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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1044
A12-0876**

State of Minnesota,
Respondent,

vs.

Kenneth Jay Rothanburg,
Appellant

Kenneth Jay Rothanburg, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 19, 2013
Affirmed
Collins, Judge***

Stearns County District Court
File No. 73-CR-08-14500

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

In this consolidated appeal, appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court (1) erred by concluding that appellant's trial attorney did not have a conflict of interest, and (2) abused its discretion in dismissing appellant's petition for postconviction relief for ineffective assistance of counsel without conducting an evidentiary hearing. We affirm.

FACTS

In November 2008, on information provided by K.M., appellant Kenneth Rothanburg was charged with (1) first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (1996) (alleging single act of genital-to-genital contact, K.M. then under 13 years of age, Rothanburg more than 36 months older); (2) first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (1996) (alleging sexual penetration, multiple acts of sexual abuse over extended period of time, Rothanburg with significant relationship to K.M. then under 16 years of age);¹ and (3) second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (1996) (alleging sexual contact, multiple acts of sexual abuse over extended

¹ Finding no evidence of sexual penetration, the district court granted judgment of acquittal on this charge after the state rested on its case-in-chief. The state then filed an amended complaint containing only the surviving charges of first- and second-degree criminal sexual conduct subsequently submitted to the jury.

period of time, Rothanburg with significant relationship to K.M. then under 16 years of age). T.R., another person with a similar significant relationship to Rothanburg, made similar allegations but later recanted. Both the state and Rothanburg subpoenaed T.R. for Rothanburg's trial. The state subsequently decided not to present T.R. as a trial witness, but Rothanburg planned to do so. After T.R. failed to appear, Rothanburg did not attempt to locate T.R. and compel T.R.'s attendance before the trial concluded.

On January 20, 2011, the jury found Rothanburg guilty of both charges of first- and second-degree criminal sexual conduct. Rothanburg moved for a new trial, arguing that the state violated the *Brady* rule by releasing T.R. from the state's subpoena without notice to Rothanburg, and failing to make T.R. available for trial. *See Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1196-97 (1963). The district court denied the motion, finding that T.R.'s testimony would not have affected the jury's verdicts. The district court adjudicated Rothanburg's conviction of first-degree criminal sexual conduct and vacated the verdict on the lesser-included second-degree offense. On March 10, 2011, the district court sentenced Rothanburg in accordance with the sentencing guidelines to 86 months in prison.

Rothanburg appealed his conviction, and this court granted Rothanburg's subsequent motion to stay the direct appeal and remand to the district court for postconviction proceedings. In January 2012, Rothanburg petitioned for postconviction relief based on ineffective assistance of counsel, arguing that his trial attorney placed concern for T.R.'s emotional health above Rothanburg's interests. Rothanburg requested an evidentiary hearing, seeking to establish grounds for relief by presenting his trial

attorney's testimony as well as "any other testimony necessary."² The district court denied Rothanburg's request for an evidentiary hearing and dismissed Rothanburg's petition for postconviction relief, finding that Rothanburg's trial attorney exhibited ordinary sympathy for T.R.'s emotional state, his sympathy did not materially impair his representation of Rothanburg, and T.R.'s testimony would not have affected the jury verdict. This appeal followed.

DECISION

We will not disturb the postconviction court's decision absent an abuse of discretion. *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002). A criminal defendant has a "constitutional right to be represented by an attorney who is not burdened by conflicts of interest." *State v. Patterson*, 812 N.W.2d 106, 112 (Minn. 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984)). "A [constitutional] violation can be demonstrated by showing that an actual conflict of interest adversely affected counsel's performance." *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). The burden of a defendant claiming ineffective assistance because of a conflict of interest depends on whether and to what extent the alleged conflict was brought to the district court's attention. *State v. Paige*, 765 N.W.2d 134, 140 (Minn. App. 2009). "A defendant who raised no objection at trial must demonstrate that defense counsel actively represented conflicting interests and [that] this conflict adversely affected the lawyer's performance." *Id.* Until a defendant establishes that counsel

² Neither to the district court nor in briefing to this court did Rothanburg identify "any other testimony necessary" that he would have presented at an evidentiary hearing.

actively represented conflicting interests, he or she has not established the constitutional predicate for the claim. *Cuylar v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). “Decisions about which witnesses to call at trial . . . are questions of trial strategy that lie within the discretion of trial counsel.” *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007).

Rothanburg refers to several of his attorney’s comments to bolster his claim that his attorney had a conflict of interest when he chose not to locate and require T.R. to testify. Rothanburg’s attorney stated that he “knew [T.R.] had emotional problems” and that “it was a very emotional thing. She had told me she was afraid of the consequences if she testified. And I’m left with making a really hard decision of if I bring her there, am I just going to get an emotional basket case or what.” Rothanburg’s attorney later stated that his options were to go forward without T.R.’s testimony or retrieve her from school, but he added that he didn’t know “what state she’s in I was left to speculate . . . in the middle of a trial when I’m trying to balance everything out.” And he later said he did not locate T.R. because “I’ve been worried that she may actually kill herself. I’m serious. She’s that emotional.” Rothanburg’s attorney acknowledged that “any attack on [K.M.’s] credibility might have had an impact.”

Our review of the record does not support Rothanburg’s contention that the district court erred by finding that Rothanburg’s attorney was free from a conflict of interest. Rather, we conclude that the decision to not call T.R. as a witness was a trial tactic that lies in the discretion of trial counsel. Rothanburg’s counsel’s comments demonstrate his hesitancy to present and elicit testimony from an emotionally fragile and unreliable

witness. Although Rothanburg reasonably argues that his attorney's statements show concern for T.R.'s well-being, he fails to demonstrate that this concern resulted in conduct contrary to Rothanburg's interests.

Additionally, Rothanburg's argument that T.R.'s testimony was essential to dispute K.M.'s credibility is also unpersuasive. While we are mindful of the importance of the credibility of witnesses, T.R.'s potential value as a witness to impugn K.M.'s credibility was, at best, limited. As the district court noted in its posttrial order, T.R.'s testimony to attack credibility on direct examination would have been restricted to whether K.M. had a reputation for lying in the community. In pretrial interviews, T.R. told Rothanburg's attorney that K.M. had a bad reputation for lying in the community, but she informed the state that she had not talked with people in the community about K.M.'s reputation for truthfulness.

Finally, Rothanburg argues that he is entitled to an evidentiary hearing to develop his claim of ineffective assistance of counsel. We review the denial of a request for an evidentiary hearing for an abuse of discretion. *Ferguson*, 645 N.W.2d at 446. Summary denial of postconviction relief is appropriate when "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2012). In postconviction proceedings, an evidentiary hearing is required whenever unresolved material facts are in dispute that must be resolved in order to determine the issues raised on the merits. *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). The allegations raised in the postconviction petition must be more than

“conclusory, argumentative assertions [] without factual support in the record.” *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007).

In his petition for postconviction relief, Rothanburg requested an evidentiary hearing to present his attorney’s testimony as well as “any other testimony necessary.” This bare request does not demonstrate that there are unresolved material facts that could be resolved by an evidentiary hearing. *See Hodgson*, 540 N.W.2d 517. The district court concluded that Rothanburg’s “allegations do not warrant a hearing because [his attorney]’s decision not to call [T.R.] in this case does not support a claim for ineffective assistance of counsel. Moreover . . . [T.R.]’s testimony would not have affected the jury’s verdict.” We agree, because “the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1.

On this record, the district court did not err by concluding that Rothanburg’s attorney was not ineffective, nor did the district court abuse its discretion by dismissing Rothanburg’s petition for postconviction relief without conducting an evidentiary hearing.

Affirmed.