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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0229**

State of Minnesota,
Respondent,

vs.

Dwight McGriff,
Appellant.

**Filed November 18, 2013
Affirmed
Stauber, Judge**

Dakota County District Court
File No. 19HACR112502

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

James C. Backstrom, Dakota County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this combined direct and postconviction appeal seeking relief from his conviction of felony domestic assault, appellant argues that he received ineffective

assistance of counsel because his attorney failed to impeach the state's key witnesses with their prior convictions of crimes of dishonesty and motives to fabricate the allegations against appellant. Because appellant cannot establish that but for trial counsel's alleged deficient performance the result of the proceeding would have been different, we affirm.

FACTS

In August 2011, appellant Dwight McGriff was charged with domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010), after he allegedly struck his girlfriend, J.S. Prior to trial, the state provided defense counsel with a two page notice that detailed the prior convictions of the state's witnesses. The notice revealed that J.S. had prior convictions of: (1) theft of a motor vehicle and misdemeanor criminal damage to property from 2001; (2) fifth-degree controlled substance crime from 2007; and (3) theft by check from May 2010. The notice also revealed that D.R., a friend of J.S.'s who was with J.S. on the night of the alleged assault, had prior convictions of: (1) wrongfully obtaining assistance from February 2010 and (2) providing a false name from 1997.

At trial, J.S. testified that on July 29, 2011, she went to a bar in Burnsville with her friends S.D. and D.R. to celebrate her birthday. After consuming several cocktails, J.S. unexpectedly ran into appellant. Appellant and J.S. had been in a sexual relationship since May 2011. According to J.S., appellant told her for the first time that he had a "girlfriend" or "baby mama," and that she was at the bar with appellant. Appellant asked J.S. not to speak with his girlfriend.

Shortly thereafter, J.S. was confronted by K.B., appellant's "girlfriend" or "baby mama." J.S.'s friend, D.R., then injected herself into the conversation and a physical altercation ensued between K.B. and D.R. J.S. testified that she helped separate the fighting women and that bar employees then asked all the involved parties to leave the bar.

J.S. testified that after she left the bar, she approached K.B. and told her that she did not "want any problems." J.S. further testified that she told K.B. that she had been intimate with appellant because K.B. seemed unaware of J.S.'s relationship with appellant. According to J.S., she then walked away and was struck in the back of her neck. J.S. claimed that she believed that she was struck by appellant because she had seen him walking toward her right before she was hit.

Prior to the cross-examination of J.S., a discussion was held outside the presence of the jury regarding J.S.'s prior convictions. In addition to seeking permission to use J.S.'s prior convictions for impeachment purposes, defense counsel stated that she "would assume" that J.S. was on probation for the 2010 conviction. Defense counsel argued that J.S.'s probationary status would be relevant for cross-examination because "if [J.S.] was engaging in any type of brawling or fighting or violating a no use condition, she could be in trouble with her probation and that would be motive for her to point the finger at [appellant] rather than herself."

The district court allowed defense counsel to impeach J.S. with her prior conviction of theft by check, but not her other convictions. The district court also determined that defense counsel had made an insufficient showing that J.S. was on

probation at the time of the charged offense, but invited defense counsel to further investigate the matter and revisit the court's ruling if necessary. Defense counsel, however, chose not to ask J.S. about her theft by check conviction during cross-examination and did not revisit the issue of J.S.'s probationary status later in the proceedings.

D.R. testified that she consumed about five or six cocktails before being "kicked out of the bar" for fighting with K.B. According to D.R., she saw appellant exit the bar and "hit [J.S.] in the back of the head." During cross examination, defense counsel did not attempt to impeach D.R. with her prior convictions and chose not to revisit the issue of D.R.'s probationary status at the time of the charged offense.

S.D. testified that she saw appellant's arm "swing forward" and make contact with J.S.'s "back area," causing her to "jerk forward." Although S.D. testified that she was "positive" that it was appellant who struck J.S., she admitted that she was inside the bar looking through a tinted window at the time of her observations. And, S.D. further admitted that she could only see outlines of people and not their facial expressions.

C.W. testified that he was working security for the bar on July 29, 2011. C.W. testified that as he was exiting the bar, he saw a male swing his arm in a swift punching motion and then heard the sound of someone being punched. According to C.W., he then detained the man and turned him over to the bar's manager. C.W., however, was unable to identify appellant as the assailant or the individual he detained.

A jury found appellant guilty of the charged offense. At the sentencing hearing, defense counsel moved for a new trial based on newly discovered evidence that (1) J.S.

was on felony probation at the time of the charged offense and (2) D.R. had a conviction of wrongfully obtaining public assistance and that she was also on probation at the time of the charged offense. The district court denied the request for a new trial because the evidence could have been discovered prior to trial and because it would not have changed the verdict. The district court also sentenced appellant to a downward-durational departure of 20 months. This appeal followed.

After the notice of appeal was filed, this court granted appellant's motion to stay the appeal and remand the case to district court for postconviction proceedings on the issue of ineffective assistance of counsel. Following an evidentiary hearing, the district court concluded that "[t]he failure to research the probationary status of [J.S. and D.R.], and to seek to introduce [D.R.'s] prior conviction of welfare fraud, while an admitted mistake and not a strategic omission, does not render [defense counsel's] assistance deficient." The court also found that "there is not a reasonable probability that, but for the failure to research the probationary status of [J.S. and D.R.] and to seek impeachment of [D.R.] with her prior welfare fraud conviction, the result of this trial would have been different." Thus, the district court denied appellant's petition for postconviction relief. This court subsequently issued an order dissolving the stay and reinstating this appeal.

D E C I S I O N

We review a postconviction proceeding to determine whether the evidence is sufficient to sustain the findings of the postconviction court. *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992). Absent an abuse of discretion, a postconviction court's decision will not be disturbed on appeal. *McMaster v. State*, 551 N.W.2d 218, 218

(Minn. 1996). A claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his or her counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The defendant must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). Matters of trial strategy presumptively fall within the discretion of trial counsel and will not be second-guessed on appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). To overcome these presumptions, allegations for postconviction relief must be "more than argumentative assertions without factual support." *Boitnott v. State*, 631 N.W.2d 362, 370-71 (Minn. 2001).

Appellant argues that his defense counsel's failure to impeach D.R. with her prior convictions of crimes of dishonesty, as well as the failure to confirm that J.S. and D.R. were on probation at the time of the charged offense, "precluded the defense from revealing their motive to fabricate the allegations against appellant." Thus, appellant argues that his "defense counsel did not exercise the customary skill and diligence that a reasonably competent attorney would perform under the circumstances."

But, we need not address the performance prong if the prejudice prong is determinative. *Hawes v. State*, 826 N.W.2d 775, 782-78 (Minn. 2013). In order to establish that prong, an appellant must establish “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 668, 694, 104 S. Ct. at 2068, 4068).

Appellant argues that there is a reasonable probability that he was prejudiced by defense counsel’s errors because “defense counsel did not introduce evidence from either its own witnesses or appellant.” Appellant argues that defense counsel instead “rested entirely on challenging the credibility of the state’s witnesses.” Appellant contends that because the credibility of the witnesses was such a key issue at trial, there was a reasonable probability that the failure to introduce evidence of D.R.’s prior convictions and the probationary statuses of D.R. and J.S. might have affected the outcome of the verdict.

We disagree. The record reflects that defense counsel effectively impeached D.R. with evidence that she consumed several alcoholic beverages prior to witnessing the alleged assault. Defense counsel also cross-examined D.R. regarding her relationship with J.S., which could provide her with a motive to implicate appellant as the assailant given that her friend had just discovered that appellant had a girlfriend or “baby mama.” Although the welfare-fraud conviction would have further impeached D.R., it is unlikely

that, under the circumstances presented here, the added information would have reasonably affected the jury's decision to find appellant guilty of the charged offense.

Appellant further argues that the failure to investigate J.S. and D.R.'s probationary statuses was prejudicial because the fact that J.S. and D.R. "were on probation at the time of the charged offense went to their motive to lie because when they were supposed to be abstaining from mood altering chemicals and remaining law abiding they instead were drinking alcohol to intoxication and engaging in disorderly conduct at a bar." But the fact that both J.S. and D.R. were on probation added nothing of substance to appellant's case. As the district court found, J.S. and D.R. "could be charged with a probation violation for filing a false police report or giving false information to a police officer, just as [they] possibly could for consuming alcohol." And defense counsel effectively challenged J.S. and D.R.'s credibility by cross-examining them about their consumption of alcohol on the night of the alleged assault, their friendship, and the new-found motive to implicate appellant—his confession that he had a girlfriend or "baby mama." Moreover, in addition to J.S. and D.R., S.D. and C.W. implicated appellant as the assailant. In light of the number of witnesses whose testimony implicated appellant as the assailant, the state's case against appellant was strong. Accordingly, there is not a reasonable probability that, but for the failure to research the probationary statuses of J.S. and D.R. and to seek impeachment of D.R. with her prior conviction of welfare fraud, the result of the proceeding would have been different.

Affirmed.