STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0662

Jason Edward Banks, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed February 12, 2018
Reversed
Hooten, Judge

Anoka County District Court
File No. 02-CR-13-8670

Gary R. Wolf, Gary Wolf Law, Minneapolis, Minnesota (for respondent)

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant state argues that the postconviction court erred in granting respondent's postconviction petition because it lacked jurisdiction to hear his petition and misapplied the two-prong test in *Strickland v. Washington* relative to his ineffective assistance of

counsel claims. *See* 466 U.S. 688, 104 S. Ct. 2052 (1984). We reverse, holding that while the postconviction court had jurisdiction to consider respondent's petition, it misapplied the *Strickland* test.

FACTS

Respondent Jason Edward Banks was charged with multiple counts of criminal sexual conduct arising out of an incident that occurred in the early morning of December 8, 2013, when he, as a driver of a taxi cab, had sex with a female patron, L.G., in the backseat. L.G. was picked up at about 2:30 a.m. from a bar, and the cab's GPS indicated that the cab was stopped from 2:41 a.m. until 3:06 a.m. on the way to L.G.'s home. Afterwards, Banks took L.G. home, dropping her off at 3:30 a.m.

According to Banks, L.G. had rubbed his shoulders as he was driving and begged him for sex after he had initially resisted her overtures. And, he claimed that during that 25 minutes when the cab was stopped, they engaged in consensual sexual activity. He admitted that he penetrated L.G. digitally, but alleged that, because there was not enough room in the backseat, and she had her pants only lowered and her knee high boots on, he was not able to engage in sexual intercourse with her.

According to L.G., she had been drinking alcohol earlier in the night at a bar and, after giving him her address, had fallen asleep during the ride when she woke up in a wooded area with Banks on top of her in the backseat engaging in sexual intercourse with her. L.G. claimed that as soon as she awoke, she immediately yelled "no" and started yelling profanities. She testified that although she tried to move away from him, he was bigger and stronger than she was, and that she was suffering from a back disability. She

claimed that he used his superior strength to hold her down, causing her to sustain bruises on her arms and thigh, and abrasions and tears to her genitalia.

After Banks was arrested and charged, the district court appointed a public defender to represent Banks. The public defender, as part of his trial preparation, reviewed a security video of L.G. leaving the bar and retained two experts: Dr. Steven Tredal and Dr. Glenn Hardin. Dr. Tredal was expected to testify that:

> The minor bruises on the arms and leg as well as the minor bruises or abrasions on the genitalia of the alleged female victim do not justify a medical conclusion that this could result only from forced sexual activity as this can also be seen with consensual sex. This is not unusual where either party is intoxicated and thus has decreased pain sensation, where there is a lack of lubrication or there is unusual positioning, e.g. in back seat of a car.

Dr. Hardin was expected to testify that, based on the alcohol content of L.G.'s blood, "a person such as [L.G.] would not exhibit obvious signs of intoxication . . . . [A]n individual such as [L.G.] could experience memory loss while appearing cognitively and physically intact to all outward appearances." Prior to trial, Banks's public defender filed motions in limine for the district court to approve these two doctors as expert witnesses. At the time trial was scheduled to begin, the court had approved Tredal's testimony but was still considering the motion regarding Hardin's testimony.

On the morning of trial, Banks discharged his public defender and hired a private attorney (trial counsel). At the request of trial counsel, the court granted a continuance. At a later pretrial hearing, trial counsel advised the court that the defense was not offering any expert testimony. At trial, trial counsel did not offer the security video and did not present

any expert testimony. But trial counsel engaged in cross-examination of the state's witnesses, including the state's forensic scientists regarding dissipation rates of alcohol and medications in the blood, the effect of mixing medications with alcohol, and increased tolerance that develops with long-term medication use. He also cross-examined the state's sexual assault nurse examiner regarding whether the bruises and abrasions L.G. sustained could also have been sustained during consensual sexual activity.

The jury found Banks guilty as charged. Following the verdict but prior to sentencing, Banks fired trial counsel and hired a second private attorney. Banks was convicted of and sentenced for one count of criminal sexual conduct in the first degree under Minn. Stat. § 609.342, subd. 1(e) (2012), which provides that a person is guilty of first-degree criminal sexual conduct if he causes personal injury to the victim by either using force or coercion to accomplish sexual penetration or if he knows or has reason to know that the victim is mentally impaired, mentally incapacitated, or physically helpless.

After sentencing, Banks filed a direct appeal,[1] but then moved to stay that appeal and remand for postconviction proceedings. That motion was granted, and this court ordered Banks to "file a postconviction petition, or a motion to reinstate the appeal, on or before July 14, 2016." On July 13, Banks filed a petition for postconviction relief. However, that petition was not served on the state until August 4, because at the time of filing, "there was not any service contact listed on the case for [the Anoka County Attorney's] office." The postconviction court nevertheless ordered an evidentiary hearing

[1] *See State v. Banks*, No. A16-0224 (Minn. App. 2016) (dismissing appeal without prejudice because appeal is moot).

on Banks's petition and, following that hearing, set aside Banks's conviction due to ineffective assistance of trial counsel and granted him a new trial.

The state appeals.

D E C I S I O N

The state argues that the postconviction court erred in two regards: first, that the court lacked jurisdiction to even hear Banks's petition for postconviction relief and, second, that even if the court had jurisdiction, the court erred in concluding that Banks received ineffective assistance of counsel.

I. Jurisdiction

"Questions concerning the authority and jurisdiction of the lower courts are legal issues subject to de novo review." *State v. Pflepsen*, 590 N.W.2d 759, 763 (Minn. 1999). Once an appeal is properly filed, a district court has no jurisdiction over matters necessarily involved in the appeal. *State v. Barnes*, 249 Minn. 301, 302–03, 81 N.W.2d 864, 866 (1957). However, "[i]f, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings." Minn. R. Crim. P. 28.02, subd. 4(4). Granting such a motion restores the district court's jurisdiction to consider matters in a postconviction proceeding.[2] *See Frisch v. State*, 840 N.W.2d 426, 427–28 (Minn. App. 2013) (noting that,

[2] We briefly note that this procedure of remanding for postconviction proceedings, as opposed to dealing with a direct appeal and a postconviction appeal in a piecemeal fashion, predates rule 28.02, subd. 4(4). Before the rule's promulgation in 2003, this court would sometimes dismiss a direct appeal without prejudice to allow a defendant to pursue postconviction relief, and if that defendant was unsuccessful in obtaining relief, allow the defendant to file a single appeal from the postconviction proceedings addressing both the

after the grant of such a motion, the district court may conduct postconviction proceedings). Minn. Stat. § 590.02, subd. 3 (2016) adds the requirement that such a petition for postconviction proceedings must be "signed by the petitioner or signed by the petitioner's attorney with proof of service on the attorney general and county attorney" when filed.

Here, Banks filed an appeal and then moved to stay that appeal and remand for postconviction proceedings. This court granted that motion and ordered Banks to "file a postconviction petition, or a motion to reinstate the appeal, on or before July 14, 2016." We further ordered that "[f]ailure to comply with this court's order may result in sanctions, including dismissal of the appeal." Banks filed a postconviction petition on July 13, but did not serve that petition on the attorney general and county attorney until August 4. The state argues that this late service means that Banks did not comply with this court's order staying his direct appeal, and therefore the postconviction court lacked jurisdiction to consider the petition on the merits. We disagree.

Assuming the state is correct that Banks failed to comply with this court's remand order, the issue remains whether that failure deprived the postconviction court of jurisdiction. The text of the order does not appear to imply such a result; it specifically orders that "[a]ppellant's motion to stay the appeal and remand for postconviction proceedings is granted," and places no time limit on that stay. Further, the order required Banks to, if he wished to pursue his direct appeal, "file . . . a motion to reinstate the appeal."

---

conviction and the denial of postconviction relief. *See State v. Riendeau*, 603 N.W.2d 341–42 (Minn. App. 1999); *see also State v. Steele*, 449 N.W.2d 157, 157–58 (Minn. 1989). Rule 28.02, subd. 4(4) streamlines this procedure while achieving the same result. *See Frisch*, 840 N.W.2d at 427.

This indicates that reinstatement (i.e., a termination of the stay) would not happen automatically on July 15. Finally, we note that past cases uniformly indicate that reinstatement of an appeal is an affirmative act by the appellate court in question—either as part of the order that originally stays the appeal or through a separate order—not something that happens automatically when the order staying the appeal is silent on the matter. *See, e.g.*, *In re Joelson*, 344 N.W.2d 613, 614 (Minn. 1984) (specifically providing that upon certain conditions "the matter shall be reinstated in this court"); *Habeck v. Ouverson*, 669 N.W.2d 907, 909 (Minn. App. 2003) (noting, after this court had dismissed an appeal, that it affirmatively "reinstated [appellant's] appeal"), *review denied* (Minn. Dec. 23, 2003). Because Banks's direct appeal has never been reinstated, we conclude that the postconviction court had jurisdiction to consider the merits of Banks's petition for postconviction relief.

II. Ineffective Assistance of Counsel

"In postconviction proceedings, the burden is on the petitioner to establish, by a fair preponderance of the evidence, facts that warrant relief." *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). In order to receive a new trial on the ground of ineffective assistance of counsel, a defendant must prove first, "that counsel's representation fell below an objective standard of reasonableness," and second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2064, 2068; *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

We review the postconviction court's factual findings to determine whether there is sufficient support in the record to sustain them. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). The court's factual findings will not be disturbed unless they are clearly erroneous. *Id.* But, we review a postconviction court's application of the *Strickland* test de novo because it involves mixed questions of law and fact. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). "If a claim fails to satisfy one of the *Strickland* prongs, we need not consider both prongs in determining that the claim fails." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

"[T]here is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotations omitted). Appellate courts "give trial counsel wide latitude to determine the best strategy for the client." *Nicks*, 831 N.W.2d at 506 (citation omitted). Our supreme court has held trial strategy, which includes decisions as to which witnesses to interview or call and what exhibits to produce at trial, as well as the extent of investigation, "should not be readily second-guessed." *Id.*; *see, e.g.*, *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (in rejecting an ineffective assistance of counsel claim based on trial counsel's failure to hire an investigator and interview witnesses, stating that "trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight"); *State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012) (stating "decisions about which witnesses to interview are typically matters of trial strategy that we will not review"); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (holding that it was "in no position to

second-guess counsel's decision to focus his strategy on other defenses instead of investigating [other] suspects").

Therefore, strategic choices made after a thorough investigation of the facts and law are "virtually unchallengeable." *Swaney*, 882 N.W.2d at 217 (quotation omitted). But, "[s]trategic choices made after a limited investigation of the facts and the law are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* (quotation omitted). "The extent of trial counsel's investigation is considered part of trial strategy." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

When considering the second prong of *Strickland*, that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors, the postconviction court must consider the totality of the evidence before the jury. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). A "reasonable probability" that the results of a proceeding would have been different exists when the probability is "sufficient to undermine confidence in the outcome of the case." *Mosley*, 895 N.W.2d at 591 (quotation omitted).

The state argues that the postconviction court erred by ruling that Banks established ineffective assistance of counsel under both prongs of the *Strickland* test. The postconviction court primarily based its decision on trial counsel's failure to: (1) call Dr. Tredal and Dr. Hardin as expert witnesses, (2) submit the security video as evidence, and (3) object to repeated references to his arrest for the offenses. The postconviction court also declared that because of the cumulative effect of these errors, and trial counsel's lack

of preparation for trial, trial counsel's representation fell below an objective standard of reasonableness, which affected the outcome of the trial. We address each basis for the postconviction court's decision in turn.

A. Expert testimony

1. Dr. Tredal

At Banks's postconviction evidentiary hearing, trial counsel explained that he did not call Dr. Tredal because he expected that the sexual abuse nurse examiner, who testified on behalf of the state that L.G.'s bruises and abrasions were consistent with a forced sexual penetration, would agree that it was also possible that L.G. could have obtained these bruises and abrasions in conjunction with a consensual sexual act.

At trial, the nurse testified as to the injuries she found as part of her evaluation, noting that L.G. had bruises to her arms, a bruise on the back of her thigh, and abrasions and tears to her genitalia. The nurse testified that L.G.'s injuries were consistent with forced penetration. However, on cross-examination, trial counsel questioned the nurse as to whether consensual sex could have caused the injuries, noting that L.G., who was 5'7" tall, had indicated that at the time of the sexual intercourse in the backseat of the cab, her pants were lowered and she had her knee-high boots on. In response, the nurse agreed that intercourse would be "more difficult" and there would be "more pushing and pressure to try and enter someone when they're not in an accommodating position." Upon further questioning, the nursed admitted that even based upon L.G.'s version of what happened, "this could have been consensual sex" and that the injuries to her vagina could have been caused by digital penetration.

On cross-examination, the nurse also admitted that she did not "have any idea how [L.G.] got any of the bruising," that bruises take from hours to a couple of days to develop, and that most people get bruises and do not even notice them. The nurse described L.G. as having fingertip-size bruises on one arm and larger bruises on the inside of her elbow. She also admitted that L.G. could have obtained the bruises from falls or stumbles. And the nurse agreed that there were numerous explanations for how an individual could sustain these same type of injuries.

Banks has failed to show what further evidence Dr. Tredal would have been able to offer if he had been called. Presumably, since Dr. Tredal acknowledged in his report the possibility that these injuries could have resulted from forced sexual activity, the state would have been able to cross-examine him to highlight his recognition that L.G.'s bruises and abrasions could also have been the result of forced penetration. Moreover, Banks has not presented any evidence that Dr. Tredal could have contributed any evidence that would assist the jury in determining the severity of L.G.'s bruises and abrasions. The nurse described the injuries in her testimony, and the jury was provided multiple photographs of L.G.'s injuries.

We conclude that based upon this record, where trial counsel was able to successfully obtain concessions from the nurse that the injuries sustained by L.G. could have resulted from consensual sex and that the bruises could have occurred from other causes, trial counsel's strategic decision to obtain this testimony through the state's witness was not unreasonable and did not amount to ineffective assistance of counsel. *See Carridine v. State*, 867 N.W.2d 488, 495 (Minn. 2015) (holding that purported failures to

investigate or call additional witnesses were not ineffective assistance of counsel when petitioner failed to show "anything other than cumulative and non-material evidence would have been admitted").

2. Dr. Hardin

Although there had been no ruling on the public defender's motion to admit the testimony of Dr. Hardin, the postconviction court was critical of trial counsel for failing to call Dr. Hardin to testify as to the effect of alcohol on L.G.'s memory and whether her level of intoxication made her physically helpless and unable to consent to sexual activity. But, during trial, the state never advanced a theory that L.G. was so intoxicated that she was unable to consent to sexual activity with Banks. L.G. consistently maintained that she did not black out, and had not had a blackout in 30 years, but rather, after giving the cab driver her address upon entering the cab, fell asleep and woke when Banks was engaging in sexual intercourse with her. In fact, consistent with the state's theory of the case, the postconviction court instructed the jury that the term "physically helpless" includes a person who is "asleep or not conscious."

Moreover, through extensive cross-examination of the state's witness, trial counsel was able to establish a timeline of L.G.'s consumption of alcohol at the bar, and using information obtained from the state's witnesses, presented evidence to the jury that L.G. was not overly intoxicated at the time that she entered the cab at 2:30 a.m. L.G. testified that she was disabled because of chronic back pain and that, in order to relieve her pain, she took three doses of prescribed pain medications each day. On the morning of December 7, however, because she knew that she would be consuming alcohol that night at a charity

event featuring free beer, she only took her morning dose of pain medications, and did not take her later two doses. After arriving at the bar, she drank four beers in a normal-sized plastic Solo cup prior to 9:00 or 9:30 p.m., at which time the free beer ran out for the event.[3] During her direct testimony, L.G. explained that when she was told she could not have anything else to drink, she thought that because she walked funny as a result of her disability, "they assumed I was drunker than I was." She explained that even though she typically walks with a cane or walker, she had left her cane in her car. Later, in her cross-examination, she admitted that at the time she got in the cab, she had not had a drink "for probably four hours" and had not taken any of her medications "for much longer than that."

Trial counsel also cross-examined the bouncer at the bar. The bouncer first noticed L.G. when she was crying outside of the bar. When he inquired, she explained that she was having an asthma attack and then began telling him about other matters that upset her. On cross-examination, he admitted that, consistent with his statement to the police, L.G. did not slur her words while she spoke with him. He further admitted that he did not think she was intoxicated until she got up to walk and started veering as she walked to her car. At that point, he stopped her from driving and told her that he would call a cab for her. The bouncer admitted that he did not know that she walked with a cane or had difficulty walking because of her back disability. Although L.G. protested and insisted that she could drive,

[3] L.G. claimed for the first time at trial that someone bought her a Bacardi coke after the beer ran out but admitted during cross-examination that she told the nurse and the detective who investigated the sexual assault that she only had four beers. And she admitted that, when the bouncer indicated that she had too much to drink, she responded that "[she] didn't think four beers was too much."

she eventually returned to the bar. The bouncer testified that he bought her a glass of pop and left her alone in the bar around 1:30 a.m., but later, when the cab arrived, he walked out with her to the cab and negotiated the fare with Banks.

The state presented the following evidence regarding L.G.'s level of intoxication. The nurse, who took a blood and urine sample on December 8 at around 6:30 p.m., did not believe that she was intoxicated at the time of her examination. A forensic scientist, who tested L.G.'s blood and urine samples, also testified that there was no evidence of alcohol in her blood sample. The scientist noted that a blood-alcohol concentration of 0.08 is the legal limit for driving and that her urine sample showed an alcohol concentration of 0.017. On cross-examination, the scientist admitted that, assuming a person has a blood alcohol level of 0.08, the alcohol level in the blood after two hours of not drinking would be close to zero due to the body's dissipation of alcohol.

Another scientist tested her blood and found that her morphine level was higher than the normal therapeutic level. But L.G. indicated that on December 8, after returning home in the cab at 3:30 a.m. and sleeping, she took her pain medications when she woke up due to her increased pain. The scientist admitted on cross-examination that her dosage could also be greater than normal because she had developed a tolerance for the drug. The scientist also admitted that opiates would slowly decrease in the blood and that after 12 hours, a person would possibly be down to about 25 percent of the original dosage.

None of these scientists testified as to the level of L.G.'s intoxication at the time of the incident and the state never argued that L.G. gave putative consent but was so intoxicated as to invalidate that consent. Moreover, trial counsel's closing argument was

that based upon the timeline that he established during the trial, primarily through L.G. and the bouncer, L.G. drank four beers prior to 9:30 p.m. and then did not drink anything for the five hours prior to getting into Banks's cab at 2:30 a.m. Using the scientists' testimony, he argued that at the time of the incident, her blood alcohol level would have been zero due to dissipation between the hours of 9:30 p.m., when the free beer ran out, and 2:30 a.m., when she entered Banks's cab five hours later. And, again using their testimony, trial counsel argued that her drug level was approximately 1/16th of the strength that it was at the time she originally took the drugs. Given that the state's theory and evidence supported that she fell asleep in the cab, and that trial counsel was able to successfully obtain evidence favorable to support his theory from the state's forensic scientists that she was not so intoxicated as to be unable to consent to sexual activity, we conclude that Dr. Hardin's possible testimony regarding whether L.G. could experience memory loss while appearing cognitively and physically intact would have had no impact on Banks's ability to rebut the state's case.

B. Bar Security Video

The postconviction court was also critical of trial counsel's failure to present the bar security video that showed L.G. leaving the bar unassisted to get into her cab. The court noted that choosing not to present the video to the jury "falls within the purview of 'trial strategy,'" but concluded that trial counsel's failure to even review the video fell below an objective standard of reasonableness. The postconviction court further concluded that this decision prejudiced Banks, because a jury might have viewed the video as impeachment

evidence of any claim that L.G. was unsteady on her feet or as casting doubt on the state's position that L.G. was physically helpless.

But, as set forth above, it was at the point that L.G. started walking unassisted from the bar to her car that the bouncer determined that she was too intoxicated and unable to drive home. Trial counsel was able to cross-examine the bouncer and obtain an admission that he did not know that she was disabled or needed a cane and that it was her earlier walk to her car that first alerted him to suspect that she was too intoxicated to drive home. L.G. also testified that she walked funny and that she was concerned that the bouncer thought she was drunk because of her unusual gait. Furthermore, the bouncer testified that when L.G. entered the cab much later, L.G. was coherent and acknowledged that she understood that he was paying the fare for her and that the cab was taking her home.

