

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAIRA ALEJANDRA SEPULVEDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81846-COA

FILED

MAY 07 2021

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

ORDER OF AFFIRMANCE

Maira Alejandra Sepulveda appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 6, 2019, and a supplemental petition filed on April 3, 2020. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Sepulveda first contends the district court erred by denying her claims of ineffective assistance of trial counsel without first conducting an evidentiary hearing. 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 her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Sepulveda argued counsel should have consulted with independent crime scene, firearms, and psychology experts in preparation for trial. Sepulveda did not identify what information any of these experts would have offered. Therefore, Sepulveda failed to allege specific facts that demonstrated her counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial had counsel performed differently. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (explaining that a petitioner claiming counsel should have conducted investigation must identify what the investigation would have revealed). Accordingly, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Second, Sepulveda asserted counsel should have called more witnesses to testify regarding Sepulveda's level of intoxication. In addition to Sepulveda's own testimony, trial counsel elicited testimony from two of Sepulveda's friends regarding her level of intoxication. Sepulveda did not identify what additional information other witnesses would have offered. Therefore, Sepulveda did not demonstrate trial counsel's performance fell below an objective standard of reasonableness or that there was a reasonable probability of a different outcome at trial had counsel called additional witnesses. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Sepulveda claimed counsel should have developed a single, coherent theory of the case, namely that the State did not prove specific intent because Sepulveda's state of intoxication prevented her from

forming the intent. As Sepulveda concedes, her own testimony before the jury was often contradictory; however, none of her testimony indicated she was in the room when the victim was shot or that she pulled the trigger. In closing, counsel argued Sepulveda's alibi defense based on her testimony, and Sepulveda failed to demonstrate that counsel's failure to focus on Sepulveda's lack of specific intent was objectively unreasonable. Further, because Sepulveda was not so intoxicated as to prevent her from driving a vehicle minutes after the crime, she failed to demonstrate there was a reasonable probability of a different outcome at trial had counsel focused his efforts on demonstrating that Sepulveda was too intoxicated to form specific intent. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Sepulveda argued counsel should have filed a motion to sever because Sepulveda's defense was antagonistic to her codefendant's defense. A district court may sever codefendants' cases if it appears a codefendant is prejudiced by the joinder. NRS 174.165(1). Prejudice can arise when codefendants raise inconsistent or antagonistic defenses, but such defenses are not prejudicial per se. *Rodriguez v. State*, 117 Nev. 800, 810, 32 P.3d 773, 779 (2001). Moreover, for defenses to be truly inconsistent, they "must be antagonistic to the point that they are mutually exclusive." *Id.* at 810, 32 P.3d at 779-80 (internal quotation marks omitted). Sepulveda raised alibi and voluntary intoxication defenses, while her codefendant argued the State did not meet its burden in proving its case beyond a reasonable doubt. Sepulveda's and her codefendant's defenses were not mutually exclusive, and therefore, their defenses were not antagonistic. Sepulveda thus failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's alleged

deficiency. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Sepulveda argued counsel should have filed a motion to sever the proceedings because Sepulveda was prejudiced by the evidence regarding her codefendant's other crimes. "A district court should grant a severance 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Marshal v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002). Sepulveda failed to demonstrate how evidence of her codefendant's other crimes prevented the jury from making a reliable judgment about her guilt. Therefore, Sepulveda failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel filed the motion. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixth, Sepulveda asserted counsel did not effectively respond to improper comments and interventions by the trial judge. Counsel responded to many of the trial judge's various comments and interventions throughout the trial. Sepulveda did not specify what other action counsel should have taken or explain how any other actions would have affected the outcome of trial. Therefore, Sepulveda failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's alleged deficiency. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventh, Sepulveda argued trial counsel failed to consult with a psychologist to provide mitigation evidence for sentencing purposes. Sepulveda did not identify what a psychologist would have revealed in

mitigation. See *Molina*, 120 Nev. at 192, 87 P.3d at 538. Additionally, Sepulveda failed to provide this court with the transcript of her sentencing hearing, which is necessary for the evaluation of Sepulveda's claim. See *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); see also NRAP 30(b)(1). Therefore, we are unable to conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, Sepulveda argued the cumulative effect of trial counsel's errors in this case warrants reversal. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, see *McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Sepulveda did not demonstrate any instances of deficient performance to cumulate, see *Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). 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: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 3
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk