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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2065**

State of Minnesota,
Respondent,

vs.

Norman Darnell Toney,
Appellant.

**Filed March 2, 2020
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-16-25152

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions of aiding and abetting first-degree burglary and aiding and abetting third-degree assault, arguing that he received ineffective assistance of counsel at his jury trial. We affirm.

FACTS

A jury found appellant Norman Darnell Toney guilty of aiding and abetting first-degree burglary (assault of person in building) and aiding and abetting third-degree assault (substantial bodily harm), and the district court entered judgments of conviction. At trial, T.F. and L.F. testified that Toney and D.M., the mother of Toney's child and T.F.'s half-sister, entered T.F.'s apartment after kicking down her door and that Toney punched T.F. after D.M. yelled for Toney to hit her. T.F. testified that the crime occurred around 1:00 a.m. on September 9, 2016. The trial evidence included a recorded phone call between T.F. and Minneapolis Police Department Sergeant Troy Walker in which T.F. told Sergeant Walker that Toney had punched her in the nose.

Toney's trial attorney presented an alibi defense based on the testimony of Toney's mother, S.H. S.H. testified that Toney came to her house around 12:00 a.m. on the night of the alleged crime, that she did not hear Toney leave the house that night, and that she had no reason to believe that he left.

The district court sentenced Toney to a term of 78 months of imprisonment for the burglary offense and a stayed term of 24 months for the third-degree assault offense. Toney

appealed, but later requested to stay the appeal so he could pursue postconviction relief. This court granted Toney's request.

Toney petitioned for postconviction relief, arguing that "his trial attorney was ineffective for failing to subpoena [D.M.] and, if she refused to testify, to move the district court to admit [D.M.'s] statement to police under [the Minnesota Rules of Evidence]." In his petition for relief, Toney asserted that D.M. told police that Toney "had nothing to do" with the assault and burglary. He explained that D.M. told police that on the night of the incident she was angry with T.F. because T.F. threw a drink on her two-year-old son and in retaliation, she went to T.F.'s apartment, kicked the door, and punched T.F. Toney asserted that D.M. "insisted [Toney's] only involvement was that he happened to be at the apartment building to pick up her and their son earlier in the evening," and that D.M. told police it "was a sister ordeal" and that she had acted on her own. Toney requested a new trial, or in the alternative an evidentiary hearing, because the jury did not hear D.M.'s statements to police that he "had nothing to do with the evening's events."

The postconviction court granted Toney's request for an evidentiary hearing. At the hearing, Toney's trial counsel testified that he did not think he would have been able to get a statement from D.M. because she had been charged as a codefendant, she was represented by counsel, and her case was pending. Toney's trial counsel explained that his defense strategy was to assert an alibi defense through the testimony of Toney's mother, S.H. Toney's trial counsel further explained that without D.M.'s statements, the state had to rely on its own witnesses to produce evidence of the assault, but that if D.M.'s statements had been admitted, they would have corroborated T.F.'s trial testimony. Recordings of the

phone calls between D.M. and police regarding the incident were admitted as evidence at the postconviction proceeding.

The postconviction court denied Toney's petition for relief on his ineffective-assistance-of-counsel claim, reasoning that Toney "did not meet his burden to overcome the strong presumption" that trial counsel's performance was reasonable. It explained that Toney's trial counsel "believed the alibi defense was stronger than a defense involving [D.M.'s] testimony or statements" and that "in pursuing the alibi defense, [trial counsel] opted to focus on [Toney's] mother placing him at [her] house at the time of the incident." The postconviction court noted that trial counsel "was aware that [D.M.] had made inconsistent statements, some of which placed [Toney] at the crime scene." The postconviction court concluded that trial counsel's decision not to seek admission of D.M.'s statements "was a trial tactic; [counsel] was making a decision about who to call as a witness to best present the alibi defense."

The postconviction court further explained that trial counsel "chose not to attempt to admit the recorded phone calls without producing [D.M.] as a live witness for a variety of reasons" including that Toney "was charged with aiding and abetting the crimes" and if the calls were played, "the State would have only needed to corroborate the elements admitted by the caller." "Without those codefendant admissions, the State had to prove every element without help from any defendant." The postconviction court also noted that "the recorded phone calls had . . . inconsistencies in addition to discrepancies with the alibi witness which could not be explained without [D.M.] testifying in person." The postconviction court again concluded that counsel's decision not to seek admission of

D.M.'s statements was "a classic example of trial strategy" and therefore did not "support a finding that [trial counsel] was ineffective." It noted that "[i]n reality, [counsel] was diligent and competent in his representation of [Toney]."

Lastly, the postconviction court explained that "[i]t is unreasonable to believe [D.M.'s] testimony would have led to a different result" because "a jury would have judged her credibility in light of the victim's testimony stating [that Toney] was the person who punched her." The postconviction court noted that the jury made a credibility determination regarding the alibi claim and still found Toney guilty, and therefore "obviously believed [T.F. and L.F.]." The postconviction court concluded that "[g]iven the inconsistencies in [D.M.'s] statements, and the conflict between her statements and [Toney's] alibi defense, the statements were just as likely to harm [Toney's] case as to aid it." The postconviction court concluded that there was "no reasonable probability [Toney] would have been found not guilty with the addition of [D.M.'s] statements."

Toney appeals.

DECISION

Toney argues that "trial counsel was ineffective for failing to subpoena [D.M.] to testify and, if she refused to testify, to have her declared unavailable and move to admit her statement to police as a statement against interest." When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). Because a claim of ineffective

assistance of counsel involves mixed questions of law and fact, our standard of review is de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

“The United States and Minnesota Constitutions guarantee a criminal defendant the right to effective assistance of counsel.” *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019). Ineffective-assistance-of-counsel claims are generally analyzed as trial errors under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013). To prevail under *Strickland*, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068; *see also Rhodes*, 657 N.W.2d at 842-45 (applying *Strickland*). An objective standard of reasonableness is defined as the level of customary skill and diligence that a reasonably competent attorney would employ in representation under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). Appellate courts apply “a strong presumption that [an attorney’s] performance falls within the wide range of ‘reasonable professional assistance.’” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Attorneys have discretion in representing their clients, and trial tactics, including “[w]hat evidence to present to the jury” and “which witnesses to call” are within that discretion. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *see Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (“We are in no position to second-guess counsel’s decision to focus his strategy on other defenses instead of investigating [other] suspects.”); *Jones*, 392 N.W.2d at 236 (“Which witnesses to call at trial and what information to present to the

jury are questions that lie within the proper discretion of the trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight.”). Appellate courts “give trial counsel wide latitude to determine the best strategy for the client.” *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). Appellate courts generally “will not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014).

Toney argues that “[a] reasonably competent attorney would have subpoenaed [D.M.] to testify” and if D.M. refused, would “have her declared unavailable and moved to admit her statement to police as a statement against interest.” He contends that trial counsel’s “lapse in considering the applicable rules was not a strategic or tactical decision.”

Toney’s trial counsel testified at the postconviction hearing that his defense theory was that another person committed the crime and that Toney was not present because he was at his mother’s home at the time of the offense. Trial counsel indicated that his alibi defense could have been negated by the admission of D.M.’s statements, some of which placed Toney at the scene of the crime. He also indicated that calling D.M. as a witness and pursuing the alibi defense were alternative defense theories. Trial counsel believed the alibi defense was stronger than a defense based on D.M.’s testimony or statements and therefore opted to emphasize Toney’s mother’s testimony placing him at her home at the time of the offense. As the postconviction court correctly concluded, “This was a trial tactic; [counsel] was making a decision about who to call as a witness to best present the alibi defense.”

Moreover, trial counsel testified that D.M.'s recorded statements would have corroborated the victim's trial testimony because D.M. admitted several elements of the offense, leaving the state to prove only that Toney aided and abetted D.M. As the postconviction court correctly reasoned, "[i]f the phone calls were played, the State would have only needed to corroborate the elements admitted by the caller" and "[w]ithout those codefendant admissions, the State had to prove every element without help from any defendant."

Toney additionally argues that trial counsel's admission that "he was not aware of the applicable rules and procedures he could have relied on" demonstrates that "not calling [D.M.] or moving to admit her statements was not a course of action trial counsel considered and rejected." At the postconviction hearing, trial counsel acknowledged that it had not "occur[red] to [him]" that D.M.'s statements would have been admissible as substantive evidence under the rules of evidence. Even so, trial counsel's testimony shows that counsel's decision not to seek admission of D.M.'s statements ultimately was based on trial strategy.

In sum, the record shows that trial counsel's decision not to offer D.M.'s statements is a classic example of trial strategy, which is not subject to appellate review. Toney therefore fails to satisfy the first part of the *Strickland* test.

Moreover, we are not persuaded that there is a reasonable probability that the jury would have reached a different result if it had heard D.M.'s statement that "she alone" assaulted T.F. At trial, both T.F. and L.F. testified that D.M. and Toney broke into T.F.'s apartment and that Toney punched T.F. In a recorded call with Sergeant Walker, T.F.

reported that Toney punched her in the nose. The postconviction court soundly reasoned that “[i]t is unreasonable to believe [D.M.’s] testimony would have led to a different result” because “a jury would have judged her credibility in light of the victim’s testimony stating [Toney] was the person who punched her.” As the postconviction court correctly determined, the jury “made a credibility determination on the alibi claim, and still found [Toney] guilty” and “[b]ased on the verdicts, the jury obviously believed [T.F. and L.F.] in this trial.”

In sum, the record shows that there is no reasonable probability that Toney would have been found not guilty based on D.M.’s statements. Toney therefore fails to satisfy the second part of the *Strickland* test.

Affirmed.