

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LASHAE R. GALLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85132-COA

FILED

MAY 15 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. Brown*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

LaShae R. Gallon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 6, 2020, and a supplemental petition filed on August 10, 2021. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Gallon argues the district court erred by denying her claims of ineffective assistance of trial counsel. 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). A petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle her to relief. *See Hargrove v. State*, 100 Nev. 498,

502-03, 686 P.2d 222, 225 (1984). 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).

In her petition, Gallon argued counsel was ineffective for failing to procure expert testimony to rebut the State's theory regarding the cause of the victim's injuries. The district court found that counsel's decision not to attempt to find another expert after abandoning a previously retained expert was a strategic trial decision. The district court's determination is not supported by substantial evidence. The district court held an evidentiary hearing on this claim, and counsel testified. Counsel did not testify that his decision was strategic in nature but rather that he did not attempt to find another expert because trial was approximately two weeks out and he did not believe an expert would have agreed to give an opinion in this abbreviated time frame. Because expert testimony was critical in identifying the cause of the victim's injuries in this matter, we conclude counsel was deficient for failing to attempt to find another expert.

Nonetheless, the State presented at trial three expert witnesses to support its theory that the victim's injuries were not caused by accidental trauma. Gallon also did not present any evidence at the evidentiary hearing as to what a defense expert would have testified to at trial. Gallon thus failed to demonstrate a reasonable probability of a different outcome at trial had counsel procured expert testimony. Accordingly, we conclude the district court did not err by denying this claim.

Gallon also argued counsel was ineffective for failing to request that a juror be dismissed for bias. In particular, Gallon alleged that a juror worked with one of the State's expert witnesses, the juror was a trauma


nurse who had experience with infants, the juror expressed concerns about her ability to be fair and impartial several times, and counsel's examination of the juror was minimal. The district court determined that Gallon's claim of bias was belied by the record because (1) the juror had informed the trial court that her relationship with one of the State's expert witnesses would not influence her ability to serve impartially; and (2) juries are presumed to follow the order and instruction given by the district court, and the jury was instructed on how to weigh both lay and expert witness credibility.

"[A] claim is not 'belied by the record' just because a factual dispute is created by the pleadings or affidavits filed during the postconviction proceedings. A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (internal quotation marks omitted). Here, neither the juror's statement of impartiality nor the presumption that jurors follow a district court's instructions necessarily disproves Gallon's claim of bias. *See Sayedzada v. State*, 134 Nev. 283, 289, 419 P.3d 184, 191 (Nev. Ct. App. 2018) (recognizing bias "may exist even where the juror promises impartiality"); *see also Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) (recognizing a juror's statements must be considered as a whole). Therefore, we conclude the district court erred in determining that Gallon's claim of bias was belied by the record.

Because the district court did not determine whether Gallon was otherwise entitled to an evidentiary hearing on this claim, we reverse the district court's dismissal of this claim and remand this matter for the district court to determine: (1) whether the juror's statements, as alleged by Gallon and when considered as a whole, demonstrate actual, implied, or

inferable bias, and (2) if so, whether such bias resulted in deficient performance and prejudice as required by *Strickland*. See *Sayedzada*, 134 Nev. at 289-92, 419 P.3d at 191-92 (discussing actual, implied, and inferable bias); see also *Weaver v. Massachusetts*, 582 U.S. 286, 294-303 (2017). If the district court determines Gallon has alleged facts that, if true, would entitle her to relief, then Gallon is entitled to an evidentiary hearing on this claim. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Lynne K. Simons, District Judge
Orrin Johnson Law
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk