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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0844**

State of Minnesota,
Respondent,

vs.

Zackary Andrew Brown,
Appellant.

**Filed April 26, 2021
Affirmed
Cochran, Judge**

Polk County District Court
File No. 60-CR-18-2365

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

Greg Widseth, Polk County Attorney, Clifford Wardlaw, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Shawn L. Autrey, Ward K. Johnson, III (pro hac vice), Johnson & Autrey Law Firm, Grand
Forks, North Dakota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and
Gaïtas, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal from judgment of conviction of third-degree criminal sexual
conduct, appellant seeks reversal of his conviction and a new trial on the basis that he

received ineffective assistance of counsel at trial. Because appellant has not demonstrated ineffective assistance of counsel, we affirm.

FACTS

The State of Minnesota charged appellant Zackary Andrew Brown with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2016), and fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2016). The complaint alleged that Brown engaged in sexual penetration with his ex-girlfriend, having reason to know that she was physically helpless at the time. According to the complaint, the alleged conduct occurred sometime in the early morning hours of January 4, 2018.

The case proceeded to a jury trial. Brown's ex-girlfriend (the victim) testified that on the date in question she was living in the same house as Brown, even though their romantic relationship had ended. She testified that she had been trying to get Brown to move out of the house for "a while" and "did not want anything to do with him." In the days before the incident, the two slept apart: Brown in the bedroom and the victim on the couch in the living room.

The victim testified that she was home alone the night of the assault and drank heavily to the point of intoxication while on the living-room couch. She testified that she spoke on the phone with two different friends before passing out. One of the friends testified that the victim called him at about 1:00 or 2:00 a.m. He further testified that, about 45 minutes into the call, he heard a noise like a door opening and a sound of a phone dropping. He "could hear screaming in the background." He also testified to hearing the

victim say things like “[s]top,” “[d]on’t,” and “[t]hat hurts.” The victim did not remember this conversation. The victim testified that she awoke the next morning around 8:00 a.m. naked from the waist down and in bed with Brown.

The victim woke up due to pounding on the front door by a police officer, who was conducting a welfare check at the request of one of her friends. The victim was still intoxicated when she awoke, and could not remember the details of the previous night. But the victim had pain in her knees, ribs, and hips. And, when she went to answer the door, she noticed that the house was in a state of disarray. The officer asked her if she was “okay.” She indicated that she was, but testified that she was confused and intoxicated at that time. A couple of hours later, she asked a friend to drive her to a hospital because she suspected that she had been sexually assaulted.

At the hospital, a nurse conducted a sexual-assault examination. In the course of the examination, the nurse used a cotton swab to collect DNA evidence from various locations on the victim’s body including the victim’s vagina and perineal area. The Bureau of Criminal Apprehension conducted DNA testing on the swabs, which contained seminal fluid. The results showed that the vaginal swab contained DNA that matched the DNA from two individuals: the victim and Brown. The perineal swab also contained DNA that matched Brown’s DNA. In interviews with police conducted before the DNA test results were available, Brown denied having any sexual contact with the victim on the date of the incident.

Before trial, Brown’s trial counsel sought to call a doctor as an expert witness to testify that the semen recovered from the victim could have been from a consensual

encounter around December 25. The district court did not allow the doctor to testify, concluding that the doctor was not qualified to testify as proposed. Brown's counsel did not identify an alternative expert. Brown's counsel also did not file a motion any time prior to trial seeking to present evidence of prior consensual sexual intercourse between Brown and the victim under Minn. Stat. § 609.347 (2020).

At trial, the state called the forensic scientist from the Bureau of Criminal Apprehension who had performed the DNA analysis on the samples recovered from the victim. The forensic scientist testified that when performing DNA analysis in a sexual-assault case, the scientist looks for both the presence of sperm heads and the volume. She testified that the scientifically accepted timeline for the lifespan of sperm in a woman's vagina is approximately 120 hours, or five days. She further testified that the volume of sperm heads recovered is significant because that volume naturally decreases over time. And recovery of a large volume of sperm heads suggests that the sperm heads were deposited close in time to the examination. The DNA swabs taken during the victim's examination recovered a significant volume of sperm heads. Based on the volume, the forensic scientist testified that the sperm had "definitely" been deposited "within the 120-hour window." The forensic scientist also testified that only Brown and the victim contributed to the DNA that she tested, and that "99.999999999 percent of the general population could be excluded" from that DNA sample.

Brown chose to testify at trial. The following summarizes his testimony. Brown lived with the victim on the date of the alleged incident and had lived with her for about a year and a half before that. His relationship with the victim was "rough" in the days

immediately preceding the incident. Brown worked a night shift on January 2, 2018, and slept late into the day on January 3, 2018. He woke up around 7:00 p.m. and then went to a bar to meet friends. When the bar closed, Brown made plans to go to his friend's house but first stopped home to pick up a case of beer from the garage. He then drove to his friend's house and remained there overnight. According to Brown, he returned home around 6:30 or 7:00 a.m. When he arrived, the door was unlocked and the house was in a state of disarray. Brown saw the victim passed out unconscious on the couch and unclothed from the waist down. After trying and failing to wake the victim, Brown carried her from the couch to the bed. He got into the bed as well, but he denied having any contact with the victim. Brown was "worried" about the victim, but he did not call the police when he first came home because he wanted to ask the victim about what had happened before calling for help. He denied having any sexual contact with the victim on the date in question or during the preceding 120 hours. He also claimed that the two last had sexual contact around December 25, 2017, when the two had consensual intercourse.

In its closing argument, the state contended that "the DNA evidence is all you need to convict" Brown. The state further argued that Brown's own testimony proved his guilt because it was unreasonable for him to fail to call the police or take the victim to the hospital if he believed that she had been assaulted. But the state thereafter returned to its argument that "[t]he hard science of this case is the foundation of the case, and there is nothing, nothing here other than [the] found two DNA samples."

In his closing argument, Brown's defense counsel argued that the evidence showed that the victim was assaulted around 2:00 or 3:00 a.m., when Brown was at his friend's

house. Brown's defense counsel argued that the assault could not have happened when Brown returned home from the bar to get beer from the garage on the way to his friend's house because the victim was awake, conscious, and speaking with friends on the phone. Brown's defense counsel further contended that the assault could not have happened when Brown returned home around 6:30 or 7:00 a.m. Counsel argued that the victim would have woken up if Brown tried to have sexual contact with her at that time, given that she was able to wake up around 8:00 a.m.

The jury found Brown guilty of both third-degree and fourth-degree criminal sexual conduct. The district court subsequently convicted Brown of third-degree criminal sexual conduct and vacated his fourth-degree criminal sexual conduct charge. This appeal follows.

DECISION

The United States and Minnesota Constitutions guarantee the right to counsel in criminal trials. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016).

Brown argues that he received ineffective assistance of counsel because his trial counsel (1) conceded his guilt, (2) failed to impeach the victim, (3) failed to properly "vet[]" his anticipated expert witness, and (4) failed to bring a motion under Minn. Stat. § 609.347, subd. 3(b), to admit evidence of prior consensual sexual intercourse

between Brown and the victim. In a direct appeal, we review a claim of ineffective assistance of counsel de novo. *Taylor*, 887 N.W.2d at 823.

We apply the two-prong standard set forth in *Strickland* to determine whether a claim of ineffective assistance of counsel requires reversal. The first prong relates to counsel's performance and the second prong examines whether the defendant was prejudiced. *Strickland*, 446 U.S. at 687, 104 S. Ct. at 2064; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Under the first prong, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020) (quotation omitted) (applying *Strickland*). An objective standard of reasonableness is the level of customary skill and diligence that a reasonably competent attorney would employ under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). There is a "strong presumption that a counsel's performance falls within a wide range of reasonable assistance." *State v. Reek*, 942 N.W.2d 148, 166 (Minn. 2020).

Under the second prong, the defendant must show "a reasonable probability" that the outcome "would have been different" but for counsel's errors. *Chavez-Nelson*, 948 N.W.2d at 671 (quotation omitted). A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 446 U.S. at 694, 104 S. Ct. at 2068. Thus, under the prejudice prong, a "defendant must show that counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding

probably would have been different.” *Rhodes*, 657 N.W.2d at 842 (quotation omitted); *see also Strickland*, 446 U.S. at 687, 104 S. Ct. at 2064.

A defendant must satisfy both prongs of the *Strickland* test to demonstrate that a new trial is required. *State v. Smith*, 932 N.W.2d 257, 270 (Minn. 2019). If the appellant fails to satisfy one prong, this court may dispose of the claim without addressing the other. *Id.* at 271. With this standard in mind, we turn to Brown’s arguments.

I. Brown has not shown that his trial counsel conceded Brown’s guilt.

Brown argues that he received ineffective assistance of counsel because his trial counsel conceded his guilt to the charged offenses. Brown contends that his trial counsel did so by confirming to the district court that Brown would not be arguing that the alleged sexual encounter on the date in question was consensual. The state counters that Brown’s trial counsel did not concede his guilt because consent was not an issue at trial.

Where defense counsel concedes a client’s guilt without the client’s permission, “counsel’s performance is deficient and prejudice is presumed.” *State v. Huisman*, 944 N.W.2d 464, 467 (Minn. 2020) (quotation omitted). In such a case, no showing of prejudice is required because the “decision to admit guilt is the defendant’s decision to make.” *Id.* (quotation omitted). But defense counsel does not concede a client’s guilt by choosing not to contest some, but not all, of the elements of the charged offense. *Id.* at 468.

In *Huisman*, which involved two charges of age-related criminal sexual conduct, defense counsel conceded the following elements: (1) the age of his client, (2) the age of the two victims, and (3) the county in which the offense allegedly occurred. *Id.* The

supreme court concluded that Huisman’s defense counsel had not conceded his guilt because he disputed the element of whether Huisman sexually penetrated the victims. *Id.* The supreme court further concluded that Huisman had not shown error under the usual *Strickland* test because his counsel’s “concessions about undisputed elements were patently reasonable.” *Id.*

Here, the state charged Brown with third-degree and fourth-degree criminal sexual conduct. To prove that Brown was guilty of third-degree criminal sexual conduct as charged, the state had to prove that he (1) engaged in “sexual penetration” with a person that he (2) knew or had reason to know was mentally impaired, mentally incapacitated, or physically helpless at the time. Minn. Stat. § 609.344, subd. 1(d). To prove that Brown was guilty of fourth-degree criminal sexual conduct as charged, the state had to prove that he (1) engaged in “sexual contact” with a person that he (2) knew or had reason to know was mentally impaired, mentally incapacitated, or physically helpless at the time. Minn. Stat. § 609.345, subd. 1(d). “Sexual penetration” includes “sexual intercourse” performed “without the complainant’s consent, except in those cases where consent is not a defense.” Minn. Stat. § 609.341, subd. 12 (2016). “Sexual contact” includes “the intentional touching by the actor of the complainant’s intimate parts.” *Id.*, subd. 11(a)(i) (2016). “Physically helpless” means that the victim is “(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” *Id.*, subd. 9 (2016).

Brown claims that his trial counsel conceded his guilt to both criminal-sexual-conduct offenses based on the following exchange with the district court, which occurred outside the presence of the jury:

THE COURT: Well, we don't have consent because your client isn't saying he did have relations with her.

COUNSEL: Yeah, he did, December 25.

THE COURT: But not during the incident in question, right? He's denying that.

COUNSEL: Right.

THE COURT: So we're not dealing with a consent case.

COUNSEL: Right.

The above colloquy is fairly analogous to *Huisman* in terms of the limited nature of the concession by trial counsel.

Brown argues that his trial counsel conceded his guilt because he agreed with the district court that consent was not an issue in this case. But, as the state notes, Brown denied having any sexual contact with the victim on the night of the alleged incident, both in interviews with the police and at trial. Brown's trial counsel's defense strategy was to argue that Brown could not have been the person who assaulted the victim because he was at a friend's house during the only window of time when the assault logically could have happened. As in *Huisman*, Brown's trial counsel's concession was "patently reasonable" given that any attempt to argue that Brown had consensual sex with the victim on the date in question would undermine Brown's own testimony. And Brown's trial counsel mounted a vigorous attack against the state's allegations regarding critical elements of both offenses: whether or not Brown sexually penetrated or had sexual contact with the victim on January 4, 2018.

