It is unclear from the record on appeal whether the program to which Friedman was referring was the same one on which the district court commented. However, even assuming the district court relied upon misinformation, Friedman failed to show that counsel's failure to object prejudiced him in light of the serious nature of his prior and instant offenses.

We conclude that the district court did not err in denying Friedman's claims that his counsel was ineffective during sentencing.

Claims of ineffective assistance of appellate counsel

Friedman argued that appellate counsel was ineffective for numerous reasons. To secure relief, Friedman must demonstrate that appellate counsel's performance was deficient and prejudice by showing that the omitted claims would have a reasonable probability of success on appeal.[28]

Friedman contended that appellate counsel should have argued that several of his convictions subjected him to double jeopardy. Double jeopardy protects a criminal defendant from a subsequent prosecution following a conviction or an acquittal and from multiple punishments for the same offense.[29] Friedman contended that his convictions for two counts of indecent exposure involving Ruth Garn and Cassie Leffner and one count open or gross lewdness involving Garn subjected him to multiple punishments arising out of the same incident.

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[28]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[29]Garcia v. State, 121 Nev. 327, 342, 113 P.3d 836, 845 (2005).

The allegations against Friedman were alleged to have occurred between November 1, 2002, and January 31, 2003. Ruth Garn testified about three separate occasions where she observed Friedman masturbating and that she saw Friedman's penis. Cassie Leffner recounted two occasions where Friedman exposed his penis to her. As the events alleged in the challenged charges were separate acts, Friedman's convictions for these offenses did not violate double jeopardy.

Friedman also asserted that appellate counsel should have argued on appeal that his conviction for aggravated stalking violated double jeopardy principles because the charge was comprised of a course of conduct alleged in the remaining counts. The aggravated stalking charge alleged a course of conduct including Friedman's telephone calls to April Gagen and other employees, his appearance at Subway and yelling obscenities at Gagen and other employees, spray painting obscenities and vulgar drawings on Subway grounds, engaging in lewd conduct in Gagen's and other employees' presence, and following Gagen one night after she left Subway, yelling obscenities at her, making vulgar hand gestures, and threatening to harm her. The remaining counts alleged incidents of indecent exposure and lewd acts committed against specific individual women. Although these instances were used in part as evidence of a course of conduct respecting the aggravated stalking charge, Friedman was not punished twice for the same offenses.

Even assuming appellate counsel had raised on appeal a double jeopardy violation claim based on the foregoing grounds, we conclude that it had no reasonable probability of success. Therefore, the district court did not err in denying this claim.

Friedman further asserted that appellate counsel should have challenged the sufficiency of the evidence to support his convictions. With the exception of Brandi Nilson, all of the victims of Friedman's crimes unequivocally identified him as the perpetrator of the alleged acts of indecent exposure and lewdness, describing these incidents in detail. Gagen unequivocally identified Friedman as the person who committed lewd acts in her presence and followed her from Subway one night and threatened bodily injury. Further, Friedman admitted to the police that he made the neighborhood watch calls warning of a sexual predator in the area, after which he appeared at Subway dressed as the sexual predator. We conclude that a challenge to the sufficiency of the evidence had no reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Friedman also argued that appellate counsel was ineffective for failing to address the meager number of defense exhibits admitted at trial. However, he failed to identify what additional exhibits or evidence he believed should have been introduced. Moreover, it appears that this claim was grounded in a claim of ineffective assistance of trial counsel, which is generally not a matter appropriate for direct appeal.[30]

Friedman next contended that appellate counsel was ineffective for not challenging the aggravated stalking statute as being unconstitutionally vague as applied to him. "The test for vagueness is

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[30]See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

whether the terms of the statute are 'so vague that people of common intelligence must necessarily guess as to [their] meaning.'"[31]

A stalking charge requires proof of, among other things, a course of conduct.[32] Friedman contended that "course of conduct" is vague as applied to him because the term was not defined or limited to a specific period of time. However, here, the time period alleged was not unfettered, but restricted to a two-month window during which the State alleged that Friedman engaged in a course of conduct designed to cause Gagen to fear death or substantial bodily injury.

Friedman also argued that NRS 200.575 was vague as applied to him because it did not define the threat necessary to support an aggravated stalking offense, i.e., the statute allows the victim's "subjective interpretations of pure speech and mere words" to substantiate an actual threat of death or substantial bodily harm. However, contrary to Friedman's assertion, NRS 200.575 does not employ a subjective test. Rather, the statute requires proof that the victim "be placed in reasonable fear of death or substantial bodily harm."[33] Here, the charge detailed the course of conduct supporting the aggravated stalking charge, and the jury was instructed that to find Friedman guilty of the offense, his actions must have placed the victim in reasonable fear of death or bodily harm.

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[31]Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175, 177 (1998) (quoting Cunningham v. State, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993)).

[32]See NRS 200.575.

[33]NRS 200.575(2) (emphasis added).

We conclude that NRS 200.575 was not unconstitutionally vague as applied to him on the grounds he asserted. Consequently we conclude that Friedman failed to demonstrate that appellate counsel was ineffective in this regard and that the district court did not err in denying this claim.

Finally, Friedman claimed that appellate counsel inadequately communicated with him during the appellate process. We conclude, however, that Friedman failed to demonstrate that additional communication would have resulted in a different outcome on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Direct appeal claims

Friedman's remaining 37 claims raised numerous alleged instances of prosecutorial and police misconduct, constitutional infirmities, and trial errors.[34] However, these claims were appropriate for direct appeal and therefore procedurally barred absent a showing of good cause for not raising them previously and actual prejudice.[35] Friedman did not adequately explain his delay in raising these matters, and we conclude that he failed to demonstrate actual prejudice. Accordingly, we conclude that the district court did not err in denying these claims.

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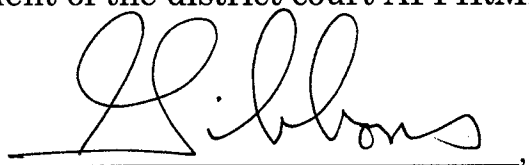
[34]These matters are contained in claims 20 through 57 of Friedman's post-conviction habeas petition.

[35]See NRS 34.810(1)(b), (3).

Having reviewed the record on appeal, we conclude that briefing and oral argument are unwarranted and that the district court did not err in denying Friedman's habeas petition.[36] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[37]



_____, C. J.
Gibbons

_____, J.
Maupin

_____, J.
Saitta

cc: Eighth Judicial District Court Dept. 17, District Judge
Kenneth A. Friedman
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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

[37]We have reviewed all documents that Friedman has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Friedman has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.