STATE OF MINNESOTA
IN COURT OF APPEALS
A11-204

State of Minnesota,
Respondent,

vs.

Johnathan David Johnson,
Appellant.

Filed December 19, 2011
Affirmed
Peterson, Judge

Sherburne County District Court
File No. 71-CR-09-732

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Leah G. Emmans, Assistant County Attorney, Elk River, Minnesota (for respondent)

Ryan B. Magnus, Jones and Magnus, Mankato, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.[*]

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

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a conviction of one count of second-degree criminal sexual conduct and from an order denying appellant's motion for a judgment of acquittal or a new trial, appellant argues that he received ineffective assistance of counsel. We affirm.

FACTS

On the evening of January 2, 2009, 18-year-old appellant Johnathan David Johnson arrived at his father's home and walked downstairs. M.B., the 13-year-old daughter of appellant's father's live-in girlfriend, was visiting with her 12-year-old friend S.H. Appellant began socializing with the two girls, and over the course of the night both girls masturbated him.

An investigator from the Big Lake Police Department separately interviewed M.B., S.H., and appellant during January 2009. Appellant explained during his interview that it was "possible" that the sexual contact occurred, but he could not be certain because he may have taken the antidepressant and sleep-aid Trazodone, and he may have been tired.

The state charged appellant with one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2008) (sexual contact with another when complainant is under age 13 and actor is more than 36 months older than complainant); and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2008) (sexual contact with another when actor has significant relationship with complainant and complainant was under age 16).

Appellant's counsel filed a notice of defense that listed only "not guilty" as a defense. The state dismissed the second count, and the remaining charge was tried to a jury.

The prosecutor called four witnesses at trial: S.H., the sister and mother of S.H., and the Big Lake Police Department officer who interviewed appellant and the two girls. The defense called appellant and the mother of M.B., who by that time was appellant's stepmother. During appellant's cross-examination, the prosecutor repeatedly refreshed appellant's memory with a transcript of his interview with the Big Lake Police investigator. The prosecutor also reminded appellant that he had responded affirmatively to the investigator's questions as to whether it was "possible" that the girls masturbated him, whether it was "probable" that the girls masturbated him, and whether it was "more than likely" that he ejaculated after the girls touched him. Appellant agreed that he made those statements during the interview. The jury convicted appellant of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), for his sexual contact with S.H.

Appellant moved for a judgment of acquittal, or alternatively, for a new trial. Appellant argued that he was denied a fair trial because the district court excluded evidence of M.B.'s sexual history and alleged past false accusations, which would have demonstrated that M.B. "recruited" S.H to attempt to perform sexual acts. Appellant also argued that he was denied a fair trial because the district court excluded evidence of his Trazodone use, which would have supported the theory that he was asleep during the incident. The district court denied appellant's motions, concluding that evidence relating to M.B. was irrelevant and inadmissible, appellant did not disclose a defense of voluntary

intoxication, appellant did not identify any witnesses who were medical professionals, and appellant was not prejudiced because he could have nonetheless testified that he slept through the sexual contact. The district court stayed imposition of sentence and placed appellant on probation for a period of up to 25 years.

D E C I S I O N

To prevail on an ineffective-assistance-of-counsel claim, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

Under the first prong, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotation omitted). "There is a strong presumption that an attorney acted competently." *Id.* Decisions about "[w]hat evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Courts

must distinguish between the professional performance of counsel and these tactical decisions. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (applying *Strickland* test). It is not an appellate court's function to second-guess trial tactics with the benefit of hindsight. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003).

Under the second prong, "to show prejudice, the defendant must undermine confidence in the trial outcome by demonstrating that but for the errors the result of the proceeding probably would have been different." *Williams v. State*, 764 N.W.2d 21, 30 (Minn. 2009). "The reviewing court considers the totality of the evidence before the judge or jury in making this determination." *Rhodes*, 657 N.W.2d at 842.

Appellant argues that his trial counsel was ineffective because counsel failed to (1) pursue a voluntary-intoxication defense, (2) attempt to show that M.B. "recruited" S.H. to perform the sexual acts, or (3) produce any other exculpatory evidence.

Voluntary-intoxication defense

Appellant argues that his trial counsel's performance was deficient because counsel did not assert a defense of voluntary intoxication. Minn. Stat. § 609.075 (2008) states:

> An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but 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. § 609.343, subd. 1(a), defines a specific-intent crime. *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). Voluntary intoxication, therefore, may be asserted as a defense.

But, a voluntary-intoxication defense, even if employed, would not have been dispositive in appellant's case. Because voluntary intoxication is only one factor that the jury may consider, we must consider the entire record to determine whether the verdict "probably would have been different." *Williams*, 764 N.W.2d at 30. The prosecutor questioned appellant's credibility multiple times at trial by referring him to the interview transcript after he claimed to not recall details of the interview. The prosecutor's cross-examination revealed that appellant recalled many details from the night of the incident during his January 2009 interview with the Big Lake Police investigator. Appellant's detailed recollections during the interview cast doubt on his contention at trial that he was asleep or sleepy during the sexual contact.

The prosecutor also elicited appellant's agreement that he told the investigator that it was "possible" that the girls masturbated him, it was "probable" that the girls masturbated him, and that it was "more than likely" that he ejaculated after the girls touched him. The prosecutor reminded the jury of appellant's impeachment in its closing argument.

Appellant has not demonstrated that a defense of voluntary intoxication could have overcome credibility problems with his own testimony. Appellant has not undermined this court's confidence in the result of the trial given the totality of the evidence before the jury.

"Recruitment" defense

Appellant argues that his attorney was ineffective in not raising evidence of M.B.'s sexual, medical, and personal history to support the defense that M.B. recruited S.H. to masturbate appellant. Recruitment is not a legal defense, and the theory does not address any elements of the crime. The statute that defines second-degree criminal sexual conduct addresses only the perpetrator's mental state; it does not take into account the complainant's motivations. Minn. Stat. § 609.343, subd. 1(a); *see* Minn. Stat. § 609.341, subd. 11(a) (defining "sexual contact" under Minn. Stat. § 609.343, subd. 1(a), as acts "committed with sexual or aggressive intent"). The statute also expressly provides that complainant's consent to the sexual contact is not a defense. Minn. Stat. § 609.343, subd. 1(a).

Because recruitment is not a legal defense, appellant cannot show that the result of his trial probably would have been different had his attorney employed the defense. Accordingly, appellant does not show prejudice under *Strickland*.

Other exculpatory evidence

Appellant contends that counsel was ineffective under *Strickland* for failing to produce exculpatory evidence. Appellant does not identify any exculpatory evidence or explain how exculpatory evidence would have affected his case at trial. To establish prejudice under *Strickland* for missing evidence, an appellant has an affirmative burden to show that counsel would have found a witness or evidence and that the witness or evidence would have made a difference in the outcome of the case. *Gates*, 398 N.W.2d at 563. Appellant has not met this burden.

Appellant has not demonstrated that the result of his trial probably would have been different had his attorney pursued the three strategies discussed above. This court need not analyze the performance of appellant's attorney if we determine that counsel's alleged missteps would not have resulted in prejudice. *Rhodes*, 657 N.W.2d at 842 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069). Because prejudicial error is not demonstrated, appellant's ineffective-assistance-of-counsel claim fails.

Affirmed.