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MARCH 7, 2024
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2024 ND 38

Zachary Archambault, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20230336

Appeal from the District Court of Ward County, North Central Judicial District, the Honorable Gary H. Lee, Judge.

AFFIRMED.

Opinion of the Court by Bahr, Justice, in which Chief Justice Jensen and Justices Crothers, McEvers, and Tufte joined. Justice McEvers filed an opinion concurring specially.

Laura C. Ringsak, Bismarck, ND, for petitioner and appellant; submitted on brief.

Breezy A. Schmidt, Assistant State's Attorney, Minot, ND, for respondent and appellee; submitted on brief.

Archambault v. State
No. 20230336

Bahr, Justice.

[¶1] Zachary Archambault appeals from a district court order denying his application for postconviction relief. He argues the court erred by denying his claims of ineffective assistance of counsel. We affirm.

I

[¶2] In 2021, a jury found Archambault guilty of continuous sexual abuse of a minor child, a class AA felony. We affirmed his conviction on appeal. *State v. Archambault*, 2022 ND 198, 982 N.W.2d 8.

[¶3] In 2023, Archambault filed an application and an amended application for postconviction relief, alleging his trial attorney provided ineffective assistance of counsel. In August 2023, the district court held an evidentiary hearing. Both Archambault and his trial counsel testified at the hearing. In September 2023, the court denied Archambault's application.

II

[¶4] "Postconviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." *Koon v. State*, 2023 ND 247, ¶ 20, 1 N.W.3d 593 (quoting *Bridges v. State*, 2022 ND 147, ¶ 5, 977 N.W.2d 718). In postconviction proceedings, the applicant bears the burden to establish the grounds for relief. *Vogt v. State*, 2022 ND 163, ¶ 5, 978 N.W.2d 727. This Court has explained its standard of review after an evidentiary hearing in postconviction proceedings:

> When we review a district court's decision in a post-conviction proceeding, questions of law are fully reviewable. The district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the

> finding, a reviewing court is left with a definite and firm conviction a mistake has been made.

Koon, at ¶ 20 (quoting *Morris v. State*, 2019 ND 166, ¶ 6, 930 N.W.2d 195 (citations omitted)).

III

[¶5] Archambault argues his trial counsel's conduct fell below the standard of reasonableness that is expected and constitutionally ensured. This Court's review of a claim of ineffective assistance of counsel is well established:

> To prevail on a claim for ineffective assistance of counsel, the applicant must show: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The question of ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal.

Koon, 2023 ND 247, ¶ 21 (quoting *Kratz v. State*, 2022 ND 188, ¶ 12, 981 N.W.2d 891 (explaining the *Strickland* test)).

[¶6] To prove the first prong, "the defendant must overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Stoppleworth v. State*, 501 N.W.2d 325, 327 (N.D. 1993) (quoting *State v. Skaro*, 474 N.W.2d 711, 715 (N.D. 1991)). "To establish the second prong, the defendant must specify how and where trial counsel was incompetent and the probable different result. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Koon*, 2023 ND 247, ¶ 22 (citation omitted).

[¶7] "Courts need not address both prongs of the *Strickland* test, and if a court can resolve the case by addressing only one prong it is encouraged to do so." *Booth v. State*, 2017 ND 97, ¶ 8, 893 N.W.2d 186 (quoting *Osier v. State*, 2014 ND 41, ¶ 11, 843 N.W.2d 277). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we

expect will often be so, that course should be followed." *Id.* (quoting *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568).

IV

[¶8] Archambault alleged his trial counsel provided ineffective assistance of counsel in six ways. In its order, the district court addressed each of Archambault's alleged grounds of ineffective assistance of counsel and made detailed findings and conclusions regarding each ground.

A

[¶9] Archambault argued his trial counsel should have filed a motion to suppress his three-hour video confession because he was suffering from drug and alcohol effects and wanted to self-harm. The district court noted Archambault does not allege law enforcement officers did not give all requisite *Miranda* warnings or that they coerced his repeated confessions. The court found:

> In this case, the confession given by Zachary Archambault lasted [approximately] three hours. He answered all questions and freely confessed to numerous instances of sexual contact with the minor child victim. There was nothing in the confession to suggest that Zachary Archambault was suffering from any mental or emotional maladies which interfered with his decision-making.

[¶10] The district court further found Archambault never told his trial counsel about his alcohol and drug use or his self-destructive frame of mind, and never asked his trial counsel about a mental evaluation for purposes of a suppression motion. The court found trial counsel could not know Archambault "was suffering from some malignant self-loathing that pushed him toward self-harm," and that trial counsel could not possibly see this for himself without Archambault informing him. Rather, the court continued, trial counsel saw a three-hour taped confession in which Archambault "seemingly knowingly and voluntarily confessed repeatedly to sexual acts with the minor child." Because the three-hour taped confession seemed "knowingly and voluntarily" given,

without more, the court held trial counsel's failure to file a pretrial motion to suppress did not fall below a reasonable standard of care.

[¶11] The district court's findings were not induced by an erroneous view of the law and are supported by evidence. The court did not clearly err in finding Archambault did not show his trial counsel's representation was below the standard of reasonableness.

B

[¶12] Archambault argued his trial counsel provided ineffective assistance of counsel because he did not interview the minor victim before trial. The district court concluded trial counsel's failure to interview the child fell below a reasonable standard of care. However, the court concluded Archambault did not show a reasonable probability that, but for trial counsel's failure to interview the victim, the result of the proceeding would have been different. The court found trial counsel's failure to interview the minor victim did not undermine the confidence of the result of the trial due to Archambault's video confession, which the court referred to as the "centerpiece" of the State's case. As explained by the court, after being properly *Mirandized*, "Archambault confessed repeatedly to the investigating officer of his many sexual acts with the minor child. These included confessions of intercourse, anal sex, and oral sex. The sexual acts occurred over a series of many months."

[¶13] We need not address whether the district court erred in finding trial counsel provided ineffective assistance of counsel by not interviewing the minor victim before trial. We resolve this allegation on the ground of lack of sufficient prejudice. The court found Archambault failed to establish there was a reasonable probability the result of a trial would have been different. The court's findings were not induced by an erroneous view of the law and are supported by evidence. The court did not clearly err in finding Archambault failed to show a reasonable probability of a different outcome but for trial counsel's alleged error.

C

[¶14] Archambault asserted his trial counsel should have requested a mental evaluation to determine Archambault's fitness or competence. Addressing this argument, the district court found Archambault testified he never told his trial counsel about his now claimed frame of mind. He also never asked his trial counsel "to request for any evaluation, except as a part of a presentence investigation." Rejecting Archambault's argument that trial counsel should have asked for the evaluation anyway, the court explained, "[a] motion for an evaluation as to competency or fitness to proceed is not automatically and routinely done," and an attorney must have a good faith basis for making a motion for a competency evaluation. Because Archambault did not tell his trial counsel about his "mental distress," the court found there was "no way [his trial counsel] could make a good faith motion for an evaluation." Based on these and other findings, the court found Archambault did not demonstrate his trial counsel's conduct fell below the standard of reasonableness. The court further noted:

> [I]t was also Zachary Archambault's burden to bring forward evidence that he does indeed suffer from some form of mental defect due to his internal self-loathing. And, that this internal self-loathing compelled him to make a false confession. Other than his own say-so, he has presented nothing. He has offered no opinion from any psychiatrist, psychologist, social worker, or any other mental health care provide[r]s who would support his allegations. The Court is not obligated to accept Zachary Archambault's self-serving testimony and wishful thinking.

[¶15] The district court's finding Archambault did not show his trial counsel's representation fell below an objective standard of reasonableness was not induced by an erroneous view of the law and is supported by evidence. The court did not clearly err in finding Archambault did not show his trial counsel's representation was below the standard of reasonableness.

D

[¶16] Citing *State v. Pickens*, 2018 ND 198, 916 N.W.2d 612, Archambault argued his trial counsel should have objected to the jury's use of a laptop during

deliberations; Archambault argued the jury should have been required to return to the courtroom to hear the evidence replayed. The district court explained:

> The trial transcript shows that the laptop which was sent to the jury was free from all other programs and information. It could not access the Internet. In fact, it was merely a device which would allow the jury to view and hear evidence admitted during trial.

