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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1623, A11-515**

State of Minnesota,
Respondent,

vs.

Stanley William Bahr,
Appellant.

**Filed September 12, 2011
Affirmed
Wright, Judge**

Fillmore County District Court
File No. 23-CR-09-352

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent)

Tiernee Murphy, Law Office of T. Murphy, PA, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's denial of his postconviction-relief petition without an evidentiary hearing and argues that his attorney rendered ineffective assistance of counsel by (1) failing to consult an expert to advise and testify for the

defense and (2) failing to introduce evidence challenging the credibility of the state's witnesses. We affirm.

FACTS

In December 2008, 14-year-old M.M. reported to Fillmore County law-enforcement officers that she had been sexually abused by her stepfather, appellant Stanley William Bahr, approximately two years earlier. As a result of an investigation, Bahr was charged with three counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a), (g), (h)(iii) (2006); and three counts of second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(a), (g), (h)(iii) (2006). Following a jury trial in March 2010, Bahr was found guilty of all counts.

At trial, M.M. testified about several occasions when she was 11 years old when Bahr “touched [her] and hurt [her].” She described when Bahr entered the bathroom while she was showering and helped wash her hair, despite her request for him to leave. On another occasion, Bahr entered the bathroom while M.M. was preparing to shower, directed her to sit on the toilet, forcibly pulled open her knees, and penetrated her vagina with his tongue. On a different occasion, Bahr held M.M.’s hand around his exposed penis. And in a fourth incident, Bahr rubbed his penis between M.M.’s legs and “inside the lips” of her vagina while she sat on a couch. M.M. testified that she did not immediately report the sexual abuse because Bahr threatened to hurt her mother, she knew Bahr was violent, and she feared Bahr would hurt her or someone else.

Amy Jo Russell, a staff attorney with the National Child Protection Training Center, testified as an expert witness for the state about the process of interviewing

children who allege that they have experienced child or sexual abuse. Russell testified that the rate of false allegations of sexual abuse in child-custody cases nationwide “is as low as 4 percent.” A Fillmore County Social Services child-protection social worker, Elizabeth Eisenbeis, testified for the state about her experience interviewing children who allege sexual abuse and about the three interviews that she and law-enforcement officials conducted with M.M. between December 2008 and February 2010.

Bahr’s counsel cross-examined each of the state’s witnesses. And Bahr called six witnesses, including several of his friends and community members.

After Bahr’s conviction of the six counts of criminal sexual conduct, the district court sentenced Bahr to 144 months’ imprisonment. Bahr appealed. We subsequently stayed the appeal to permit Bahr to petition for postconviction relief. In his postconviction-relief petition, Bahr alleged that he received ineffective assistance of counsel at trial, in violation of the United States Constitution, U.S. Const. amend. VI, and the Minnesota Constitution, Minn. Const. art. 1, § 6; and he sought an evidentiary hearing. The district court denied Bahr’s petition for postconviction relief without a hearing. This appeal followed.

DECISION

I.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel’s performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by counsel’s deficient performance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citing *Strickland v. Washington*, 466

U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The burden of proof on this claim rests with the defendant, who must overcome the “strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *accord Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (noting that judicial review should be “highly deferential” to counsel’s performance). When the defendant fails to prove either counsel’s deficient performance or resulting prejudice, the defendant’s claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005); *see also Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring that defendant prove both prongs).

An appellate court gives particular deference to trial strategy. *Carney v. State*, 692 N.W.2d 888, 892 (Minn. 2005). Whether to call a witness and what evidence to present at trial are decisions that rest within trial counsel’s discretion and generally will not be reviewed on appeal. *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Trial counsel’s preparation for trial, selection of evidence to present to the jury, and cross-examination of witnesses generally are considered questions of trial strategy that are not reviewed for competence. *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008); *Opsahl*, 677 N.W.2d at 421; *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *see also State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (rejecting ineffective-assistance-of-counsel claim premised on counsel’s failure to seek venue change, hire investigator, and interview prospective witnesses). Minnesota courts have rejected claims of ineffective assistance of counsel based on trial counsel’s decisions about whether to obtain expert assistance and

testimony, as well as which witnesses to call or cross-examine, as tactical judgments within trial counsel's broad discretion. *See, e.g., Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (holding that defendant failed to establish that counsel's performance fell below an objective standard of reasonableness based in part on challenge to trial counsel's decision of whether to call expert witness); *Cooper v. State*, 565 N.W.2d 27, 33 (Minn. App. 1997) (holding that appellant's allegations that counsel failed to follow evidentiary leads, present testimonial evidence, obtain expert testimony, and meaningfully cross-examine witnesses "involved the exercise of tactical judgment and will not support a claim of ineffective assistance of counsel"), *review denied* (Minn. Aug. 5, 1997).

Bahr asserts that his trial counsel was ineffective because he failed to consider or investigate the use of expert testimony before trial, despite knowing that the state intended to introduce expert-witness testimony.¹ But decisions as to what evidence to present and whether to call defense witnesses to rebut the state's evidence are questions of trial strategy that rest soundly in the discretion of counsel. *Sanchez-Diaz*, 758 N.W.2d at 848; *Leake*, 737 N.W.2d at 539.

Bahr relies on *State v. Rhodes*, in which the Minnesota Supreme Court recognized that an ineffective-assistance-of-counsel claim may lie in defense counsel's failure to pursue available expert and eyewitness testimony to rebut evidence that was critical to the state's wholly circumstantial case. 627 N.W.2d 74, 87-88 (Minn. 2001) (*Rhodes I*).

¹ Approximately six weeks before trial, the state gave Bahr's counsel notice that it intended to amend the witness list to include an expert witness to testify "regarding disclosure/grooming/other issues in child criminal sexual conduct cases."

But in an appeal of the district court's subsequent postconviction decision, the Minnesota Supreme Court affirmed the district court's denial of the defendant's ineffective-assistance-of-counsel claim, concluding that the defendant failed to establish that his counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by counsel's allegedly inadequate representation. *State v. Rhodes*, 657 N.W.2d 823, 844-45 (Minn. 2003) (*Rhodes II*). As in *Rhodes II*, Bahr's allegations that his counsel erred by failing to consult with and retain an expert witness to rebut the state's expert are insufficient, on this record, to establish that trial counsel's trial preparation and trial performance were ineffective.

Likewise, we are not persuaded by Bahr's contention that an expert witness was necessary for the defense to rebut the testimony of the state's expert that the rate of false allegations in child-custody cases nationwide "is as low as 4 percent." Although on the "cold record" the introduction of this testimony, without objection, seems troubling, we decline to review in hindsight counsel's decisions regarding trial tactics. *See Jones*, 392 N.W.2d at 236 ("Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight."). Decisions regarding how to address or mitigate damaging witness testimony involve trial counsel's tactical judgment and rest within counsel's discretion. The record reflects that the strategy that Bahr's counsel employed included the use of his closing argument to attack the authority of experts and the accuracy of expert testimony generally so as to diminish the value of Russell's testimony. In addition, Bahr's counsel advised the jury of cases from a nearby Minnesota community that involved false accusations of sexual abuse.

Bahr also argues that his counsel's representation was ineffective because his counsel failed to introduce evidence to support certain defenses that he addressed in his opening statement. For example, during his opening statement, Bahr's counsel advised the jury that the evidence would establish that M.M.'s allegations emerged while her mother and Bahr were engaged in a contentious divorce and custody dispute. He also addressed M.M.'s inconsistent accounts of the sexual assault on the couch that she gave in her interviews during the investigation. Contrary to Bahr's assertion on appeal, Bahr's counsel presented evidence to support these asserted facts. For example, he elicited contradictory testimony from Eisenbeis and M.M. about M.M.'s description of the sexual assault on the couch in two of Eisenbeis's interviews with M.M. Indeed, Bahr's counsel cross-examined both M.M. and Eisenbeis extensively about the amount of time between the interviews and the inconsistencies in M.M.'s descriptions of the incidents. Bahr's counsel advanced the defense that M.M.'s allegations were orchestrated by her mother's attempts to gain an advantage in their dissolution proceedings. The record demonstrates that Bahr's counsel cross-examined M.M.'s mother regarding past orders for protection and no-contact orders to discredit M.M.'s sexual-abuse allegations as an attempt to gain strategic advantage in the dissolution case against Bahr. Bahr's contention that his counsel failed to address the defenses that he identified in his opening statement is plainly contrary to the record.

In sum, the alleged errors that Bahr asserts pertain to the witnesses selected, the investigation conducted, the questions posed, and the evidence presented to the jury. Each challenge involves tactical decisions of trial strategy that do not support an

ineffective-assistance-of-counsel claim. *Cooper*, 565 N.W.2d at 33. Consequently, Bahr fails to establish that his counsel's performance fell below an objective standard of reasonableness.

Bahr's ineffective-assistance-of-counsel claim also fails because Bahr has not demonstrated that he was prejudiced by his counsel's representation. To establish prejudice, a defendant must prove that, but for counsel's errors, it is reasonably probable that the result would have been different. *Rhodes II*, 657 N.W.2d at 842. Had Bahr presented an expert witness at trial, that witness may have cast doubt on the reliability of child victims. But Bahr's counsel accomplished this defense strategy through his impeachment of the state's witnesses and his closing argument. The record reflects that Bahr's counsel crafted a defense based on Bahr's good character and the dearth of evidence supporting M.M.'s accusations. He executed this defense strategy through vigorous cross-examination and impeachment of the state's witnesses. Bahr's challenge fails to overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance" by demonstrating either that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by that performance. *Gail*, 732 N.W.2d at 248; *Lahue*, 585 N.W.2d at 789.

II.

Bahr also argues that the district court abused its discretion by denying his postconviction-relief petition without holding an evidentiary hearing. An evidentiary hearing must be held on a postconviction-relief petition unless "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat.

§ 590.04, subd. 1 (2010); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008) (holding that evidentiary hearing may be granted only when petitioner “allege[s] facts that are sufficient to entitle him or her to the relief requested and the allegations [are] more than argumentative assertions without factual support” (quotations omitted)). An evidentiary hearing on a claim of ineffective assistance of counsel is warranted when the petitioner alleges “facts that would affirmatively establish that his attorney’s representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different.” *Leake*, 737 N.W.2d at 536 (quotation omitted) (citing *Strickland*, 466 U.S. at 690-94, 104 S. Ct. at 2066-68).

Relying on *Rhodes I*, Bahr argues that an evidentiary hearing is “particularly important” when the state’s case is circumstantial. 627 N.W.2d at 87-88. In *Rhodes I*, the Minnesota Supreme Court remanded for an evidentiary hearing on the defendant’s ineffective-assistance-of-counsel claim based on affidavits suggesting that defense counsel failed to present available witness testimony to rebut evidence critical to the state’s circumstantial case. *Id.* The facts and circumstances in *Rhodes I* are distinguishable from those presented here. The state’s case against Bahr was not circumstantial. It was based on direct evidence presented through M.M.’s testimony. The expert testimony that Bahr proffered in his postconviction-relief petition would merely cast doubt on M.M.’s credibility. It would not directly refute M.M.’s testimony.

The district court correctly determined that Bahr’s allegations involve his counsel’s exercise of tactical judgment and trial strategy, which permitted the merits of Bahr’s claims to be determined based on the district court record without additional fact-

finding. Because the record conclusively demonstrates that Bahr is entitled to no relief for his ineffective-assistance-of-counsel claim, *see* Minn. Stat. § 590.04, subd. 4, the district court's decision to forgo an evidentiary hearing is legally sound.

Affirmed.