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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0326**

State of Minnesota,
Respondent,

vs.

Ryan Jameson Ojibway,
Appellant.

**Filed August 14, 2017
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CR-14-2620

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota;

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Gerald K. Wallace, Wallace Law Firm, PLLC, Duluth, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Connolly,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this combined direct and postconviction appeal, following a stay and remand, appellant argues that the postconviction court (1) abused its discretion by denying his postconviction claims pertaining to a witness's proposed testimony that he claims would establish that he received ineffective assistance of counsel or the presence of newly discovered evidence that would entitle him to a new trial; (2) erred by applying the wrong evidentiary burden in denying appellant's newly-discovered-evidence claim; and (3) erred by limiting its consideration of trial counsel's allegedly deficient performance to the bench trial and not the jury trial phase. Because we conclude that the postconviction court did not err by denying appellant's proposed witness's testimony, the error in applying the wrong evidentiary burden to the newly-discovered-evidence claim did not affect the outcome of the proceeding; and the postconviction court did not err in considering trial counsel's allegedly deficient performance, we affirm.

FACTS

On October 25, 2013, appellant Ryan Jameson Ojibway attended a party with his former coworkers, including victim Z.T. Appellant consumed a large quantity of alcohol. Early the following morning, after the party had ended, Z.T., who was sleeping in a sleeping bag in a closet, woke up to find appellant standing over her. Z.T. acted as if she were asleep. Appellant crawled into Z.T.'s sleeping bag and, despite her protestations, started "touching . . . and groping" her. Appellant then engaged in vaginal penetration of

Z.T. despite her telling him, “No,” “Stop,” and “Don’t.” Z.T. testified that she did not yell or scream because she was scared and did not know what to do.

A few days later, after receiving support and encouragement from her sisters and one of her friends, Z.T. made a report of sexual assault to the police. The investigating officer interviewed Z.T. and collected the pajama pants she was wearing on the night of the assault. The pants were submitted for forensic testing, and the test revealed a single-source male DNA profile that matched a known sample of appellant. Appellant was charged with third-degree criminal sexual conduct.

On May 27-28, 2015, a jury trial was held. The jury could not reach a verdict. At the second trial, appellant’s counsel advised appellant to waive his right to a jury trial and submit to a court trial, which occurred on July 22, 2015.

The district court found appellant guilty of third-degree criminal sexual conduct and sentenced him to 62 months in prison. Appellant petitioned for postconviction relief, identifying five issues: (1) ineffective assistance of counsel; (2) newly discovered evidence; (3) due process violations; (4) insufficient evidence; and (5) an improperly issued search warrant.

At the postconviction hearing, the court heard testimony from the officer who investigated the incident, appellant’s girlfriend, the woman who was passed out in the room when the event occurred, and appellant’s trial counsel. The testimony of another witness, J.S., was excluded because the investigative report regarding his testimony “suggested that [J.S.’s testimony] would have to be excluded on the basis of the Minnesota Rape Shield

Law.” The postconviction court ultimately denied appellant’s petition for postconviction relief. This appeal concerns only three issues.

D E C I S I O N

“When reviewing a postconviction court’s decision, we examine only whether the postconviction court’s findings are supported by sufficient evidence. We will reverse a decision of the postconviction court only if that court abused its discretion.” *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012) (quotation omitted). “We review legal issues de novo We will not reverse an order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (citations and quotations omitted).

I. The postconviction court did not abuse its discretion by excluding evidence in the postconviction hearing.

Appellant argues that the postconviction court erred by excluding the testimony of J.S., a potential witness, on the ground that his testimony would be barred under the Minnesota Rape Shield Law, Minn. Stat. § 609.347, subd. 3 (2016). Appellant argues that the exclusion was an abuse of discretion because of the breadth of J.S.’s statement to the defense investigator that included J.S.’s observations of Z.T. that contradicted her version of the events and provided information “tending to establish bias, prejudice, or an ulterior motive surrounding the charge of criminal sexual conduct.” We disagree.

In a prosecution for third-degree criminal sexual conduct, “evidence of the victim’s previous sexual conduct shall not be admitted nor shall any reference to such conduct be

made in the presence of the jury” except by court order. Minn. Stat. § 609.347, subd. 3. An exception to the rule exists where the consent of the victim is a defense and the evidence is of “the victim’s previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated.” *Id.*, subd. 3(a)(i).

We disagree with appellant’s characterization of J.S.’s testimony. J.S. never made any statement regarding a previous incident of sexual assault that was fabricated by Z.T. J.S. would have testified that Z.T. claimed that he tried to have sex with her, but she said no. J.S. would not have testified that Z.T. claimed that he sexually assaulted her. The rest of J.S.’s testimony would have been inadmissible because it concerned Z.T.’s previous sexual activity and violated Minn. Stat. § 609.347, subd. 3.

Because J.S.’s testimony would have been inadmissible, we conclude that the postconviction court’s decision to exclude J.S.’s testimony was not erroneous.

