

# ARKANSAS SUPREME COURT

No. CR 07-915

JOSE ENRIQUE MENDIOLA  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered      January 15, 2009

APPEAL FROM THE CIRCUIT COURT  
OF PULASKI COUNTY, CR 2003-2538,  
HON. BARRY A. SIMS, JUDGE

AFFIRMED.

## PER CURIAM

In 2004, appellant Jose Enrique Mendiola was found guilty by a jury of three counts of aggravated robbery, one count of Class Y felony kidnapping, and two counts of Class B felony kidnapping. He received concurrent sentences for an aggregate term of 780 months' imprisonment. The Arkansas Court of Appeals affirmed. *Mendiola v. State*, 92 Ark. App. 359, 214 S.W.3d 271 (2005).

Subsequently, through counsel, appellant timely filed in the trial court a verified petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition after a hearing, and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

In the petition filed in the trial court and on appeal, appellant claims that trial counsel was ineffective in two instances.<sup>1</sup> Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

Appellant first contends that counsel was ineffective for failing to object to allegedly improper statements made by the prosecutor during voir dire. The trial transcript in appellant's direct appeal<sup>2</sup> reveals that while questioning prospective jurors, the prosecutor explained to the jury panel that an accomplice is someone "who aids, assists, helps, plans, et cetera, to have a crime committed" and whose responsibility for committing the crime is the same as the principal actor. The prosecutor then gave a hypothetical example that involved four people working together to commit a crime. He questioned the jury about whether all four participants in the hypothetical example were equally liable for committing the crime although only one person physically took the property from its owner.

Appellant first argues that the prosecutor's explanation was an incorrect statement of the law and that the jurors' understanding of accomplice liability was tainted because trial counsel failed to object to the explanation. He contends that as a result he was convicted of aggravated robbery and kidnapping rather than robbery and false imprisonment. Appellant bases this argument on the

<sup>1</sup>The original petition contained three bases for ineffective assistance of counsel. The third argument regarding jury instructions is not shown as a point on appeal. Claims raised below but not argued on appeal are considered abandoned. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007).

<sup>2</sup>The record lodged in appellant's direct appeal is a public record which need not be incorporated into the record on the second appeal which stems from the same judgment of conviction. *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998) (per curiam).

language in Arkansas Code Annotated § 5-2-403 and § 5-2-406 (Repl. 2006), and claims that these statutes “establish that participants [in a crime] do not take on the level of culpability of the most culpable individual.”

Appellant’s reliance on these statutes is misplaced. Section 5-2-406 applies only when two or more defendants are charged and tried together, and the degree of each defendant’s culpability may differ. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006) (citing *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006)); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999). That is not the case here, as appellant was tried individually and not jointly with his codefendants.

Also, appellant fails to demonstrate how the prosecutor’s definition of accomplice liability was an incorrect statement of the law. Appellant cites section 5-2-403(b) as the basis for this contention, but fails to show a substantive or material distinction between the prosecutor’s definition and section 5-2-403(b).

Here, appellant fails to establish that counsel’s performance was deficient, as counsel cannot be ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene v. State, supra*. Further, appellant fails to show that he suffered prejudice as a result of counsel’s actions.

In the first point on appeal, appellant also contends that there was insufficient evidence to prove that appellant “was the prime mover” in these crimes as cited by the trial court in its order denying the Rule 37.1 petition. This argument is merely a challenge to the sufficiency of the evidence, which appellant cannot raise through a Rule 37.1 proceeding by framing his question as an allegation of ineffective assistance of counsel. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005).

Appellant's second point on appeal concerns the amendment of the felony information regarding two of the three kidnapping charges. On the morning of the trial, the prosecutor notified the trial court that appellant was being charged with kidnapping for the purpose of terrorizing another person. Ark. Code Ann. § 5-11-102(a)(5) (Repl. 2006). Previously, appellant had been charged with kidnapping for the purpose of causing physical injury. Ark. Code Ann. § 5-11-102(a)(4). Appellant claims here that the amendment modified the nature of the charges and that trial counsel was ineffective for failing to object or move for mistrial. He additionally contends that the basis for his remedy is rooted not only in Arkansas law, but also in his constitutional right of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

As a threshold matter, appellant fails to establish that the felony information modification in fact changed the nature or degree of the two amended kidnapping charges. We have previously addressed similar situations and found that the amended kidnapping charges were changed only in the manner in which the offense was committed, and not in the nature or degree of the crime. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007); *Baumgarner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1994); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982). As no legal basis supports this contention, trial counsel was not ineffective for failing to raise an argument without merit. *Greene v. State*, *supra*.

Affirmed.

Imber, J., not participating.