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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-0291  
A12-1645**

State of Minnesota,  
Respondent,

vs.

Dale Channing Casebolt,  
Appellant,

Dale Channing Casebolt, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed March 18, 2013  
Affirmed  
Connolly, Judge**

Clearwater County District Court  
File No. 15-CR-10-134

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Richard Mollin, Clearwater County Attorney, Bagley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and Crippen, Judge.\*

## UNPUBLISHED OPINION

**CONNOLLY**, Judge

In this consolidated appeal, appellant challenges the denial of his motion for a new trial on the ground of improper jury selection and the denial of his petition for postconviction relief on the ground of ineffective assistance of counsel. Because we see no error in either denial, we affirm.

### FACTS

In the summer of 2009, B.D., then 11, went to the house where her friend, S.R., lived with her stepfather, appellant Dale Casebolt, and his two children, who are younger than S.R. Appellant and the four children went to a lake, where appellant picked up the children, one at a time, and threw them into the water. When it was B.D.'s turn, he held her for a longer time and placed his hands on her vagina before throwing her into the water. B.D. then left the water; appellant remained in it.

When the group returned to the house, B.D., who had forgotten her nightclothes, borrowed a pair of appellant's shorts to wear as pajamas, securing them with a drawstring around her waist, over her underwear. S.R. and her stepbrother fell asleep. Appellant settled himself on a sofa between B.D. and S.R.'s stepsister to watch a movie.

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

Appellant began touching B.D.'s leg. She became upset and went to the bathroom, but returned because she thought appellant would come looking for her. Appellant again put his hand on B.D.'s leg, but moved it up to her crotch over her underwear, then moved his finger inside and outside her vagina. B.D. was afraid, in part because appellant is a large man, between 260 and 270 pounds. Eventually, B.D. told appellant she wanted to go to sleep and went to bed. B.D.'s grandmother picked her up the next morning.

Six to eight months later, in February 2010, B.D. told S.R. what had happened the previous summer, and S.R. told a school official. The school official, a mandated reporter, prepared a report of B.D.'s statement:

Today [B.D.] told me that [appellant] touched her. It had been earlier reported that he had touched her leg but today when she was telling me about the incident, she mentioned that she was wearing shorts w/elastic. Once she said that[,] I asked her if he touched more than her leg. She said he went into her shorts [and] underpants when the others were sleeping on the couch.

A sheriff's deputy interviewed B.D., who said that, while sitting next to her, appellant had touched her leg, moved his hand to her underwear, and put his fingers inside her body; she also said that he touched her inappropriately while they were swimming.

Based on B.D.'s statements, appellant was charged with two counts of first-degree criminal sexual conduct (sexual penetration) and two counts of second-degree criminal sexual conduct (sexual contact).

Prior to trial, the district court decided to conduct voir dire by questioning potential jurors individually rather than together and, in response to appellant's counsel's objection, said that, after the state completed questioning of each juror, counsel could challenge that juror for cause.<sup>1</sup> One potential juror said she was the music teacher at the local elementary school and knew B.D., S.R., appellant, and some of the witnesses. When the state questioned her, the juror said she knew the prosecutor, with whom she was in the same book club, and that she had sat in the prosecutor's election booth at the fair. The juror asserted that, despite her acquaintance with some of those involved in the case, she could be fair and impartial. After the state's questions revealed the juror's relationship with the prosecutor, appellant's trial counsel (counsel) sought the court's permission to ask the juror additional questions. Permission was denied. Counsel did not move to strike that juror for cause or to use a peremptory strike against her.

Counsel read the school official's report aloud to the jury in his opening statement and later offered it as an exhibit. The district court sustained a hearsay objection to it, and it was not admitted into evidence or submitted to or reviewed by the jury.

The jury found appellant guilty of one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct and acquitted him of one count of second-degree criminal sexual conduct.<sup>2</sup>

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<sup>1</sup> See Minn. R. Crim. P. 26.02, subd. 4(3)(d)(iv).

<sup>2</sup> One count of first-degree criminal sexual conduct was dismissed.

Appellant moved for a new trial on the ground of improper jury selection. His motion was denied, and he was sentenced to 187 months in prison. He appealed (A11-0291) and petitioned this court to stay the appeal and remand for postconviction proceedings on his claim of ineffective assistance of counsel. This court granted his petition.

At a postconviction evidentiary hearing, counsel testified that he was uncomfortable about the juror's occupation as a teacher, not about her relationship with the prosecutor.

The district court denied the postconviction petition. Appellant challenged the denial (A12-1645). By order of this court, the stay on his prior appeal was removed and the two appeals were consolidated.

Appellant now argues that counsel was ineffective in not having the school official's report admitted into evidence and submitted for the jury's review and in not striking the juror who was acquainted with some of those involved in the case.

## **DECISION**

Claims of ineffective assistance of counsel are reviewed de novo because they involve mixed questions of fact and law. . . . We review a postconviction court's legal conclusions de novo, and its factual findings for clear error. . . .

. . . To prevail on an ineffective assistance of counsel claim, appellant must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a

reasonably competent attorney would perform under similar circumstances. In evaluating claims of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable, and this court does not review matters of trial strategy or the particular tactics used by counsel.

*State v. Hokanson*, 821 N.W.2d 340, 357-58 (Minn. 2012) (quotations and citations omitted).

### **1. The school official's report**

During his opening statement, counsel read the school official's report of B.D.'s statement verbatim to the jury. Counsel did not question B.D. concerning the report or call the school official to testify about it. Counsel's only attempt to have the report admitted occurred while he was cross-examining police officers; the report was objected to as hearsay and was excluded.

At the postconviction hearing, counsel testified:

I do not recall why I did not have the witness there from the school district to have it properly introduced through that person. I tried to, for lack of a better word, back door it in through the police [officers] who had copies of it as part of their . . . investigation. . . . I argued that it . . . should come in under one of the exceptions to the rule.

. . . .  
. . . [I]n all honesty and hindsight . . . quite frankly . . . I think I screwed up by not having that person there [to testify about the report]. . . . [A]t the same time I recall having reluctance regarding that piece of . . . evidence because I did not know exactly what [B.D.'s] statement was going to be regarding the first report.

The district court concluded that:

[Counsel's] admission touches upon the difficult strategic decision [he] faced. . . . [T]here was some risk involved if the

defense attempted to get the subject evidence before the jury via the victim or the [school official].

The victim presented well, and appeared to be a credible witness. It is noteworthy that [counsel's] cross examination of the victim was quite brief. It cannot be said that the decision not to confront the victim about her prior statement was unreasonable.

It appears that [counsel] also made a strategic decision not to call the [school official], probably for similar reasons. If called to testify, the prosecution would likely have questioned [her] about the circumstances surrounding her discussion with the victim about the allegations. Such testimony could bolster the credibility of the victim and, of course, the victim's allegations would again be repeated in front of the jury.

[Counsel] attempted to get the victim's prior statement in through witnesses (the [police] officers) who could not describe the attendant circumstances or the demeanor of the victim. That approach avoided much of the risk involved in attempting to get the statement in through the victim or the [school official]. It cannot be said that such a strategic decision was unreasonable.

...  
... Ultimately the ... decision not to confront the victim or call the [school official] must come under the label of trial strategy, [to] which the court is required to give due deference.

Appellant argues that, because counsel had alternative means of introducing the report into evidence by questioning the victim or calling the school official as a witness, the failure to introduce it was ineffective assistance. But appellant does not address the risks counsel would have run in questioning the victim or the disadvantages of once more putting the victim's allegations before the jury. These are strategic decisions, and "this court does not review matters of trial strategy." *Id.* at 357.

Moreover, even if error did occur, appellant was not prejudiced. *See id.* at 358, (noting that an ineffective-assistance claim also requires a showing that, but for counsel's

errors, the result would have been different). Appellant argues that the report was significant “because B.D. testified at trial that [appellant] sexually touched her but in her initial report to the school staff, B.D. only claimed that [appellant] touched her leg.” But the jury heard both B.D.’s testimony and the report, and the two are not contradictory. When B.D. was asked, in February 2010, if she told a school official about the touching, she answered, “I told [S.R.] and she told the school official.” Thus, when the school official wrote in her report after speaking with B.D., “It had been earlier reported that [appellant] had touched [B.D.’s] leg,” that earlier report was not B.D.’s, since B.D. had not previously talked to the school official. It was S.R.’s report, in which S.R. apparently told the school official only that appellant touched B.D.’s leg. B.D. told the school official what she told the jury: appellant “touched more than [her] leg.” Therefore, even if the school official’s report had been admitted, it would not have served to impeach B.D.’s testimony or diminish her credibility. The district court correctly concluded that the result of appellant’s trial would not have been different if the report had been admitted.

## **2. The disputed juror**

“Attorneys must make tactical decisions during jury selection, and a claim of ineffective assistance of counsel cannot be established by merely complaining about counsel’s failure to challenge certain jurors or his failure to make proper objections.”

*Jama v. State*, 756 N.W.2d 107, 113 (Minn. App. 2008) (quotations omitted).

In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause. . . . The test is whether a prospective juror can set aside his or her

impression or opinion and render an impartial verdict. . . . [I]f jurors indicate their intention to set aside any preconceived notions and demonstrate to the satisfaction of the trial judge that they are able to do so, this court will not lightly substitute its own judgment.

*State v. Drieman*, 457 N.W.2d 703, 708-09 (Minn. 1990) (quotations and citations omitted).

The disputed juror, the music teacher in the elementary school attended by B.D., S.R., and appellant's children, was questioned by the court, counsel, and the prosecutor. She told the court that, because she had taught music to every child in the school for the past 12 years, she knew B.D. and S.R.; that she thought she could be fair regardless of her student-teacher relationship with B.D.; that, while she had "a heart for children," she believed she could be fair, and that she could wait until after she heard all the evidence to make a decision.

When counsel asked the juror if she would "listen to or believe one person over the other more because of [her] intimate knowledge of all the parties?", she responded "I would hope not. I don't think so." She also told counsel that (1) she thought she "ha[d] a pretty good gauge" of when students were making things up; (2) she would be able to rise above her soft spot for children in the court situation; and (3) she could be "fair and impartial" despite her knowledge of some of those involved in the case. Counsel said he would pass on a challenge for cause.

The prosecutor then questioned the juror:

Q. And you and I are friends, correct?

A. Right.

Q. Okay. And we've known each other for a few years?

- A. Couple years, yeah.
- Q. Okay. You have helped me out personally and we're in a book club together, correct?
- A. Mm-hmm. Correct.
- Q. . . . [C]ould you set aside that friendship and look at the facts and the evidence separately and make a determination? In other words, can you be fair and impartial to the defense as well as to the [s]tate in this matter?
- A. Yes, I can do that.

The prosecutor said, "I will also pass for cause." Counsel asked, "Judge, can I ask a couple more questions?" and was told he could not.

At the postconviction hearing, the juror said she had no information prior to trial about appellant having abused either B.D. or S.R. The prosecutor noted that, during jury selection, "there was no motion or request made from defense counsel. . . He did not ask to strike [the juror] for cause or for a peremptory."

The district court found that the juror "was not exposed to any prejudicial information" and "was asked about her relationship with the prosecuting attorney and indicated that she could set their friendship aside and be fair to the defendant." The district court also found that counsel "had an opportunity to question [the juror] and exercise a peremptory challenge, but chose to accept the juror" and that "[a]fter the state had questioned [the] juror . . . , [a]ny subsequent challenge for cause would have been denied, but no such challenge was made" and concluded that "[j]ury selection was conducted pursuant to the rules and [appellant] was not prejudiced thereby" and that "[t]he conduct of [counsel] regarding jury selection does not constitute ineffective assistance of counsel."

Appellant argues that counsel's failure to remove the juror either for cause or for a peremptory was ineffective assistance because counsel at the postconviction hearing testified that "he wanted [the juror] removed." But juror selection is a strategic process; counsel's decision to reserve a peremptory challenge for a possibly less acceptable juror and to refrain from using a peremptory challenge on a juror who had repeatedly asserted her ability to be impartial was a strategic decision. *See id.* at 708 (holding that test for striking a juror for cause is whether the juror can set aside his or her impressions or opinions and render an impartial verdict); *see also Jama*, 756 N.W.2d at 113 (holding that failure to challenge a particular juror is not ineffective assistance).

Even if the failure to remove this juror were ineffective assistance, appellant was not prejudiced by it. The jury unanimously found him guilty on only two of the three counts, so the juror obviously did not refuse to decide in appellant's favor in every situation as a result of her prejudice.

The district court did not err in denying postconviction relief on the basis of ineffective assistance of counsel.

**Affirmed.**