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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0758**

State of Minnesota,  
Respondent,

vs.

Anthony Charles Treadwell,  
Appellant.

**Filed May 19, 2009  
Affirmed  
Stoneburner, Judge**

Olmsted County District Court  
File No. 55CR061841

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Government Center, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

Mary M. McMahon, 10190 Country Club Curve, Woodbury, MN 55129 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and  
Collins, Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant argues that his conviction of first-degree criminal sexual conduct must be reversed, and he is entitled to a new trial because he received ineffective assistance of counsel in his court trial. Because appellant has failed to show a reasonable probability that the outcome of his trial would have been different but for the conduct of counsel, we affirm.

## DECISION

Defendants are guaranteed reasonably effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). An allegation 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). The burden is on appellant to 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." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

"There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance. Even if counsel's performance does not fall within this great range of reasonableness, a sixth amendment violation is not necessarily established. The error of counsel must have prejudiced the proceeding." *State v. Jones*,

392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted). “[A]n attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotations omitted).

Appellant Anthony Charles Treadwell acknowledges the objective standard-of-reasonableness analysis employed in ineffective-assistance claims but requests that this court instead apply a plain-error standard to his claim. Because there is no authority or legal basis for Treadwell’s request, we apply the well-established objective standard-of-reasonableness analysis.

Treadwell argues that he was denied effective assistance of counsel because his attorney provided “wholly ineffective cross-examination of all of the state’s witnesses,” which did not provide him with the adversarial trial guaranteed under the Sixth Amendment. Treadwell relies on *U.S. v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045 (1984), for the principle that a defendant is entitled to “require the prosecution’s case to survive the crucible of meaningful adversarial testing.” Treadwell also argues that his trial counsel elicited incriminating evidence during cross-examination constituting such ineffectiveness that Treadwell should be granted a new trial. Treadwell offers numerous excerpts from the trial transcript to illustrate his claims.

The state notes that *Cronin* “stands for the proposition that the appointment of inexperienced counsel shortly before trial . . . is not alone sufficient to establish an ineffective-assistance-of-counsel claim” and asserts that the record of the present case

does not show that there was a breakdown of the adversarial process. The state argues that appellant's arguments fail to satisfy either prong of the *Strickland* test. We agree.

This court explained in *State v. Irwin* that cross-examination of witnesses is an aspect of trial tactics. 379 N.W.2d 110, 115 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986) (stating that asserting a "failure to conduct cross-examination in a certain manner" constitutes taking issue with trial tactics). "[T]rial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *Jones*, 392 N.W.2d at 236. Because we do not review an attorney's tactical decisions, Treadwell's claims about his attorney's cross-examinations do not support his claim that his attorney's representation fell below an objective standard of reasonableness.

Additionally, our review of the record confirms that Treadwell's attorney reasonably cross-examined the 13-year-old complainant, M.F., and succeeded in eliciting her testimony that she sometimes makes up things that are false. The testimony quoted by Treadwell in his brief on appeal supports counsel's argument to the jury that M.F. was seeking attention and did not want to change her story at trial because she had already told it to a number of people. And Treadwell's assertion that the district court instructed his attorney on how to perform a cross-examination does not accurately reflect the record, which shows that the district court discussed with both attorneys how to continue questioning M.F., who was demonstrating emotional difficulty on the witness stand.

As additional evidence of counsel's ineffectiveness, Treadwell asserts that counsel elicited prejudicial, prior-consistent statements by M.F. when he asked M.F.'s psychologist to read from her notes. But, as noted above, counsel's manner of cross-

examining this witness is a tactical decision not subject to review. And the record does not support Treadwell's assertion that counsel's cross-examination of the psychologist caused the district court to permit the prosecutor to ask the psychologist her opinion about whether M.F. had been abused. In a pretrial hearing, the prosecution stated that the psychologist was being called as a fact witness to establish M.F.'s prior consistent statements and was not being called as an expert witness. Nonetheless, at trial, the district court permitted the prosecutor to ask her opinion over defense counsel's objection, noting that the psychologist's expert credentials and foundation for the testimony had been established. We find no support in the record for the assertion that admission of this testimony resulted from any conduct of Treadwell's counsel.

Treadwell's claim that his attorney repeatedly asked the complainant to describe the object he used in penetration is not supported by the record, which shows that those questions were asked of the psychologist. Treadwell also misstates the record by asserting that his attorney elicited testimony about the record of Treadwell's assault of M.F.'s mother: the state elicited that testimony during its cross-examination of Treadwell.

Because Treadwell has not satisfied the reasonableness prong of the ineffective assistance test, we do not reach the second prong of the *Strickland* analysis (whether there is a reasonable probability that the result would have been different, but for counsel's errors) except to note that Treadwell failed to even allege that the outcome *might* have been different but for the deficiencies of which he complains. Explaining the verdict, the district court stated,

The videotaped interview was compelling to me. The most powerful piece of evidence in the case. There [complainant] described without any suggestion of details a detailed account, and she talks about surrounding circumstances of sexual talk and activity by the defendant with her that corroborate the penetration allegation and sound true to me.

We conclude that even if Treadwell's counsel had conformed to Treadwell's performance expectations, the record does not support a conclusion that the outcome of the court trial would have been different.

In the alternative, Treadwell asks this court to preserve his right to pursue his claim of ineffective assistance of counsel in a postconviction proceeding. Because Treadwell's claims all relate to non-reviewable trial tactics documented in the record, we decline to preserve Treadwell's right to pursue this claim in a post-appeal petition for postconviction relief.

**Affirmed.**