

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA JEAN BAKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50182

**FILED**

JUN 05 2009

TRACEE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Barbara Jean Baker to two equal and consecutive prison terms of 20 to 50 years.

On appeal, Baker challenges her conviction on three grounds. She contends that there was insufficient evidence adduced to support her conviction, the State provided inadequate notice to permit her to defend against the charges, and her attorney proceeded under a conflict of interest.

Sufficiency of the evidence

First, Baker argues that the State put forth insufficient evidence to sustain her conviction. Specifically, she contends that the case was entirely based on circumstantial evidence, the State improperly focused on Baker and failed to prove that she had the opportunity to kill the victim, and the State failed to establish a precise date and time of the victim's death.

The standard of review for a challenge to the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Circumstantial evidence is enough to support a conviction. Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467 (1997), holding limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. At trial, officers testified that they responded to a report of a burglary and shooting at the home shared by Baker and her husband, Charlie Simms, on January 21, 2006. They searched the home and discovered Simms’ body in bed. The medical examiner testified that Simms, who died as a result of a single gunshot wound to the head, was not killed on January 21, 2006, but it was possible that he could have been killed anytime between January 17 and January 20, 2006.

Detectives further testified that the reported burglary of the home appeared staged. In support of this opinion, they noted that no apparent force had been applied to any entryway. While a screen door had been cut, further analysis revealed that the cut was made from the inside of the house. Detectives also noted that numerous firearms were missing from the gun safe, but the individual gun boxes were placed back in the

safe and it was left ajar. They posited that a burglar would not have replaced the boxes and would have left the safe wide open. Moreover, the detectives testified that it was unusual that the burglar retrieved the safe combination from the desk drawer, neglected to take the victim's cell phone and keys to his vehicle from the drawer, closed the desk drawer, and returned a chair to its position in front of the desk. In addition, while the shotgun and stereo equipment stacked by the back door seemed to indicate that the burglar was surprised and ran out the back door without taking the property, detectives found it unusual that the burglar apparently closed the door behind him. Overall, detectives noted that the residence lacked an appearance that it had been ransacked. In addition, a detective opined that it was unusual that the victim was shot in his bed by a burglar when most violent incidents between burglars and homeowners occur when the homeowner confronts the burglar.

Other witnesses testified that Baker had stated that "[i]f [she] could just get rid of Charlie, [she]'d be a rich, rich widow." Baker had expressed a belief that if she divorced Simms, she would not be entitled to any of the money he inherited. She had also told people that she did not love her husband, had only married him for money, and was in love with another man. The State also introduced evidence that Baker had registered with online dating sites, describing herself as single or divorced. A search of her home revealed an attorney's business card, a pamphlet from a divorce clinic, and photographs of a man whom Baker met online.

While the bullet recovered from the victim's body was too damaged for a positive identification, a forensic examiner could not exclude the possibility that it was fired from Baker's .40 caliber H&K pistol. In addition, two guns belonging to Baker, one of which was the .40

caliber pistol, the empty box for which was found in the gun safe, were recovered at a recycling center in City of Industry, California, on January 25, 2006. The center's service area included the Hampton Inn in West Covina, California, where Baker was registered as a guest between January 17, 2006, and January 21, 2006.

Baker testified that she was vacationing in Southern California at the time of the victim's death. She also presented a witness who claimed to have seen Simms alive on the afternoon of January 17, 2006. However, the State presented a rebuttal witness who testified that Baker met him in Las Vegas on January 19, 2006, two days after she had checked into a hotel in West Covina and two days before she checked out of the hotel and reported the murder to the police.

We conclude that the jury could reasonably infer from this evidence that Baker willfully, deliberately, and premeditatedly murdered the victim with a firearm. See NRS 200.030(1)(a); NRS 193.165. Although Baker offered explanations and contradicted some of the State's evidence, it was for the jury to determine the weight and credibility to give the testimony. Further, the precise time of death is not an element of first-degree murder. See NRS 200.030(1)(a). The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

#### Adequacy of charging document

Second, Baker argues that the State violated her right to due process by failing to provide sufficient notice of the alleged date and time of the offense. She contends that the failure to provide the notice deprived her of the ability to present an effective alibi defense.

Because a challenge to the sufficiency of a charging document involves a constitutional issue, “we review de novo whether the charging document complied with constitutional requirements.” West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). This court has recognized that where a challenge to the sufficiency of the information is raised after the verdict, the verdict cures any technical defects unless the defendant has been prejudiced by the defective charging document. Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669-70 (1970).

Baker failed to show that she was prejudiced by any deficiency in the information. The information contained the elements of the charged murder and provided Baker with adequate notice of the State’s theory of the case to allow her to prepare a defense. See NRS 173.075(1); Sanders v. Sheriff, 85 Nev. 179, 182, 451 P.2d 718, 720 (1969) (holding that a charging document “may simply be drawn in the words of the statute so long as the essential elements of the crime are stated”); see also Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985) (recognizing that the purpose of NRS 173.075 is to put the defendant on notice of the charges she is facing and allow her to prepare a defense). While the information did not specify an exact time of death, we have recognized that an approximate date of the offense is sufficient where time is not an essential element of the charged offense. See Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Further, this court has recognized significant latitude in cases where the time of death cannot be precisely alleged. See West, 119 Nev. at 419-20, 75 P.3d at 814 (providing that an information charging a defendant with a death occurring “on or during the year 1998,” provided adequate notice). In light of our prior decisions, we conclude that the instant information did not prejudice

Baker. Accordingly, we conclude that Baker's due process rights were not violated.

Conflict of interest

Third, Baker argues that her right to a fair trial and effective assistance of counsel was violated when her counsel proceeded under an actual conflict of interest. She asserts that her counsel's law partner actively represented Baker's sisters, Cynthia Baker and Katherine Nicolella, who stood to inherit from the victim's estate if Baker was convicted. According to Baker, because of this conflict, her counsel failed to object to or aggressively impeach her sister Cynthia Baker's testimony. Further, she asserts that her counsel stood to gain financially if she was convicted. She contends that her waiver of the conflict was "suspect," and the conflict of interest could not be waived in this matter. She further alleged additional claims of ineffective assistance of counsel based on the conflict.

To show a Sixth Amendment violation of her right to counsel, Baker must demonstrate both an actual conflict and an adverse effect on her attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). "[W]e presume prejudice only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 783 (1987) (internal quotation marks and citation omitted); see also Lockhart v. Terhune, 250

F.3d 1223, 1226 (9th Cir. 2001) (noting that harmless error does not apply where an actual conflict of interest is alleged).

Because the same firm represented Baker and her sisters, who stood to inherit if Baker was convicted, an actual conflict of interest existed. See RPC 1.7(a)(2); RPC 1.10(a). However, a defendant may waive objections to any actual or potential conflict by her counsel and continue to be represented by him, so long as the district court personally addresses the defendant and determines that she made a voluntary, knowing, and understanding waiver of the conflict. Kabase v. District Court, 96 Nev. 471, 473, 611 P.2d 194, 195-96 (1980); see Hayes v. State, 106 Nev. 543, 557, 797 P.2d 962, 970-71 (1990), overruled on other grounds by Ryan v. District Court, 123 Nev. 419, 168 P.3d 703 (2007). It is within a district court's discretion whether to accept a defendant's waiver of her right to conflict-free counsel. Middleton v. State, 114 Nev. 1089, 1110 n.5, 968 P.2d 296, 311 n.5 (1998); see also Wheat v. United States, 486 U.S. 153, 163 (1988) (recognizing that trial courts have "substantial latitude" in deciding whether to accept a defendant's waiver of a conflict of interest); Ryan, 123 Nev. at 428, 168 P.3d at 709 (concluding that although district court has wide discretion to balance non-indigent criminal defendant's right to choose counsel against administration of justice, strong presumption exists in non-indigent defendant's right to choose counsel and this presumption should rarely yield to imposition of conflict-free representation).

We conclude that Baker failed to demonstrate that the district court abused its discretion in accepting her waiver. Prior to the start of trial, Baker and her sisters executed a written waiver of the conflict of interest. The document noted that the sisters stood to inherit

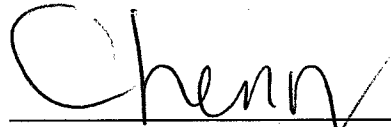
from the victim's estate if Baker was convicted. The State had also provided Baker with notice that it intended to call both sisters as witnesses in its case in chief. While the district court did not personally canvass Baker about the details of her waiver, the court appointed independent counsel to advise Baker on the conflict and her waiver. After meeting with Baker, counsel informed the court that he believed that Baker's waiver was knowing and voluntary. Baker also personally acknowledged to the district court that she was waiving the conflict and understood that she could not argue on appeal that her right to conflict-free counsel was violated. Though Baker now asserts that her written waiver was "suspect," she does not assert any condition that calls into doubt whether the waiver made after consulting with independent counsel was unknowing or involuntary. Further, the record on appeal does not support Baker's contention that her counsel would sustain a windfall if she was convicted. In addition, the conflict of interest was not so egregious as to render it unwaivable.

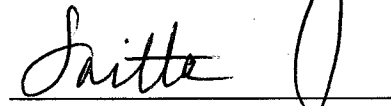
Regarding Baker's additional claims of ineffective assistance of counsel based on the conflict, we decline to consider them. This court has repeatedly stated that claims of ineffective assistance of counsel will not generally be considered on direct appeal; such claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). Accordingly, we conclude that Baker must raise her claims of ineffective assistance of counsel in the district court in the first instance by initiating a post-conviction proceeding.

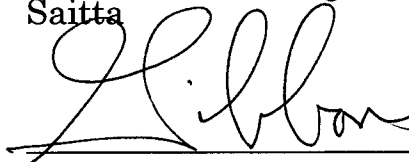


Having considered Baker's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

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

  
\_\_\_\_\_, J.  
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge  
Joel M. Mann, Chtd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk