IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
RALPH SIMON JEREMIAS,
Respondent/Cross-Appellant.

No. 83685

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order granting in part a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Evidence at trial showed that respondent/cross-appellant Ralph Jeremias conspired with Ivan Rios and Carlos Zapata to rob Brian Hudson and Paul Stephens. According to Zapata, who pleaded guilty and testified for the State, Zapata and Jeremias drove to the victims' apartment. Jeremias entered the victims' apartment and shot Hudson and Stephens to death. After leaving in a panic, Jeremias and Zapata returned to take money, drugs, and computers. A jury convicted Jeremias of conspiracy to commit robbery, burglary while in possession of a deadly weapon, two counts of robbery with the use of a deadly weapon, and two counts of murder with the use of a deadly weapon. The jury sentenced Jeremias to death for the murders. This court affirmed Jeremias' convictions and sentences on appeal. *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018). Jeremias challenged his convictions and sentences in a timely postconviction petition for a writ of habeas corpus, which the district court granted in part and denied in part. The State appealed and Jeremias cross-appealed.

The State contends that the district court erred in granting relief on Jeremias' claim that trial counsel should have obtained testimony

from a potential impeachment witness. In his answer and cross-appeal, Jeremias contends that the district court correctly granted relief on that claim but asserts that he was entitled to relief on other ineffective-assistance-of-counsel claims as well.

We evaluate the merit of ineffective-assistance claims under the two-part test established by the United States Supreme Court in *Strickland v. Washington*: a petitioner alleging ineffective assistance of counsel must show (1) counsel's performance fell below an objective standard of reasonableness (deficient performance) and (2) a reasonable probability of a different outcome but for counsel's deficient performance (prejudice). 466 U.S. 668, 687-88, 694 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *see Kirksey v. State*, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1113 (1996) (applying *Strickland* to appellate counsel claims). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690; *Ennis v. State*, 122 Nev. 694, 704-05, 137 P.3d 1095, 1102 (2006). A court need not consider both prongs of the *Strickland* test if a petitioner makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697.

Postconviction claims warrant an evidentiary hearing when the claims are supported by specific factual allegations that are not belied by the record and that would entitle the petitioner to relief if true. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The petitioner bears the burden of proving the facts supporting the claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). On appeal, we defer to the district court's factual

findings, *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005); *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004), and review the application of law to those facts de novo, *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

The district court did not err in granting relief based on trial counsel's failure to present testimony to impeach the codefendant's testimony

The State contends that the district court erred in granting Jeremias relief on the claim that trial counsel should have pursued Danny Carrillo's testimony to impeach Zapata. Evidence introduced at the evidentiary hearing showed that Jeremias' attorneys received a letter from Carrillo several years before trial. In that letter, Carrillo asserted that Zapata admitted to Carrillo in jail that Jeremias had not killed the victims and that Zapata lied to law enforcement to receive a more lenient sentence. Carrillo's counsel, however, denied Jeremias' counsel permission to speak with Carrillo in order to authenticate the letter or secure Carrillo's testimony. The district court concluded that trial counsel performed deficiently by failing to pursue Carrillo's testimony through other means and that Jeremias was prejudiced by this failure. The State argues that counsel's performance did not fall below an objective standard of reasonableness, the district court evaluated the prejudice prong under an incorrect standard, Jeremias failed to demonstrate prejudice, and the relief granted was too broad and not warranted by the error alleged. We conclude that these arguments lack merit.

First, substantial evidence supports the district court's conclusion that trial counsel acted unreasonably in failing to pursue Carrillo's testimony. Jeremias' counsel was obligated to investigate "when there is no reason to believe doing so would be fruitless or harmful."

Browning v. Baker, 875 F.3d 444, 473 (9th Cir. 2017); *see Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). The record supports the district court's conclusion that Carrillo could have impeached Zapata's testimony, which was the leading evidence against Jeremias at trial. Zapata testified that he travelled with Jeremias to the victims' apartment, remained outside the apartment when Jeremias entered, heard gunshots, saw Jeremias quickly leave the apartment, and heard Jeremias admit to shooting the victims. Thus, Zapata's testimony was the evidence that the defense should have focused on undermining.

Nevertheless, trial counsel failed to exhaust available avenues to obtain Carrillo's testimony after Carrillo's counsel denied them permission to speak with Carrillo. *See Turpin v. Mobley*, 502 S.E.2d 458, 464 (Ga. 1998) (finding counsel ineffective where counsel "had obvious avenues of investigation available to them that reasonable counsel would have pursued and they did not pursue"). Jeremias' counsel could have attempted to speak with Carrillo without permission from Carrillo's counsel, given that the subject of the conversation had nothing to do with Carrillo's case. *See* RPC 4.2 ("In representing a client, a lawyer shall not communicate *about the subject of the representation* with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." (emphasis added)); *Servin v. State*, 117 Nev. 775, 783, 791, 32 P.3d 1277, 1283, 1288-89 (2001) (recognizing that SCR 182, which was worded similarly to RPC 4.2, did not prohibit the defendant's counsel from subpoenaing a witness who was represented by counsel in a separate

matter). Counsel could have sought a court order to authorize communication with Carrillo. Jeremias' counsel also could have monitored Carrillo's prosecution and spoken with Carrillo after that prosecution concluded, which was several months before Jeremias' trial. We conclude that substantial evidence supports the district court's conclusion that trial counsel's failure to pursue any of these investigative avenues was objectively unreasonable.

Second, the district court did not employ an incorrect standard to evaluate the prejudice prong under *Strickland*. The State argues that the district court improperly considered whether counsel's inaction could have changed the result of trial instead of whether it would have changed the result of trial. But a petitioner does not need to show that but for counsel's deficient performance, the result of the trial would have been different. Instead, a petitioner must show a reasonable probability that the result of the trial would have been different. *McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999); *cf. State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (citing *Strickland* for the proposition that "the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different").

In the context of an ineffective-assistance claim related to the guilt phase of a trial, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695; *see McNelton*, 115 Nev. at 403, 990 P.2d at 1268 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." (quoting *Strickland*, 466 U.S. at 694)). A verdict may be rendered unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence

to have determined the outcome." *Strickland*, 466 U.S. at 693, 694 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case."). The district court's language, recognizing how the new evidence could have changed the quantum of evidence, is consistent with the *Strickland* standard. Accordingly, we discern no error in this regard.

Third, the district court did not err in concluding that Jeremias was prejudiced. Contrary to the State's assertion, the evidence against Jeremias for the robbery and murder convictions was not overwhelming. Jeremias was identified near the victims' apartment roughly one to two hours before the shooting, but neither Jeremias nor his vehicle were identified leaving the scene after the shots were fired. No physical or forensic evidence placed Jeremias in the victims' apartment at the time of the shooting. Although Jeremias' use and possession of the victims' credit cards the evening of the murders was consistent with Zapata's testimony that Jeremias shot the victims, it was just as consistent with Jeremias' testimony that he happened upon the murder scene after the fact and opportunistically took property. The only witness who testified that Jeremias was in the apartment at the time of the shooting and later admitted to the shooting was Zapata, who testified as part of a plea agreement and whose vehicle was identified leaving the scene of the shooting. Thus, the record supports the district court's conclusion that there was a reasonable probability of a different outcome at trial if counsel had impugned Zapata's testimony.

The State also argues that Jeremias did not demonstrate prejudice because Carrillo's testimony would not have been considered credible enough to impeach Zapata. We cannot evaluate the merit of this

argument. The State consented to a limited evidentiary hearing solely on the issue of counsel's deficient performance, contested Jeremias' efforts to produce Carrillo, and conceded that Carrillo was credible for the purposes of the hearing. The State cannot now assert Carrillo was not credible when the State did not object to, and indeed assented to, the district court's decision to forgo Carrillo's testimony. *See LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (recognizing that party cannot complain of a procedure to which that party agreed); *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (recognizing that parties may not pursue theories on appeal that are inconsistent with those advanced below). Thus, nothing in the record before us suggests that Carrillo would have been any less credible than Zapata.

Lastly, we conclude that the district court's decision to grant a new trial was not overbroad. Contrary to the State's assertion that any prejudice pertained only to the penalty phase, the district court's findings support the conclusion that Jeremias was prejudiced at both phases of trial. Zapata's testimony was the principal evidence implicating Jeremias in the planning and execution of the robbery and murders. If that testimony were to be successfully impugned, a jury could believe that Jeremias did not plan to rob the victims, was not present when the victims were murdered, or was merely present during the shooting; any of these scenarios could result in a different outcome at the guilt phase of trial. *See Winston v. Sherriff*, 92 Nev. 616, 618, 555 P.2d 1234, 1235 (1976) (recognizing that "mere presence cannot support an inference that one is a party to an offense"). The potential scenarios could result in conviction of lesser charges or outright acquittal. Accordingly, the district court did not err in granting a new trial.

The claims raised in Jeremias' cross-appeal do not warrant further relief

As we are affirming the district court's order granting postconviction relief, we need not consider the arguments raised in Jeremias' cross-appeal. Nevertheless, we address some of the arguments raised out of concern that the underlying errors could be repeated on retrial.

Concession of guilt to robbery

Relying on *Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (1994), and *McCoy v. Louisiana*, 584 U.S. 414 (2018), Jeremias argues that we should presume prejudice based on counsel's opening statement that conceded Jeremias' acts constituted a robbery and implicitly contradicted Jeremias' statements and testimony that he only took property after finding the victims dead. We disagree.

Jones and *McCoy* presume prejudice only in situations where counsel concedes guilt over their client's objections and in contravention of their client's testimony. *See McCoy*, 584 U.S. at 423 ("When a client expressly asserts that the objective of his defence is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (internal quotation marks, emphasis omitted)); *Jones*, 110 Nev. at 738-39, 877 P.2d at 1056-57 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." (quoting *State v. Harbison*, 337 S.E.2d 504, 507 (N.C. 1985))). Neither case is applicable here. The challenged concession did not undermine Jeremias' testimony. *See Watters v. State*, 129 Nev. 886, 889-90, 313 P.3d 243, 247 (2013) (recognizing that opening statements outline what evidence will be presented during trial). The jury had not yet been instructed on the legal definition of robbery. And the context of counsel's opening statement, which goes on to categorically deny that Jeremias killed

the victims, appears to rely on an uninstructed juror's colloquial understanding of robbery. In closing argument, after the jury had been instructed on the legal definition of robbery, counsel argued, consistent with Jeremias' testimony, that Jeremias did not commit robbery.

Although we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing, should counsel elect to engage in a similar strategy on retrial, reasonably prudent counsel should present a more precisely phrased opening statement.

Rios' statement

Jeremias asserts that the State introduced Rios' statement during the penalty phase of trial in violation of SCR 250. In the statement, Rios conveyed a fear of Jeremias, described Jeremias as a violent person, and told detectives that Jeremias did not express remorse. Jeremias contends that counsel should have objected to the statement's introduction.[1] We agree.

The State was required to "summarize the evidence which the state intends to introduce at the penalty phase of trial . . . and identify the witnesses, documents, or other means by which the evidence will be introduced." SCR 250(4)(f); *see Mason v. State*, 118 Nev. 554, 561, 51 P.3d 521, 525 (2002) (holding that language in the rule requiring that the notice summarize "the evidence which the state intends to introduce at the penalty

---

[1]Jeremias also contends that the statement was inadmissible because it was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its introduction violated the Confrontation Clause. Jeremias failed to plead sufficient facts to demonstrate that counsel performed deficiently in this regard because Rios' right against self-incrimination was personal and could not be asserted by Jeremias, *United States v. Le Pera*, 443 F.2d 810, 812 (9th Cir. 1971), and the Confrontation Clause does not apply to penalty hearings, *Summers v. State*, 122 Nev. 1326, 1331, 148 P.3d 778, 782 (2006).

phase of trial" is "plain and without qualification; it applies to any evidence which the State intends to introduce"). Neither Rios' statement nor testimony about the statement was described in the State's notice of intent to seek the death penalty or its notices of evidence in aggravation. Based on those omissions, counsel should have challenged the introduction of this evidence. Had counsel objected, the evidence would have been excluded absent a showing of good cause. SCR 250(4)(f). The record does not suggest any such good cause given that the State was in possession of Rios' statement since 2009.

Although this claim lacks merit as pleaded, upon retrial, the State should adhere to the requirements of SCR 250 and provide adequate and timely notice of evidence it intends to introduce at the penalty hearing pursuant to SCR 250.

Having concluded that the district court did not err in granting relief, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Cadish

_____, J.
Stiglich

_____, J.
Lee

_____, J.
Parraguirre

_____, J.
Bell

PICKERING, J., with whom HERNDON, J., agrees, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to affirm the district court's grant of a new trial based on ineffective assistance of trial counsel regarding the Carrillo letter. I disagree that, by conceding the letter's authenticity, the State thereby conceded prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In my view, the district court erred in granting relief after the partial evidentiary hearing. *Strickland*'s prejudice standard required Jeremias to show a reasonable probability that, but for counsel's errors, the result of trial would have been different, *id.* at 689, and that showing was not made. Rather than affirm, I would vacate and remand this matter to the district court to determine if Jeremias was prejudiced by his counsel's performance.

To establish ineffective assistance of trial counsel, a defendant must show that (1) counsel's performance was deficient and (2) prejudice. *See Strickland*, 466 U.S. at 687-88, 694; *Molina v. State*, 120 Nev. 185, 190, 192, 87 P.3d 533, 537, 538 (2004); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Here, the issue was trial counsel's failure to further pursue Carrillo's testimony, after being initially rebuffed by the attorney representing Carrillo in Carrillo's own criminal case. Carrillo's testimony could have potentially impeached Carlos Zapata's testimony asserting that Jeremias killed the victims. The district court properly determined that an evidentiary hearing was warranted, *see Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002), and exercised its discretion to focus the initial inquiry on *Strickland*'s first prong, deficient performance, *see* NRS 50.115(1) (recognizing court's authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence").

Specifically, the district court limited the "evidentiary hearing [to the] narrow issue" of "verifying that [not calling Carrillo as a witness at trial] was a matter of trial strategy." If that were the case, then Jeremias likely could not establish deficient performance. *See Doleman v. State*, 112 Nev. 843, 847, 921 P.2d 278, 280-81 (1996) ("A strategy decision [by trial counsel], such as who should be called as a witness, is a tactical decision that is virtually unchallengeable absent extraordinary circumstances.").

Jeremias's trial counsel, Charles Cano, testified at the evidentiary hearing. Carrillo's letter was admitted without objection from the State. Cano then testified that the defense did not pursue Carrillo as a witness after receiving the letter because Carrillo's lawyer, Robert Langford, declined their request to speak to him. After Cano finished testifying, an exchange occurred between the court and counsel about Jeremias's request that the State transport Carrillo, who is incarcerated, to court to testify at the evidentiary hearing. The State advised the court that it was not necessary to hear from Carrillo since, "for purposes of this hearing," the State had proceeded "as if everything was true in that letter," and that this allowed "Mr. Cano [to testify] to what he would have done had he not been prevented by Mr. Langford from talking to Mr. Carrillo. So I don't think it's necessary to call Mr. Carrillo for purposes of this evidentiary hearing."

At the conclusion of the hearing, the district court granted Jeremias a new trial based on ineffective assistance of trial counsel. I submit that this was error. *Strickland* requires not just a showing of deficient performance but also a showing that but for counsel's failure to further pursue Carrillo's testimony and introduce it at trial, there was a reasonable probability of a different outcome at trial. Because the district

court limited the evidentiary hearing to deficient performance under *Strickland*, it had not received Carrillo's testimony nor evaluated its credibility or potential impact on Jeremias' trial.

The majority concludes that the State, by conceding that Carrillo would have testified consistently with his letter at this stage of the bifurcated evidentiary hearing, waived the prejudice showing and cannot argue on appeal that Jeremias did not establish prejudice. This is too broad a reading. The State conceded that Carrillo would, if called at the evidentiary hearing, testify to the statements in his letter; it did so for the purpose of evaluating the reasonableness of counsel's decisions in not pursuing his testimony given the statements in the letter. The State's concession evidenced its desire to streamline the postconviction proceedings. Notably, the State contemplated that Carrillo's testimony would have only been relevant to this stage of the proceedings to authenticating the letter, which had already been admitted at the hearing. When viewed in this context, the record does not support a conclusion that the State conceded that Jeremias demonstrated prejudice.

Under *Strickland*, Jeremias bears the burden of proving that, had Carrillo testified at trial, it is reasonably possible there would have been a different outcome. That showing was not made. We do not know whether Carrillo could or would have testified at trial. As stated, Carrillo's attorney had refused the overtures from Jeremias's attorneys to meet with him and nothing at the limited evidentiary hearing addressed whether further pursuit of Carrillo prior to trial would have met with different results. Carrillo telling the postconviction investigator that he "stood by the letter" is not the same as "I was willing to be transported to court and testify" years earlier, at Jeremias's jury trial. By not completing the

evidentiary hearing as to prejudice, the district court hindered Jeremias' ability to substantiate his claim and the State's ability to evaluate Carrillo's credibility and the admissibility and impact of his potential trial testimony. Moreover, the district court did not hear the impeachment evidence and determine that Carrillo was willing to testify at Jeremias' trial, was credible, and that his proposed testimony was sufficiently compelling to have impeached Zapata's testimony and reasonably altered the outcome of trial. Thus, the district court's conclusions that Carrillo's testimony could have affected the outcome of trial are not, in my view, supported by substantial evidence.

For these reasons, I would not affirm the decision to grant a new trial. Instead, I would vacate and remand for the district court to complete the evidentiary hearing and determine whether Jeremias can meet his burden of demonstrating prejudice under *Strickland*.

Pickering, J.
Pickering

I concur:

, J.
Herndon

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 9
Attorney General/Carson City
Clark County District Attorney
Resch Law, PLLC d/b/a Conviction Solutions
Eighth District Court Clerk