II. The postconviction court did not err in denying postconviction relief based on an improper legal standard.

Appellant next argues that the postconviction court erred by applying the incorrect standard of review for his postconviction relief motion. The postconviction court applied the correct preponderance-of-the-evidence standard of review before analyzing the legal issues raised by appellant. However, when discussing the newly-discovered-evidence claims, the postconviction court applied the clear-and-convincing standard of review for postconviction claims filed outside the two-year statute of limitation period. *See Rhodes*

v. State, 875 N.W.2d 779, 788 (Minn. 2016) (stating that “[t]he clear-and-convincing-innocence requirement in [Minn. Stat. § 590.01, subd. 4(b)(2)] is more stringent than the newly-discovered-evidence test that applies to timely petitions”). Because appellant’s petition for postconviction review was filed within the two-year statute of limitations, the postconviction court erred in applying the clear-and-convincing standard rather than the preponderance-of-the-evidence standard.

However, we conclude that this error was harmless. On a postconviction appeal, we review issues of law *de novo*. *Matakis*, 862 N.W.2d at 36. Whether J.S.’s testimony is admissible under Minn. Stat. § 609.347, subd. 3(a)(i), is a question of law. As we have concluded, J.S.’s testimony was inadmissible as a matter of law and therefore, the postconviction court’s error in applying the incorrect standard of review does not entitle appellant to a new trial. Considering the preponderance of the evidence and applying the law *de novo*, we conclude that the testimony would not be admissible.

Appellant also argues that his claims of ineffective assistance of counsel were analyzed under the same incorrect standard of review. We disagree. The postconviction court denied the ineffective-assistance-of-counsel claim immediately after stating the preponderance-of-the-evidence standard and before stating the clear-and-convincing standard that was incorrectly applied to the newly-discovered-evidence claim. The incorrect standard was not mentioned in the ineffective-assistance-of-counsel analysis. We conclude that the postconviction court did not err in regard to that claim.

III. The postconviction court did not limit its consideration of appellant's counsel's allegedly deficient performance to the bench trial or fail to consider counsel's actions during the jury trial.

Appellant also argues that the postconviction court erred by applying the *Strickland* ineffective-assistance-of-counsel test to his trial counsel's performance at the bench trial but not the jury trial.

The *Strickland* analysis is a two-pronged test that requires a defendant to show that (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). An insufficient showing on one of these requirements defeats a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). An attorney provides reasonable assistance upon exercising the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). There is a strong presumption that an attorney acts competently. *Id.* As a general rule, matters of trial strategy do not provide a basis for an ineffective-assistance-of-counsel claim. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Appellant's argument relies on one sentence of the postconviction court's order¹ and ignores the remainder of the order that discusses whether appellant's counsel's performance fell below an objective standard of reasonableness and likely effected the proceeding. The thrust of appellant's ineffective-assistance-of-counsel argument was based on "the supposed failure to find and present all witnesses." The postconviction court analyzed the reasons appellant's counsel did not present the witnesses, which included counsel's actions prior to the jury trial. In doing so, the postconviction court concluded that any failure to investigate and uncover the testimony was irrelevant because it did not prejudice the defense. The witnesses that appellant argues should have been presented were found to be not credible or were unable to provide any details of the incident due to intoxication. Further, none of the allegedly overlooked witness testimony refutes the presence of appellant's semen on the victim's pajama pants or provides insight as to whether the sex was consensual, the two key issues at trial. Given the postconviction court's analysis of appellant's counsel's actions prior to trial, at the jury trial, and at the bench trial, we conclude that the postconviction court did not improperly analyze the ineffective-assistance-of-counsel claim.

Additionally, appellant cites two Supreme Court cases to argue that his trial counsel was ineffective because he failed to investigate. As a general rule, "the extent of any investigation is a part of trial strategy and, thus, should not be readily second guessed."

¹ The postconviction court order stated, "[I]t is impossible to say that the outcome would have been different. This is especially true where, as here, the Court served as fact-finder. The Court need not speculate about what might have swayed a jury."

State v. Nicks, 831 N.W.2d 493, 506 (Minn. 2013). However, the Supreme Court has noted that a cursory investigation does not automatically reflect a tactical decision. *Rompilla v. Beard*, 545 U.S. 374, 377, 125 S. Ct. 2456, 2460 (2005) (holding that even when a defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will rely on as evidence of aggravation at the trial’s sentencing phase); *Wiggins v. Smith*, 539 U.S. 510, 512, 123 S. Ct. 2527, 2530 (2003) (concluding that counsel provided ineffective assistance when his failure to thoroughly investigate stemmed from inattention and not strategic judgment); *Nicks*, 831 N.W.2d at 506.

However, neither case applies here because appellant’s trial counsel performed more than a cursory investigation. Testimony from the trial counsel at the postconviction hearing indicates that he appropriately investigated the potential witnesses. Trial counsel testified that he “talked to [his] client about [interviewing the witnesses] and we made the decision that [he] wouldn’t talk to them because [they] wouldn’t be using them.” The attorney in *Rompilla*, who failed to investigate the files of the defendant’s criminal record, even though one aggravating factor the prosecution planned to present was the defendant’s violent criminal history, is clearly distinguishable. See *Rompilla*, 545 U.S. at 383-84, 125 S. Ct. at 2464.

Trial counsel also explained to appellant his reluctance to use the witnesses who might have sided with the victim, and he advised against presenting their testimony. However, he reminded appellant that, if appellant heard anything that indicated that a witness would testify favorably to appellant, he should let trial counsel know and that

person could be added to the witness list. These actions are not neglectful but rather the essence of trial strategy resulting from thoughtful discussion with appellant; they were within trial counsel's discretion.

Because evidence in the record indicates that trial counsel properly investigated the claims and mitigating factors, the postconviction court did not err in denying the ineffective-assistance-of-counsel claims.

Affirmed.