

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82863-COA

FILED

FEB 03 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Javar Eris Ketchum appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Ketchum argues the district court erred by denying his September 11, 2020, petition without first conducting an evidentiary hearing. In his petition, Ketchum claimed his trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Ketchum claimed that his trial counsel was ineffective for failing to file a motion requesting discovery. However, counsel filed a motion to compel discovery prior to trial. Accordingly, Ketchum failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning a request for pretrial discovery. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Ketchum claimed that his trial counsel was ineffective for failing to review all of the surveillance footage in the possession of the State prior to trial. Ketchum asserted that counsel failed to review portions of the surveillance video that depicted him interacting with the victim prior to the shooting. Ketchum contended that counsel's failure to review all of the surveillance footage led counsel to improperly assess the factual circumstances of the case.

However, the record in this matter demonstrated that significant evidence of Ketchum's guilt was presented at trial. During trial, a witness testified that Ketchum indicated that he intended to rob the victim prior to the shooting. The record demonstrates that surveillance video depicted Ketchum and the victim together shortly before the shooting but did not depict the actual shooting. The surveillance video also depicted the aftermath of the shooting and showed Ketchum taking items from the victim. Ketchum subsequently fled the scene with the victim's belongings. In light of the significant evidence of Ketchum's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel viewed all of the surveillance footage prior to the trial.

Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Ketchum claimed that his trial counsel was ineffective for failing to object to admission of the surveillance video recordings. Ketchum contended that counsel should have attempted to stop the admission of the recordings because they were the State's most critical pieces of evidence. The record demonstrates that the surveillance video recordings were relevant evidence, and relevant evidence is generally admissible at trial. *See* NRS 48.015; NRS 48.025(1). In addition, Ketchum did not demonstrate that the probative value of the surveillance recordings was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, *see* NRS 48.035(1), and therefore, Ketchum did not demonstrate the recordings were inadmissible. Accordingly, Ketchum failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel objected to admission of the surveillance video recordings. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Ketchum claimed that his trial counsel was ineffective for failing to object during the State's rebuttal argument when it displayed portions of the surveillance video recording that were not previously utilized during the trial. The record demonstrates that the surveillance video recordings that the State used during its rebuttal argument were admitted into evidence during trial. Thus, the State did not improperly base its argument upon facts not in evidence. *See Morgan v. State*, 134 Nev. 200, 215, 416 P.3d 212, 227 (2018) ("A fundamental legal and ethical rule is that

neither the prosecution nor the defense may argue facts not in evidence.”). Accordingly, Ketchum failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness. In addition, the Nevada Supreme Court reviewed the underlying claim on direct appeal and concluded that the State properly utilized the surveillance videos during its rebuttal argument. *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance). Ketchum thus failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State’s rebuttal argument. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.


Fifth, Ketchum claimed that his trial counsel was ineffective during the cross-examination of Antoine Bernard by failing to question him concerning his pretrial statement to the police. During cross-examination, counsel extensively questioned Bernard concerning his statement to the police, and counsel highlighted inconsistencies between that statement and Bernard’s testimony during direct examination. Accordingly, Ketchum did not demonstrate his counsel’s performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel questioned Bernard further concerning his statement to the police. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Ketchum argues that the State withheld the surveillance video recordings in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim could have been raised on direct appeal, and was therefore procedurally barred absent a demonstration of good cause and actual

prejudice. See NRS 34.810(1)(b), (3). A valid *Brady* claim can constitute good cause and prejudice sufficient to excuse the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (“[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.”). However, the Nevada Supreme Court has already concluded “the State did not withhold the evidence because the record shows that Ketchum had pretrial access to the entire DVR system memorializing the night’s events,” *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance), and that conclusion is the law of the case, see *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Javar Eris Ketchum
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk