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

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0147

State of Minnesota,
Respondent,

vs.

Freddy Ivan Bau Rocano,
Appellant.

Filed December 12, 2022
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-20-2816

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Bruce Rivers, Rivers Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal, appellant challenges his conviction for fourth-degree criminal sexual conduct following a jury trial, claiming that he had ineffective assistance of trial counsel and seeking reversal and remand for a new trial. Appellant contends his trial

attorney provided ineffective assistance by failing to (1) "present a complete defense of consent" by not introducing evidence of the victim's prior consensual sexual conduct with others; (2) offer evidence of the victim's alleged motive to falsely accuse appellant; (3) request a jury instruction on voluntary intoxication as a defense; and (4) impeach the victim by offering her complete police statement into evidence. Because the trial record does not allow us to determine appellant's claims of ineffective assistance, we decline to reach the merits. Appellant's right to pursue an ineffective-assistance-of-counsel claim in a petition for postconviction relief is preserved. Thus, we affirm.

FACTS

The following facts are taken from the evidence received during the jury trial. Appellant Freddy Ivan Bau Rocano and J.O., an 18-year-old female, worked together at a fast-food restaurant. After their shift ended on September 6, 2019, they joined a group of coworkers in playing laser tag and drinking. Rocano invited the group of coworkers to his Saint Paul apartment, where Rocano, J.O., and two other coworkers continued drinking through the night and into the next morning. J.O. had eight to ten shots of alcohol before going into a bedroom to lie down.

On the morning of September 7, J.O. watched the sunrise from Rocano's patio and took a photo. J.O. rode with Rocano as he drove the other two coworkers home. Rocano invited J.O. to join him to see an apartment he was thinking about leasing. They returned to Rocano's apartment, and they each took three shots of tequila. J.O. testified that she then "felt like [she] was going to throw up," "ran into the bathroom," and "couldn't stand." Rocano carried J.O. to his bed.

J.O. testified that Rocano was on top of her, and she was "trying to push him off of [her], but [she] was losing feeling in [her] arms and [she] was saying 'no, no, no,' and [she] said that until [she] couldn't speak anymore." J.O. described Rocano as "grabbing [her] butt and feeling all over [her] body." J.O. testified that her memory has gaps about what happened next. She recalled that she did not take her clothes off, but her "clothes were off," Rocano sucked her nipples, and she could not move as she watched Rocano unbuckle his pants. J.O. also recalled Rocano "thrusting" in an act of "penetration" before she "lost consciousness." J.O. testified that she did not initially remember penetration, but the memory came back a few months later.

Next, J.O. remembered waking up in Rocano's car, and she was completely dressed. Rocano parked, and J.O. told him that she "kn[ew] what [he] did." J.O. then ran towards "the nearest building [she] could find," locked herself in a coffee-shop restroom, and called a friend, who took her to the hospital. A sexual-assault nurse examiner (SANE) performed a physical examination. J.O. described the assault to her friend, the SANE, and a police investigator. The SANE noticed an injury to J.O.'s labia majora and collected samples from J.O.'s vaginal area, her breasts, and her neck. A blood sample was taken from J.O. at 2:45 p.m. on September 7 for alcohol and drug testing.

Respondent State of Minnesota charged Rocano with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2018) (sexual penetration when the actor knows or has reason to know that the complainant is physically helpless) (count one); fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(d) (2018) (sexual contact when the actor knows or has reason to know that the complainant is

physically helpless) (count two); fifth-degree criminal sexual conduct under Minn. Stat. § 609.3451, subd. 1(1) (2018) (nonconsensual sexual contact) (count three); and providing alcohol to a minor under Minn. Stat. § 340A.503, subd. 2(1) (2018) (count four).

At trial, the state offered testimony from J.O., the friend who brought her to the hospital, the SANE, several police officers, including a police investigator who interviewed J.O. and recorded her statement, and forensic scientists. A forensic scientist testified that Rocano's DNA matched samples from J.O.'s neck and nipples. Another forensic scientist testified J.O.'s blood test results showed an alcohol concentration of 0.076. No drugs were detected.

Rocano's attorney argued that J.O. consented to the sexual contact and that Rocano stopped when J.O. asked him to stop. Rocano did not testify in his own defense and offered a witness who testified that Rocano is "a hard-working person" and "very responsible." The jury found Rocano not guilty on count one and guilty on counts two, three, and four. The district court sentenced Rocano to 24 months in prison, stayed for five years, on count two, to be served concurrently with his gross-misdemeanor sentence on count 4.

Rocano appeals.

DECISION

Rocano argues that we should reverse his conviction and remand for a new trial because his trial attorney provided ineffective assistance of counsel. The state argues that the record on appeal is inadequate to reach the merits and, alternatively, that Rocano's claim lacks merit.

The U.S. and Minnesota constitutions guarantee criminal defendants the right to effective assistance of counsel. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012) (citing U.S. Const. amend. VI; Minn. Const. art. I, § 6). When reviewing an ineffective-assistance-of-counsel claim, this court uses the test announced in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Id.* at 357-58. *Strickland* requires an appellant to establish that "(1) [their] counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (citing *Strickland*, 446 U.S. at 687). An appellate court need not reach both *Strickland* elements if an appellant fails to satisfy one element. *Id.* There is a "strong presumption that counsel's performance was reasonable." *Id.*

"When a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred." *Id.* But when an ineffective-assistance claim requires examination of evidence outside the trial record or additional fact-finding, it is appropriate to proceed with a postconviction petition. *Id.* "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Appellate courts may decline to address the merits of an ineffective-assistance claim if the record is insufficient. *Id.*

In caselaw reviewing trial counsel's performance for ineffective assistance, the supreme court has stated that "counsel must have the discretion and flexibility to devise a trial strategy that best serves the client." *State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998).

Matters of trial strategy are generally not reviewable under *Strickland*. *Andersen*, 830 N.W.2d at 13. *See, e.g.*, *State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012) (stating decisions about which witnesses to interview are usually matters of trial strategy that appellate courts do not review); *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (stating whether to cross-examine an expert witness is an issue of trial strategy). In particular, "[w]hat evidence to present to the jury, what witnesses to call, and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). On the other hand, "when counsel fails to conduct such a thorough investigation of facts that are so directly related to the defendant's theory of the case, that conduct falls below an objective standard of professional conduct." *State v. Nicks*, 831 N.W.2d 493, 507-08 (Minn. 2013) (reversing district court's decision to deny postconviction relief after concluding appellant alleged facts sufficient to warrant an evidentiary hearing based on the claim that trial counsel failed to obtain evidence "central" to counsel's theory and strategy).

Rocano contends his trial attorney's representation was objectively unreasonable and affected the outcome of his trial because the attorney failed to (1) present evidence of J.O.'s prior sexual conduct with others to bolster Rocano's consent defense; (2) offer evidence of J.O.'s alleged motive to falsely accuse Rocano; (3) ask the district court to instruct the jury on voluntary intoxication as a defense to the intent element; and (4) offer J.O.'s complete recorded police statement as impeachment evidence. We address Rocano's arguments in turn, noting that in each instance, we lack information outside the trial record

needed to explain Rocano's trial attorney's decisions, and thus we are unable to determine whether the trial attorney provided ineffective assistance or made unreviewable strategic decisions.

A. Evidence of Victim's Prior Sexual Conduct and Rocano's Consent Defense

On appeal, Rocano argues that his trial attorney failed to advance his consent defense by offering evidence of J.O.'s previous sexual relationships with other coworkers under Minn. R. Evid. 412(1)(A)(i). Rule 412 generally excludes evidence of a victim's previous sexual conduct unless allowed by the court's order after it determines that consent is a defense and that the evidence "establish[es] a common scheme or plan." Minn. R. Evid. 412(1)(A)(i).

In his brief to this court, Rocano generally alludes to J.O. having prior sexual relationships with coworkers. Rocano argues that this evidence tends to prove a common scheme or plan as contemplated by rule 412. Alternatively, Rocano contends that J.O.'s previous sexual relationship with her manager was admissible under Minn. R. Evid. 404(b). The state argues that introducing evidence of J.O.'s prior sexual relationships was a tactical choice by Rocano's trial attorney, that it "may have been discussed on the record," and that this court cannot review this claim because Rocano failed to provide transcripts of his pretrial hearing or the first three days of trial. The state also argues that without a postconviction hearing, "there is no way of knowing" whether Rocano "personally insisted that trial counsel pursue these tactics."

We begin by considering the record on this issue. The trial transcript of exchanges outside the jury's presence briefly mentions J.O.'s prior sexual relationships with two coworkers—with her manager and with the friend who took her to the hospital after the assault. The record also suggests that J.O. may have been fired and later rehired by the restaurant. On the fourth day of Rocano's trial[1] and outside the jury's presence, Rocano's attorney agreed with the prosecuting attorney that Rocano had not filed a rule 412 motion and that "nothing about [J.O.'s] sexual life will come in" as evidence. The district court stated that it did not expect to hear any evidence about J.O.'s sexual history. Rocano's attorney responded that J.O.'s "sexual conduct will not be relevant to us in our defense. We don't—we could have done that, but we didn't do it." The jury then returned to the courtroom, and opening statements began.

During Rocano's opening statement, his attorney said that J.O. and Rocano were "barely speaking at work" because in 2018, J.O., while working as a manager, "started having an affair with an employee." The prosecuting attorney objected, which the district court sustained. The attorneys conferred with the district court outside the jury's presence, and that conference was not captured by the court reporter. Upon returning to the record and still outside the jury's presence, Rocano's attorney apologized to the district court and explained that he was "trying to establish a motive" for J.O. related to her firing and that any evidence of her prior sexual history was unnecessary. The prosecuting attorney objected to admitting any evidence of J.O.'s firing and rehiring. The district court

[1] The state is correct that the transcript in the appellate record includes no pretrial hearings and begins after three days of jury selection.

admonished Rocano's attorney before ruling that J.O.'s employment history was relevant evidence, but any evidence of an affair was "nowhere near as probative" as needed to "outweigh the extreme prejudice." When the jury returned, the district court instructed the jury that arguments of counsel are not evidence. Rocano's attorney continued his opening statement without mentioning J.O.'s sexual history.

At one point during trial, Rocano's attorney stated outside the jury's presence that he "could have" admitted evidence of J.O.'s alleged prior sexual conduct, but it was unnecessary to establish J.O.'s alleged motive to lie. This statement suggests that Rocano's trial attorney made a strategic decision not to offer evidence of J.O.'s past sexual conduct, which decision would not be reviewable under *Strickland. See Bobo,* 770 N.W.2d at 138. Rocano's theory in this appeal, however, is that his trial attorney's failure to offer evidence of J.O.'s prior sexual conduct was objectively unreasonable because the evidence supported Rocano's defense that J.O. consented to some sexual contact and was lying about the sexual assault.[2] Based on this limited record, we cannot determine whether Rocano's attorney provided ineffective assistance or whether his trial attorney made a strategic decision not to offer evidence of J.O.'s prior sexual conduct.[3]

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[2] We note that the record evidence does not show whether J.O. made prior false allegations of sexual assault, which is required to show a common plan or scheme for admission. Minn. Stat. § 609.347, subd. 3 (2018).

[3] Similarly, we cannot determine the merits of Rocano's argument that his trial counsel failed to offer J.O.'s alleged previous sexual relationship under Minn. R. Evid. 404(b). Rule 404(b) allows evidence of a past acts to establish motive but also provides that "[e]vidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct . . . is governed by Rule 412."

The supreme court summarized our difficulty well when it declined to review an ineffective-assistance-of-counsel claim by stating that "the record before us is devoid of the information needed to explain the attorney's decisions. Under these facts, any conclusions reached by this court . . . would be pure speculation on our part." *Gustafson*, 610 N.W.2d at 321. Because the record is inadequate to assess whether Rocano's attorney provided ineffective assistance or made a strategic decision not to offer evidence of J.O.'s prior sexual conduct under rule 412 or rule 404(b), we decline to determine whether Rocano's trial attorney provided ineffective assistance in presenting evidence on his consent defense.

B. Evidence of Victim's Alleged Motive to Falsely Accuse Rocano

Rocano argues that his trial attorney failed to offer evidence of J.O.'s motive to falsely accuse Rocano. In his brief to this court, Rocano contends that, before the sexual assault in September 2019, J.O. was fired as a shift leader, a managerial position, after having a sexual relationship with her manager; J.O. was then rehired at a lower-ranking position. Rocano also claims that he was asked about rehiring J.O., and he responded that J.O. should not be a manager.

Rocano's attorney told the jury during opening statements that "the relationship between Mr. Rocano and the accuser was not going well because the accuser wanted to be a manager . . . . [T]he owner wanted [Rocano's] opinion about the accuser becoming a manager, and Mr. Rocano said no." The record, however, does not include evidence about Rocano giving his employer his opinion that J.O. should not be a manager or that J.O. was aware of Rocano's opinion or statement to his employer. During her direct examination,

J.O. testified that she "left" her position at the fast-food restaurant in June 2019 and "return[ed]" shortly after. Rocano's attorney did not cross-examine her on this topic. On appeal, Rocano argues that his trial attorney provided ineffective assistance because he failed to introduce evidence of J.O.'s alleged motive to lie about the assault.

The decision to offer evidence is, generally, strategic and not subject to a *Strickland* challenge. *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006). When the failure to offer evidence directly relates to a defendant's theory of the case, then it may show ineffective assistance of counsel. *Nicks*, 831 N.W.2d at 508. Here, the record on appeal is insufficient to address Rocano's claim of ineffective assistance based on his trial attorney's failure to present evidence of J.O.'s alleged motive to falsely accuse Rocano. Because no record evidence (or postconviction evidence) establishes what Rocano told his employer about J.O. or what J.O. knew about any statements Rocano made, we cannot determine whether Rocano's trial attorney's failure to offer this evidence provided ineffective assistance or was strategic.

This may, in part, be based on Rocano's decision to not testify at trial, a constitutional right he told the court he had fully discussed with his attorney. We cannot speculate in that regard. *See Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (declining to decide ineffective-assistance claim based on an inadequate trial record because if the analysis "requires evidence of attorney-client communications, [a postconviction] evidentiary hearing should be held"). Thus, we decline to reach the merits of Rocano's claim that his trial attorney provided ineffective assistance by failing to introduce evidence of J.O.'s alleged motive to falsely accuse Rocano. *See Gustafson*, 610 N.W.2d at 321.

C. Voluntary-Intoxication Defense

Rocano argues that his trial attorney's representation was ineffective because he "failed to argue that [Rocano] could not commit the act with intent, due to his intoxication, nor did he move to include the voluntary intoxication defense in the jury instructions." The state argues that we should reject this ineffective-assistance claim for two reasons: first, it is not "so obviously erroneous that [it] could not have been strategic"; and second, finding prejudice relies "on speculation about what evidence might have been available to defense counsel and admissible."

"If the crime charged has a specific intent as an element and if intoxication is offered by the defendant as an explanation for his actions, then the court must give an instruction on intoxication." *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981). Rocano is correct that count two required the state to prove that he had a specific intent to engage in sexual contact and that he "kn[ew] or ha[d] reason to know that [J.O. was] mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.345, subd. 1(d); *see* Minn. Stat. §§ 609.341, subd. 11(a) (defining "[s]exual contact" in section 609.345, subdivision 1, as requiring "sexual or aggressive intent"), 609.02, subd. 9 (defining "know" as requiring the actor to believe the specified fact exists) (2018); *State v. Austin*, 788 N.W.2d 788, 792-93 (Minn. 2010) (interpreting a statute prohibiting nonconsensual "sexual contact" to "define a 'specific intent' crime"); *State v. Stevenson*, 637 N.W.2d 857, 861 (Minn. App. 2002) (holding that "knowing or having reason to know" in statute demonstrated legislative intent to define fifth-degree criminal sexual conduct as specific-intent crime). J.O. testified that she and Rocano each had three shots of tequila.

Rocano's trial attorney, however, did not request an involuntary-intoxication jury instruction or argue that specific intent was lacking because of Rocano's intoxication.[4]

As with our analysis of Rocano's appellate arguments on his consent defense, we cannot reach the merits of his appellate arguments on the voluntary-intoxication defense. The record on appeal does not provide any evidence about Rocano's trial attorney's decision not to pursue voluntary intoxication as a defense. Thus, we cannot determine whether Rocano's attorney made a strategic decision or provided ineffective assistance by failing to offer evidence of or otherwise pursue a voluntary-intoxication defense. *See Torres*, 688 N.W.2d at 573; *Gustafson*, 610 N.W.2d at 321.

D. Victim's Police Statement as Impeachment

Rocano argues that the complete recording of J.O.'s police statement could have been used "to impeach J.O."; therefore, "counsel did not meet the objective reasonableness standard due to his failure in admitting the full video interview [of J.O.'s police statement] pursuant to the rule of completeness." The state argues that the record does not allow this

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[4] The Minnesota Statutes provide that "when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind." Minn. Stat. § 609.075 (2020). The pattern jury instruction on voluntary intoxication for a specific-intent crime at the time of Rocano's trial read as follows:

> The defendant must prove the claim of intoxication by the greater weight of the evidence. The greater weight of the evidence means that the evidence must lead you to believe that it is more likely that the claim is true than not true. If the evidence does not lead you to believe that it is more likely that the claim is true than not true, then the claim has not been proven. However, the state must prove beyond a reasonable doubt that the defendant had the required intent.

10 *Minnesota Practice*, CRIMJIG 7.03 (2015).

court to determine whether it was objectively unreasonable not to use the omitted portions of the recorded interview to attack J.O.'s credibility.

Under Minn. R. Evid. 106, if a party introduces part of a recorded statement, an adverse party "may require the introduction at that time of any other part" of the recorded statement. *See State v. Robertson*, 884 N.W.2d 864, 872-73 (Minn. 2016) (citing this aspect of Minn. R. Evid. 106). Rocano is correct that his trial attorney did not move to admit J.O.'s complete recorded police statement under rule 106 despite trying to offer her statement in other ways and failing.

Rocano's trial attorney sought to introduce a copy of J.O.'s recorded police statement during his cross-examination of J.O., but the district court determined that Rocano's trial attorney had "not laid foundation." Outside the presence of the jury, Rocano's trial attorney suggested that he wanted to introduce all of J.O.'s recorded police statement. After more discussion,[5] the district court stated that the recording could be introduced if the proper foundation was laid.

During the prosecuting attorney's direct examination of the police investigator, a portion of J.O.'s recorded police statement was played. During the police investigator's cross-examination, Rocano's attorney asked to play all of J.O.'s recorded police statement, and the district court stated that Rocano's trial attorney "need[ed] to ask foundational questions." Rocano's attorney asked two more questions along those lines before stating,

[5] Rocano's trial attorney also stated that he believed the prosecuting attorney had stipulated to admission of the police statement. The prosecuting attorney stated that he "did not mean in any way to represent . . . that [he] was going to stipulate" to admitting the entire recorded police statement.

"Ok. I'm not going to play it," and the entire recorded police statement was never introduced. In his testimony, the police investigator agreed that the portion of J.O.'s recorded police statement that was played for the jury was "not the full interview."

With the limited record before us, we cannot determine whether Rocano's trial attorney's failure to lay foundation for the entirety of J.O.'s recorded police statement provided ineffective assistance or reflected a strategic decision, as is usually the case when an attorney decides what evidence to present. *Bobo*, 770 N.W.2d at 138. If it was a strategic decision, then it would not be reviewable under *Strickland*. *Id.* We also note that the record does not include the omitted portions of J.O.'s recorded police statement, nor does the record suggest that the police statement would have impeached J.O., which is the only prejudice Rocano asserts on appeal. Thus, we decline to reach the merits of this claim of ineffective assistance. *See Gustafson*, 610 N.W.2d at 321.

In sum, because the record is inadequate to determine Rocano's claims of ineffective assistance of trial counsel, we will not consider his claims in a direct appeal. Rocano's right to assert ineffective-assistance-of-counsel claims in a future postconviction petition is preserved. *See State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003).

Affirmed.