DA 18-0159

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 6N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CECIL THOMAS RICE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 17-250D
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Danny Tenenbaum, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Travis Ahner, Flathead County Attorney, John Donovan, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: December 4, 2019

Decided: January 14, 2020

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant and Appellant Cecil Rice (Rice) appeals from the jury verdict of December 5, 2017, finding Rice guilty of deliberate homicide and the Judgment and Sentence issued by the Eleventh Judicial District Court, Flathead County, on January 31, 2018. We affirm.

¶3 Rice asserts his trial counsel was ineffective for failing to object to the State's unlawful use of other character evidence or evidence of his prior spousal abuse—other bad acts.

¶4 Claims of ineffective assistance of counsel (IAC) are mixed questions of law and fact that we review de novo. *State v. Jefferson*, 2003 MT 90, ¶ 42, 315 Mont. 146, 69 P.3d 641.

¶5 Article II, Section 24, of the Montana Constitution and the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, guarantee a defendant the right to effective assistance of counsel. *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095.

¶6 In assessing IAC claims, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Kougl*, ¶ 11. Under the *Strickland* test,

the defendant must (1) demonstrate that "counsel's performance was deficient or fell below an objective standard of reasonableness" and (2) "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Kougl*, ¶ 11 (quoting *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234). Courts determine deficient performance based on whether a defendant's counsel acted within the broad "range of competence demanded of attorneys in criminal cases." *Schaff v. State*, 2003 MT 187, ¶ 18, 316 Mont. 453, 73 P.3d 803 (citations omitted). A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional conduct. *Kougl*, ¶ 11.

¶7 When defendants raise ineffective assistance of counsel claims on direct appeal, we first determine whether the claims are more appropriately addressed in a postconviction relief proceeding. *Kougl*, ¶ 14. "[A] record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut" the strong presumption counsel's conduct falls within the wide range of reasonable professional conduct. *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (citations omitted). If we cannot answer from the record "the question 'why' counsel did or did not take the actions constituting the alleged ineffective assistance, the claims are better raised by a petition for post-conviction relief where the record can be more fully developed, unless 'no plausible justification' exists for defense counsel's actions or omissions." *Sartain*, ¶ 30 (quoting *Kougl*, ¶¶ 14-15). Trial counsel is afforded considerable latitude, and a defendant "must overcome the presumption that, under the circumstances," counsel's decision could be considered a sound strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

¶8 Rice was convicted of deliberate homicide by pushing Anthony Walthers (Walthers) off the Old Steel Bridge into the Flathead River where he drowned. In addition to Rice and Walthers, Cody Robinson (Robinson) and Heather Meeker (Meeker), Rice's wife, were also present at the scene of the homicide. At trial, the State called Meeker to testify. During the State's examination of her, the State asked her to describe her relationship with Rice, whether there had been physical abuse in the relationship, and whether she was scared of Rice. No objection was made by Rice's counsel to this line of questioning. Meeker testified she and Rice were "pretty toxic for each other," that there had been physical abuse on and off for the duration of the time they had been together, and she was scared of Rice at times. During closing argument, the State reminded the jury of this other bad acts evidence. Again, Rice's counsel failed to object.

¶9 Defendant argues his trial counsel was ineffective because there was no justifiable reason not to object to the State admitting this other bad acts evidence—evidence of Rice's character or evidence of his prior spousal abuse—pursuant to M. R. Evid. 404(b). Rice asserts there was no permissible, legitimate purpose for the State to inquire about Meeker and Rice's relationship and their history of physical violence other than to portray him in a bad light and create the inference he acted in conformity with his prior bad conduct.

¶10 The State counters the other bad acts evidence was relevant to explaining why Meeker said nothing to police during her first contact with law enforcement and why she initially lied to detectives during her formal interview, both of which Rice's counsel used to attack her credibility on cross-examination. The State asserts Meeker's fear of how Rice

would react if she told the truth, and her basis for that fear, explained why she remained silent during her first contact with law enforcement and why she initially lied to detectives.

¶11 Rice bears a heavy burden in bringing this non-record-based claim. Trial counsel is afforded considerable latitude, and Rice "must overcome the presumption that, under the circumstances," counsel's decision could be considered a sound strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. In order for Rice to succeed on direct appeal notwithstanding the silent record, he must rebut the strong presumption that counsel's decision not to object falls within the wide range of reasonable professional conduct. *Sartain*, ¶ 30.

¶12 Based on the record, Rice's claims do not reveal an entitlement to relief, and the Court does not need information beyond the record to address Rice's claim. Given defense counsel's cross-examination of Meeker, it is quite possible Rice's counsel did not object to the other bad acts evidence as he intended to use it to attack Meeker's credibility and provide context as to her motivation to lie about Rice pushing Walthers off the bridge in retaliation for Rice's prior acts against her. Thus, counsel may have had a justifiable reason to not object to the other bad acts evidence. More importantly, even if we assume Rice's counsel did not have a strategic reason for not objecting and the other bad acts evidence was not relevant or admissible, Rice is unable to meet his burden of proving prejudice resultant from counsel's failure to object and the admission of this other bad acts evidence.

¶13 The second prong of the *Strickland* test requires Rice show prejudice from counsel's deficient performance. To do so, Rice must demonstrate "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*,

¶ 11 (quoting *Turnsplenty*, ¶ 14). From our review of the record, the evidence of Rice's guilt was overwhelming. Robinson testified that on the way to the bridge Rice was threatening to throw Walthers off it, that Walthers was afraid to climb onto the bridge for fear Rice would throw him off it, that he heard the sound of fabric being grabbed and gravel under foot, and that he saw Walthers's feet going over the railing and falling into the water with some force. Robinson also testified to Rice's conduct after Walthers went into the water—Rice did nothing to assist or rescue Walthers but pulled his hood up and headed to the van; once Robinson, Rice, and Meeker were in the van, Rice drove away and ordered Meeker to get rid of Walthers's backpack; and while in the van Rice admitted to pushing Walthers off the bridge, stating, "People need to take me seriously if I say I'm going to throw somebody off a bridge." The following day, while he was in Woodland Park, Robinson found a police officer and told him what happened. When the officer did not take further action, Robinson went to the Sheriff's Office to report the homicide. When the prosecutor asked Robinson if it was his belief Rice threw Walthers into the river, Robinson responded, "It's not my belief, it's what happened."

¶14 Meeker testified when she got into the van after Walthers went into the river, Rice said, "I told him I was going to push him over." Meeker also testified Rice screamed at her to throw Walthers's backpack out of the van and that she, Rice, and Robinson made a pact that if questioned about what happened, they would all respond that Walthers fell off the bridge. Tyson Nelson, who roomed with Rice at the detention center, testified Rice confessed to him that he had pushed someone off the Old Steel Bridge.

¶15 Although Rice asserts there was significant evidence Walthers's death was an accident, no one testified to that effect. Even if Meeker had not testified as to the other bad acts evidence, in light of the overwhelming evidence presented against Rice, we do not find there was a reasonable probability of a different outcome. Even if trial counsel's performance had been ineffective for failing to object to other bad acts evidence, Rice has failed to establish prejudice under the second prong of the *Strickland* test—reasonable probability that, but for counsel's errors, the result of the proceeding would have been different—as a result of counsel's ineffective performance.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶17 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA