

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0655

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER PAUL MCKEEN,

Defendant and Appellant.

APPELLANT'S ANDERS BRIEF

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Honorable Donald L. Harris

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B. Judgment (Doc. #146) 8 pages

I. INTRODUCTION

After carefully examining the record on appeal, and researching the relevant law, Counsel has concluded that this case has no legally non-frivolous issues. Counsel has reviewed the entire record, researched any possible violations of the applicable provisions of the Montana or U.S. Constitutions, the applicable statutes and the Montana Rules of Evidence, in reaching this conclusion. As Counsel has decided that no non-frivolous issues are presented by this appeal, she requests leave to withdraw as counsel and submits this brief, in accord with Sec. 46-8-103, M.C.A.

II. ISSUES PRESENTED

A. Was Mr. McKeen denied the effective assistance of counsel, when his trial counsel failed to object to prejudicial testimonies by the State's expert on child sexual abuse and the lead detective, and to exclude the belated SANE exam results?

III. COMBINED PROCEDURAL AND FACTUAL STATEMENT

a. Facts of Case.

In 2017 and 2018 M.V, the minor daughter of Grace Vasquez, Mr. McKeen's partner, was sexually assaulted by him, at his trailer in

Lockwood, Montana. App. A, DC# 1- Motion for leave and Supp.

Affidavit in support. Grace was at work when the assaults occurred, and M.V. was 8 years old. Id.

In June 2018, M.V. lost her journal, and her aunt, Priscilla Guerrero, whom had bought it for her, helped her look for it. Tr. Tr., Vol, I, p. 140-43. Eventually, M.V.'s cousin, Victoria Vasquez, found it, and when she did, she read part of it that was very disturbing. Id, p.168. She read a passage in which M.V. said she hated the Defendant, and he had done sex with her. Id, p. 170-71. CAO exhibits 3, 4, 5 & 8. She told her mother, Priscilla, whom reported the allegation to Child Protective Services on June 28, 2018. Id, p. 177.

M.V. also had previously told her older sister, Marrisa Pearson, that when she slept between Mr. McKeen and her mother in one bed, that he touched her between her legs. Tr. Tr. Vol IV, pp. 628-29. However, the incident was not reported, and M.V.'s mother allegedly confronted him, and told him not to repeat it. Id.

Detective Denise Baum, of the Billings Police Department, was assigned to chair the investigation. Tr. Tr. Vol. II, p.p. 262-64. A forensic interview of M.V. was conducted on July 5, 2018, and during

that interview, M.V. described that Mr. McKeen put his private part into her back private part, and the assaults occurred on 3 to 4 occasions, with the last one being in late spring, 2018. Id.

Dr. Cynthia Brewer conducted a SANE examination of M.V. on July 31, 2018, and she reported abnormal findings in M.V.'s hymen and other genital areas, that she opined were indicative of child sexual abuse. Tr. Tr. Vol. III. pp. 364-70. However, she failed to take samples of a green discharge the child had, citing the victim's need to use the restroom. Id.

The defense expert, Dr. Felice Gersh, contested that the abnormal findings cited by Dr. Brewer were erroneous, and that the anatomical feature she noticed, was embryonic, and not from child sexual abuse. Tr. Tr. Vol. III, pp. 536-40. She also testified that Dr. Brewer didn't conduct the examination from the correct position, and she should have tested the green discharge, despite M.V.'s need to urinate. Id, p. 576. Basically, the doctors disagreed on the nature and configuration of M.V.'s hymenal tissue, as to whether or not the structure of that tissue was normal or was damaged by sexual abuse. Tr. Tr. Vol. II & III; pp.342-475; (Dr. Brewer); pp. 509-512 (Dr. Hersh).

Mr. Mc Keen was interviewed after his arrest on May 10, 2019, by Detective Baum, and told her, after being Mirandized and when confronted with the allegations, that "it didn't happen."
Tr. Tr. Vol. II, p. 100.

B. Procedural Events.

On May 8, 2019, Mr. McKeen was charged with 2 counts of sexual intercourse without consent with a minor, and 1 count of sexual assault of a minor, contrary to Sec. 45- 5-502 (3) & (4) (a), M.C.A. App. A, DC## 1 & 3 (Mot for Leave to file and Supp Aff; Information. He was arraigned and bond was set on May 13, 2019, three days after his arrest. Id, DC# 5- Minute Entry. After two changes of court appointed counsel on January 21, and June 26, 2020, trial status hearing was held on November 6, 2020: Id, DC# 57, and jury trial was set for January 24, 2022. Id, DC# 59.

The state and defense filed notices of expert witness testimony. Id, DC# 18 & 86, and later, the defense filed to exclude that expert testimony. Id, DC# 101.

The State also filed a motion to exclude allegedly improper defense expert testimony on July 15, 2021. Id, DC# 93; and the Defense filed their response on July 30, 2021. Id, DC# 100.

On February 26, 2021, the state filed their amended information. Id, DC# 67, and the charge remained the same as previously filed.

A motion to depose Dr. Cynthia Brewer was filed by the state on February 26, 2021, and an order granted on the same date. Id, DC## 62& 66.

Defense counsel filed a motion to produce records for in camera review on April 20, 2021, DC# 78, and an order was issued on the same date. Id, DC# 79. The defense filed another motion for a subpoena duces tecum and in camera inspection on July 9, 2021, and an order was granted on July 12, 2021, and a subpoena issued the same date for the M.V.'s counseling records. Id, DC# 91 & 92.

On May 12, 2021, a final pretrial conference was held. Id, DC# 84, and trial was reset. Id, DC# 85. The state and defense filed trial briefs. Id, DC ## ## 71,73, 98 & 102.

Another final pretrial conference was held on January 20, 2022. DC# 116, and defense counsel filed their exhibit list on January 21,

2022. Id, DC# 117. Defense counsel also filed a motion in limine to admit SANE exam photos on January 25, 2022. Id, DC# 119.

A jury trial was held on January 24-27. Id, DC# 118.00; 118.01; 121 & 123.

The state called six witnesses, including their expert, Wendy Dutton. Tr. Tr., Vol. I- IV. Ms. Dutton testified extensively as a blind expert witness. Id Vol. II, pp. 196-251. Her testimony included that when children are interviewed in a courtroom setting, two things occur; they provide less information in their narrative and when they are asked leading questions, they are more likely to go along with the lead. Id, pp. 227-28. As a basis for these opinions , she stated this was consistent with what she had seen, and that research supported this opinion. Id, p. 228. Defense counsel did not object to this line of questioning.

When Detective Denise Baum testified, she stated that Officer Shawn Wichman, whom did the forensic interview, conducted it in line with teh requisite protocols and she outlined the training required for such interviews. Tr. Tr. Vol II, pp. 285-87. Detective Baum further testified that older children are able to provide more details, and that if

something has recently happened, a lot of time the child is still in the processing stage. Id, p. 288. She also was allowed to opine that M.V. was a "very good historian." Id, p. 289.

Defense counsel did not object to this line of testimony as inadmissible expert testimony or as vouching for the victim's credibility. Detective Baum admitted on cross examination that the SANE exam performed by Dr. Brewer fell outside the recommended time limit of 120 hours of the alleged assault, or within five days. Id, p. 330.

Dr. Cynthia Brewer testified extensively to her qualifications and the SANE examination she conducted on July 31, 2018, and agreed the date of that exam fell outside the typical time limit of 120 hours. Id, pp.341- 360. Neither defense counsel requested to voir dire her outside the jury's presence, nor was a motion in limine filed to exclude her testimony and opinions due to the failure to observe the time limits for a SANE exam.

During trial, the lower court did eventually grant the defense request, which was staunchly objected to by the State, to admit sensitive photos of M.V.'s genitalia, over the State's objection, citing the need for the jury to view the actual photos and Dr. Gersh's opinion that

it was essential to admit those photos. Tr. Tr. Vol. III, p.73. The lower court did order that the courtroom be cleared when the photos were displayed and they be sealed. Id.

For the defense case, defense counsel first called Dr. Felicia Hersh, and her testimony, for the most part, rebutted and disagreed with that of Dr. Brewer. Tr. Tr. Vol. IV, pp. 526-620. She specifically stated that the hymen was normal, and Dr. Brewer did not follow accepted protocols for the SANE exams conducted. Id, pp. 562; 575; 583. The defense called Marissa Pearson was their last witness. Id, pp. 623-34. She testified that in December, 2017, M.V., whom is her younger sister, had previously told her when she her mother, and Mr. McKeen slept in one bed, and that during one night he touched her leg. Id, p. 632. She also told the detective that M.V. may have been confused about what sex was, due to her being so young. Id, p. 634.

After both parties presented closing arguments, the jury retired and later returned guilty verdicts on all three counts. App. A, DC###127, 128 & 129.

On August 3, 2022, sentencing was held and Mr. McKeen was sentenced to 60 years prison on each count, to run concurrently. App. B-DC# 146- Sent Judgment.

His notice of appeal was filed on November 17, 2022. App. A, DC# 151.

IV. SUMMARY OF ARGUMENT

In this criminal appeal, the only potential issues for appeal are ineffective assistance of counsel at the trial stage. Arguably, defense counsel should have filed to exclude the expert testimony of Dr. Brewer as her opinions resulted from an untimely SANE exam and also to limit the expert testimony of Wendy Dutton, on how testifying in a courtroom setting impacts an alleged child sexual abuse victim, and as well Detective Baum's testimony on M.V. being a very good historian, and the forensic examiner doing a competent job for that interview. Additionally, as the SANE exam was done outside the time limit, those results could have been challenged.

However, it is unlikely that these issues can be litigated in this appeal, as the record is not clear on why either or both defense counsel failed to make objections, and/ or file appropriate pretrial motions in

limine. Matters of trial strategy are typically not taken up on direct appeal, where IAC is alleged. Additionally, even assuming errors occurred, it is arguable that none of such errors alone or combined, served to prejudice the Defendant's case, such that a different outcome could be expected.

V. ARGUMENT

A. Standards of Review.

Ineffective assistance of counsel claims are mixed questions of law and fact which are reviewed de novo. *State v. Johnston*, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70 (citing *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095).

The admission or exclusion of expert testimony is reviewed pursuant to an abuse of discretion standard. Whether an expert is allowed to testify at trial is an evidentiary ruling. *Doyle v. Clark*, 2011 MT 117, ¶ 22, 360 Mont. 450, 254 P.3d 570. A district court's evidentiary rulings are reviewed for abuse of discretion. *State v. Hardman*, 2012 MT 70, ¶ 8, 364 Mont. 361, 276 P.3d 839; *State v. Robins*, 2013 MT 71, ¶ 9, 369 Mont. 291, 293–94, 297 P.3d 1213, 1215.

B. The Operative Standard for Ineffective Assistance of Counsel.

When a defendant raises ineffective assistance of counsel claims on direct appeal, first, it must be determined whether the claims are more appropriately addressed in a postconviction relief proceeding. *State v. Rodriguez*, 2021 MT 65, ¶ 31, 403 Mont. 360, 483 P.3d 1080 (citing *Santoro*, ¶ 16). Ineffective assistance of counsel claims are appropriate for review on direct appeal when “no plausible justification” exists for the actions or omissions of defense counsel. *Kougl*, ¶ 15 (citing *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641); *State v. Secrease*, 2021 MT 212, ¶ 14, 405 Mont. 229, 235, 493 P.3d 335, 339.

The Montana Supreme Court has recently reaffirmed the standard for appellate review of an “IAC” claim, on direct appeal.

“[f]irst, the defendant must show that counsel's performance was deficient,” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *State v. Rose*, 2017 MT 289, ¶ 19, 389 Mont. 374, 382, 406 P.3d 443, 449.

In order to maintain an “IAC” claim on direct appeal, however, claims of ineffective assistance of counsel are only reviewed once a record has

been developed. If there exists no record - based justification for the actions or omissions of trial counsel, the Montana Supreme Court may review such claims on direct appeal .

C. Potential IAC claims for Mr. Christopher McKeen.

The three felony charges against Mr. McKeen were very serious, and carried substantial prison terms. He was represented by not only one but two defense counsel. Key to the State's case was the expert testimony of Dr. Cynthia Brewer, whom examined M.V., the victim, and provided damaging expert opinions that implied Mr. Mc Keen in the crimes. Tr. Tr. Vol III, pp. 342-401. She did not conduct the SANE exam within the typical 120 hours or five days, and defense counsel didn't object to any of her findings on that basis. Arguably, they could have filed a motion in limine to exclude all or part of her testimony. However, it appears from the record, that the failure to meet such a deadline was beyond the control of Dr. Brewer or the State's investigators. This is because of a delayed reporting issue, and the victim's inability to precisely date the assaults.

Moreover, the defense had retained a competent expert on the medical issues relating to the SANE exam and the alleged

abnormalities described by Dr. Brewer, Dr. Felice Gersh. Nowhere in her testimony, both in the preliminary in chambers testimony, and her trial testimony, did she challenge the opinions offered by Dr. Brewer, due to the failure to meet that time limit for a SANE exam.

A potential second issue of IAC, was defense counsel's failure to object to certain prejudicial testimony by Wendy Dutton, the State's child sexual abuse expert. Ms. Dutton, whom testified as a blind expert, and provided extensive opinions, veered outside the typical range of testimony, to critique the trial process itself. She proffered that both research and her own experience showed that in a courtroom setting, child victims react in two ways- they provide less information in their narrative and when they are asked leading questions, they are more likely to go along with the lead. *Id.*, pp. 227-28.

