STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0096

William James Shorter, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 26, 2012
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Olmsted County District Court
File No. 55-CR-08-4860

Tedman J. Heim, Allen and Heim Law Office, Rochester, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmstead County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's summary denial of his petition for postconviction relief, which was based on claims of ineffective assistance of counsel and

newly discovered evidence. Because the district court correctly determined that appellant is not entitled to relief on his ineffective-assistance-of-counsel claim, we affirm in part. But because the record does not conclusively show that appellant is entitled to no relief on his newly discovered evidence claim, we reverse in part and remand for an evidentiary hearing on that claim.

FACTS

In July 2009, a jury found appellant, William James Shorter, guilty of conspiracy to commit first-degree murder in connection with Brenda Shorter's assault of his brother on the family farm.[1] At trial, the state argued that appellant and Brenda Shorter conspired to kill appellant's brother to recover proceeds from a life insurance policy that appellant had taken out on his brother. The state further argued that the specific financial motive was an attempt to save the family farm, which had gone into foreclosure.

The state also charged Brenda Shorter. Her jury trial was held in February and March 2010. She testified that she assaulted her brother-in-law, but she denied having conspired with appellant or having had any knowledge of the life insurance policy at the time of the assault. The jury found Brenda Shorter guilty of attempted second-degree murder and two counts of second-degree assault with a dangerous weapon. But the jury acquitted her of attempted first-degree murder and conspiracy to commit first-degree murder.

[1] Appellant and Brenda Shorter were married at the time. The district court dissolved their marriage in March 2009.

In September 2011, appellant petitioned for postconviction relief, seeking a new trial, or in the alternative, an evidentiary hearing, on the grounds of newly discovered evidence. He also sought relief on the grounds of ineffective assistance of counsel. The district court denied the petition without a hearing, and this appeal follows.

D E C I S I O N

A postconviction court must hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). To obtain a hearing, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would entitle him or her to relief. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). An evidentiary hearing is required when disputed material facts must be resolved to determine the postconviction issues on the merits. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). If the postconviction court has any doubts regarding whether to conduct an evidentiary hearing, it should resolve those doubts in favor of granting a hearing. *Dobbins v. State*, 788 N.W.2d 719, 736 (Minn. 2010). A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

Ineffective Assistance of Counsel

To receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984). *Bobo v. State*, 820 N.W.2d 511, 516 (Minn.

2012). Under that test, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced by counsel's deficient performance. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). A defendant must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *accord Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (observing that judicial review should be "highly deferential" to counsel's performance).

Appellant claims that his trial counsel was ineffective because counsel (1) failed to adequately confer with appellant prior to trial, (2) did not provide appellant with a copy of the documentary evidence against him, (3) failed to review the state's financial and insurance evidence before trial, and (4) failed to interview or subpoena Brenda Shorter. The district court concluded that there was no need for an evidentiary hearing because the material facts are undisputed and that appellant's claim fails under the *Strickland* test. We agree.

Under the first prong of the *Strickland* test, inadequate attorney-client contact—whether in quantity or quality (e.g., failure to adequately confer with appellant and to provide appellant with a copy of the documentary evidence)—does not necessarily establish ineffective assistance of counsel. *See*, e.g., *State v. Caldwell*, 803 N.W.2d 373, 387 (Minn. 2011) (stating that "the number of attorney-client consultations does not alone demonstrate inadequate representation"). Rather, the focus must be on the lawyer's performance and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *see Caldwell*, 803 N.W.2d

at 387 (declining to find ineffective assistance of counsel based on defendant's claim that "his counsel consulted with him only three times" and evaluating the claim based on counsel's performance). In addition, an appellate court will not review the decisions an attorney made in preparing for trial (e.g., failure to review the state's financial evidence) so long as the attorney's actions were reasonable. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). Similarly, the extent of counsel's investigation (e.g., failure to interview Brenda Shorter) is considered a part of trial strategy and generally beyond review. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001). Finally, "[w]hat evidence to present to the jury, including which defenses to raise at trial and what witnesses to call [(e.g., failure to subpoena Brenda Shorter)], represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

