

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0585**

State of Minnesota,
Respondent,

vs.

Wlemonger Emmanuel Deward,
Appellant.

**Filed August 1, 2022
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-19-2413

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Wheelock, Judge; and
Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

JESSON, Judge

After a suicide note from one of his stepchildren revealed a pattern of sexual abuse, appellant Wlemonger Deward was charged with two counts of first-degree criminal sexual conduct. A jury found Deward guilty of both counts, in part based on the testimony of his two stepchildren. In a petition for postconviction relief, Deward alleged that he received ineffective assistance of counsel due to an inadequate investigation and failure to call favorable witnesses. Following a hearing, the postconviction court denied the petition, concluding that the alleged errors were matters of trial strategy that are inappropriate for review. Deward appeals. Because the matters challenged as ineffective assistance amounted to trial strategy, and because the evidence supports the second count of first-degree criminal sexual conduct, we affirm.

FACTS

This appeal stems from repeated instances of Deward's alleged sexual abuse of his stepchildren, L.C. and Z.C. The conduct spanned from 2012 to 2018. The allegations of sexual abuse were first disclosed to law enforcement in May 2018 when L.C. was being treated for suicidal ideations. L.C. gave his therapist a note that stated: "I was raped when I was 6 (four days before my 7th birthday). I feel like it shouldn't impact me as much as it does, but it impacts me a lot." Although the note did not name Deward, L.C. later told

hospital staff that Deward was the person who sexually assaulted him. The state charged Deward with two counts of first-degree criminal sexual conduct.¹

Trial Testimony

A six-day jury trial was held in November 2019. Both Z.C. and L.C. testified.²

Z.C. was the first to testify. At the time of the trial, Z.C. was 11 years old. Z.C. explained that, starting when she was roughly four years old, Deward would enter her bedroom at night and use his penis to “do inappropriate things” to her vagina. Z.C. described sexual assaults by Deward in at least two of the houses they lived in, including their house on Dupont Avenue in Minneapolis. After a while, Z.C. told her aunt about what had occurred. Her aunt repeated the allegations to Z.C.’s grandmother and mother. Z.C. also testified that “normally” she, L.C., and their other siblings would stay at their grandmother’s house during the summer.

L.C. testified second. L.C. was 13 years old during the trial. L.C. explained that while he was living at their Dupont Avenue home, Deward entered the bedroom and lifted L.C. off of his bed. Deward then pulled down L.C.’s pants and inserted his penis into L.C.’s anus. L.C.’s testimony was detailed, including the use of diagrams and descriptions of how their bodies were positioned during the sexual assault and how it made him feel. L.C. was then asked to clarify how he knew this particular assault occurred four days before his seventh birthday. L.C. stated that “[b]ecause three days before that, I had friends who

¹ Minn. Stat. § 609.342., subd. 1(a) (2018).

² Six other witnesses, including L.C. and Z.C.’s sister, a therapist, two forensic interviewers, a child-protection investigator, and a Minneapolis Police Department investigator, also testified at trial.

had their birthday on the 4th. And then I knew that my birthday was coming up, so I was counting down the days.” He clarified that he was “very excited” for his birthday, so he would continuously repeat to himself “four days,” “three days,” counting down to his birthday on July 11. Although more instances of abuse were alleged in the complaint, this was the only specific event that L.C. testified to. According to L.C., their mother did not believe either his or Z.C.’s allegations.

The jury found Deward guilty of both counts of first-degree criminal sexual conduct. The district court sentenced Deward to 156 months’ imprisonment and a ten-year conditional release for count 1 and a concurrent 345 months’ imprisonment and lifetime conditional release on count 2.

Deward appealed, and this court stayed the appeal and remanded the case to the district court to permit him to pursue postconviction relief. In his petition for postconviction relief, Deward alleged that he received ineffective assistance of counsel due to an inadequate investigation and failure to call favorable witnesses.³ This court stayed his direct appeal pending the outcome of the petition for postconviction relief. The district court granted a postconviction evidentiary hearing.

Postconviction Proceedings

The evidentiary hearing took place on three different days. Six witnesses were heard: Deward, Deward’s wife (and mother of Z.C. and L.C.) (mother), Deward’s two biological children, Z.C., and Deward’s trial counsel.

³ Deward also alleged that Z.C. recanted her testimony, but that claim is not material to this appeal.

Important to this appeal was the testimony of trial counsel. Trial counsel testified that he met with Deward roughly six times, but most of the documents and other evidence came from mother. This evidence included L.C. and Z.C.'s medical records, some videos, and photographs of the children's bedroom door of the Dupont house. She also provided a list of potential witnesses, some of which trial counsel followed up with but "some of them didn't want to say anything to us; others didn't really say what we thought they would say or what we were told they would say, and others didn't have anything that was particularly helpful."

Trial counsel recalled speaking with Deward about a possible alibi involving his in-person alcohol treatment, but he determined that the alibi "did not work timing wise." He also relayed a "long discussion" he had with Deward about whether or not they should call certain witnesses, including Deward himself. According to his counsel, the decision to call witnesses was left up to Deward, who declined to call anyone. This included Deward's biological children, who trial counsel explained could have "open[ed] the door" to evidence that they did not want before the jury.

The postconviction court denied Deward's petition for postconviction relief. In doing so, the postconviction court found the testimony of Deward and mother "less credible" than the other witnesses at the postconviction hearing. The court concluded that trial counsel's decision to not call certain witnesses—which comprised Deward's first three claims of ineffective assistance of counsel—amounted to trial strategy.⁴ As to the claim

⁴ And despite being trial strategy, the court found the reasons for not calling the witnesses to be objectively reasonable.

that trial counsel did not adequately investigate the potential alibi, the court found trial counsel's performance both objectively reasonable and without prejudice to Deward, and pointed to testimony that trial counsel did in fact investigate the alibi before concluding that there was a timing issue.⁵

Deward appeals his convictions and the denial of his petition for postconviction relief.

DECISION

I. Trial counsel's choices regarding the extent of investigation and witness selection are matters of trial strategy.

Deward claims that he received ineffective assistance of counsel based on several failures from his trial counsel.

We review a postconviction court's denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion by exercising its discretion in an arbitrary or capricious way, basing its decisions on an erroneous view of the law, or by making clearly erroneous factual findings. *Id.* This court reviews legal issues de novo and reviews factual issues to

⁵ There were two other claims of ineffective assistance of counsel that the postconviction court denied, which are not before us on appeal. The first was that trial counsel failed to investigate whether L.C. and Z.C. had HSV-2 (more commonly known as herpes). But the court credited trial counsel's testimony that he received this medical documentation from mother and was aware that they did not have herpes. The final claim was that trial counsel failed to file pretrial *Paradee* motions. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (ruling that criminal-sexual-conduct defendants may request that the court conduct an in-camera examination of confidential records and provide any relevant records to the parties). But the postconviction court concluded that, because there were *Paradee* motions filed by trial counsel, this claim was "entirely without merit."

determine whether there is sufficient evidence in the record to sustain the postconviction court's findings. *Id.*

With regard to ineffective-assistance-of-counsel claims, as are presented here, we utilize the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To prevail on such a claim, an appellant must demonstrate that (1) “counsel’s performance fell below an objective standard of reasonableness” (objectiveness prong), and (2) a reasonable probability exists that the outcome would have been different but for counsel’s errors (prejudice prong). *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (quotation omitted). We need not address both prongs if one is determinative. *Id.*

Under the first prong of *Strickland*, we examine whether counsel’s “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. An objective standard of reasonableness is the level of “customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotation omitted). There is “a strong presumption that counsel’s performance was reasonable.” *Anderson v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Matters involving trial strategy that we generally do not review include “[t]he extent of counsel’s investigation,” *id.*, counsel’s decisions regarding what evidence to present, *see State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006) (“What evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel”), and counsel’s advice to the client, *e.g.*, *State v. Brocks*,

587 N.W.2d 37, 43 (Minn. 1998) (concluding that counsel’s advice about what the defendant should discuss at trial was reasonable trial strategy).

Deward broadly argues two errors in his trial counsel’s assistance: a constitutionally inadequate investigation and a failure to call witnesses. We review each in turn.

Constitutionally Inadequate Investigation

For the claim of constitutionally inadequate investigation, Deward alleges three errors by trial counsel: (1) not taking photos of the children’s bedroom lock; (2) failing to investigate and introduce evidence of a prior false accusation of abuse against Deward; and (3) neglecting to share evidence of Deward’s alcohol treatment with him.

First, Deward argues that trial counsel did not take photos of the lock on the door to the Dupont Avenue bedroom where Z.C. and L.C. slept during some of the alleged assaults. This photo falls into the contours of trial strategy because the photo of a lock on the bedroom door would not have established that the door was locked on any of the nights of the alleged assaults. And regardless, the postconviction court credited trial counsel’s testimony that he believed the evidence already established the “difficulty of committing the sexual assault in the bedroom,” making the additional photo unnecessary. It is reasonable for trial counsel to not obtain a photo of the bedroom door lock.⁶

Second, Deward contends that his trial attorney inadequately investigated his case based on a failure to examine and introduce evidence of a prior false accusation of abuse

⁶ Deward brought a third challenge under his ineffective-assistance-of-counsel claim, which was that his trial counsel failed to “present any evidence.” However, as Deward points to no other specific evidence that was not presented, this is just another way to argue about the lack of a photo showing the bedroom door lock.

against Deward. Specifically, the trial attorney did not investigate allegedly false allegations against Deward that Z.C. and L.C. made in the past to child protection. This allegation stems from the assertion that Deward and his wife were aware that his children were making false accusations to child protection against him and relayed that information to the trial counsel. But even if this assertion were true, it was reasonable for the trial counsel to avoid probing this line of questioning through Deward or his wife in the manner that Deward suggests because it would have been barred by Minnesota Rule of Evidence 608(b), which generally bars the admission of extrinsic evidence of specific instances of truthfulness or untruthfulness. *See also State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998).

Third, Deward alleges that trial counsel did not show him his alcohol-treatment records, which could have established an alibi. As a matter of trial strategy, trial counsel determined that the alcohol-treatment records would not have established an alibi, as the time range in the complaint spanned over six years—far longer than the time Deward spent in treatment. This shows not only that trial counsel investigated this potential alibi, but also that counsel reasonably ruled out this alibi as a possible defense.

Failure to Call Witnesses

Deward next alleges trial counsel erred by failing to call favorable witnesses. Specifically, Deward wanted his trial counsel to call his wife and two biological children to testify.

The calling of witnesses falls directly in the area of trial strategy that we generally do not review for ineffective assistance of counsel. *Mems*, 708 N.W.2d at 534. Even if we

were to second guess the trial counsel's strategy, the testimony that Deward now seeks through his family witnesses was either already established or likely inadmissible. According to Deward, his biological children would have testified about the difficulty of Deward sexually abusing Z.C. and L.C. in their bedroom due to the number of people in the house. But this was already part of trial counsel's cross-examination of both L.C. and Z.C., making Deward's biological children's testimony repetitive. As for wife's testimony that Z.C. and L.C.'s reports of prior abuse to children protection were false, as explained above, this is likely barred by Minnesota Rule of Evidence 608(b). For these reasons, it is reasonable that trial counsel did not choose to call these witnesses.

In sum, because Deward's challenges implicate matters of trial strategy that we do not review, the postconviction court did not err in concluding that Deward did not receive ineffective assistance of counsel. *See Peltier*, 946 N.W.2d at 372 (affirming without addressing the first prong).

II. The evidence was sufficient to support a conviction as to L.C.

Next, Deward argues that the evidence was not sufficient to support a conviction of first-degree criminal sexual conduct. This is a narrow challenge and involves solely the conviction comprising the assault against L.C. Deward's challenge is based on Z.C.'s testimony that the children "normally" spend the summer at their grandmother's home.

To assess whether sufficient evidence supports a conviction, this court "carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*,

887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). When direct evidence supports an element of an offense, this court’s review is limited “to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). We assume that the jury believed the state’s witnesses and did not credit any testimony to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not overturn a jury verdict if the jury could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the state’s burden of proof beyond a reasonable doubt. *Griffin*, 887 N.W.2d at 263.

Before getting to the evidence introduced, first we look to the elements of the first-degree criminal sexual conduct statute,⁷ which criminalizes

A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant’s age nor consent to the act by the complainant is a defense;

Minn. Stat. § 609.342, subd. 1(a).

⁷ This statute was reordered in 2021. The current version of this statute is Minnesota Statutes section 609.342, subdivision 1a(e) (Supp. 2021).

With this statute in mind, we turn to the evidence presented by the state. Viewed in the light most favorable to the verdict, the state established that L.C. was under 13 years of age and that Deward was more than 36 months older than L.C. at the time of the assault. And L.C. testified that Deward sexually penetrated him. This alone is sufficient evidence of first-degree criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2020); *see State v. Carver*, 380 N.W.2d 821, 827 (Minn. App. 1986) (concluding that victim testifying that an appellant sexually penetrated her was all that was required to constitute sufficient evidence), *rev. denied* (Minn. Mar. 27, 1986). Regardless, L.C. went into great detail of the sexual assault at trial, including diagrams and the body positions of both L.C. and Deward during the assault. We are to assume that the jury believed this testimony. *Moore*, 438 N.W.2d at 108. Similarly, L.C.’s description of how he remembered the date of the assault was specific, and would require this court to infer that a seven year old would not remember their own birthday.

To convince us otherwise, Deward does not make any arguments other than the sole assertion that the assault against L.C. was “impossible” because, as described by Z.C., the children spend summers at their grandmother’s house. But Z.C. only testified that they “normally” spent most of the summer at their grandmother’s house, not that they spent the entire summer in 2017 (the year of the specific assault L.C. testified to) away from the Dupont Avenue home. Notably, this argument regarding summers spent with grandmother was also made to the jury in the closing arguments and we must presume it was rejected.

In sum, the evidence was sufficient to support the second conviction of first-degree criminal sexual conduct.⁸

Affirmed.

⁸ Deward also raises a general issue where he critiques every conclusion in the postconviction court order point by point. But he does not argue that the postconviction court abused its discretion, nor does he clearly point to an error that is not otherwise raised in his ineffective assistance of counsel argument. Because it is Deward's burden to show prejudice, this argument is not properly before us. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (requiring appellant to demonstrate prejudice).