

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JERRY S. GATES,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13542
Trial Court No. 3AN-16-07051 CI

SUMMARY DISPOSITION

No. 0233 — December 15, 2021

Appeal from the Superior Court, Third Judicial District,
Anchorage, Erin B. Marston, Judge.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth
D. Friedman, Redding, California, under contract with the
Office of Public Advocacy, Anchorage, for the Appellant.
Elizabeth T. Burke, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Following an altercation at his home in 2006, Jerry S. Gates was convicted of attempted first-degree murder, fourth-degree controlled substance misconduct, second-degree weapons misconduct, fourth-degree weapons misconduct, and

third-degree assault.¹ Gates appealed, and we affirmed his convictions.² Gates then filed an application for post-conviction relief, alleging that he received ineffective assistance of counsel at trial and on appeal. In particular, Gates claimed that his trial and appellate attorneys were incompetent for failing to identify an error in the jury instructions that undermined his argument that he acted in self-defense.

The superior court dismissed Gates’s application. The court ruled that Gates had not “pleaded a prima facie case or demonstrated prejudice due to ineffective assistance of counsel with respect to any of his attorneys.” According to the court, “[p]rejudice, in this context, means identifying a legal argument that would have been successful if competently pursued.” The court reviewed the trial record and found that Gates’s self-defense claim was “untenable given the facts of the case.”

The superior court noted that the evidence presented at the trial showed that the attempted murder and assault charges were based on Gates’s conduct during an altercation which occurred in Gates’s home. The evidence showed that, during the altercation, Gates drew a .45 caliber revolver that was hidden in his couch and fired several shots — one of which wounded his neighbor, Christopher Short. When Short fled the residence, Gates put down the revolver, picked up an SKS assault rifle, and followed Short outside. Gates saw Short hiding in a raspberry patch near Gates’s deck, and he fired the assault rifle at him. Short then left the berry patch and ran toward his own house. According to Short, Gates fired at least one more shot at him.

After reviewing this record, the superior court found that “[n]othing in the record demonstrates why Gates would have been justified in shooting at the other man

¹ AS 11.41.100(a) & AS 11.31.100(a), AS 11.71.040(a)(2), AS 11.61.195(a)(1), AS 11.61.210(a)(3), and AS 11.41.220(a), respectively.

² *Gates v. State*, 2015 WL 4387384, at *6 (Alaska App. July 15, 2015) (unpublished).

multiple times, switching firearms for a more powerful weapon and then chasing the man out of the home and down the street while firing the weapon again.” Because the court found there was no reasonable possibility that Gates would have prevailed on his self-defense argument even if the jury had been given the instructions Gates identified in his application, it determined that Gates had not met his burden of demonstrating prejudice.

On appeal, Gates suggests that it is self-evident that his self-defense claim would have succeeded if the jury had been instructed differently.

But to succeed on a claim of ineffective assistance of counsel, an applicant for post-conviction relief must demonstrate not only that their attorney’s conduct fell below the standard of performance minimally required of criminal law practitioners (*i.e.*, incompetence), but also that there is a reasonable possibility that the attorney’s incompetence affected the outcome (*i.e.*, prejudice).³ And to satisfy the prejudice prong, the applicant must show “actual prejudice.” In other words, “mere conclusory or speculative allegation[s] of harm will not suffice.”⁴

The effect that attorney incompetence may have on the outcome of a trial is rarely self-evident.⁵ In the context of allegedly mistaken jury instructions, in order to establish prejudice, the applicant generally must discuss the importance of an accurate instruction in relation to the litigation strategies of the parties, the material issues of fact

³ *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

⁴ *State v. Jones*, 759 P.2d 558, 573 (Alaska App. 1988).

⁵ *Id.* (“In some situations . . . the negative effect of an attorney’s incompetence may be obvious In many other situations, however, the effect of an attorney’s incompetence may be anything but self-evident. In those cases, it is incumbent upon the accused, having established incompetence, to adduce further evidence to establish what its actual effect was, or what would have happened had the incompetence not occurred.”).

that were disputed at trial, and the evidence presented on those disputed issues. Gates did not engage in such a discussion in his post-conviction pleadings, nor does he do so on appeal. Instead, Gates raised only a single, conclusory claim of prejudice: that the jury would not have convicted him if it had been correctly instructed. He failed to show, based upon the facts and evidence offered at trial, that there was a reasonable possibility that the jury would have accepted his self-defense claim even if it had been instructed in the manner that he now suggests is correct. Consequently, Gates did not satisfy his burden of pleading a prima facie case of prejudice.

We have reviewed the record in this case, and we perceive no error in the superior court's finding that Gates's application did not establish a prima facie case for relief. We accordingly AFFIRM the superior court's dismissal of Gates's post-conviction relief application.