As to the second prong, appellant does not identify any prejudice that resulted from his trial counsel's failure to adequately confer with him or to provide him a copy of the evidence against him. With regard to his trial counsel's failure to review evidence prior to trial, appellant merely asks: "Without having reviewed such documents prior to trial, how would appellant's counsel be prepared to challenge the introduction of exhibits, or adequately cross examine the witnesses that testified to the relevance of these documents." Raising this question does not meet appellant's burden to show prejudice. *See Leake v. State*, 737 N.W.2d. 531, 535 (Minn. 2007) ("Allegations in a postconviction petition must be more than argumentative assertions without factual support, and an evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient

to entitle him or her to the relief requested.") (quotation and citation omitted). Lastly, with regard to his trial counsel's failure to subpoena Brenda Shorter, appellant asserts that the result at trial would have been different had she testified, but concedes that "it is unknown whether or not she would have testified if subpoenaed by appellant's counsel."

Appellant's argument that a hearing is necessary to "explain the trial attorney's decisions regarding not calling Brenda Shorter, not reviewing key evidence prior to the start of trial, and the claims of inadequate preparation" is unavailing. Because appellant failed to allege facts showing that his attorney's performance was objectively unreasonable and that he was prejudiced as a result, the reasons for trial counsel's performance are irrelevant. And because appellant failed to allege facts that, if proved by a fair preponderance of the evidence, would satisfy the *Strickland* test, the postconviction court did not err by summarily denying his ineffective-assistance-of-counsel claim.

Newly Discovered Evidence

To receive an evidentiary hearing on a postconviction claim of newly discovered evidence, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would satisfy the four-pronged test of *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). *Bobo*, 820 N.W.2d at 517. Under that test, a new trial may be granted only if the petitioner proves

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer, 566 N.W.2d at 695.

Appellant claims that Brenda Shorter's testimony at her trial is new evidence that satisfies all four prongs of the *Rainer* test. Appellant's postconviction affidavit asserts that Brenda Shorter's "motivation, mind set, and version of events" was never disclosed to anyone, including appellant, "prior to her testimony at her own trial." Appellant's postconviction submissions included a partial transcript of Brenda Shorter's trial testimony. Brenda Shorter testified that she was not acting at the direction of appellant when she assaulted her brother-in-law, that she first learned about the insurance policy on her brother-in-law from the police after the assault, that she later searched for and found the policy documents in appellant's hutch when appellant was away from the home, that she was upset when she found the documents because she "couldn't believe that [appellant] had done something like this" and because appellant had "gone behind [her] back", that she did not have any kind of an agreement with appellant to murder her brother-in-law, and that she did not act with the knowledge of any kind of life insurance on her brother-in-law or any potential payout to appellant.

The district court summarily denied appellant's newly discovered evidence claim, reasoning that the third and fourth prongs of the *Rainer* test are not satisfied because Brenda Shorter's trial testimony is not credible and not likely to produce an acquittal or a more favorable result.[2] Appellant argues that his postconviction submissions establish that he is entitled to a new trial under the *Rainer* test. Alternatively, he argues that the

[2] Because the district court determined that the appellant's claim fails under the third and fourth prongs of the *Rainer* test, it did not determine whether the first and second prongs are satisfied.

district court should have held an evidentiary hearing before deciding the claim. For the reasons that follow, we agree that appellant presented sufficient evidence to obtain a hearing on his newly discovered evidence claim. *See Opsahl*, 677 N.W.2d at 423 ("The showing required for a petitioner to receive an evidentiary hearing is lower than that required to receive a new trial.").

In denying appellant's request for relief without a hearing, the district court concluded, under the third prong of the *Rainer* test, that appellant failed to show that the newly discovered evidence is not cumulative, impeaching, or doubtful. Specifically, the district court concluded that Brenda Shorter's trial testimony was not credible. But that decision was based solely on the jury's guilty verdict at her trial. The district court reasoned that

> an impartial fact-finder has already assessed Brenda Shorter's credibility and the evidence offered here. During the course of her own trial she was questioned as to her intent when hitting [her brother-in-law] with the hatchet, to which she responded that she just wanted him to stop treating the cattle poorly, did not try to kill him, and did not mean to hurt him. . . . Nevertheless, the jury convicted her of attempted second degree intentional murder. The conclusion therefore follows that although the jury heard her testimony, they did not find it credible, beyond a reasonable doubt. This necessarily casts doubt upon the veracity of the evidence offered by [appellant]. . . .

