DA 18-0686

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 290

TIMOTHY CHEETHAM, SR.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Jefferson, Cause No. DV 2017-15
Honorable Luke Berger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Greg Beebe, Beebe & Flowers Law Firm, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

Steven C. Haddon, Jefferson County Attorney, Boulder, Montana

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Submitted on Briefs: October 9, 2019

Decided: December 17, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Timothy Cheetham, Sr. (Cheetham) appeals the order of the Fifth Judicial District Court, Jefferson County, denying his petition for postconviction relief. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In August 2014, a jury found Cheetham guilty of one count of Sexual Intercourse Without Consent (SIWC), a felony offense in violation of § 45-5-503, MCA; one count of Sexual Assault, a felony offense in violation of § 45-5-502, MCA; and one count of Sexual Abuse of Children, a felony offense in violation of § 45-5-625, MCA. The charges arose from Cheetham's sexual abuse of five-year-old N.S., the granddaughter of his then-wife. Cheetham was represented at trial by assistant public defender Steven Scott (Scott). On Scott's advice, Cheetham did not testify at trial.

¶3 After trial but prior to sentencing, Cheetham saw a reference in a Child Protective Services report to a medical report prepared following a forensic examination performed on N.S. by Dr. Jessie Salisbury of the Community Health Center in Butte, Montana (Salisbury Report). Cheetham brought this reference to Scott's attention. The Salisbury Report had not been disclosed to the defense and, prior to sentencing, Scott filed a motion to dismiss the charges against Cheetham for negligent destruction of evidence, arguing the State failed to preserve and disclose a potentially exculpatory medical report. The Salisbury Report stated that a "copious amount" of N.S.'s hymen was intact, but also stated this observation did "not negate the possibility of a penetration injury." When it was

demonstrated that the State did not have a copy of the Report, and Scott subsequently obtained one, he withdrew his motion.

¶4 Following sentencing, Cheetham appealed his conviction, asserting the District Court abused its discretion by failing to conduct adequate inquiry into his request for substitute counsel, and that he was denied effective assistance of counsel by Scott's handling of the Salisbury Report. *State v. Cheetham*, 2016 MT 151, ¶ 1, 384 Mont. 1, 373 P.3d 45. This Court determined the District Court had not erred regarding Cheetham's request for substitute counsel. *Cheetham*, ¶ 28. We further determined that, although several reasons for Scott's approach to handling the Salisbury Report were reflected on the record, the effectiveness claim could not be resolved without further development of a record in a postconviction proceeding about Scott's tactical decisions. *Cheetham*, ¶ 36.

¶5 Cheetham filed a petition for postconviction relief, alleging Scott had rendered ineffective assistance of counsel by failing to investigate and utilize statements in the Salisbury Report, including that, after the alleged assault, N.S.'s hymen was intact and "normal," and by coercing Cheetham into choosing not to testify.[1] The District Court held a hearing on Cheetham's petition and heard testimony from Cheetham, his expert witness Dr. Theodore N. Hariton, Scott, defense investigator Christine Munsey, and Dr. Salisbury. Dr. Hariton testified that a pre-pubescent girl's hymen would have shown signs of scarring had it been penetrated by an adult male penis, as alleged in the SIWC count. Dr. Salisbury

[1] A third claim regarding an alleged violation of Cheetham's right to be present at a critical stage of the trial has not been raised on appeal.

testified that, while N.S.'s exam results could be considered "normal," she had observed a narrowing of the hymen that was "suspicious of a previous injury," and could not rule out a penetration injury. The District Court determined Cheetham had received effective assistance of counsel because Scott acted reasonably in his handling of the Salisbury Report, and in advising Cheetham against testifying.

¶6 Cheetham appeals. Additional facts are referenced herein.

STANDARD OF REVIEW

¶7 "We review a district court's denial of a petition for postconviction relief to determine whether that court's findings are clearly erroneous and whether its conclusions of law are correct." *Mascarena v. State*, 2019 MT 78, ¶ 4, 395 Mont. 245, 438 P.3d 323. Ineffective assistance of counsel claims present mixed questions of law and fact that we review de novo. *State v. Hatfield*, 2018 MT 229, ¶ 18, 392 Mont. 509, 426 P.3d 569. "A petitioner seeking to reverse a court's denial of a petition for postconviction relief bears a heavy burden." *State v. Cobell*, 2004 MT 46, ¶ 14, 320 Mont. 122, 86 P.3d 20.

DISCUSSION

¶8 *Did the District Court err by denying Cheetham's petition for postconviction relief based on his claims of ineffective assistance of counsel?*

¶9 The right to counsel in criminal prosecutions is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. A two-prong test is applied to ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *see Whitlow v. State*, 2008 MT 140, ¶¶ 10-11, 343 Mont. 90, 183 P.3d 861. Both prongs of the test must be satisfied in order to prevail, and if the defendant makes "an insufficient showing" on one prong, there is no need to address the other prong. *Whitlow*, ¶ 11. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. We address Cheetham's claims in turn.

Salisbury Report

¶10 Cheetham argues that Scott acted unreasonably in failing to pursue the Salisbury Report. He also argues Scott should have supported the Report's finding that N.S.'s hymen was considered "normal" with available expert testimony, such as offered by Dr. Hariton during the postconviction hearing, which indicated penetration would have left scarring in a pre-pubescent girl. Cheetham argues Scott's memory is distorted by hindsight, and that it was "more likely" that Scott's decision not to investigate further was not based on his belief that the report would be unhelpful or counterproductive, but a result of neglect.

¶11 Scott testified he saw a summary of the Salisbury Report in a Child Protective Services report in February 2014, six months prior to trial. Based on his training in sexual assault evidence, Scott concluded at that time the Report would not be helpful to Cheetham's defense. When Cheetham brought the issue to his attention in December 2014, Scott did not initially recall he had previously considered the Report in February. However, he had also discussed it with three of his colleagues, and their collective opinion was that the report was not exculpatory.[2] Scott filed a motion for dismissal based on the State's failure to preserve the Report, arguing the Salisbury Report "could have been" exculpatory, but testified he would not have used the Report at trial, even if he had then possessed it.

¶12 Cheetham argues Scott's training and knowledge regarding sexual assault evidence are not at issue, and that the question turns solely on the reasonableness of Scott's decision to not further investigate the Salisbury Report. However, while classifying counsel's decisions as either "ignorant/neglectful" or "strategic/tactical" no longer settles the question of whether they were objectively reasonable, *Whitlow*, ¶ 17, counsel's knowledge and training are considerations in determining the reasonableness of his decisions. Scott testified that his training has indicated "there is no correlation between having a hymen or not as to whether a female has had sexual intercourse." This understanding was consistent

[2] After Cheetham brought up the report, Scott had defense investigator Christine Munsey follow-up with Dr. Salisbury to confirm the conclusion of her Report that it was possible for N.S. to have been penetrated by an adult male penis and still have a "normal" examination. Dr. Salisbury did confirm it.

with the indication in the CPS summary of the Salisbury Report that a "copious amount" of intact hymen "did not negate the possibility of a penetration injury." Scott pursued the issue by consulting with several of his colleagues, who advised him that his training matched their training and understanding, leading him to conclude the Report was not exculpatory, that is, "evidence that would have tended to clear the accused of guilt, to vitiate a conviction." *State v. Meredith*, 2010 MT 27, ¶ 25, 355 Mont. 148, 226 P.3d 371. Although Dr. Hariton, Cheetham's expert witness, testified that Scott made an erroneous assessment of the evidence, and that Scott clearly could have offered expert testimony at trial to support Hariton's approach, there was also support for Scott's actions. Dr. Salisbury testified in contradiction to Dr. Hariton, opining that hymens stretch, injuries heal quickly, and that signs of the injury do not always remain, and reaffirmed her Report's assessment that the possibility of injury could not be ruled out.

¶13 Indeed, Dr. Salisbury stated in her Report that the narrowing of the hymen was "suspicious of a previous injury." This was another reason for Scott not to use the Report in Cheetham's defense. More, while it was established at trial that N.S. reported the abuse in 2013 after suffering flashbacks and dreams about the incidents nine years later, the Report indicated she had reported that "her grandfather had touched her private parts with his hands" as early as 2006, which would have corroborated N.S.'s much later disclosure. While these points could be analyzed under the prejudice prong, they are also pertinent to an assessment of the reasonableness of Scott's actions under the first prong.

¶14 To prevail, Cheetham "must overcome the strong presumption that his counsel's defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions," *Weaver v. State*, 2005 MT 158, ¶ 15, 327 Mont. 441, 114 P.3d 1039, or might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. While pursuing the Report further, using it at trial, and supporting it with available expert testimony may well have been a reasonable strategy, we cannot conclude that the strategy Scott elected to pursue was not also a reasonable approach. It was well supported by the conclusions of Dr. Salisbury, which confirmed the understanding of Scott and his colleagues, and avoided findings contained in the Report that were potentially adverse to Cheetham.

¶15 Consistent with this conclusion is the holding in *Barber v. State*, 153 A.3d 800 (Md. App. 2017), cited by the State, where the Defendant, as here, asserted in a postconviction relief proceeding that his trial counsel was ineffective for failing to consult with medical specialists and utilize expert testimony to "refute the opinion of [the State's medical expert] that a normal genital exam can be consistent with penetrating sexual abuse." *Barber*, 153 A.3d at 806. As here, the Defendant offered the testimony of Dr. Hariton in support of his claim. Noting the divergence of medical opinion on the issue, but that there was good support for the State's trial position, the Court reasoned that:

> Because of a significant number of journal articles supporting [the State's expert's] views, calling an OBGYN who shared Dr. Hariton's opinions would be risky inasmuch as such opinion could be contradicted, or at least undermined by the literature discussed, *supra*.

> Because trial counsel's decision not to call an expert (like Dr. Hariton) is entitled to "a heavy measure of deference to counsel's judgment," *Cirincione*, 119 Md. App. at 486 (citation and quotation marks omitted), and because there is nothing in the record before this Court to demonstrate that trial counsel lacked the knowledge, training or skill to make that decision, appellant has failed to carry his heavy burden to establish that his trial counsel's conduct did not fall "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689.

Barber, 153 A.3d at 822-23.[3]

¶16 Cheetham has not met his burden to demonstrate Scott's performance was unreasonable or deficient, and that the District Court erred. The conclusion on that prong is dispositive and renders further inquiry into the question of prejudice unnecessary. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

Trial Testimony

¶17 Cheetham testified that Scott strongly advised him not to testify at trial and that he was not prepared to testify or be cross-examined. He stated that, although he repeatedly told his defense team he wanted to testify, "there was never any preparatory thought process . . . or scenario . . . . They would close it with, 'It is your choice,' but they wouldn't prepare me. And, terrified for life, I didn't." Cheetham felt coerced by Scott's comment that Cheetham would "leave prison in a body bag," although Scott explained that he used this phrase in connection with his advice for Cheetham to accept a plea deal to attempt to avoid the very long sentences he was facing. Cheetham argues Scott's actions were illegitimate persuasions, even in the context of whether to accept a plea deal.

[3] A writ of certiorari to the Court of Appeals of Maryland was subsequently denied. *Barber v. State*, 2017 Md. LEXIS 378, 453 Md. 10, 160 A.3d 547.

¶18 Scott testified that he did discourage Cheetham from testifying because Cheetham's lack of memory, his substance abuse, his infidelity, and because he persistently advanced conspiracy theories about N.S. Even during preparatory questions in anticipation of trial, Scott testified Cheetham "didn't make a lot of sense" and feared his testimony would be used to impeach Cheetham on cross-examination. However, Scott stated he also advised Cheetham that testifying was ultimately his decision. Munsey added that she and Scott both advised Cheetham against testifying "because Mr. Cheetham had terrible times remembering dates or events or how they occurred in what order. But we told him that ultimately this was . . . was his case and his life. And that, if he felt strongly he should testify, then we would support his decision."

¶19 "The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution guarantee an individual the right against self-incrimination. A necessary corollary to the right against self-incrimination is the right to testify in one's own behalf. 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.' In addition, the Fourteenth Amendment secures the right of a criminal defendant to choose between silence and testifying in his own behalf." *In re J.S.W.*, 2013 MT 34, ¶¶ 18-19, 369 Mont. 12, 303 P.3d 741 (*quoting Rock v. Arkansas*, 483 U.S. 44, 53, 107 S. Ct. 2704, 2710 (1987)).

¶20 We cannot conclude under these circumstances that Scott's actions constitute a failure to "exercise reasonable professional judgment." *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. The record is clear that Scott did not forbid Cheetham from testifying, but

strongly advised Cheetham of his concerns. Scott testified that when he attempted to prepare Cheetham for testimony, Cheetham was "an absolutely terrible historian" that led to his assessment that "if Mr. Cheetham got on the stand, he would do absolutely terrible." Scott was also concerned about impeachment upon cross-examination, a legitimate trial consideration. *See United States v. Teague,* 953 F.2d 1525, 1533 (11th Cir. 1992) ("[I]f counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel."); *see also Stevens v. State*, 2007 MT 137, ¶¶ 16-18, 337 Mont. 400, 162 P.3d 82. Cheetham and Scott both testified it was clearly communicated to Cheetham that it was ultimately his decision whether to testify, rather than coercion from Scott. We hold that Cheetham did not carry his burden of establishing the District Court's findings are clearly erroneous and that his counsel's performance was deficient in this regard. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

¶21 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ BETH BAKER