

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA WILLIAM BACHARACH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82886-COA

FILED

FEB 03 2022

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

ORDER OF AFFIRMANCE

Joshua William Bacharach appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Bacharach argues the district court erred by denying his November 8, 2017, petition and later-filed supplement without first conducting an evidentiary hearing. In his petition, Bacharach claimed that 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. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de

novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). 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, Bacharach argued his trial counsel was ineffective for failing to object when the trial court threatened a State's witness. "The test of whether a trial judge has acted impermissibly in intimidating a witness turns on whether the judge's comments were so severe that they resulted in the witness's refusal to testify or to totally change testimony." *State v. Martinez*, 653 P.2d 879, 884 (N.M. Ct. App. 1982) (citing *Webb v. Texas*, 409 U.S. 95, 98 (1972); *McNutt v. United States*, 267 F. 670 (8th Cir. 1920)).

The State and Bacharach's counsel informed the trial court that a witness refused to talk with either party prior to trial. The parties requested the trial court to admonish the witness to refrain from informing the jury of information concerning Bacharach's gang affiliation and criminal record during her testimony. The trial court subsequently admonished the witness not to refer to those issues during her testimony. The trial court noted that if the witness violated its order in an attempt to aid Bacharach, it would send her to jail and someone else would have to pick up her child. The witness stated that she understood the trial court's admonishment, and she later testified before the jury.

The trial court's admonishment to the witness did not constitute a threat that resulted in the witness's refusal to testify. In addition, Bacharach did not demonstrate that the admonishment caused

the witness to totally change her testimony. Accordingly, Bacharach failed to demonstrate that the trial court impermissibly intimidated or threatened the witness. Thus, Bacharach did not demonstrate his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected when the trial court admonished the witness. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Bacharach argued his trial counsel was ineffective for failing to object when a detective improperly offered unnoticed expert opinion testimony concerning gunshot residue, cartridge casings, bulletproof vests, and bullet impacts. This court previously concluded that a substantial amount of evidence demonstrating Bacharach's guilt was presented at trial. *Bacharach v. State*, No. 69677, 2016 WL 6560416, *1 (Nev. Ct. App. 2016) (Order of Affirmance). That evidence included a police officer's observation of Bacharach shooting from a vehicle and driving in a dangerous manner, residents of the relevant neighborhood that observed a person matching Bacharach's characteristics shooting at the officer and hiding items, the discovery of Bacharach hiding in a backyard, and the discovery of his fingerprint on a firearm magazine that was recovered from the crime scene. In light of the substantial amount of evidence of Bacharach's guilt presented at trial, Bacharach failed to demonstrate a reasonable probability of a different outcome had counsel objected to admission of the detective's opinion testimony. Therefore, we conclude the

district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Bacharach argued his trial counsel was ineffective when the State improperly discussed the definition of the reasonable doubt standard during its closing argument. The Nevada Supreme Court “has repeatedly cautioned the district courts and attorneys not to attempt to quantify, supplement, or clarify the statutorily prescribed standard” of reasonable doubt. *Daniel v. State*, 119 Nev. 498, 521, 78 P.3d 890, 905 (2003) (quotation marks and emphasis omitted). However, “[c]ounsel may argue that evidence and theories in the case before the jury either amount to or fall short of” the statutory definition of reasonable doubt. *Id.* at 521, 78 P.3d at 906.

During its closing argument, the State noted that multiple witnesses identified Bacharach as the perpetrator of the crimes. The State argued, based on the identification testimony and facts surrounding the crimes, that the jury should find that Bacharach was identified as the perpetrator of the crimes and, therefore, that he committed all of the crimes beyond a reasonable doubt. The State did not attempt to quantify, supplement, or clarify the statutorily prescribed standard of reasonable doubt. Accordingly, Bacharach did not demonstrate that the State’s closing argument was improper. Thus, Bacharach failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness by failing to object during closing argument or a reasonable probability of a different outcome at trial had counsel done so. Therefore, we conclude the

district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Bacharach argued his trial counsel was ineffective for failing to impeach witnesses' testimonies with their inconsistent statements. Bacharach appeared to assert that counsel should have questioned witnesses in a different manner concerning their identifications of him as the perpetrator of the offenses. Bacharach did not identify a particular witness that should have been questioned concerning inconsistent statements. Thus, Bacharach did not support this claim with specific factual allegations. Moreover, the record demonstrates that counsel questioned multiple witnesses concerning their versions of events and challenged their abilities to perceive the events or identify Bacharach as the perpetrator of the offenses. Accordingly, Bacharach did not demonstrate that counsel's performance fell below an objective standard of reasonableness. Bacharach also did not demonstrate a reasonable probability of a different outcome had counsel further questioned witnesses concerning their identification testimonies or prior statements. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

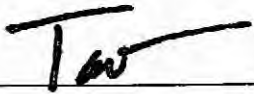
Fifth, Bacharach argued the trial court erred by refusing to permit cross-examination of a police officer concerning the footage recorded from a body camera and by admitting unreliable identification testimony. These claims could have been raised on direct appeal, and Bacharach did not demonstrate good cause for the failure to do so and actual prejudice. Therefore, he was not entitled to relief, *see* NRS 34.810(1)(b), and we

conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Sixth, Bacharach argued that the trial court erred by denying his motion for mistrial after a witness testified she discussed this matter with police officers that were assigned to the gang unit. However, Bacharach has previously raised this claim, and this court concluded he was not entitled to relief. *Bacharach*, 2016 WL 6560416, at 1. The doctrine of the law of the case prevents further litigation of this issue. *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Oronoz & Ericsson, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk