

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LEE LIKE,

No. 36254

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 15 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On March 17, 1997, appellant was convicted, pursuant to a jury verdict, of one count of grand larceny auto. The district court adjudged appellant a habitual criminal and sentenced him to life without the possibility of parole. Appellant filed a direct appeal, contending that the district court erred in: (1) denying his motion for self-representation; (2) failing to properly arraign him; and (3) allowing the State to amend the information to add a habitual criminal charge. This court affirmed appellant's conviction, concluding that appellant's contentions lacked merit.¹

On April 28, 1999, appellant filed a petition for a writ of habeas corpus alleging, among other things, that his counsel was ineffective for failing to investigate, prepare for trial, and advocate on appellant's behalf. Without conducting an evidentiary hearing,² the

¹Like v. State, Docket No. 29407 (Order Dismissing Appeal, December 9, 1998).

²Although the district court did not conduct an evidentiary hearing, it did hear argument from counsel with respect to whether appellant's petition raised issues requiring an evidentiary hearing. The district court concluded that an evidentiary hearing was not necessary because, even assuming appellant could prove that trial counsel should have further investigated in order to discover evidence to impeach the victim, this additional evidence would not have affected the outcome of the proceeding. Indeed, there was sufficient evidence beyond the mere testimony of the victim that appellant committed grand larceny auto, including the fact that law enforcement caught appellant with the vehicle and that appellant gave authorities a fake name and claimed that the vehicle was his.

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district court denied appellant's petition, finding that counsel's conduct did not fall below an objective standard of reasonableness. Appellant filed the instant appeal.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must meet the two-part test set forth in Strickland v. Washington.³ A petitioner must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's errors were so severe that they rendered the jury's verdict unreliable.⁴ The court, however, need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁵ Moreover, we have held that a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.⁶

Appellant first contends that the district court erred in denying his petition because his counsel was ineffective in failing to investigate the background of the victim, Deborah Preston. Particularly, appellant alleged that had his counsel investigated Preston, they would have found witnesses to testify that she: (1) was intoxicated on the night of the purported attack; (2) was a flirtatious "partier" who liked to gamble and hang out with "high rollers" so that she could gamble their money; (3) had previously accused another man of rape; and (4) had filed a civil lawsuit against her former employer. Additionally, appellant alleged that further investigation would have revealed that the victim's account of events immediately after the incident was inconsistent with her trial testimony. Appellant contends that, had his counsel investigated and discovered this information, he could have used it to impeach Preston at

³466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 687.

⁵Id. at 697.

⁶Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

trial.⁷

We conclude that the district court did not err in finding that appellant was not prejudiced by his counsel's failure to investigate Preston's background. We cannot say that trial counsel failed to impugn the credibility of Preston. In fact, the jury did not find appellant guilty of first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, or robbery with the use of a deadly weapon, despite the fact that Preston testified that appellant committed these acts.

At trial, Preston testified that appellant stuck a gun in her back, threatened to kill her, and forced her into her car. Preston also testified that appellant forced her to drive to a parking lot and attempted to force her mouth onto his penis. Preston said she fought with appellant and bit appellant's penis. Appellant then began choking Preston and she played dead. Thereafter, Preston testified that she attacked appellant, and escaped from the car. Appellant drove off with Preston's vehicle and her personal property.

On cross-examination, defense counsel got Preston to concede that she had consumed six drinks that evening, and that she had gone upstairs with another man. Counsel also pointed out numerous instances where Preston's trial testimony contradicted her preliminary hearing testimony. We conclude that counsel's cross-examination likely left doubt in the minds of the jurors regarding Preston's credibility since the jury only convicted appellant of grand larceny auto.

Moreover, even assuming that Preston could have been further impeached, there was ample evidence beyond her testimony that

⁷In a related argument, appellant contends that his counsel was ineffective in failing to request that the victim "undergo a psychological evaluation to determine if she was being truthful." Appellant contends that his case is "strikingly similar" to Warner v. State, 102 Nev. 635, 792 P.2d 1359 (1986), where this court held that counsel was ineffective, in part, for failing to seek a psychological examination of the victim. We conclude that this case is distinguishable from Warner, and that ordering a psychological examination would not have resulted in a different outcome. In Warner, there was no corroborating evidence of sexual assault beyond the testimony of the victim, and the victim had admitted to lying on occasion. 102 Nev. at 637, 729 P.2d at 1360. Here, there was ample evidence to corroborate Preston's testimony that appellant had stolen the vehicle.

appellant stole Preston's vehicle. Indeed, Robert Glenn Holmes, a shift operations supervisor at the Treasure Island Hotel and Casino, testified that appellant admitted to stealing a sweatshirt and gave Holmes permission to retrieve it from his car. When Holmes opened the trunk of the car, he discovered two different Nevada license plates, a wad of money, blood, and a weapon. Holmes then called the Las Vegas police and waited with the car.

Las Vegas police officer Kelli Hickle responded to the scene. Hickle testified that appellant gave her a false identification and name. Hickle ran the vehicle identification number of the automobile that appellant asserted was his and discovered that the vehicle had been reported stolen by Deborah Preston. Hickle contacted Preston, who gave Hickle permission to search the vehicle. Appellant's fingerprints were found inside the vehicle. Because appellant was essentially caught "red-handed" with the stolen vehicle, we cannot say that appellant would not have been convicted of grand larceny auto had trial counsel investigated and further impeached Preston.

Appellant next contends that the district court erred in denying his petition because his counsel was ineffective in failing to object to a violation of the exclusionary rule. Specifically, appellant's counsel failed to object when one witness, Robin Gibson, was present in the courtroom during Preston's testimony just prior to being called to testify as a witness.