Our conclusion that Brown’s trial counsel did not concede his guilt is further supported by the fact that the jury never heard the exchange between the district court and trial counsel that Brown now characterizes as a concession of guilt. The discussion occurred completely outside the presence of the jury. We are aware of no case concluding that trial counsel conceded the defendant’s guilt based on statements that occurred outside of the presence of the jury. *See, e.g., State v. Luby*, 904 N.W.2d 453, 459 (Minn. 2017) (reversing conviction where defense counsel conceded defendant’s guilt during closing arguments); *Dukes v. State*, 621 N.W.2d 246, 255 (Minn. 2001) (remanding to the postconviction court for further proceedings to determine whether defendant received ineffective assistance of counsel when his counsel conceded guilt during closing argument); *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (reversing where defense counsel implied that defendant was guilty during cross-examination of the alleged victim). Because Brown’s counsel reasonably agreed with the district court’s statement that they were “not dealing with a consent case,” trial counsel was not ineffective in this regard. And because Brown has failed to meet the first prong of the *Strickland* standard with regard to this claim, we need not consider the second prong. *See Smith*, 932 N.W.2d at 271.

II. Trial counsel's alleged failure to impeach the victim does not constitute ineffective assistance of counsel.

Brown argues next that his trial counsel's performance was deficient because he failed to impeach the victim's character for honesty after the prosecution "opened the door" by asking another witness about the victim's reputation for truthfulness within the community. We disagree.

A trial counsel's decision not to impeach a witness is a matter of trial strategy. *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (explaining that decisions regarding what evidence to present to the jury, which defenses to raise, and what witnesses to call are matters of trial strategy). We generally do not "review ineffective assistance of counsel claims based on trial strategy." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). "Our reluctance to scrutinize trial tactics is grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). But we will examine trial strategy that implicates a defendant's fundamental right, such as whether to plead guilty, waive a jury, testify on his or her own behalf, or appeal. *Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). No such fundamental right is implicated by trial counsel's decision not to impeach a witness. *See id.* Because the decision not to impeach the witness was a tactical decision that did not implicate a fundamental right, Brown has not satisfied the first prong of the *Strickland* test with regard to this claim. Therefore, we need not consider whether he was prejudiced as a result. *See Smith*, 932 N.W.2d at 271.

II. Brown has not shown that his counsel's performance deprived him of an expert witness who would testify in support of his theory of the case.

Brown further argues that his trial counsel's performance fell below an objective standard of reasonableness because his trial counsel failed to call an expert witness. The record indicates that Brown's trial counsel located a proposed expert witness, but the district court concluded that the witness was not qualified to testify as an expert. Brown argues that his trial counsel's performance fell below an objective standard of reasonableness because he failed to properly "vet[]" the proposed expert witness. Here again, Brown has not met his burden under *Strickland*.

First, Brown has not shown that the exclusion of his proposed expert was a result of trial counsel's failure to "vet" the witness. The record does not contain any evidence of "vetting," or lack thereof, on the part of Brown's trial counsel.¹ Nor is there any evidence regarding the type of "vetting" that is necessary for trial counsel to meet an objective standard of reasonableness. As a result, Brown has failed to demonstrate that the exclusion of his proposed expert was the result of representation that fell below an objective standard of reasonableness.

Even assuming that Brown could make such a showing, to prevail he must also show that he was prejudiced as a result. To do so, he bears an affirmative burden to show that a reasonable attorney could have found a qualified expert to testify to his theory of the case

¹ We note that Brown did not order the transcript of the proceeding in which the district court ruled that his proposed expert witness would not be allowed to testify. As a result, the record before us fails to reveal the underlying basis for the district court's conclusion that Brown's proposed expert was not qualified to testify.

and that the witness's testimony probably would have made a difference. *See Gates v. State*, 398 N.W.2d 558, 563 (Minn. 1987) (holding that appellant had not demonstrated prejudice where he alleged that trial counsel should have investigated further to locate additional witnesses but did not show the existence of a witness whose testimony would have benefited him). Brown has not met this burden. He has not identified any qualified expert who would have testified in support of his theory of the case—namely, that the sperm in the samples taken from the victim on January 4 could be from a consensual sexual encounter that happened approximately ten days earlier. Without identification of such an expert, there is no basis to conclude that the exclusion of Brown's expert had any effect on the outcome of the trial. As a result, Brown has not shown “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 561 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). Consequently, Brown has failed to meet the *Strickland* standard with regard to trial counsel's efforts to present an expert witness.

IV. Brown has not shown ineffective assistance of counsel resulting from the absence of a motion under Minn. Stat. § 609.347.

Brown also argues that his trial counsel's performance fell below an objective standard of reasonableness because his trial counsel did not file a motion under Minn. Stat. § 609.347 to introduce evidence of previous consensual intercourse between Brown and the victim to explain the state's DNA evidence.² The state argues that Brown has not

² Brown's ability to introduce evidence of the victim's prior sexual activity to show the source of the semen also implicates Minnesota Rule of Evidence 412. In his brief, Brown refers to both rule 412 and section 609.347. But because rule 412 is “superseded to the

shown prejudice because the district court would not have admitted the evidence even if his trial counsel had filed a section 609.347 motion. We agree that Brown has not demonstrated prejudice.

In a criminal-sexual-conduct prosecution, “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,” unless an enumerated exception applies *and* “the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature.” *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015) (quoting Minn. Stat. § 609.347, subd. 3). One such exception provides that the defense may introduce “evidence of specific instances of the victim’s previous sexual conduct” where “the prosecution’s case includes evidence of semen.” Minn. Stat. § 609.347, subd. 3(b). In such a case, the evidence is admissible “solely to show the source of the semen.” *Id.* “The accused may not offer evidence described in subdivision 3” except by making a motion at least three business days before trial. *Id.*, subd. 4. This law, known as the rape-shield law, “serves to emphasize the general irrelevance of a victim’s sexual history, not to remove relevant evidence from the jury’s consideration.” *Wenthe*, 865 N.W.2d at 306 (quotation omitted).

Here, the prosecution’s case included evidence that Brown’s semen was recovered from the victim’s vagina. Brown’s trial counsel wanted to introduce evidence of prior consensual relations between Brown and the victim to “show the source of the semen.”

extent of its conflict with” section 609.347, we confine our analysis to whether Brown’s trial counsel was ineffective for failure to bring a motion under section 609.347. Minn. Stat. § 609.347, subd. 7.

Minn. Stat. § 609.347, subd. 3(b). Because the evidence fell into one of the enumerated exceptions, it would be admissible if the district court concluded that “the probative value of the evidence [was] not substantially outweighed by its inflammatory or prejudicial nature.” *Id.*, subd. 3. To seek admission of this evidence, Brown’s trial counsel was required to move for admission of the evidence at least three days before trial. *Id.*, subd. 4. Brown’s counsel made no such motion.

Assuming, without deciding, that Brown has shown that his trial counsel’s performance fell below an objective standard of reasonableness by failing to make such a motion before trial, Brown has not demonstrated that the probable result of his trial would have been different. At trial, Brown’s counsel made essentially the same motion and the district court heard the motion. Trial counsel asked the court “to allow the evidence of the voluntary sexual interaction between the defendant and [the victim] on or about December 25.” Trial counsel wanted to introduce the evidence to explain the recovery of Brown’s sperm from the victim during the sexual-assault examination on January 4, 2018. The district court went through the rape-shield law analysis and concluded that the evidence was not admissible.

The district court excluded the evidence because there was no scientific evidence to support that sperm could remain alive from December 25 through January 4—approximately ten days. The only expert testimony at trial regarding the ability to detect sperm recovered during a sexual-assault examination placed the outer limit at 120 hours (or five days). As a result, the court found that “the only purpose [the evidence] would serve would be to muddy the water, so to speak, because you don’t have a causal link.”

Thus, the evidence that Brown's trial counsel sought to admit regarding a consensual sexual encounter around Christmas would not have been admitted even if trial counsel had noticed it under Minn. Stat. § 609.347. Because Brown has not shown prejudice from his claim that his trial counsel was ineffective for failing to bring a pretrial motion under Minn. Stat. § 609.347, this argument fails the second prong of the *Strickland* analysis.

In sum, Brown is not entitled to a new trial on the basis of ineffective assistance of trial counsel because he has not satisfied the *Strickland* standard for any of his alleged claims.

Affirmed.