

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

Case No. 5D18-3987

SCOTT FREDERICK BUSH,

Appellee/Cross-Appellant.

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Opinion filed February 14, 2020

Appeal from the Circuit Court
for Orange County,
Gail A. Adams, Judge.

Ashley Moody, Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellant/Cross-Appellee.

Loren D. Rhoton, of Loren Rhoton, P.A.,
Tampa, for Appellee/Cross-Appellant.

ORFINGER, J.

Scott Frederick Bush was convicted of capital sexual battery, lewd or lascivious molestation, and battery stemming from two separate incidents allegedly involving two of his three daughters, D.B. and N.B. His convictions were affirmed on appeal. Bush v. State, 145 So. 3d 860 (Fla. 5th DCA 2014). Bush then filed a petition for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, alleging four grounds for relief—all

based on claims that his trial counsel was ineffective.¹ Following an evidentiary hearing, the postconviction court denied relief on grounds one and two, but granted relief on grounds three and four, vacated Bush's conviction and ordered a new trial. We affirm the trial court's order denying relief on grounds one and two without further discussion. However, we reverse the order granting relief on grounds three and four and the grant of a new trial.

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. Yarborough v. Gentry, 540 U.S. 1, 5 (2003). To establish a valid claim for ineffective assistance, a petitioner must first prove that his trial attorney's representation was legally deficient, meaning that counsel's performance was objectively unreasonable and fell below prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). Second, the petitioner must show that he was prejudiced by his trial counsel's deficient performance such that counsel's errors deprived him of a fair trial. The petitioner must prove both elements. Id. at 687. The court may dismiss a petitioner's claims upon finding either that counsel's performance was reasonable or that counsel's performance did not prejudice the petitioner. Id. at 697.

In assessing the deficiency prong, courts maintain a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. A reasonable tactical decision by counsel with which the petitioner disagrees will

¹ Specifically, Bush alleged that his trial counsel was ineffective for: (1) failing to present evidence that the daughters' mother had encouraged them to accuse Bush of molesting them; (2) failing to present evidence that D.B. had recanted the uncharged sexual abuse allegations she made back in 2003; (3) failing to object to irrelevant and unduly prejudicial evidence regarding his prior career as a pharmaceutical salesperson; and (4) failing to elicit testimony from D.B. that would have cast doubt on the reliability of her sisters' testimony.

not establish a valid ineffective assistance claim. See id. at 690. In order to show that his counsel's performance was objectively unreasonable, the petitioner must show that "no competent trial counsel" would have made the same decisions or used the same trial strategy employed by trial counsel. See Windom v. State, 886 So. 2d 915, 922 (Fla. 2004). In conducting this analysis, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. The court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. If the petitioner shows that his counsel's performance was unreasonable, the court must determine whether trial counsel's performance resulted in prejudice. Id. at 694. The petitioner can prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id.

"Because ineffective assistance of counsel claims present mixed questions of fact and law, th[is] Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo." Simmons v. State, 105 So. 3d 475, 487 (Fla. 2012). But, the trial court's ultimate conclusions on the deficiency and prejudice prongs are questions of law reviewed de novo. Bruno v. State, 807 So. 2d 55, 61–62 (Fla. 2001).

With these standards in mind, we review the postconviction court's rulings on the two grounds on which Bush received relief. On Bush's third ground for relief, the postconviction court found that trial counsel's failure to object to prejudicial evidence

regarding Bush's prior career as a pharmaceutical salesman was unreasonable and that this evidence became a feature of the trial, tainting the jury and likely altering the outcome.

The failure to object to inadmissible evidence, which damages the defendant's theory of defense, can constitute a valid ineffective assistance claim. See, e.g., Curran v. State, 229 So. 3d 1266, 1269 (Fla. 1st DCA 2017) (holding that counsel rendered ineffective assistance in lewd or lascivious molestation trial where counsel failed to object to testimony that defendant committed uncharged acts of molestation); Marro v. State, 855 So. 2d 716, 716–17 (Fla. 4th DCA 2003) (holding that defendant's allegation that counsel at aggravated battery trial failed to object to inadmissible hearsay elicited from victim, which characterized defendant as "a pretty rowdy guy, pretty violent at times," stated claim for ineffective assistance of counsel because defendant asserted self-defense at trial, and there was reasonable probability that characterization as violent person frustrated that defense).

During the trial, the State's evidence suggested that Bush had laced D.B.'s ice cream with a paralytic and then sexually battered her when she was unable to move. But even if trial counsel's decision not to object was unreasonable, the lack of objection did not cause prejudice under Strickland because this evidence pertained only to the count that the jury convicted Bush of the lesser-included offense of simple battery, and not capital sexual battery as charged. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. Nelson v. State, 73 So. 3d 77, 84 (Fla. 2011) (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)). The jury clearly rejected D.B.'s contention that Bush drugged and sexually battered her.

In granting Bush's fourth ground for relief, the postconviction court found that trial counsel was ineffective for failing to present evidence from D.B. that would have called into question the reliability of the testimony of N.B., the other victim, and C.B., Bush's oldest daughter. During a recorded interview with law enforcement, D.B. said that her sisters had confided in her that they could not remember Bush abusing them. Specifically, in reference to N.B., D.B. stated:

[D.B.]: . . . And I thought that my siblings like would -- would be able to talk about what happened too. But I -- I talked to my sister recently, [N.B.], and she said she didn't remember anything.

. . . .
But I tried talking to [N.B.] about it. She just -- she gets really upset, and she just tells me that, you know, stuff happened. But she -- she asked me like if it's possible for something to happen and you not to remember it. I'm like, "Yeah, honey. It happened to me."

And like she's asked me like what happened to me. And I've kind of told her. But I don't know. It's just -- I don't know. Sometimes I'll -- I'll feel more strong about it. And sometimes like I just don't want to talk about it.

[AGENT]: Had she -- had she disclosed what happened to her to you, that perhaps that she remembers?

[D.B.]: No. She just won't really tell me.

And, in reference to C.B., D.B. stated:

[D.B.]: And if I try talking to her about it, she's just like, "I'm not in a state to talk about this. Like, I don't want to talk about it. It happened a long time ago. Why does it matter? I don't remember anything."

And I'm like, "How can you not remember anything? You were older than me." And she just gets mad. She gets so mad at me.

And like I know that I didn't remember the really big stuff that happened to me until I was, you know, in my early 20s, like, 18, 19, early 20s.

[AGENT]: Uh-huh.

[D.B.]: Because I had suppressed all that, obviously. I can't even imagine what [C.B.] has suppressed. And it was like those things happened since ten. Like, I like fought that so hard. Like, I didn't want that to be real. Like, I've cried so many times. I didn't want it to be real. I wanted it to be a bad nightmare.

The State argues that the postconviction court should not have granted relief on this ground because D.B.'s statements were inadmissible hearsay, and the decision not to question the daughters on their respective recollections of the abuse did not constitute deficient performance, but was sound trial strategy.

We disagree with the State's first point. D.B.'s prior statements might have been admissible as impeachment evidence. Any party can attack the credibility of a witness using the witness's prior statements that are inconsistent with the witness's trial testimony. See § 90.608(1), Fla. Stat. (2013). If the witness does not admit to making the prior inconsistent statement when asked, the questioning party may offer extrinsic evidence of the prior statement through another witness. The prior inconsistent statement is not hearsay because it is not being offered for its truth, but to show inconsistency for impeachment purposes. Marshall v. State, 68 So. 3d 374, 375 (Fla. 5th DCA 2011). Trial counsel could have asked N.B. and C.B. if they told D.B. that they could not remember Bush abusing them. If they admitted making the statements, the credibility of their allegations would have suffered a blow. If they denied making them, trial counsel could have then elicited their prior inconsistent statements through D.B.'s testimony.²

² If D.B. then denied that either sister told her that she did not remember the abuse, trial counsel could have then confronted D.B. with the transcript of the recorded interview.

However, we agree with the State's second point. Trial counsel's explanation for not using D.B.'s interview was that he believed D.B.'s statements suggested N.B. and C.B. did not *want* to remember the abuse, not that they *could not* remember it. In his experience in cross-examining witnesses, trial counsel, a death-qualified criminal lawyer with forty-four years of experience, felt it was best not to push any of the daughters on their memories, because forcing them to remember the alleged events would have made them appear more traumatized, and thus, more believable.

Decisions on whether to cross-examine a witness and how vigorously to challenge the witness's testimony require a "quintessential exercise of professional judgment." Ford v. Cockrell, 315 F. Supp. 2d 831, 859 (W.D. Tex. 2004). And, the Supreme Court has strongly cautioned courts against second guessing such decisions. See Strickland, 466 U.S. at 689. We believe that trial counsel's tactical decision in this case was reasonable trial strategy. We cannot say that no reasonable trial attorney would have made the same decision that trial counsel made here. Defense counsel in sexual abuse cases, especially child abuse cases, is often put in a difficult position, forced to attack the credibility of a vulnerable victim, typically through cross-examination, while showing sympathy and respect for the alleged victim in order to avoid alienating the jury. Trial counsel's strategy here was not unreasonable.

For these reasons, we affirm the trial court's order denying relief on grounds one and two, but reverse the order granting relief on grounds three and four and the grant of a new trial.

AFFIRMED in part; REVERSED in part; and REMANDED.

EDWARDS and SASSO, JJ., concur.