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MARCH 22, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Wickham, Petitioner and Appellee, v. State of North Dakota, Defendant and Appellant.	)	Supreme Court No. 20210313 District Court No. 08-2020-CV-02968 08-2018-CR-02679

BRIEF OF THE APPELLEE

Appeal from the Order Granting Post-Conviction Relief Entered September 15, 2021.

Burleigh County District Court
South Central Judicial District
The Honorable Bobbi Weiler, Presiding

ORAL ARGUMENT REQUESTED

Dated March 22, 2022.

/s/ *Lloyd C. Suhr*

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ORAL ARGUMENT REQUESTED

[¶1] Wickham requests oral argument. Given the procedural history of this case and the fact-intensive nature of the issue, oral argument will be helpful to the Court.

STATEMENT OF THE ISSUE

[¶2] Whether the district court's findings in its Order Granting Post-Conviction Relief, which followed a full review of the trial record and an extensive evidentiary hearing, were clearly erroneous?

STANDARD OF REVIEW

[¶3] In Bridges v. State, this Court recently summarized the well-established standard of review in post-conviction relief proceedings:

> "A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding."

2021 ND 232, ¶ 5, 968 N.W.2d 188 (quoting Hunter v. State, 2020 ND 224, ¶ 11, 949 N.W.2d 841).

STATEMENT OF FACTS

[¶4] On August 27, 2018 the Petitioner (Wickham) was charged by Criminal Complaint in criminal case number 08-2018-CR-02679 with two counts of Gross Sexual Imposition. (R1:1:¶1). Count one was a class AA felony in violation of N.D.C.C. § 12.1-20-03(1)(a). Id. Count two was a class A felony in violation of N.D.C.C. § 12.1-20-03(2)(b). Id. The alleged victim for both counts was L.A. Id.

[¶5] On August 28, 2018 Wickham applied, and was approved for, court-appointed counsel. (R9). His trial counsel was assigned on August 29, 2018. (R9).

[¶6] Trial was scheduled in district court for January 22-23, 2019. (R31). As reflected by the transcript, trial was held January 22-24, 2019. (R194-197).

[¶7] Bismarck Police Department Detective Jon Lahr (Lahr) testified during the State's case-in-chief. (R196:135:6). During direct examination by the State, Lahr described the following exchange with Wickham:

> Q: Did you have a conversation with Mr. Wickham at that time when the vehicle was pulled over?
> A: It was very brief. Basically, *I told him that he was under arrest*. The patrolman made contact with Mrs. Wickham, the driver, first and then Mr. Wickham was in the passenger's seat. And then by the time I got up there, I had told Mr. Wickham to step out of the vehicle, which he complied. *I told him that he was under arrest*. He asked for what. I explained. And then at that time he was brought back to his vehicle. During that process, no information was obtained that was pertinent to this case or evidentiary value or exculpatory. *He basically, in summary, stated that he would like to speak with a lawyer or have a lawyer.*

(R196:179:13-25; 180:1).(Emphasis added).

[¶8] There was no testimony that Wickham had been read his Miranda rights. Wickham's trial counsel did not object to Lahr's testimony about Wickham's post-arrest request for counsel, did not request any kind of curative instruction, nor move for a mistrial. Id.

[¶9] The jury began deliberations on January 24th at approximately 9:35 a.m. (R197:354:6). During their deliberations, the jury had five separate questions. (R123; R124; R126; R128; R130).

[¶10] In their fourth question, the jury the jury informed the trial court "[a]t this point we are not in agreement as to the verdict and we might not be able to reach a

unanimous verdict. What happens in that case?" (R128). The trial court's response shows that the question was received at 2:00 p.m. (R129). The trial court instructed the jury to continue deliberations. Id.

[¶11] In their fifth question, the jury stated "[w]e'd like to hear the detective's testimony regarding his interactions with the defendant." (R130). The trial court's response shows that the question was received at 2:48 p.m. (R131). The trial court and the parties met outside the presence of the jury to discuss the scope and logistics of the jury rehearing Lahr's testimony. (R197:367:17-25; 368:1-13). The trial court agreed to have Lahr's testimony read back except for the portion summarizing his qualifications. (R197:367:30-24). During that meeting, Wickham's trial counsel did not seek a mistrial or curative instruction based on Lahr's original testimony that Wickham asked for a lawyer, did not object to the jury rehearing that portion of Lahr's testimony, and did not seek a curative instruction to accompany the read back of Lahr's testimony. Id.

[¶12] At 5:21 p.m. the trial received the jury's verdict. (R197:369:12-20). The jury returned guilty verdicts on both counts. (R132).

[¶13] Sentencing was scheduled for May 1, 2019. (R145). Criminal Judgment was entered that same day (R169). Wickham was sentenced on count 1 to twenty-five years incarceration with five suspended for a period of five years' probation to follow. (R169:1). On count 2 Wickham was sentenced to twenty years incarceration to run concurrently with the sentence in count 1. (R169:2).

[¶14] On May 6, 2019 Wickham filed a letter with the Court that was deemed a Notice of Appeal. (R175). The North Dakota Supreme Court affirmed the conviction. See State v. Wickham, 2020 ND 25, 938 N.W.2d 141.

[¶15] On November 3, 2020 Wickham filed an Application for Post-Conviction Relief (Application) in civil case number 08-2020-CV-02968. (R1). Subsequent references to the record shall be in relation to that civil file.

[¶16] The Application alleged, among several claims not before this Court on appeal, that the conviction was obtained in violation of Wickham's right to effective assistance of counsel under the 6th Amendment to the United States Constitution and Article 1 § 12 of the North Dakota Constitution when trial counsel failed to object, request a curative instruction, or move for a mistrial when Lahr improperly testified about Wickham's exercise of his right to counsel. (R1:6-7:¶2). On December 2, 2020 the State filed an Answer denying the allegation. (R7:3:¶2).

[¶17] An evidentiary hearing was scheduled for July 7, 2021. (R15).

[¶18] The transcript from the evidentiary hearing shall be cited to as ("Trans. P.___, lines ____"). On direct exam at the hearing, Wickham's trial counsel testified that he did not recall Lahr's testimony about Wickham asking for a lawyer. (Trans. P. 38, lines 11-25; P. 39, lines 1-5). He agreed that it would be improper to comment on a suspect's invocation of their Fifth Amendment right to counsel, but offered no explanation for failing to object, ask for a mistrial, or request a curative instruction in response to Lahr's testimony about Wickham asking for a lawyer after having been arrested. (Trans. P.39, lines 10-25; P. 40, line 1; P. 88, lines 10-17). Even though he had already conceded on direct exam that he didn't

even recall Lahr's testimony about Wickham's request for counsel, he nonetheless asserted that his failure to object to the statement was strategic. (Trans. P. 68-69).

[¶19] On September 15, 2021 the district court issued a nineteen page Order Granting Application for Post-Conviction Relief (Order) (R20). In addition to the considering the extensive testimony at the evidentiary hearing, the district court also reviewed the entire 373-page trial transcript prior to rendering a decision. (R20:1:¶1).

[[¶20] Much of the Order pertained to claims that are not before this Court. With respect to the failure to object when Lahr testified about Wickham's request for counsel, the district court concluded that trial counsel's performance was not objectively reasonable because he had a duty to protect Wickham's constitutional rights, he failed to do so by not objecting when the testimony was originally offered and when it was read back to the jury, and that this was not trial strategy. (R20:16-17;¶¶49-51).

[¶21] The trial court also concluded that trial counsel's error prejudiced Wickham because, had there been an objection, it would have been sustained and a mistrial declared given the magnitude of the issue and the fact the testimony was elicited during the State's direct examination of its own witness. (R20:17:¶52). The granting of a mistrial would have led to a different outcome in the case. (R20:18:¶54). The trial court also noted that the error prejudiced Wickham because the jury had been struggling to reach a unanimous verdict, and this was not a case where the issue of guilt was clear even without the constitutional error. (R20:17-18:¶53).

ARGUMENT

A. Standard for ineffective assistance of counsel

[¶22] The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to effective assistance of counsel. Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524 (citing Wright v. State, 2005 ND 217, ¶ 10, 707 N.W.2d 242). Whether Wickham received ineffective assistance of counsel is ultimately a mixed question of law and fact. Truelove v. State, 2020 ND 142, 945 N.W.2d 272, 275 (citing Edwardson v. State, 2019 ND 297, ¶ 8, 936 N.W.2d 376).

[¶23] The United States Supreme Court established the standard for reviewing claims of ineffective assistance in Strickland v. Washington, 466 U.S. 668 (1984). This standard is applied in North Dakota. Truelove at ¶ 7. There are two "prongs".

[¶24] The first prong requires Wickham to prove that trial counsel's performance fell below an objective standard of reasonableness. Id. (citing Strickland at 687-88). The performance is measured through consideration of prevailing professional norms. Id. There is a strong presumption that an attorney's performance falls within the wide range of reasonable professional assistance, and reviewing courts are required to consciously try to limit the distorting effect of hindsight. Id.

[¶25] The second prong requires Wickham to establish that trial counsel's deficient performance resulted in prejudice. Id. To meet that burden, Wickham must show that but for trial counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. Id.; See

Strickland at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

1. The district court properly found trial counsel's performance fell below an objective standard of reasonableness

[¶26] Lahr's testimony that Wickham requested a lawyer was heard by the jury on two separate occasions without objection from trial counsel. The first was during Lahr's testimony on direct exam by the State. (R196:179:13-25; 180:1). The second was when Lahr's testimony, exclusive of that portion outlining his qualifications, was read back to the jury. (R197:367:17-25; 368-369:1-7).

[¶27] There is no legally material distinction between a defendant's exercise of their right to remain silent and the exercise of their right to counsel. See e.g. Senn v. State, 947 So.2d 596, 597 (Fla. 2007)(comment on a defendant's request for an attorney may be construed as a comment on their invoking the right to remain silent). This is logical, as the defendant who asks for a lawyer is, by doing so, telling law enforcement that they do not want to talk.

[¶28] In its Order, the district court summarized the constitutional implications this Court has found to exist when comments are made about a defendant's right to remain silent:

> A comment on the defendant's post-arrest silence is an improper comment on the right to remain silent in violation of the Fifth and Fourteenth Amendments of the United States Constitution. *State v. Ebach*, 1999 ND 5, ¶ 15, 589 N.W.2d 566. The prosecution may not impeach a defendant with his post-arrest silence if he was advised of his rights as required under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because the *Miranda* warning carries an implicit "assurance that silence will carry no penalty" and it is "fundamentally unfair" to use post-warning silence. *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). "When a defendant invokes his Fifth Amendment right against self-

> incrimination by choosing to remain silent, it is a violation of the defendant's due process rights to use his silence for impeachment." *State v. Anderson*, 2016 ND 28, ¶ 12, 875 N.W.2d 496. . . . "Improper comment about a defendant's invocation of the right to remain silent is a constitutional error that may be reviewed on appeal even though not raised at trial." *State v. Gaede*, 2007 ND 125, ¶ 18, 736 N.W.2d 418.

State v. Wilder, 2018 ND 93, ¶¶ 5-6, 909 N.W.2d 684. (R20:13-14:¶43)

[¶29] In Freeman v. Class, 95 F.3d 639, (8th Cir. 1996), the Eighth Circuit Court of Appeals addressed the very point before this Court -- the constitutional implications of defense counsel's failure to object when comments are made at trial about a defendant's exercise of their right to remain silent. Freeman was arrested and charged with grand theft of an automobile. Id. at 641. During trial, the prosecutor elicited testimony from a State Trooper and a Deputy Sheriff concerning his post-arrest exercise of his right to remain silent. Id. at 643. Additionally, during closing arguments the prosecutor alluded to Freeman's exercise of his right to remain silent. Id. Defense counsel did not object any of the testimony or statements nor did he move for a mistrial. Id.

[¶30] Freeman was convicted. Id. at 639. He brought a petition for writ of habeas corpus in state court alleging ineffective assistance of counsel. Id. His petition was denied, and the South Dakota Supreme Court affirmed. Id. Freeman than filed a like petition in federal court, which was granted. Id.

[¶31] In affirming, the Eighth Circuit Court of Appeals made it clear that a criminal defendant has a right to remain silent and that defense counsel had "no reasonable factual basis not to object" when testimony and commentary about the exercise of that right had been proffered. Id. at 643-44. The court opined that "a motion for

mistrial would have been appropriate and should have been made". Id. at 644. It was important to the Eighth Circuit that two of the three references to Freeman's exercise of his right to remain silent were elicited during the prosecution's case-in-chief on direct examination. Id. The message being sent to the jury was that Freeman must have had something to hide since he exercised his right to remain silent, which was clearly prejudicial. Id.

[¶32] Just as in Freeman, the comments about the exercise of his constitutional rights came from a State witness, during the State's direct examination, and during the State's case-in-chief. Although the State attempts to characterize it as a "yes or no" question, the question from the State to Lahr that resulted in the improper comment broadly asked about "a conversation with Mr. Wickham at that time when their vehicle was pulled over" (R196:179:13-14). If only a yes-or-no answer was sought, the State could have stopped Lahr from going on any further. Instead, the State allowed Lahr to speak freely until he commented on Wickham's request for a lawyer. The State asked the question. The State cannot be allowed to blame the witness for overstepping with his answer into constitutionally forbidden territory.

[¶33] The implication of Lahr's testimony regarding Wickham's request for counsel is the same as the implication in Freeman, - the defendant asked for a lawyer so he must have had something to hide. In failing to object to this commentary not only at the time Lahr originally testified to Wickham's request for counsel, but again when Lahr's testimony was read back to the jury, trial counsel committed an error of constitutional magnitude effecting the fundamental fairness of the trial.

[¶34] The State argues that the district court failed to recognize the presumption of reasonableness. However, the district court rejected several other grounds asserted as a basis for ineffective assistance of counsel. (R20:8-13: ¶¶30-42). If the district court was not honoring the presumption of reasonableness, then it would not have rejected several other claims of ineffective assistance and did not simply find in favor of Wickham on all of them. The State's argument is groundless.

[¶35] The State goes to great lengths to argue that trial counsel's failure to object was part of a strategy to avoid drawing attention to the statement about Wickham's request for a lawyer in the presence of the jury. There are three problems with this argument.

[¶36] First, trial counsel conceded in his testimony at the evidentiary hearing that he did not even recall Lahr's testimony about Wickham's request for counsel. (Trans. P. 38, lines 11-25; P. 39, lines 1-5). It is illogical that trial counsel could not even recall the testimony at issue but yet could recall his failure to object to it being strategic.

[¶37] Second, in the encounter where Wickham he had requested a lawyer, he had been placed under arrest and made no statements to Lahr about the case. (R196:179:13-25; 180:1). Yet, in his testimony at the evidentiary hearing trial counsel focused on a completely different encounter where Wickham was not in custody and did make statements. (Trans. P.68, lines 8-25; P.69, lines 1-15). Confusingly, trial counsel attempted to explain his failure to object to Lahr's testimony about Wickham's request for a lawyer by focusing on an entirely different

and unrelated encounter between Lahr and Wickham altogether. It makes no sense how this can be deemed strategic.

[¶38] Third, the trial court and the parties met outside the presence of the jury to discuss the scope and logistics of the jury rehearing Lahr's testimony. (R197:367:17-25; 368:1-13). Even though he could have done so without drawing the jury's attention to the issue, (since they were not present) Wickham's trial counsel did not seek a mistrial or curative instruction based on Lahr's original testimony that Wickham asked for a lawyer, did not object to the jury rehearing that portion of Lahr's testimony, and did not seek a curative instruction to accompany the read back of Lahr's testimony. Id. This shows that trial counsel's failure to object, both during Lahr's live testimony and during the readback, was not the result of strategy. It was the result of error.

[¶39] The district court's finding that the first prong of Strickland was met is supported by the record. It was not clearly erroneous.

2. The district court properly found that trial counsel's failure to object was prejudicial

[¶40] The district court found that had trial counsel objected, "this Court would have sustained the objection and declared a mistrial based on Detective Lahr's testimony regarding Wickham's invocation of his right to counsel." (R20:17:¶52). The district court elaborated that this was because the testimony was elicited by the State's own questioning of its own witnesses, and because violations of Wickham's constitutional rights cannot be taken lightly. Id. Where the district court itself states that, had trial counsel objected there would have been a mistrial

declared rather than a conviction, it is not just a "reasonable probability" that the outcome would have been different, it is a certainty.

[¶41] The State takes exception to Judge Weiler (as the post-conviction proceeding judge in district court) opining how the objection would have been handled at trial since Judge Hagerty (who has since retired) was the trial court judge. The State characterizes Judge Weiler's opinion about the propriety of a mistrial as "mere speculation" since it was not based on the "in-the-moment knowledge of the circumstances of the trial that would have been known to the trial judge". (Appellant's Brief :13:¶21).

[¶42] The State disregards the fact that Judge Weiler reviewed the entire trial transcript, presided over an extensive evidentiary hearing, and is well-versed in the underlying proceedings. To suggest that because Judge Weiler did not preside over the trial her opinion on the propriety of a mistrial is little more than "speculation" is incredulous. It treats review of the record as meaningless. Additionally, the mistrial remedy Judge Weiler described was not a novel one as this exact issue, involving the same trial prosecutor, caused a mistrial to be declared on June 27, 2019 in State v. David Schneider, 08-2018-CR-02488, a fact pointed out to the district court in Wickham's Post-Hearing Brief. (R35:14:¶43).

[¶43] Since trial counsel never objected to Lahr's testimony about Wickham's request for counsel at any time, the district court never had a chance to consider a mistrial, curative instruction, or to establish a record to preserve the issue on direct appeal. Where trial counsel fails to lodge a proper objection at trial, and it deprives the district court of an opportunity to engage in meaningful review of

available remedies, this can be ineffective assistance of counsel. See e.g. Brewer v. State, 2019 ND 69, 924 N.W.2d 87 (failure of defense counsel to object to Rule 404(b) evidence at time of trial found ineffective as it limited trial court's analysis at trial and preservation of issue on appeal).

[¶44] The State contends that the evidence was sufficient to convict notwithstanding the constitutional violation, and that the district court failed to assess it. Perhaps the State believes it had sufficient evidence, but as the district court noted, "[t]o the jury, Wickham's guilt was not, by any means, immediately clear. It took the jury extensive time to reach a unanimous verdict, and the jury, at least once, informed the Court that the jurors were unable to reach a unanimous verdict." (R20:17-18:¶53). "[T]his was not a case where the evidence implicating the Defendant's guilt was otherwise clear…" (R20:17:¶53).

[¶45] It was not lost upon the district court, nor should it be lost upon this Court, that the jury deliberated for several hours, expressly stated it could not reach a verdict, and only after hearing Lahr's testimony a second time, without objection, was it able to render a verdict a short time later. As the district court correctly noted, "[h]ad the jury not heard this testimony, especially for a second time, there is a reasonable probability the jury could have remained deadlocked and a mistrial would have been ordered." (R20:19:¶56).

[¶46] The district court's finding that the second prong of Strickland was met is supported by the record. It was not clearly erroneous.

CONCLUSION

[¶47] The district court's Order was proper. Wickham respectfully requests that it be affirmed in all respects.

Dated March 22, 2022.

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CERTIFICATE OF COMPLIANCE

[¶1] The undersigned hereby certifies the Brief of the Appellee complies with the page limitations set forth in Rule 32 of the North Dakota Rules of Appellate Procedure.

[¶2] The Brief has seventeen (17) pages according to the word processing page counting feature.

Dated March 22, 2022.

/s/ *Lloyd C. Suhr*

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CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on March 22, 2022, I filed the **Brief of the Appellee** with the Clerk of the North Dakota Supreme Court by electronic means using email address supclerkofcourt@ndcourts.gov with a copy electronically sent to Assistant Burleigh County State's Attorney Joshua Amundson, at his designated address for e-filing, bc08@nd.gov, and to the best of my knowledge said filing and service are in accordance with N.D. R. App. P. 25.

Dated March 22, 2022.

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