STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0178

State of Minnesota,
Respondent,

vs.

Brandon Jerome Hanson,
Appellant.

Filed June 22, 2020
Affirmed
Smith, Tracy M., Judge

Isanti County District Court
File No. 30-CR-16-139

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

Jeffrey R. Edblad, Isanti County Attorney, Joel B. Whitlock, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Schellhas, 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

SMITH, TRACY M., Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, and after a stay of the appeal for postconviction proceedings, appellant Brandon Hanson argues that the district court erred by denying his request for a new trial based on ineffective assistance of counsel. He argues that his trial counsel was ineffective due to his failure to introduce evidence that the victim recanted her allegations. Because Hanson's ineffective-assistance claim is based on his counsel's trial strategy, his claim fails, and we affirm.

FACTS

In March 2016, Hanson was charged with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2014), and two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2014). The case proceeded to a jury trial, and the jury found Hanson guilty on all counts. The following facts were presented at trial.

Jury trial

On March 9, 2015, 11-year-old R.B. told her mother that Hanson had sexually assaulted her on multiple occasions. Hanson is R.B.'s maternal uncle; he lived with R.B.'s mother (his sister) for about ten years and frequently helped care for her four children. R.B. told her mother that Hanson had been doing "not very good things to her" and that Hanson had made her "suck his d--k" on multiple occasions in different rooms in the house. R.B.'s

mother, accompanied by her (the mother's) grandfather, went to the police station that night to report what R.B. had told her. When she and her grandfather returned to the house, the grandfather woke Hanson up and told him that he needed to leave, which Hanson did.

A few days later, a law enforcement officer interviewed R.B. using the Corner House protocol. R.B. was initially reluctant to talk about why she was there. When R.B. did share what had happened, she immediately burst into tears. She explained that Hanson had made her "suck his d--k" several times throughout the past year. She could not remember exact dates but believed that the most recent incident occurred in the fall of 2014. She recalled that the sexual encounters occurred two or three times in Hanson's bedroom, and once in the bathroom, and provided descriptions of those spaces. She stated that Hanson would put a blanket over her head so that nobody would see her if they came downstairs, and that he told her "don't use your teeth, use your lips." She provided a number of other sensory details about the encounters, describing, for instance, hearing the zipper of Hanson's pants and feeling like "he was peeing in [her] mouth." R.B. was 11 years old when these encounters occurred, and she did not immediately tell anyone because she was scared.

R.B. testified at trial and provided details consistent with her Corner House interview, and the state played a portion of the interview for the jury. The trial lasted five days, with both parties calling numerous witnesses. The state called R.B., R.B.'s mother, the mother's grandfather, the mother's grandmother, R.B.'s aunt, the responding officer,

and the officer who interviewed R.B. Hanson testified on his own behalf and denied the allegations. Hanson also called his brother, who is also R.B.'s uncle, and five friends.

One of these five friends was L.C. L.C. testified that she has known Hanson for about nine years and met him through her ex-boyfriend. She testified that she also knows R.B. and R.B.'s sister and mother, and that R.B. and her sister used to visit and spend the night at L.C.'s house. L.C. testified that she has a "pretty close" relationship with R.B. and that, after hearing about the allegations against Hanson, she texted R.B. and asked if they were true. She stated that she also spoke with R.B. in person at a Wal-Mart. L.C. then attempted to testify that R.B. told her that she (R.B.) made up the allegations "for attention." The state objected to this testimony, and the district court sustained the objection and struck the testimony regarding R.B.'s alleged statements to L.C. from the record. Defense counsel reserved the right to recall R.B. and ask her directly about the alleged recantation, but did not do so.

The jury found Hanson guilty on all four counts of criminal sexual conduct. The district court imposed convictions and sentences on the first two counts, resulting in a sentence of 180 months' imprisonment. Hanson filed a timely notice of appeal with this court, and we stayed the appeal to allow Hanson to pursue postconviction relief in district court.

Postconviction evidentiary hearing

The district court held a postconviction evidentiary hearing on Hanson's claim that he received ineffective assistance of trial counsel. Hanson argued in the district court, and

argues here, that his trial attorney unreasonably failed to present admissible evidence that R.B. told L.C. that she "made up" the sexual-assault allegations. Hanson's trial attorney testified at the evidentiary hearing and was questioned by both the state and Hanson's appellate counsel. The following facts were presented at the hearing.

Hanson's counsel had about five years' experience as a trial attorney in addition to seven years' experience as a judicial law clerk. In Hanson's case, the trial attorney engaged in vigorous pretrial motion practice, conducted extensive jury voir dire, presented numerous defense witnesses, and cross-examined each of the state's witnesses. His cross-examination of the state's witnesses included impeachment of R.B.'s aunt with text messages obtained, with Hanson's help, in the middle of trial.

Hanson's trial counsel testified about his knowledge of and investigation into R.B.'s alleged recantation to L.C. He explained that, on June 6, 2017—just over a week before Hanson's trial—he received a report detailing L.C.'s account from his investigator, whom he had asked to follow up on a tip from Hanson that L.C. may have useful information. The report noted that the investigator talked to L.C. on that date. The report stated that L.C. said she was "in disbelief" when she learned about the allegations against Hanson. L.C. said that, after hearing about the allegations, she contacted R.B. by either text message, Facebook message, or in a face-to-face conversation—she could not remember which and did not have records of any messages. During this contact, she told R.B. that she (L.C.) had been sexually assaulted as a child and that it had severe negative impacts on her life. She also told R.B. that, if what R.B. was saying was true, the person who did it belonged in jail,

but that these type of allegations should not be made up. L.C. claimed that, after she confronted R.B., R.B. admitted the allegations were untrue and that she made them up to get attention. Again, L.C. did not have any records of R.B.'s alleged statements.

L.C. also claimed that she spoke with R.B. in a Wal-Mart, where R.B. again told her that she made up the allegations. L.C. told the investigator that she (L.C.) did not want to see Hanson go to prison for something he did not do. She also made very derogatory remarks about how R.B. and R.B.'s sister dressed, saying that they dressed like they were "asking for" certain things to happen to them. L.C. explained that the reason she had not brought the information about her conversations with R.B. forward sooner was that she had nothing but her word to support her account.

Hanson's trial attorney testified that he believed that the information L.C. gave the investigator would be helpful to Hanson's case because the defense's theory of the case was that R.B. was not telling the truth. He testified that, when he received the report, he discussed it with two supervising attorneys. After the consultation, he decided not to question R.B. about the alleged recantation on cross-examination but to instead just call L.C. as a witness and question her about it. Hanson's trial attorney acknowledged that he thought that testimony from L.C. about R.B.'s statements would be impermissible under the hearsay rules but that he decided to proceed that way anyway. He also stated that, when the district court ruled during trial that the testimony from L.C. was inadmissible hearsay, he agreed with that ruling.

When asked whether his decision not to cross-examine R.B. about the alleged recantation was strategic, Hanson's trial attorney responded that the question was "a tough question to answer" but stated:

> I guess partially. I know I'd had conversations with my supervisors about what they thought the statements from [L.C.], whether they were hearsay or not. So—and it came back that they did not think that it was hearsay and there was not any reason that I needed to ask [R.B.] anything about those questions and I could just ask [L.C.] what [R.B.] had said to her on that date in Walmart. And I had reservations about whether or not it was hearsay and personally kind of thought it was hearsay. But after speaking with my investigators—or my supervisors decided I—that we were—that's how we were going to proceed with it.

When pressed again on whether the decision was strategic, he responded, "I guess I don't know how they're going to classify it, if that's strategic or not. I don't—I don't know if that's a strategy. It was my legal belief that it wasn't hearsay."

Hanson's trial attorney was not asked and did not testify about why he did not recall R.B. to ask her about the alleged recantation after the district court precluded L.C.'s testimony, although he had reserved the right to recall R.B.

The district court denied Hanson's request for postconviction relief, determining that his trial attorney's conduct was trial strategy and accordingly not subject to review in an ineffective-assistance-of-counsel claim. This court dissolved the stay of Hanson's direct appeal, and the sole issue now before us is whether Hanson was denied his constitutional right to a fair trial based on ineffective assistance of counsel.

D E C I S I O N

Claims of ineffective assistance of counsel involve mixed questions of law and fact. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). When reviewing a postconviction court's decision to deny relief based on an ineffective-assistance-of-counsel claim, appellate courts "consider the [postconviction] court's factual findings that are supported in the record" and "conduct a de novo review of the legal implication of those facts on the . . . claim." *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

To determine whether a criminal defendant received ineffective assistance of counsel, Minnesota courts apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Mosley*, 895 N.W.2d at 591. Under the first prong, the defendant must show that "his attorney's performance fell below an objective standard of reasonableness." *Id.* (quotation omitted). An objective standard of reasonableness is the level of customary skill and diligence that a reasonably competent attorney would employ in representation under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). Courts "review ineffective assistance claims with a strong presumption that counsel's performance was reasonable." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). Under the second prong, the defendant must show that "a reasonable probability exists that the outcome would have been different, but for counsel's errors." *Mosley*, 895 N.W.2d at 591 (quotation omitted). The reviewing court considers the totality of the evidence presented in determining if the result probably would have been different. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). If the ineffective-assistance

claim fails under either prong of the *Strickland* test, the reviewing court does not need to address the other prong. *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015).

Minnesota courts will "generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). "Trial strategy" includes matters such as the selection of evidence presented to the jury, what witnesses to call, what questions to ask witnesses, and whether to make objections. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Such matters "lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *Bobo*, 770 N.W.2d at 138.

The postconviction court determined that Hanson's ineffective-assistance claim fails because it is based on trial strategy. It also concluded that, even if it could review the claim, it fails under the prejudice prong of the *Strickland* test. We begin with whether Hanson's claim is based on trial strategy.

Hanson argues that his trial attorney's failure to present admissible evidence of R.B.'s alleged statements to L.C. "was not a result of a strategic decision" but rather resulted from a failure to understand and comply with the rules of evidence. He argues that, while R.B.'s alleged out-of-court statements to L.C. were inadmissible to prove the truth of the matter asserted in the statements pursuant to Minn. R. Evid. 801 and Minn. R. Evid. 802 (i.e., inadmissible as hearsay), the statements were admissible for impeachment purposes. He proposes that his trial attorney could have impeached R.B. with the alleged statements by complying with the procedure outlined in Minn. R. Evid. 613(b). Rule 613(b)

states that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Under Hanson's argument, the "extrinsic evidence" would have been L.C.'s statements that R.B. recanted her allegations. He argues that the record is "unusually clear" here in that it shows that his attorney wanted to present evidence of the alleged recantation to the jury "but was unable to only because he did not comply with the rules of evidence."

The state responds that the record shows that Hanson's trial attorney did understand the rules of evidence and that his understanding of the rules supports the postconviction court's determination that his decision was based on strategy rather than legal error. The state asserts that Hanson's trial attorney's decision was not only strategy, but a reasonable strategy, given the reliability problems with the defense witness who would testify about R.B.'s "possible recantation." The state also points to the trial attorney's experience and the quality and extent of his other efforts throughout the course of the proceedings, to bolster its argument that he was a competent, zealous advocate.

An attorney's unreasonable mistake of law can, in some circumstances, constitute an objectively unreasonable performance under the first *Strickland* prong. *See Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under

Strickland.”); *State v. Ellis-Strong*, 899 N.W.2d 531, 539 (Minn. App. 2017) (“An attorney’s ‘mistake of law’ because of a failure to look up a statute *may* amount to an objectively unreasonable performance.” (emphasis added)). But “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

Here, Hanson’s trial attorney testified that, after he learned about R.B.’s alleged statements to L.C., he consulted with supervisors about how to proceed. Although he “personally kind of thought it [would be] hearsay” if L.C. testified about R.B.’s statements, he decided to proceed by asking L.C. about the statements anyway. Even if we assume this initial decision was based on an erroneous view of the law, the record shows that, after the district court excluded L.C.’s testimony about R.B.’s statements as hearsay, Hanson’s trial attorney knew that he could recall R.B. and ask her whether she ever recanted her allegations. In fact, after Hanson’s counsel made an offer of proof regarding the content of R.B.’s alleged statements to L.C. and suggested that the statements would go not only to the truth of the matter but also to R.B.’s credibility, the district court stated that the credibility component “certainly is an appropriate purview for cross-examination or for calling [R.B.] as a witness.” Nothing from the postconviction evidentiary hearing record suggests that Hanson’s trial attorney did not understand his option to ask R.B. about the statements and then to attempt to impeach her if she denied making them. *See* Minn. R. Evid. 613(b). His decision not to take the potential path to admitting the statements for impeachment purposes, which would require questioning R.B. about them, was strategic.

The supreme court has held that an attorney's choice regarding whether to cross-examine a witness, and specifically an alleged victim in a sexual-assault case, is unreviewable trial strategy. *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001). In *Vick*, the appellant argued that his trial attorney did not "effectively cross-examine [the child-victim] about her different accounts of the [sexual] abuse" when the child had provided new details about the alleged touching by the appellant after her initial report. *Id.* The supreme court concluded that the attorney's cross-examination of the victim was a matter of trial strategy that was not reviewable for competence. *Id.* The court further decided that, even if it were reviewable in that case, the attorney's decision not to aggressively cross-examine the child-victim "was reasonable in order to avoid creating sympathy for [the child] and hostility toward [the defendant] or his attorney." *Id.*

Though this case factually differs from *Vick* in that the victim allegedly recanted entirely, rather than added details to, her allegations, the record suggests similar, and even additional, reasons that Hanson's trial attorney made a strategic decision not to cross-examine R.B. about her alleged conversations with L.C. The timing of L.C.'s report—made about a week and half before trial, when the case had been pending for over a year and the allegations arose over a year before that—along with the content of L.C.'s statement to the investigator, would have provided the state with abundant ammunition to impeach L.C.'s credibility. By asking R.B. about her alleged statements to L.C., the defense risked pitting the credibility of R.B.—who had testified consistently and in detail about the sexual assaults against her—against the credibility of L.C. Attempted impeachment of R.B.,

which could have consumed significant time, could conceivably have generated additional sympathy for R.B. and, as the state points out, been perceived by the jury as a last-minute, "desperate" effort on Hanson's part to support his case. This context in which Hanson's trial attorney made his decision supports our conclusion that he was acting strategically, rather than based on a misunderstanding of the evidentiary rules, when he declined to cross-examine R.B. about the alleged recantation.

We conclude that the district court correctly determined that Hanson's ineffective-assistance-of-counsel claim is not subject to review under *Strickland* because it is based on trial strategy. Accordingly, we need not reach the prejudice prong of the *Strickland* test.

Affirmed.