STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1536

Dale Samual Karoff, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 1, 2008
Affirmed
Hudson, Judge

Ramsey County District Court
File No. K1-03-3570

Mark W. Peterson, 150 Edina Executive Plaza, 5200 Willson Road, Edina, Minnesota 55424 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from an order denying his postconviction petition challenging his conviction of first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion in refusing to allow a defense expert to testify; (2) the postconviction court erred in failing to rule on the defense-expert testimony issue at the postconviction hearing; and (3) he was denied the effective assistance of counsel. We affirm.

FACTS

In January 1999, B.Q. separated from her husband. Shortly thereafter, B.Q. and her then five-year-old son D.Q. moved in with B.Q.'s mother and stepfather. B.Q.'s stepfather is appellant Dale Karoff. B.Q. and D.Q. lived with appellant and B.Q.'s mother from the spring of 1999 through November 2001. During this time period, D.Q. developed a very close relationship with appellant.

In September 2003, appellant was charged with first-degree criminal sexual conduct after it was alleged that he had sexual contact with D.Q. Appellant pleaded not guilty, and a jury trial was held on the matter. Prior to voir dire, appellant moved to offer the testimony of Dr. Susan Phipps-Yonas, a psychologist who occasionally testifies as an expert in sexual-abuse cases. Dr. Phipps-Yonas had reviewed the file and the victim's videotaped interview, and appellant sought to introduce her testimony to assist the jury by explaining the concept of "false memory" and indications in the victim's demeanor on the video suggesting that the victim's accusations were the product of "false memory."

Appellant claimed that the purpose was not to establish whether the victim was being truthful, but, rather, whether he might be confused or had been coached on how to testify. The district court initially denied the defense request to offer the testimony on the basis that it would not be helpful to the jury and would be unduly prejudicial to the state. But the district court reserved the issue for later consideration if the state offered expert testimony.

At trial, D.Q. testified that appellant would touch and put his mouth on D.Q.'s penis, and that appellant had D.Q. put lotion on his penis, as well as put his mouth on appellant's penis. Leah Mickschl, a registered nurse who evaluated D.Q., also testified on behalf of the state. Mickschl offered testimony about delayed reporting and suggestibility, as well as the difficulties children have reporting. Mickschl also testified that D.Q. knew the difference between the truth and falsehood and that D.Q. was telling the truth. When prompted, Mickschl offered testimony bolstering the victim's credibility, explaining the reasons for her opinion that D.Q. had not been "coached." The defense did not object to Mickschl's testimony and, in fact, elicited some of this testimony on cross-examination. The defense rested without calling a witness or presenting any evidence.

The jury found appellant guilty of the charged offense, and the district court sentenced appellant to 108 months' imprisonment. No direct appeal was brought from the conviction. In September 2006, appellant filed a petition for postconviction relief claiming that (1) he was denied the effective assistance of counsel; (2) he was denied the right to present evidence by the exclusion of the defense expert-witness testimony; and

(3) he was denied a fair trial by undue restrictions on his right to cross-examine the victim concerning appellant's theory that the victim's father was the real perpetrator. Following an evidentiary hearing, the district court denied appellant's petition for postconviction relief. Appellant subsequently requested a rehearing of his postconviction petition, which was also denied by the district court. This appeal follows.

D E C I S I O N

On review of a postconviction decision, this court determines whether there is sufficient evidence to support the postconviction court's findings. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). The postconviction court's decision will not be overturned unless the court has abused its discretion. *Id.* A postconviction court's legal determinations are reviewed de novo, but its factual findings will not be set aside unless they are clearly erroneous. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006); *Doppler v. State*, 660 N.W.2d 797, 801 (Minn. 2003).

I

Appellant argues that: (1) the district court abused its discretion by not allowing the defense expert witness to testify; and (2) the postconviction court compounded the error by refusing to rule on this claim. The state argues that because the district court afforded defense counsel the opportunity to renew his request to have the defense expert testify, there was never a final order excluding the proposed testimony. The state contends that, without a final order, the postconviction court properly declined to address the issue.

Appellant correctly notes that the postconviction court did not address the issue in its memorandum denying appellant's petition for postconviction relief. But in the order denying appellant's request for a rehearing on the matter, the postconviction court stated that the issue

> is not an issue to be raised in a postconviction petition and this Court stands by its original ruling.
>
> Additionally, the trial court gave defense counsel the opportunity to renew his offer to present expert testimony. Because [appellant] was able to renew the request, there was no final order excluding the proposed testimony. However, trial counsel never renewed the offer. Despite [appellant's] claim that he is not presenting the issue in terms of ineffective assistance of counsel, it is nevertheless a tactical decision concerning what witnesses to call and what witnesses to present that is not subject to court review.

The record further reflects that prior to voir dire, the state moved to exclude the defense expert's testimony. In addressing the issue, the district court stated:

> I think that the questions pretty much do come down to the credibility of the child, and I am going to grant the State's motion to exclude her testimony because I do not find that it is helpful to the jury, and I think that it would be unduly prejudicial.
>
> One of the cases, in fact, stated that by allowing testimony of that nature is generally inadmissible because the expert status may lend an unwarranted stamp of scientific legitimacy to the allegations. And so to alleviate that danger, I am going to grant the State's motion.
>
> *And since they are not offering any expert testimony along those same lines, I don't think it—there is any point in leaving the matter open.*
>
> *Now, I assume if the State does, then I certainly would let you argue again.*

(Emphasis added.)

The record indicates that the district court's initial decision to exclude the defense expert-witness testimony was premised in part on the state's assertion that it would not offer any expert testimony. But the district court recognized that the state's position might change as the trial progressed. Thus, the district court reserved the issue, giving defense counsel the option to renew its request based on the actual evidence presented by the state. Appellant correctly observes that, in fact, the state presented expert testimony at trial through the registered nurse who interviewed D.Q. But appellant also concedes that defense counsel did not renew its request to have the defense expert testify. Therefore, we conclude that there was no final ruling excluding the testimony of appellant's expert witness.

Because there was no final ruling on the issue, the postconviction court properly decided not to address appellant's argument. "A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity." *Hummel v. State*, 617 N.W.2d 561, 563 (Minn. 2000). Here, appellant is collaterally attacking his conviction based on an issue that was never finally decided by the district court. Appellant's argument that the district court abused its discretion in refusing to allow his defense expert to testify is largely premised on the fact that the state was allowed to present expert testimony. But that was not the state of the record when the district court made its preliminary ruling, and defense counsel never requested a final ruling based on

the evidence actually presented by the state. Therefore, the postconviction court had no ruling to review.

Appellant appears to argue that, notwithstanding the lack of a final decision by the district court, the postconviction court should have ruled on the issue based on the plain language of the postconviction statute. This statute provides:

> Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that:
> (1) the conviction obtained . . . violated the person's rights under the Constitution or laws of the United States or of the state . . .
>
> . . . .
>
> may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner . . . or grant a new trial . . . .

Minn. Stat. § 590.01, subd. 1 (2006).

The postconviction-relief statute provides a broad spectrum of relief upon a proper showing of facts that warrant reopening the case. *See id.* Despite the broad scope of the statute, appellant is nevertheless unable to show that his rights were violated by the district court's decision. Again, the district court's initial decision was made based on the state's contention that it did not plan to offer expert testimony. But the state *did* offer expert testimony. As a result, had defense counsel renewed its request to present the defense expert's testimony, the district court may well have granted that request. But defense counsel did not renew the motion and accordingly, on this record, the postconviction court properly declined to address appellant's argument. *See* 9 Henry W.

McCarr & Jack S. Nordby, *Minnesota Practice* § 39.3 (2001) (stating that "[t]he broad spectrum of relief provided by the [postconviction-relief] statute permits great flexibility in equitably disposing of the post conviction petition"). Because the district court's ruling was not final, and the postconviction court properly declined to address the issue, we need not address the merits of appellant's argument that the district court abused its direction in refusing to allow the defense expert to testify.

II

Appellant argues that he was denied the effective assistance of counsel and is therefore entitled to a new trial. In order to succeed on a claim for ineffective assistance of counsel, appellant "must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). There is a strong presumption that an attorney's representation falls within the range of reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Trial tactics, including which witnesses to call and what information to present to the jury, are within counsel's discretion. *Id.* This court does not review trial tactics or an attorney's decision regarding which witnesses to call. *Id.*

Appellant contends that his trial counsel's performance fell below the objective standard of reasonableness by (1) failing to renew the request to present testimony from

the defense expert; (2) eliciting testimony from the state's witnesses that bolstered the state's case; (3) providing appellant with poor legal advice; and (4) failing to object to hearsay reports of the victim's mother.

A. Failure to renew request to present expert testimony

Appellant argues that his trial counsel was ineffective because he failed to renew the request to present testimony from the defense expert. As discussed above, the district court initially refused to allow a defense expert to testify. But the court noted that defense counsel could renew his offer to present expert testimony if the state offered expert testimony in its case-in-chief. At trial, Mickschl testified to the details of what D.Q. told her. She also testified that D.Q. knew the difference between the truth and a falsehood and that D.Q. was telling the truth. She further testified about delayed reporting and suggestibility and the basis for her opinion that D.Q. was not "coached" in any way. In addition, defense counsel elicited testimony from Mickschl on cross examination that the victim's disclosure could not have been suggested by others. Nevertheless, after the state rested, appellant's trial counsel decided not to renew its request to present its own expert-witness testimony. Such a decision is a trial tactic, which this court does not review. *See Jones*, 392 N.W.2d at 236.

B. Elicitation of testimony from state's witness

Appellant also claims that his trial counsel's examination of the state's witnesses was prejudicial. Specifically, appellant points to his trial counsel's cross-examination of Mickschl where Mickschl answered "[n]o, it's not possible," to the question of whether it was "possible" that the victim's story was not true, or "possible" that his parents coached

him to tell his story. Appellant argues that the only possible answer to the question asked by his attorney would be prejudicial and demonstrates his trial counsel's incompetence. But again, appellant's trial counsel's questions on cross-examination include part of the trial strategy, which this court does not review. *See Jones*, 392 N.W.2d at 236. Moreover, appellant offered no evidence at the evidentiary hearing supporting his argument that his counsel acted outside the range of reasonable professional assistance by eliciting this testimony from the victim. *See Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (holding that defendant did not meet his burden to show that he was denied the effective assistance of counsel because he failed to offer any evidence such as affidavits from unaffiliated defense attorney experts to the effect that counsel's representation of the defendant fell below an objective standard of reasonableness).

C. Incompetent legal advice

Appellant argues that he received poor legal advice from his trial attorney on the issue of whether he should testify at trial. We disagree. The record reflects that appellant waived his right to testify in open court, and at the evidentiary hearing, appellant conceded that he understood that waiving his right to testify was his decision to make and that it was, in fact, he who made the decision not to testify. As the postconviction court found, there is no evidence in the record that trial counsel engaged in coercion, undue pressure, use of illegitimate means, or tactics undermining appellant's free will. Appellant contends that no reasonable lawyer could possibly have believed that the case was going well, and thus, his lawyer's advice not to testify was based on his lawyer's gross misjudgment as to the strength of the state's case as well as his lawyer's view that

appellant's testimony might be more prejudicial than helpful. But again, this advice constitutes a trial tactic within appellant's counsel's discretion. Moreover, it is common for defense attorneys to advise their clients not to testify, and such advice is within the objective standard of reasonableness absent some evidence to the contrary. *See Gates*, 398 N.W.2d at 561 (stating that the defendant bears the burden to show that his trial counsel's assistance fell below the objective standard of reasonableness).

D. Failure to object to hearsay reports

Finally, appellant argues that his trial counsel's failure to object to the hearsay report of the victim's mother demonstrates that his trial counsel was ineffective. The postconviction court acknowledged that the victim's mother's statements constituted inadmissible hearsay. *See* Minn. R. Evid. 805 (stating that hearsay within hearsay is not excluded under the hearsay rule only if each part of the combined statements conforms with an exception). But, an attorney could have legitimate reasons for not objecting to certain testimony and for not raising a certain defense, and this court should not second-guess the attorney's decisions after trial. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that appellate courts do not review matters of trial strategy for competency). Thus, the failure of appellant's trial counsel to object to the hearsay testimony of the victim's mother does not in and of itself demonstrate that appellant did not receive the effective assistance of counsel.

We acknowledge that, on this record, the trial strategy of appellant's trial counsel raises legitimate questions, particularly on the expert-witness issue. In hindsight, it can

certainly be argued that appellant's trial counsel should have renewed his motion to present the defense expert's testimony, especially after the potentially damaging testimony was elicited from Mickschl. But appellant failed to present any evidence at the postconviction hearing demonstrating that this was ineffective assistance of counsel. And, more importantly, all of appellant's ineffective-assistance claims constitute trial tactics, which lie within the proper discretion of trial counsel and which this court is loathe to interfere with or second-guess. *See Jones*, 392 N.W.2d at 236. Accordingly, we conclude that appellant failed to meet his burden to show that he was denied the effective assistance of counsel.

Affirmed.