Distinguishing *Pickens*, the court wrote "the laptop was merely a mechanical device which allowed the jury to review evidence which had already been received. The laptop was not available to review and listen to testimony," and "no one was allowed to enter the jury room to assist the jury in playing the laptop." "Given the state of the law which allows for the use by the jury of mechanical playback equipment during deliberations," the court wrote, "any failure to object to that practice does not fall below a standard of reasonable care."

[¶17] The district court's findings were not induced by an erroneous view of the law and are supported by evidence. Forty years ago, this Court held it was not error for the district court to allow tapes and playback equipment to go to the jury room. *State v. Halvorson*, 346 N.W.2d 704, 711-12 (N.D. 1984). In doing so, we agreed "with the reasoning of those jurisdictions which have allowed recordings and slides, along with the mechanical equipment necessary to hear or view the exhibits, to go to the jury room once the evidence is properly admitted." *Id.* at 712. As noted by the district court, permitting a laptop to go to the jury room is equivalent to permitting another mechanical device to go to the jury room to hear or view the admitted exhibit, as long as the laptop only contains admitted evidence and does not permit access to the internet. *See* Anne T. McKenna & Clifford S. Fishman, *Wiretapping and Eavesdropping* § 41:62 (Nov. 2023 Update) ("If recordings are allowed to go to the jury room and to be played by the jury without judicial supervision, special care should be taken to assure that they contain what was in fact admitted into evidence—no more and no less."; "The parties and trial judge should also take care to assure that the device sent to the jury room to enable the jury to re-hear or re-

view the recording does not contain other files whose contents might prejudice either side.").

[¶18] It was not error for the district court to allow the laptop to go to the jury room when the laptop only permitted the jury to see properly admitted evidence. *See Thorne v. State*, 174 So. 3d 477, 479 (Fla. Dist. Ct. App. 2015) (holding trial court's decision to give the jury a laptop with videos of appellant's statements to review in the jury room during deliberations was within its sound discretion); *People v. Rojas*, 133 A.D.3d 543, 544, 21 N.Y.S.3d 27, 28 (2015) (holding "[t]he court did not err in allowing the deliberating jury to view a surveillance video, already in evidence, on a laptop computer"); *see also United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015) (holding "the district court had discretion to send the video recording to the jury room during deliberations and to provide the jury with the technology to view this properly admitted video exhibit in the privacy of the jury room"); *Frasco v. People*, 165 P.3d 701, 704-06 (Colo. 2007) (holding district court did not abuse its discretion in honoring the jury's request to view the victim's videotaped interview during its deliberations); *Lucas v. State*, 34 So.3d 195, 196 (Fla. Dist. Ct. App. 2010) (concluding the trial court's decision to allow the jury to have access to the videotaped confession and a player in the jury room was within the court's sound discretion); *Thomas v. State*, 878 So.2d 458, 459 (Fla. Dist. Ct. App. 2004) (concluding the trial court did not abuse its discretion when it sent "a video cassette recorder into the jury room so that the jury could view the video tape of [defendant's] confessions during its deliberations"); *People v. Watson*, No. 3-14-0510, 2020 IL App (3d) 140510-UB, ¶ 107, 2020 WL 918800, at *17 (Ill. App. Ct. Feb. 25, 2020) ("[T]he court did not abuse its discretion in allowing the jury to view the confession video in the jury room rather than the courtroom. Permitting the jury to view the video in this manner allowed the jury to review the video without outside intrusions and helped ensure the privacy and secrecy of the jury's deliberations."); *State v. Centeno*, 537 P.3d 232, 243 (Utah 2023) (concluding the district court did not abuse its discretion when it allowed jury to take video footage of defendant's police interview into the jury room during deliberations).

[¶19] The concern in *Pickens* was not the jury's use of mechanical equipment to view admitted evidence; it was the district court's "decision to allow a clerk to present evidence to the jury during its deliberations." 2018 ND 198, ¶ 21. "Allowing another person into the jury room to display evidence may influence the jury's decision in unexpected ways not preserved in the record. This type of interaction raises potentially serious concerns about the privacy and integrity of jury deliberations." *Id.*; *but see* 6 Wayne R. LaFave, et al., *Crim. Proc.* § 24.9(c) (4th ed. Dec. 2023 Update) ("Some courts have allowed a technician to enter the jury room to operate the recording and play back the requested segment for the jury, so long as proper safeguards are followed, including a strict prohibition on comments or communication of any sort.").

[¶20] In this case, as the district court specifically stated, "no one was allowed to enter the jury room to assist the jury in playing the laptop." *Compare State v. Calvert*, 2017 UT App 212, ¶ 53, 407 P.3d 1098, 1111 (denying claim of ineffective assistance of counsel because counsel did not object when the prosecutor proposed sending the state's laptop into the jury deliberation room), *with Williams v. State*, 250 So.3d 850, 851 (Fla. Dist. Ct. App. 2018) (allegation defense counsel learned, but did not bring to the court's attention, that the prosecutor, accompanied by the bailiff and when neither defense counsel nor the trial judge was present, went into the jury room to show the jurors how to view the surveillance video on the prosecutor's laptop, stated a facially sufficient claim of ineffective assistance of counsel).

[¶21] Based on the state of the law, trial counsel's failure to object to the jury using the laptop in the jury room, a laptop that only permitted the video to be heard and viewed, did not fall below an objective standard of reasonableness. This conclusion is consistent with our holding in *State v. Boehler*, 542 N.W.2d 745 (N.D. 1996), where we rejected the defendant's argument his conviction should be reversed because the court "did not provide videotape viewing equipment in the jury room." As noted in *Boehler*, the decision whether to permit equipment in or preclude it from the jury room is a discretionary decision that will be affirmed absent an abuse of discretion. *Id.* at 747 ("In its discretion, the trial court may preclude certain exhibits from the jury room."); *see also* 75B Am. Jur. 2d *Trial* § 1372 (Feb. 2024 Update) ("Whether a jury may

be permitted to take to the jury room tape recorded or videotaped evidence which has been properly admitted generally is within the sound discretion of the judge."); 2 Michael H. Graham, *Handbook of Fed. Evid.* § 403:2 (9th ed. Nov. 2023 Update) ("It rests in the court's discretion whether exhibits received in evidence may be in the possession of the jury during their deliberations.").

E

[¶22] Archambault argues his trial counsel should have obtained a continuance after the State's late disclosure of the forensic interview of the alleged victim. The district court found:

> When it was disclosed at trial that a forensic interview had not been turned over, [trial counsel] made a request for a number of possible remedies, including a continuance. A brief continuance was eventually granted. The alleged failure by [trial counsel] to request continuances is a nonissue. . . . When a discovery violation was uncovered he asked for relief, including a continuance. A continuance was granted. [Trial counsel] did all he could have done regarding discovery, and a continuance. The fact that the Court denied his request for mistrial or dismissal, and allowed only a day for [trial counsel] to recalibrate his defense is not a shortcoming on [trial counsel's] part.

Based on those findings, the court found Archambault did not demonstrate his trial counsel's conduct was below the standard of reasonableness.

[¶23] The district court's finding Archambault did not show his trial counsel's representation fell below an objective standard of reasonableness was not induced by an erroneous view of the law and is supported by evidence. The court did not clearly err in finding Archambault did not show his trial counsel's representation was below the standard of reasonableness.

F

[¶24] Lastly, Archambault argued his trial counsel should have made a motion for a new trial or an acquittal. The district court held whether to move for a new trial or acquittal is one of trial strategy and his trial counsel's decision not

to move for a new trial did not fall below an objective standard of reasonableness. The court noted a motion for new trial limits possible appellate issues, limits the scope of review, and is reviewed under the abuse of discretion standard. "By not making a motion for new trial[, trial counsel] left the range of possible issues on appeal, as well as the standards of appellate review open." The court concluded trial counsel's decision not to file a motion for new trial did "not fall below that of a reasonable attorney."

[¶25] The district court's finding Archambault did not show his trial counsel's representation fell below an objective standard of reasonableness was not induced by an erroneous view of the law and is supported by evidence. The court did not clearly err in finding Archambault did not show his trial counsel's representation was below the standard of reasonableness. *Brown v. State*, 2023 ND 105, ¶ 4, 991 N.W.2d 41 ("An unsuccessful trial strategy does not make defense counsel's assistance defective, and we will not second-guess counsel's defense strategy through the distorting effects of hindsight." (quoting *Garcia*, 2004 ND 81, ¶ 8)).

V

[¶26] Based on our review of the record, we conclude the district court properly denied Archambault's ineffective assistance of counsel claims. We affirm the court's order denying Archambault's application for postconviction relief.

[¶27] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte
Douglas A. Bahr

McEvers, Justice, concurring specially.

[¶28] I agree with the majority that the order denying postconviction relief should be affirmed. However, I write separately to point out that I do not agree with the district court that trial counsel's failure to interview the child victim fell below an objective standard of reasonableness. The majority appropriately

does not address the district court's rationale on prong one because it is unnecessary for the opinion, as the district court also found Archambault failed to show he was prejudiced by his attorney's conduct.

[¶29] The district court's order discussing the attorney's failure to interview the child victim before trial states:

> [The attorney] did not interview the child before trial, and consequently never learned of the existence of the forensic interview. An attorney does have an obligation to investigate fully his case. [The attorney] failed in this regard. The failure to interview the child and to learn of the forensic interview fell below a reasonable standard of care. The first *Strickland* prong has been met.

[¶30] I agree with the district court that an attorney has an obligation to investigate the case. I disagree that failure to interview the child based on the facts of this case fell below an objective standard of reasonableness. An applicant for postconviction relief bears a "heavy burden" to prevail on an ineffective assistance of counsel claim. *Bahtiraj v. State*, 2013 ND 240, ¶ 8, 840 N.W.2d 605.

> Generally, to meet the first prong of *Strickland*, the applicant must "overcome the 'strong presumption' that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight." *Hunter v. State*, 2020 ND 224, ¶ 12, 949 N.W.2d 841. The first prong is measured against "prevailing professional norms." *Bahtiraj*, 2013 ND 240, ¶ 10, 840 N.W.2d 605.

Abdi v. State, 2021 ND 110, ¶ 11, 961 N.W.2d 303. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992).

> *Strickland* directs that in examining the first element—whether counsel's performance was deficient—judicial scrutiny of counsel's performance must be highly deferential. The proper measure of attorney performance is simply reasonableness under prevailing professional norms, considering all the circumstances from the defense counsel's perspective at the time. However, because it is all too easy to second-guess an unsuccessful counsel's defense through the distorting effects of hindsight, in making that inquiry a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

State v. Skjonsby, 417 N.W.2d 818, 822 (N.D. 1987) (cleaned up) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2065-66 (1984)).

[¶31] In reviewing a claim of ineffective assistance of counsel based on counsel's failure to investigate, "[a]n attorney's responsibility is to investigate and to evaluate his client's options in the course of the subject legal proceedings and then to advise the client as to the merits of each." *Dunning v. United States*, No. 17-00174-WS, 2018 WL 1278912, at *6 (S.D. Ala. Feb. 20, 2018) (citing *Tafero v. Wainwright*, 796 F.2d 1314, 1320 (11th Cir. 1986); *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)). "A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel." *United States v. Decoster,* 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc). In other words, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.

[¶32] As the district court noted, this was a case where there were only three or four possible witnesses including Archambault who had given a three-hour taped confession in which he confessed repeatedly to sexual acts with the minor child. Another witness, Archambault's wife, was interviewed and reported that she walked in on Archambault having sex with the minor child. Archambault's attorney requested discovery from the State, and should have been able to rely

on full disclosure by the State. When, as here, there is overwhelming evidence from an eye witness and a taped interview confessing to the acts, there is not much any defense attorney could have done. *See United States v. Katz,* 425 F.2d 928, 930 (2d Cir. 1970). In light of the case against Archambault known to counsel through discovery, I would conclude that Archambault failed in his burden to show his counsel's representation fell below an objective standard of reasonableness. Under *Strickland,* it was not per se unreasonable for Archambault's attorney not to interview the child.

[¶33] Lisa Fair McEvers