

*This opinion is nonprecedential except as provided by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
A21-1553**

State of Minnesota,
Respondent,

vs.

Abdulahi Dahir Salad,
Appellant.

**Filed November 21, 2022
Affirmed
Klaphake, Judge ***

Dakota County District Court
File No. 19HA-CR-19-1164

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

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Klaphake, Judge.

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

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

On direct appeal from his conviction of first-degree criminal sexual conduct and following a stay of the appeal and remand to the district court for postconviction proceedings, appellant argues that (1) the evidence was insufficient to sustain his conviction; (2) his waiver of his right not to testify on his own behalf was not knowing and voluntary; (3) he was denied the effective assistance of counsel; and (4) the district court abused its discretion by summarily denying his petition for postconviction relief. We affirm.

DECISION

Ordinarily, we review the denial of a postconviction petition for an abuse of discretion. *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). But when, as here, “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).

I.

Appellant Abdulahi Dahir Salad argues that the evidence was insufficient to sustain the jury’s verdict. In reviewing such an argument, this court reviews the evidence in the light most favorable to the verdict “to determine whether the facts in the record 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. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotation omitted). We

will not disturb the jury's verdict if the jury acted with "due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt" and could "reasonably conclude that [the] defendant was proven guilty of the offense charged." *Id.* (quotation omitted).

Salad was convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2018), after he sexually assaulted his then-wife's 14-year-old sister, I.S. The statute requires proof of sexual penetration of a victim under the age of 16 and a significant relationship between the victim and the perpetrator. *Id.* "Sexual penetration" includes "sexual intercourse, cunnilingus, fellatio" and "any intrusion however slight into the genital or anal openings . . . of the complainant's body by any part of the actor's body or any object used by the actor for this purpose" without the complainant's consent. Minn. Stat. § 609.341, subd. 12 (2018). Cunnilingus constitutes sexual penetration if there is "contact between the female genital opening of one person and the mouth, tongue, or lips of another person, however slight." *State v. Blom*, 358 N.W.2d 63, 64 (Minn. 1984) (quotation omitted).

Salad argues that the evidence adduced at trial was insufficient to sustain the jury's finding of guilt "because all of the evidence relating to penetration was uncertain or contradictory." But penetration of the vagina is not required for the act of cunnilingus. *Id.* Here, I.S. testified at trial that Salad pulled down her pants and put "his mouth on [her] vagina." And when asked to clarify if Salad's mouth was "on the outside or inside or both of [her] vagina," I.S. stated, "I believe both." Moreover, I.S. reported to the nurse who performed the sexual-assault examination that Salad's mouth touched her vagina. And I.S.

told a county social worker that Salad's mouth was touching the "inside" of her vagina. I.S.'s trial testimony and out-of-court statements to the nurse and social worker, along with evidence of I.S.'s reports to the nurse and social worker, are enough to prove the element of sexual penetration. The jury found the state's evidence relating to sexual penetration to be credible, and we defer to the jury's credibility determination. *See State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016) (stating that an appellate court defers to the jury because the jury is "generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony" (quotation omitted)). Accordingly, the evidence was sufficient to sustain the jury's guilty verdict.

II.

Salad also contends that the waiver of his right to testify was not knowing and voluntary. A criminal defendant has a constitutional and a statutory right to testify. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7; Minn. Stat. § 611.11 (2020); *see State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (stating that right to testify is protected by the Fourteenth Amendment of the United States Constitution and Minnesota state law). "[T]he right to testify in one's own defense is a personal right which counsel does not have the ultimate authority to waive." *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). A defendant's personal waiver of the right to testify "should be voluntary and knowing." *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). The defendant bears the burden of proving that the waiver of his right to testify was not voluntary and knowing. *Id.* If trial

counsel denies a defendant's right to testify, a new trial must be granted "regardless of the probable result in a subsequent proceeding." *Id.* at 750.

After the state rested, a bench conference was held at which Salad's trial counsel indicated that he needed some time to speak with Salad about "what he wants to do moving forward." The following colloquy then occurred on the record:

Trial counsel: Mr. Salad, we are at the portion of this jury trial where if you were going to testify, it would happen next. Do you understand that?

Salad: Yes.

Trial counsel: And you have a constitutional right that allows you to testify if you so choose. Do you understand?

Salad: Yes.

Trial counsel: And to testify in a case like this means that the judge can't stop it, the prosecutors can't stop it, I can't stop it, I can't tell you that, I'm sorry, you can't, shouldn't, won't, whatever. In the end the decision is yours and yours alone. Do you understand that?

Salad: Yes.

Trial counsel: And, in fact, you're the one who has to make the decision whether or not you choose to testify in this case. Does that all make sense to you?

Salad: Yes.

Trial counsel: And you're clear about where we are today and what is happening today, and you're of sound mind and know what you're doing?

Salad: Yes.

Trial counsel: What is your choice today? Do you choose to testify or do you choose to retain your presumption of innocence and stay silent?

Salad: That was a lot of words.

Trial counsel: Okay. Let me say it again. Do you want to testify or not?

Salad: No.

Salad argues that this exchange shows that his waiver of his right to testify was invalid because his “response, ‘that was a lot of words,’ indicates he was not understanding the nuances of [his] rights.” Salad also argues that trial counsel’s reference to the “presumption of innocence” compounded his confusion by indicating that testifying on one’s own behalf means giving up the right to a presumption of innocence. We disagree.

The record reflects that trial counsel asked for a recess to confer with his client about his right to testify and then clearly explained to Salad that he has a right to testify, that he was “the one who has to make the decision,” and that no one could prevent him from testifying. Moreover, when Salad indicated some confusion, trial counsel again asked if Salad wanted to testify, and Salad unambiguously replied, “No.” Although trial counsel’s statement, “Do you choose to testify or do you choose to retain your presumption of innocence and stay silent?” is troubling because it indicates that Salad would forgo the presumption of innocence by testifying, there is no indication that Salad was confused by the statement. Instead, in his affidavit in support of his postconviction petition, Salad claimed that he received erroneous advice on the right-to-testify issue because it was a “‘he-said-she-said’ case” in which credibility was the key issue. He did not claim that he

was confused about whether he would forgo the presumption of innocence by testifying. Because there is no indication that Salad was confused about the presumption of innocence, and because he clearly waived his right to testify, Salad cannot meet his burden to show that his waiver of his right to testify was not knowing and voluntary.

III.

Salad argues that he was denied the effective assistance of counsel because his trial counsel (A) failed to adequately investigate his case; (B) failed to call a crucial witness; (C) failed to question the DNA evidence; (D) failed to disclose evidence to Salad; and (E) advised him not to testify. Because an ineffective-assistance-of-counsel claim presents mixed questions of law and fact, a *de novo* standard of review applies. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Criminal defendants have a constitutional right to the assistance of counsel. U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. This right is the “right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). We analyze ineffective-assistance-of-counsel claims under a two-prong test set forth in *Strickland*. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To prevail on such a claim, Salad must demonstrate that (1) “counsel’s performance fell below an objective standard of reasonableness” and (2) there is “a reasonable probability that, but for counsel’s errors, ‘the result of the proceedings would have been different.’” *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (quoting *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010)). We need not address both prongs of the test if one prong is determinative. *Id.*

Under the first prong, appellant must show that 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 “the customary skills 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 counsel’s performance was reasonable.” *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

A. Alleged failure to investigate

Salad asserts that there is a deep hatred by older generations of Ethiopians toward Somali people. He contends that, because he is Somali and the victim and her family are Ethiopian, his trial counsel should have investigated the cultural antipathy between Salad and the victim’s family, and the role that may have played in the allegations. Salad argues that his trial counsel’s failure to conduct such an investigation amounts to ineffective assistance of counsel.

“The extent of counsel’s investigation is considered a part of trial strategy,” which we generally do not review. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). But it is true that “a failure to investigate a potential defense may constitute ineffective assistance if it results not from counsel’s considered choice but rather from inattention or neglect.” *Swaney*, 882 N.W.2d at 218. When determining whether an alleged failure to investigate constitutes ineffective assistance of counsel, this court considers whether the decision was based on trial strategy or whether it demonstrates that counsel’s performance fell below an objective standard of reasonableness. *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009).

We give trial counsel “wide latitude to determine the best strategy for the client.” *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013).

Here, Salad fails to explain what “investigation” his trial counsel should have performed. Instead, he argues that his trial counsel, who was aware of this alleged conflict, was ineffective by not asserting the alleged cultural conflict as a defense. But trial counsel’s decision not to assert the alleged cultural conflict as a defense is a strategic decision that is not reviewable. *See State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014) (“The determination of which defenses to raise represents an attorney’s trial strategy.”).

Moreover, there is no indication that trial counsel’s decision not to pursue the defense was unreasonable. Salad admitted in his affidavit in support of his postconviction petition that the animosity between Ethiopians and Somalis is “between the older generation” and is “not present” in the generations of him and his now ex-wife. And, to the extent Salad claimed that his now ex-mother-in-law’s hatred toward him was the driving force behind the sexual-assault allegations, the evidence presented at trial indicated otherwise. The jury heard testimony that I.S. told both of her sisters about the abuse *before* she told her mother. In fact, it was two days after the abuse before I.S. told her mother about it. Although I.S.’s mother was the individual who reported the abuse to law enforcement, her response was not indicative of a cultural conflict, but rather the normal response of a concerned parent. Thus, Salad cannot demonstrate that counsel was ineffective by declining to raise a cultural animosity defense.

B. Failure to call A.A. as a witness

Salad also contends that his trial counsel was ineffective by not calling A.A., a friend of the victim's family, as a witness because she would "have impeached the credibility" of I.S. by testifying that Salad's now ex-wife told her that I.S. was lying about the abuse. But trial strategy, including which witnesses to call and what information to present to the jury, is within counsel's discretion and not reviewed on appeal. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Moreover, as the state points out, A.A. was not a witness to the incident and did not speak directly with the victim. And the assertions in her affidavit are based on hearsay, which would likely be inadmissible at trial, as would be A.A.'s opinion that I.S. was lying. As such, it was not unreasonable for trial counsel not to call A.A. as a witness.

C. Alleged failure to question the DNA evidence

Salad further argues that his trial counsel was ineffective by failing to consult with a DNA expert. But again, this argument relates to trial strategy, which is not reviewable. *See id.* (stating that trial strategy, including which witnesses to call and what information to present to the jury, is within counsel's discretion and not reviewed on appeal). Moreover, the record reflects that the DNA evidence presented at trial was of limited value. As the postconviction court found, there was no DNA found on the victim's genital area. Rather, the only swab that contained a DNA mixture was taken from the victim's neck. Trial counsel cross-examined the state's witnesses regarding this DNA swab, which provided the jury with alternative explanations for the DNA being present on the victim's neck. Therefore, Salad is unable to demonstrate that trial counsel was ineffective for not consulting with a DNA expert on this case.

D. Disclosure of evidence

Salad argues that his trial counsel was “ineffective because he failed to disclose all the evidence in the case to . . . Salad in a timely manner.” But Salad fails to identify what the new evidence was. Instead, he simply asserts that trial counsel failed to disclose “new disclosures from the [s]tate having to do with [I.S.’s] testimony and perhaps some other matters.” Without more information, Salad is unable to show that his trial counsel’s performance was unreasonable.

E. Advice not to testify

Salad argues that trial counsel was ineffective because he advised Salad not to testify. He argues that since this was a “he-said-she-said case,” such advice was unreasonable. But “it is well settled that advising a client not to testify does not render trial counsel incompetent.” *State v. Alvarez*, 820 N.W.2d 601, 627 (Minn. App. 2012), *aff’d*, 836 N.W.2d 527 (Minn. 2013). And there is nothing in the record demonstrating that it was unreasonable for trial counsel to advise Salad not to testify. *See State v. Armstrong*, 163 N.W.2d 67, 69 (Minn. 1968) (“We are not prepared to say that a defendant advised to remain off the witness stand has been ill served by his attorney. There is nothing in the record before us to demonstrate that the advice, if given, was without good reason.”). Accordingly, Salad was not denied the effective assistance of counsel.

IV.

Finally, Salad challenges the summary denial of his postconviction petition. “Upon filing a petition for postconviction relief, an evidentiary hearing must be held unless the petition and the files and records of the proceeding conclusively show that the petitioner is

entitled to no relief.” *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018) (quotation omitted). “In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner.” *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). This court reviews the “summary denial of a petition for postconviction relief for an abuse of discretion.” *Andersen*, 913 N.W.2d at 422.

“To be entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim, an appellant must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland*.” *Nissalke v. State*, 861 N.W.2d 88, 93 (Minn. 2105) (quotation omitted). But as addressed above, Salad is unable to satisfy the first prong of the *Strickland* test. Thus, Salad is unable to show that the postconviction court abused its discretion by summarily denying his postconviction petition.

Affirmed.