The district court's reasoning would be persuasive *if* the jury had also convicted Brenda Shorter of conspiracy to commit murder in the first degree or attempted first-degree murder—but the jury acquitted on those charges. We observe that during cross-examination, the prosecutor extensively questioned Brenda Shorter regarding her

family's poor financial circumstances at the time of the assault. The prosecutor also questioned her regarding the life insurance policy that appellant obtained on his brother. Despite this cross-examination, which supported the conspiracy and attempted first-degree murder charges, the jury found Brenda Shorter not guilty of those charges.

The not-guilty verdicts suggest that the jury may have credited Brenda Shorter's testimony that her crime was not premeditated and that she did not conspire with appellant to commit the crime. Of course, it is also possible that the jury exercised its power of lenity. *See State v. Hooks*, 752 N.W.2d 79, 86 (Minn. App. 2008) (explaining that "[j]ury nullification, also called jury lenity, is the extraordinary power of the jury to issue a not-guilty verdict even if the law as applied to the proven facts establishes that the defendant is guilty"). There is no way of knowing exactly what the jury determined regarding Brenda Shorter's credibility. But because it found her not guilty of the conspiracy and premeditated murder charges, the guilty verdict on the second-degree intentional-murder charge does not necessarily support the district court's conclusion that the jury discredited *all* of Brenda Shorter's trial testimony. *See State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977) ("A jury, as the sole judge of credibility, is free to accept part and reject part of a witness' testimony . . . even if the jurors believe that a witness has knowingly and wilfully testified falsely as to a material fact, . . . they may believe or disbelieve his testimony as to other facts as they deem it worthy or unworthy of belief." (quotations and citation omitted)). Thus, the district court erred in basing its determination under the third prong of the *Rainer* test solely on the jury's verdict.

The district court's determination under the fourth prong of the *Rainer* test was based in part on its conclusion that Brenda Shorter's trial testimony was not credible. The district court reasoned that the testimony was of "questionable credibility" and probably would not produce an acquittal or a more favorable result in light of the "independent circumstantial evidence of [appellant's] conspiracy with Brenda Shorter." However, as discussed above, the district court erred in its credibility determination. And although we recognize that there is independent evidence of appellant's guilt, the evidence is entirely circumstantial, which indicates that an evidentiary hearing is appropriate. *See Opsahl*, 677 N.W.2d at 423 ("[E]videntiary hearings are particularly appropriate when the petition attacks important evidence in a circumstantial case.").

The supreme court recently stated that "[a]n evidentiary hearing provides the postconviction court the means for evaluating the credibility of a witness." *Bobo*, 820 N.W.2d at 516; *see also Opsahl*, 677 N.W.2d at 423-24 (explaining that the postconviction court erred "[b]y concluding that the recantations were unreliable without first evaluating the credibility of the witnesses at an evidentiary hearing"). If Brenda Shorter testifies credibly and consistently with her trial testimony at an evidentiary hearing on appellant's petition, her testimony would refute the circumstantial evidence of a conspiracy with appellant and could satisfy the fourth prong of the *Rainer* test.[3] *See Bobo*, 820 N.W.2d at 520 (reasoning that if the third *Rainer* prong were to be established

[3] "[The Minnesota Supreme Court has] long held that the crime of conspiracy requires (1) an agreement between two or more people to commit a crime and (2) an overt act in furtherance of the conspiracy." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (quotations and citations omitted).

at an evidentiary hearing on remand, the fourth prong might be satisfied as a result). In sum, there is a material dispute regarding Brenda Shorter's credibility as a witness for appellant and a determination that she is credible could resolve the third and fourth prongs of the *Rainer* test in appellant's favor.[4] Thus, the record does not conclusively show that appellant is "entitled to no relief" and an evidentiary hearing is required. Minn. Stat. § 590.04, subd. 1.

We do not intend to suggest by this opinion that appellant will prevail on the merits after the hearing. The district court may ultimately determine that Brenda Shorter is not credible, based on her testimony at the hearing and its consideration of all other factors bearing on her credibility. The district court may also determine that the first or second prongs of the *Rainer* test are not satisfied, which has not been decided at this point. But on this record, appellant is entitled to a hearing. We therefore reverse the district court's summary denial of appellant's newly discovered evidence claim and remand for an evidentiary hearing on that claim.

Affirmed in part, reversed in part, and remanded.

[4] Accordingly, we reject appellant's argument that his postconviction submissions establish that he is entitled to a new trial under the *Rainer* test.