Arguably, this testimony is objectionable, for it invades a criminal defendant's right of cross examination, a fundamental right protected by both the Montana Constitution, Art. II, Sec. 24, and the Sixth Amendment of the U.S. Constitution. However, Ms. Dutton did not specify whether direct exam by the State or cross exam by defense counsel implicated these conditions. A second objection would be that

this testimony functionally acts as impermissible vouching by the state, for implicit in this opinion, is that if the jury sees shortcomings in a victim's trial testimony, and is inclined to discount that testimony, the fault is the trial process itself, and that stressful environment.

The Montana Supreme Court has ruled that is solely the jury's duty to determine the credibility of a witness. *State v. Robins*, 2013 MT 71, ¶ 11, 369 Mont. 291, 297 P.3d 1213. Consequently, no expert, defense or prosecution, is allowed to comment on the credibility of an alleged victim. *Robins*, ¶ 11.

However, one exception to this prohibition does allows an expert to comment directly on a victim's credibility in child sexual abuse cases in some cases. *Robins*, ¶ 10 (citing *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991)). The exception we established in *Scheffelman* allows an expert to directly comment on the victim's credibility if the expert can meet certain criteria, *Robins*, ¶ 11. The *Scheffelman* exception is implicated **“only when the expert directly comments on the victim's credibility.”** *Robins*, ¶ 12. **“Expert testimony that only indirectly bears on a child sexual abuse victim's credibility does not have to satisfy the [*Scheffelman*]**

exception's requirements to be admissible.” *Robins*, ¶ 12 (citing *State v. Morgan*, 1998 MT 268, 291 Mont. 347, 968 P.2d 1120).

Here, while Ms. Dutton’s comments on the court room process’s impact on child victims’ testimony could be viewed as improper comment, such must also be evaluated for potential prejudice.

The focus then turns to the second prong of the Strickland test which concerns whether counsel's deficient performance renders the trial result unreliable or the proceedings fundamentally unfair. *Riggs v. State*, 2011 MT 239, ¶ 12, 362 Mont. 140, 264 P.3d 693. To establish prejudice, the defendant must show that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Riggs*, ¶ 12.

Also, defense counsel may not have objected as a matter of trial strategy, and those decisions, cannot be deduced from this trial record.

As this Court noted, in a very recent case alleging IAC at the trial stage, for counsel’s failure to object to video testimony:

“[W]e do not know whether the alleged errors in this case reflect a coherent trial strategy or whether they were reasonable and

deserve deference and we refuse to speculate.” *Soraich*, ¶ 24.
“Claims involving omissions of trial counsel are often ill-suited for direct appeal.” *Robinson*, ¶ 29.

State v. Sawyer, 2019 MT 93, ¶ 16, 395 Mont. 309, 315, 439 P.3d 931, 934.

The same arguments regarding improper comment on witness testimony and vouching, could apply to the testimony of Detective Baum, regarding that M.V. was a “very good historian,” and that her colleague, whom performed the forensic interview, complied with all the complex protocols for those important interviews.

This was likely expert, not merely lay testimony, and also constituted impermissible vouching. Detective Baum was not declared as an expert as to being able to accurately recite how forensic interviews of child sexual abuse victims must be conducted, and furthermore, for her to comment on a colleague’s credentials appears to be a serious conflict of interest.

“Accordingly, no witness may not comment on the credibility of another witness's testimony, nor can a prosecutor elicit such testimony. *Hayden*, ¶¶ 26, 31 (citing *State v. St. Germain*, 2007 MT 28, ¶ 27, 336 Mont. 17, 153 P.3d 591; *State v. Hensley*, 250 Mont. 478, 481, 821 P.2d 1029, 1031 (1991)).

The Montana Supreme Court has also emphasized that it is improper for a prosecutor to offer personal opinions as to witness credibility. *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506.

Ultimately, however, all these potential IAC claims must be viewed through the lens of actionable prejudice. *Strickland v. Washington*, supra. Viewing all these claims in light of the entire record, it does not appear that even assuming objections would have been successful, that the admission of these testimonies would have so prejudiced Mr. McKeen, that a different outcome at his jury trial would have occurred. The timing of the SANE exam was beyond the State's agents' control. The Dutton testimony was not major, and cross examination could have unduly emphasized it. Detective Baum's testimony, while borderline, may not rise to the level of improper vouching and impermissible comment on a witness' testimony. However, contrary arguments can be proffered, in the context of this case.

VI. CONCLUSION

Appropriate relief should be granted in this case.

DATED this 27th day of March, 2024.

/s/ Penelope S. Strong
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,372 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

DATED this 27th day of March, 2024.

/s/ Penelope S. Strong
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CERTIFICATE OF SERVICE

I, hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each attorney of record, and each party not represented by attorney in the above-referenced District Court action as follows:

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