

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBIN DEMARIO HARDEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60329

**FILED**

DEC 12 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

In his petition filed on October 14, 2010, and his supplemental petition filed on January 23, 2011, appellant claimed that he received ineffective assistance of trial and appellate counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). To demonstrate prejudice from

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

trial counsel's errors, the petitioner must show that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland, 466 U.S. at 687-88; Lyons, 100 Nev. at 432-33, 683 P.2d at 505. To demonstrate prejudice for appellate counsel's failure to raise an issue on appeal, the petitioner must show that "the omitted issue would have a reasonable probability of success on appeal." Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry—deficiency and prejudice—must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that appellate counsel was ineffective for failing to point out on direct appeal that the police report stated that the surveillance video from the store did not show the robbery. Appellant failed to demonstrate that he was prejudiced. On direct appeal, appellate counsel argued that the State failed to gather evidence by not obtaining the surveillance recording that allegedly captured the robbery. This court rejected the argument, concluding that, in light of the store clerk's testimony and appellant's own admissions, the surveillance video was immaterial and would not have affected the outcome of the trial even if it had been presented as evidence. Thus, because the surveillance video was immaterial, appellant could not show that he was prejudiced by appellate counsel's failure to provide further argument on this issue. Furthermore, the officer who drafted the police report testified that he viewed video of the entrance to the store, but that the store manager was unable to show him video from inside the store where the incident took place. Thus, the officer's statement in the police report was not proof that the robbery did not occur. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to obtain a copy of the surveillance video at an earlier time, for

failing to adequately investigate and interview the store managers regarding the video, and for requesting that the witnesses not be allowed to testify to what they saw on the video. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. As this court concluded on direct appeal, the surveillance video was immaterial. Appellant failed to show that any testimony by the store managers or other witnesses regarding the video would have been favorable to him and would have had a reasonable probability of altering the outcome of the trial. Thus, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to move to suppress his confession because it was not recorded or in writing. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. There is no requirement that a defendant's statements be recorded in order to be admissible at trial. Jimenez v. State, 105 Nev. 337, 341, 775 P.2d 694, 696-97 (1989). Counsel thoroughly cross-examined the police officers about their failure to record the interrogation, and it was for the jury to decide the credibility of the officers. See id. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to the admission of photographs of the store and the victim's injury. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. The layout of the store and the bruises incurred by the victim were relevant to proving that appellant committed robbery, and they were not more prejudicial than probative. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that appellate counsel was ineffective for failing to argue that there was insufficient evidence to support the robbery conviction because the stolen liquor was not the “personal property” of the clerk. Appellant failed to demonstrate that appellate counsel’s performance was deficient or that he was prejudiced. Testimony was presented to the jury that the store clerk opened the gate to the secured liquor aisle, allowed appellant to take two bottles of liquor from that aisle, and attempted to assist appellant with the bottles. Appellant pushed the clerk to the ground and left the store with the liquor. This testimony constituted substantial evidence from which a juror could reasonably infer that the store clerk was in “possession and control” of the liquor. See Klein v. State, 105 Nev. 880, 885, 784 P.2d 970, 973 (1989). Thus, appellant could not show that this issue had a reasonable probability of success on appeal. To the extent that appellant sought to raise an independent claim of insufficient evidence, outside the context of ineffective assistance of counsel, he waived this claim because he did not raise it on appeal and did not demonstrate good cause and actual prejudice for his failure to raise it. See NRS 34.810(b)(2). Accordingly, the district court did not err in denying this claim.


Sixth, appellant claimed that appellate counsel was ineffective for failing to respond to the State’s fast track response on direct appeal. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced, as he did not explain how the result of the appeal would have been different had counsel filed a reply. Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to make a timely objection to a partial play-back of testimony

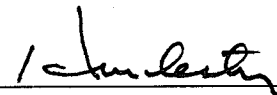
for the jury. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The jury requested to rehear portions of the officers' testimony, the district court played back those portions, and counsel unsuccessfully sought to have the cross-examination testimony played back to the jury. The officers' testimony had already been heard by the jury, and appellant failed to demonstrate that he was prejudiced by the play-back of certain requested portions of the trial testimony. Thus, the district court did not err in denying this claim.

Appellant also claimed that the trial court erred by refusing to instruct the jury on the missing video and to play back the entire cross-examination testimony to the jury. These claims were waived because they could have been raised on direct appeal and appellant did not show good cause for failing to raise them. NRS 34.810(1)(b), (3). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Linda Marie Bell, District Judge  
Rubin Demario Harden  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk