IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUIE SCHAFER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84340

FILED

JUN 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Appellant Jacquie Schafer, her boyfriend Will Sitton, and his brother Robert beat, robbed, and killed Schafer's roommate. Robert pleaded guilty and testified against Schafer and Sitton at their joint trial. Schafer argues that the district court erred in denying her claims of ineffective assistance of counsel without conducting an evidentiary hearing.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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 697. An evidentiary hearing is required when the petitioner raises claims supported by specific facts that are not belied by the record and that, if true, would entitle the

petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Schafer argues that the district court erred in denying her claim that trial counsel failed to adequately investigate her case to challenge the joinder of her trial with Sitton's. She contends that trial counsel did not consult a battered woman syndrome expert, investigate Sitton's history of violence, and argue duress as a defense. In a related claim, Schafer alleged that trial counsel should have presented similar evidence at sentencing to explain why Schafer did not call the police after leaving the victim's apartment.

Counsel must adequately investigate a defendant's case to satisfy the objective standard of reasonableness. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). "Once a reasonable inquiry is made, counsel should make a reasonable strategy decision on how to proceed with his client's defense." *Id.* In denying these ineffective-assistance-of-counsel claims without conducting an evidentiary hearing, the district court overlooked the factual issues concerning the reasonableness of trial counsel's investigation and litigation decisions. We conclude that Schafer alleged specific facts that are not belied by the record and that, if true, may have entitled her to relief. In particular, the record reflects that trial counsel considered presenting evidence that Schafer was afraid of Sitton, he previously abused her, and Robert threatened her after the victim's death. However, counsel did not present this evidence. The factual underpinnings of trial counsel's investigation and decisions exist outside the record. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225; *see also Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (providing "that [w]here something more than a naked allegation has been asserted, it is

error to resolve the apparent factual dispute without granting the accused an evidentiary hearing" (internal quotation marks and alteration omitted)). While tactical decisions are entrusted to counsel, *see Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), assessing the reasonableness of those decisions is often more difficult without a record of counsel's testimony at an evidentiary hearing. In this case, we conclude that an evidentiary hearing is necessary to fully consider trial counsel's performance and any potential prejudice that resulted. Therefore, under these circumstances, we cannot affirm the denial of these claims and remand this case to the district court to conduct an evidentiary hearing.[1]

Second, Schafer argues that the district court erred in denying her claim that trial counsel should have called Robert's nephew to rebut his testimony about hurting his hand working on his nephew's car. Schafer has not shown deficient performance or prejudice. Trial counsel was not objectively unreasonable for not investigating the source of Robert's hand injury. *See Rompilla v. Beard*, 545 U.S. 374, 382-83 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."). Conflicting testimony about the source of Robert's hand injury, at most, would be marginally relevant impeachment material. Moreover, this court found that "sufficient evidence tended to connect [Schafer] to the robbery and murder so as to corroborate Robert's testimony." *Schafer v. State*, No. 73334, 2019 WL 300388, at *1 (Nev. Jan. 17, 2019) (Order of Affirmance). Therefore, Schafer has not shown a

[1]To the extent Schafer argues that appellate counsel was ineffective in challenging the district court's refusal to sever her trial from Sitton's, we conclude she has not shown that counsel's performance was objectively unreasonable.

reasonable probability of a different outcome at trial, and the district court did not err in denying this ineffective-assistance claim without conducting an evidentiary hearing.

Third, Schafer argues that the district court erred in denying her claim that trial counsel should have objected to an instance of prosecutorial misconduct during rebuttal argument. The prosecutor made a brief remark that Schafer could be found guilty under the aiding-and-abetting theory without explaining that she must have the requisite criminal intent. *See Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (explaining that "under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime"). Even assuming trial counsel should have objected, Schafer has not shown prejudice. Because the jury was properly instructed on aiding-and-abetting liability, Schafer has not demonstrated a reasonable probability of a different outcome at trial had counsel objected. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that "this court generally presumes that juries follow district court orders and instructions"). Therefore, the district court did not err in denying this ineffective-assistance claim without conducting an evidentiary hearing.

Finally, Schafer argues that the district court erred in adopting the findings of fact and conclusions of law prepared by the State. We have urged district courts to "either draft[ ] [their] own findings of fact and conclusions of law or announce[ ] them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007). Although Schafer did not provide the transcript of the hearing on her petition and

therefore "we necessarily presume that the missing portion [of the record] supports the district court's decision," *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007), we would remind the district court on remand that if it does not draft its own findings, the district court must provide specific guidance regarding findings and conclusions on the record when directing a prevailing party to draft a proposed order.

Having concluded that Schafer is only entitled to the relief described above, 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.

Stiglich, C.J.

Lee, J.

Bell, J.

cc: Hon. Mary Kay Holthus, District Judge
The Gersten Law Firm PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk