VERMONT SUPERIOR COURT
Rutland Unit
83 Center St
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 174-4-20 Rdcv

Bartshe vs. State of Vermont

RULING ON THE MERITS

This is a post-conviction relief (PCR) case. Petitioner James Bartshe asserts claims of ineffective assistance of criminal defense counsel with regard to both jury selection and trial, as well as a claim of juror misconduct. Bartshe is represented by Kelly Green and the State is represented by Travis Weaver. This case was tried on November 15, 2021. Bartshe presented five witnesses: two jurors, two private investigators, and a defense attorney. The State presented no witnesses. Post-trial memoranda were complete December 29.

Findings of Fact

The court finds the following facts established by a preponderance of the evidence. Bartshe was convicted after trial of lewd and lascivious conduct with a fifteen-year-old child, his adopted son. Exhibits 1-3; State v. Bartshe, Docket No. 1577-11-15 Rdcr. The charged incident took place "on or about September 3, 2015." Ex. 1. Bartshe was represented by appointed counsel Lamar Enzor.

At the trial before the undersigned, Bartshe called two jurors and three professional witnesses: two defense investigators and a defense attorney. The two jurors were a Ms. S.D. and a Mr. S.R.[1] S.D. is a nurse at the Rutland Regional Medical Center (RRMC) and had in the past been a police officer at several departments and worked as a police dispatcher while in nursing school. She is certified as a sexual assault nurse examiner (SANE) and worked in that role at RRMC from 2015 to 2017, after which she became a nurse supervisor. In 2016 she was on a panel with the local State's Attorney, Rose Kennedy, to discuss sexual assault awareness. Articles about that event were published in the Mountain Times and Rutland Herald in April of 2016, along with photos in the Herald identifying S.D. (but using her maiden name) and Kennedy sitting next to each other. Ex. 5. S.D.'s husband is a state trooper. Her juror questionnaire indicated that she worked at the hospital as a nurse but did not list her husband's employment or her prior employment as a police officer. Ex. 5.1.The affidavit of probable cause notes that the child was interviewed at the Rutland hospital. Ex. 2 ¶ 1.

S.D. believes she mentioned at voir dire that her husband was a trooper on the drug task force, but stated that she felt she could be fair. She does not recall being asked any questions about her work. The transcript of jury selection has

[1] The court is using initials to avoid any unnecessary invasion of the jurors' privacy.

no mention of her name. No one was asked any questions about working at the hospital as a nurse. It is possible that she had been questioned about her husband's employment during voir dire for a different case that day. It is not possible to tell from the transcript whether she might have raised her hand in response to the defense attorney's question about friends or family in law enforcement, because he noted that some jurors had their hands up but did not name them or follow up with any of them individually. Ex. 9, pp. 109-110.

Juror S.R. was one of many potential jurors who responded in the affirmative when asked whether he or a close friend or family member had been a victim of sexual assault. Each of them was questioned separately. He indicated that he had been molested as a child, but that he had "learned to cope with it and move on" with his life and "absolutely" could be fair. Ex. 9 at 49-50. He was not asked who molested him, or the impact it had upon him. At the trial in this PCR case, he testified that as in this case it had been a male family member who abused him, and that he had counseling for several years as a result. Attorney Enzor challenged him for cause, but when the judge denied the challenge because of SR.'s assurances that he could be fair, Enzor failed to make any argument based on inferred or implied bias. Id. at 51-52.[2]

[2] Juror S.R. also failed to disclose on his juror questionnaire that he had a past conviction for DUI and had been charged with simple assault at one time. Aside from showing a lack of disclosure, these facts were not directly relevant here.

The first investigator testifying at the PCR trial was Claire Skogsberg. She works as an investigator for a criminal defense firm in White River junction. Her firm does a social media and court record check for every potential juror on the court's list. She previously worked with Vermont Private Eye and was hired to assist on this PCR case. She found the Mountain Times article about S.D. after identifying S.D.'s maiden name from social media. All of this took Skogsberg at most an hour.

The second investigator, Susan Randall, is the owner of Vermont Private Eye. She collected the juror questionnaires for this PCR case and interviewed the jurors. She credibly testified that doing a social media investigation of the jury pool is done routinely by attorneys in both civil and criminal cases as part of their due diligence in preparing for trial, and that it can be done quickly. In addition, the Defender General authorizes payment for such investigations.

Bartshe presented as his expert attorney Elizabeth Kruska, who has significant trial experience as a criminal defense attorney, has taught criminal law and evidence at Vermont Law School, is a past president of the Vermont Bar Association, and has been a regular contributor to the SCOV Law blog. She reviewed numerous records for this case including Attorney Enzor's file, the transcripts from the trial and jury selection, and the juror questionnaires. She

opined that Enzor's conduct fell below the standard for a Vermont attorney in several ways.