Based upon this record, Banks has failed to show what value the security video, consisting of a few seconds with a time and date of 2:20 a.m. on December 8, would have in rebutting the state's case. As set forth above, the state's theory, based upon L.G.'s testimony, was that she was physically helpless because she was asleep at the time that Banks engaged in intercourse with her.

C. References to Banks's Arrest

The third primary basis on which the postconviction court granted Banks a new trial was the repeated references, by both the state and trial counsel, to Banks's arrest. In doing so, the court improperly delved into the trial strategy of trial counsel.

After Banks was arrested and taken into custody, he gave a statement to an investigator. Trial counsel chose not to object to the investigator's testimony that the

statement was taken while Banks was in jail for this offense. Trial counsel explained at Banks's postconviction hearing, "If the evidence that is objectionable is not really damning . . . I'll generally choose not to [object] because a lot of times the jury will wonder more often what you're trying to hide. If there's nothing important in it, they will draw inferences that may not be important." This testimony indicates a clear strategy for choosing when, and when not, to object.

And, the record reflects that, to the extent that the trial counsel referenced Banks's arrest in his cross-examination of the investigator, he did so in an attempt to limit the impact of Banks's statement in which Banks gave several differing versions of his sexual activity with L.G. During cross-examination of the investigator, trial counsel obtained concessions from the investigator that Banks gave the statement while he was in jail without counsel present and without a full awareness of the allegations against him. In doing so, trial counsel attempted to show that Banks was not being deceitful with the investigator when he gave several versions of what had occurred, but, instead, as he became more fully aware of what was being alleged by L.G., was increasingly more forthcoming. This clearly falls within the realm of trial strategy.

Moreover, even if trial counsel was deficient by not objecting to and actually referencing Banks's arrest, as the postconviction court noted, the Minnesota Supreme Court has stated that there is not a general rule requiring a finding of prejudice when the jury "learn[s] that a defendant is in jail for the crime for which he or she is on trial." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). We thus conclude that the postconviction court both improperly reviewed trial counsel's strategy and improperly expanded the scope

of what constitutes prejudicial conduct, and therefore the court erred by granting Banks a new trial on the basis of the references to his arrest.

D. Cumulative Errors

Finally, the postconviction court noted that, even if the alleged errors by trial counsel did not individually require a new trial, the cumulative effect of those alleged errors did. Assuming, without deciding, that the cumulative effect of trial counsel's errors may be considered, we disagree. Trial counsel successfully impeached multiple witnesses, pointed out multiple contradictions in the state's witnesses' testimony, obtained admissions of evidence favorable to the defense's theory, made numerous objections, many of which were sustained, and successfully got impeachment evidence excluded for four of Banks's five prior felony convictions. We conclude that, after an extensive review of the record, trial counsel reasonably prepared for trial and that his performance at trial does not evince an overall pattern of conduct falling below the objective standard of reasonableness.

Moreover, our review of the totality of the evidence in the record does not support Banks's claim that there was a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. The evidence against Banks was substantial. His version of the events repeatedly changed. For instance, upon being asked to provide a DNA sample, Banks changed his story, admitting that during the course of the evening he had ejaculated, but claiming he did so on the backseat of the cab. Although Banks claimed that he was not able to have sexual intercourse with L.G., semen samples taken from L.G.'s vagina contained DNA consistent with Banks's DNA. And, while Banks described L.G. as sexually aggressive during the approximately 11 minutes

prior to the time the cab stopped in the woods, the bouncer specifically denied that she was sexually aggressive with him.

In reviewing the record and the postconviction court's application of *Strickland*, we conclude that the court erred when it determined that trial counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Trial counsel was able, through effective cross-examination, to obtain information that would support his theory of the case that L.G. was not rendered physically helpless because of her intoxication. The jury's acceptance of L.G.'s version of the incident that she was rendered physically helpless as a result of her falling asleep, rather than Bank's version that L.G. was the sexual aggressor and consented to the sexual activity, does not make trial counsel's strategy unreasonable. And, we cannot conclude that trial counsel's strategy in failing to call expert witnesses, to introduce the security video, or to make certain objections had a reasonable probability of affecting the jury's verdict.

Reversed.