We conclude that the district court did not err in finding that there was no reasonable probability that the outcome of the trial would have been different had appellant's counsel excluded Gibson from the courtroom. Gibson was not a key witness in this case and, in fact, testified that she had no independent recollection of Preston. Rather, Gibson testified that, according to the medical records, Gibson had evaluated appellant when he was brought into the hospital. Because there is no indication in the record that Gibson's testimony was affected by her presence in the courtroom while Preston was testifying, we conclude that the district court did not err in finding that appellant was not prejudiced by his counsel's conduct.

Appellant next contends that the district court erred in denying his petition because his counsel was ineffective in failing to object to the opinion of a police detective that appellant had a bite mark on his

penis. Particularly, appellant contends that the detective was not qualified to give a medical opinion about the origin of the mark, and that appellant had told his counsel prior to trial that the mark on his penis resulted from a poor circumcision. We conclude that the district court did not err in finding that appellant was not prejudiced by his counsel's failure to object because appellant was not convicted of sexual assault and the testimony about the bite mark was completely irrelevant to whether appellant committed the crime of grand larceny auto.⁸

Appellant next contends that the district court erred in denying his petition because counsel was ineffective in failing to file a motion to suppress evidence. We conclude that appellant's contention lacks merit because a motion to suppress would have been denied by the district court for numerous reasons. First, appellant consented to the search of the car when he told hotel security that they could retrieve stolen property from his car and where the car was located.⁹ Second, the Fourth Amendment is inapplicable because hotel security, rather than a government official, conducted the initial search uncovering the incriminating evidence.¹⁰ Third, appellant lacked standing to object to the police officer's search of the vehicle because he was not in lawful possession of the vehicle.¹¹ Finally, the police searched the car only after contacting its owner, Preston, who consented to the search of the vehicle.¹² Accordingly, the district court did not err in finding that counsel was not ineffective for failing to file a motion to suppress.

⁸We reject appellant's contention that this testimony affected the outcome of this case because it served to corroborate Preston's testimony, making her look more credible in the eyes of the jury.

⁹See State v. Taylor, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998) (holding that the Fourth Amendment is not implicated where a person with actual authority over property consents to its search).

¹⁰See State v. Miller, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (recognizing that the Fourth Amendment is inapplicable to a search conducted by a private individual not acting as an agent of the government).

¹¹See Odoms v. State, 102 Nev. 27, 30, 714 P.2d 568, 570 (1986) (holding that person has no legitimate expectation of privacy in property that is unlawfully possessed).

¹²See Taylor, 114 Nev. at 1079, 968 P.2d at 321.

Appellant next contends that the district court erred in denying his petition because counsel was ineffective in failing to file a motion to sever the burglary count from the other charges since it involved stealing the hotel's property and was unrelated to his encounter with Preston. We conclude that appellant's contention lacks merit because all counts against appellant arose from a series of connected transactions and the evidence of the burglary would have been cross-admissible in the trial on the other counts.¹³ In fact, it was the hotel's investigation with regard to appellant's burglary that led hotel security, and eventually, law enforcement to discover the vehicle that appellant was convicted of stealing.

Appellant next contends that the district court erred in denying his petition because his counsel was ineffective in failing to file a discovery motion because then "he would have [at] least had some basic information from which to impeach Preston."¹⁴ We conclude that appellant's contention lacks merit because this additional evidence would not have changed the fact that there was ample evidence that appellant committed grand larceny auto beyond Preston's testimony. Moreover, because the jury did not find appellant guilty of the other crimes that Preston testified appellant committed, it is apparent that appellant's trial counsel adequately impeached Preston.

Appellant next contends that the district court erred in denying his petition because his counsel was ineffective at sentencing in failing to object to the introduction of six of appellant's prior felony convictions. At sentencing, however, appellant's counsel informed the court that appellant wished to proceed in proper person. Appellant

¹³NRS 173.115; see also Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (holding that two charges may be tried together where evidence of one charge would be cross-admissible in a separate trial on another charge).


¹⁴In a related argument, appellant contends that his due process rights were violated because the State's failure to turn over evidence concerning Preston was a Brady violation. We conclude that appellant has failed to establish that additional impeachment evidence against Preston was material to appellant's defense because he has failed to show that it would have affected the outcome of the trial. Homick v. State, 112 Nev. 304, 314, 913 P.2d 1280, 1287 (1996); see also Wallace v. State, 88 Nev. 549, 551-52, 501 P.2d 1036, 1037 (1972) (citing Brady v. Maryland, 373 U.S. 83 (1963)).

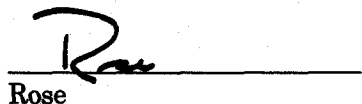
thanked the court for allowing him to represent himself. Appellant then objected to each of the six convictions, providing a cogent, legal argument for his objection, and even citing this court's case law. Appellant argued that some of his convictions were remote in time, were misdemeanors under Nevada law, or were constitutionally infirm. Although it is unclear from the records whether the district court formally granted appellant's motion to represent himself, the record of the sentencing hearing reveals that the district court heard arguments with regard to potential defects in appellant's prior convictions prior to adjudging him a habitual criminal. In light of this fact, we conclude that the district court did not err in finding that counsel was not ineffective at sentencing because there is no reasonable probability of a different outcome.

Finally, appellant contends that the district court erred in denying his petition because his counsel was ineffective in failing to object to numerous instances of prosecutorial misconduct. We conclude that the district court did not err in finding appellant was not prejudiced by appellant's failure to object to instances of prosecutorial misconduct because such misconduct did not rise to the level that would justify reversal of appellant's conviction.¹⁵

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

¹⁵See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

cc: Hon. Mark W. Gibbons, District Judge
Attorney General
Clark County District Attorney
David M. Schieck
Clark County Clerk