With regard to the two jurors at issue, Kruska opined that Enzor fell below the standard of care by failing to adequately research the potential jurors before voir dire (or alternatively, requesting a case-specific juror questionnaire),[3] failing to ask sufficient follow-up questions regarding one juror's experience with child sexual abuse and the other's work as a nurse, failing to establish an adequate foundation at jury draw for a challenge for cause, and failing to argue "inferred" or "implied" bias rather than actual bias. She also noted that he apparently had unused peremptory challenges that he could have used to strike the two jurors. The State disputes this last point, noting that a careful reading of the transcript suggests Enzor had used all his peremptory challenges. Both sides seem to agree the transcript is less than clear on this point.[4]

With regard to the trial itself, Kruska opined that Enzor's representation fell below the standard of a Vermont criminal defense attorney in the following ways: failing to object to a trooper's testimony that Bartshe never asked "what is he accusing me of?" and that the trooper found Bartshe's denials "appalling,"

[3] Kruska's testimony differed from the investigators' to some extent. She testified that a defense attorney needs to thoroughly vet each potential juror, but that such vetting can be done in various ways: by the attorney doing online research, hiring a private investigator, talking to other lawyers who are trying cases with the same jury pool, requesting a case-specific questionnaire, or questioning the jurors thoroughly at voir dire.

[4] With counsel's consent the court sought to obtain the judge's version of the jury chart from the criminal file, which would have shown the number of challenges used. It apparently was not retained in the file.

not objecting when the trooper testified that Bartshe denied a consent search of his house and immediately mentioned that he had an attorney, not objecting to the admission of a statement by the child that every time he ran away he would be returned and he "wanted the abuse to stop," not objecting when Bartshe's coworker testified that after the police questioned him he told her his son was accusing him of molesting him "since the age of nine," and failing to ask for a mistrial on the basis of the above.

During deliberations the jury sent a note out asking: "If there is a history of abuse between defendant and victim, would it be admissible?" Ex. 11 at 42. Enzor did not object to the judge proposing to tell the jury they could "only go on the evidence presented" or the judge's actual words to the jury: "you have to take the evidence that was presented to you and make your decision, if you can, based on the evidence that you heard in court." Ex. 11, pp. 42 and 48. Kruska opined that this, too, fell below the standard of practice. She indicated that Bartshe's attorney should have objected because it gave the jury license to rely on the references to prior abuse, that he should instead have requested an instruction that they not consider that evidence, and that he should have sought a mistrial.

The jury asked in the same note what would happen if they could not reach agreement, noting: "We have different opinions on the evidence shown to

us." Ex. 11 at 45. The jurors subsequently sent out a note expressly asking for playback of certain testimony, including that of one of Bartshe's coworkers. Ex. 11 at 51-53. The judge described the note as asking for the testimony that the child "accused him of molesting him at age nine." Id. at 52. With the consent of counsel, the court has reviewed the juror note in the criminal file.[5] The actual language of this portion of the note is that the jury asks to hear again the following testimony of Bartshe's coworker: "DCF is taking [child] and [child] accused him of molesting him since the age of 9." This is followed by "(?)" and by "Abuse since 3rd grade?" Enzor agreed to playback of the witness' entire testimony, and raised no objection to the jury hearing the highly prejudicial testimony again. Kruska opined that this also fell below the standard of practice.

The jury ended up taking more time to deliberate than the evidence took to present. After the guilty verdict, Judge Kupersmith noted to the jury that if they had deadlocked "it would have been understandable, given the nature of the evidence." Id. at 58.

The State presented no witnesses. It did not proffer Attorney Enzor or any other lawyer as a witness. Nor did the State counter the investigators' testimony with regard to the common practice of researching jurors prior to jury selection.

[5] A copy of the note is attached to Attorney Green's February 1 filing.

Ineffective Assistance of Counsel

In considering an ineffective assistance claim, the court "must consider the totality of the evidence before the judge or jury." Strickland v. Washington, 446 U.S. 668, 695 (1984). The standard the court must apply is as follows:

> Vermont uses a two-part standard for evaluating an ineffective assistance of counsel claim—a test that is essentially equivalent under the United States and Vermont constitutions. Ineffective assistance of counsel cases first require that the petitioner show by a preponderance of the evidence that defense counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms. If this first burden is met, petitioner must further show that counsel's performance prejudiced the defense by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

In re Combs, 2011 VT 75, ¶ 9, 190 Vt. 559 (internal quotations and citations omitted). To establish the first element, "petitioner must first overcome the strong presumption that counsel[']s] performance, absent the distorting effects of hindsight, fell within the wide range of reasonable assistance." In re Plante, 171 Vt. 310, 313 (2000). As to the second element, the United States Supreme Court has defined a "reasonable probability" in this context as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

A. The Claim With Respect to Jury Selection

Bartshe presents several arguments of ineffective assistance regarding voir dire: the failure to research the jurors, the failure to inquire into S.D.'s work as a nurse, the failure to inquire into the circumstances of S.R.'s childhood abuse, and the failure to argue inferred or implied bias to strike S.R. as a juror.

Based upon the unchallenged testimony of the two investigators, the evidence is that doing social media research on the jury pool is common these days, and would likely have been paid for here by the Defender General. Although Attorney Kruska conceded that that such research is not done for every case, this was a felony charge with a potential sentence of up to fifteen years, and would certainly have risen to the top of the list of serious cases requiring extra effort. Attorney Kruska testified that social media investigations are only one option to thoroughly vet potential jurors, but there is no evidence that the defense attorney here did any vetting at all beyond jury draw itself. His vetting at the draw failed to inquire into S.D.'s disclosed work as a nurse at the same hospital at which the child here was examined, which would at least have turned up her experience doing sexual assault exams. He did not follow up with any jurors when they raised their hands indicating they had friends or family in law enforcement, which may have led him to learn of S.D.'s husband and her past employment as a police officer. The lawyer also failed to inquire into the

circumstances of S.R.'s childhood abuse, which would have given him a potential basis for an argument of implied or inferred bias. *See, e.g.*, State v. Atherton, 2016 VT 25, ¶ 10, 201 Vt. 512.

However, as the State points out, a lawyer has limited time to do voir dire. The task is never likely to be done perfectly even under ideal circumstances, and in this case the judge was pushing the lawyers to move quickly because he was due in another courthouse. While the lawyer could have registered an objection to the time allotted to preserve it for the record, that would not likely have changed the amount of time he received. There is only so much a lawyer can do in the limited time typically available for jury draw.

Lawyers are "accorded particular deference when conducting *voir dire.*" Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001). "[D]efense attorneys have wide discretion in decisions regarding trial strategy and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" In re Sheldon, No. 2020-186, 2021 WL 4817779, at *2 (Vt. Oct. 15, 2021) (unpub. mem.), quoting Strickland, 466 U.S. at 694. There are many judgment calls to be made during voir dire as to what to ask, who to ask, and how to ask it. While review now may suggest many other questions, the court is quite certain that any jury draw could be reviewed and found wanting in

hindsight. The court is not persuaded that the failures here fell so far below the bar that they constituted ineffective assistance.

Even if the court did find ineffective assistance at voir dire, there is nothing from which the court can conclude that the second element of the test for ineffective assistance has been met. There is nothing to suggest a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Combs, 2011 VT 75, ¶ 9. Even if the two jurors had been researched or questioned further, and even if they had been struck from the jury, the court has no basis for any conclusion as to what impact that would likely have had on the result here. *Accord*, State v. Baker, 963 P.2d 801, 808 (Utah Ct. App. 1998)("Although defendant suggests numerous questions which counsel could have asked the jurors, he has not demonstrated that further inquiry into each juror[ ] ... would have altered the outcome of his [trial].")(quotation and citation omitted). The court has no knowledge as to the other jurors who would have replaced them, and no knowledge of how these two jurors contributed to the deliberations and the guilty verdict. The petition on this issue is denied.

B. Ineffective Assistance of Counsel at Trial

Bartshe's expert, highly experienced Attorney Elizabeth Kruska, credibly testified that several of the defense attorney's actions (or inactions) at trial fell

below the standard of care for a Vermont criminal defense attorney. No other lawyer testified to the contrary. The State argues that these could have been strategic choices by Enzor, but it failed to proffer any testimony from him or any other defense attorney to support this theory.

It is true that Enzor's theory of the case was in part that the police had done a sloppy job and prejudged the case without fully investigating, and in part that the child was not believable, but he could have made those same arguments just as well without the testimony referring to multiple years of abuse. It is also true that lawyers often choose not to raise an objection for fear it may highlight an issue they hope the jury will miss, but the devastatingly prejudicial nature of the testimony referring to multiple years of prior abuse made such a strategy completely unjustified here. Any judge would have granted a motion to strike and given an instruction to the jury to disregard such testimony,[6] and after it happened twice the court might well have granted a mistrial.

If he wished to downplay the objections, the defense attorney could have approached the bench to raise the issues out of the jury's hearing and sought a simple instruction to the jury to disregard the testimony. Likewise, when the jury asked about the evidence regarding past abuse, he should have asked the

[6] The State argues that the statements were admissible under Rule 404(b) to show why the child called the police (motive) and why Bartshe was upset (state of mind). However, both the child's motive for the call and Bartshe's distress were just as explainable with one incident of abuse as with a history of abuse. Thus, these would not have been proper bases for admission.

court to respond that they could *not* consider anything related to past abuse. Despite the deference accorded decisions made during trial, the court concludes that the failures to seek to strike the testimony about past abuse, to seek a mistrial on that basis, and to seek a later instruction to the jury to disregard it, fell below the standard of practice for Vermont criminal defense attorneys.

The next question is that of prejudice. After suggesting they might be deadlocked, the jury sent out notes asking to hear the coworker's specific testimony about "past abuse" again, and inquiring about the use of that evidence. They asked: "If there is a history of abuse between defendant & victim, would it be admissible?" The State reads the question about past abuse as a sophisticated use of the term admissible, such that the question would mean "if there was past abuse, would the State have been allowed to put that into evidence?" The court, with years of experience with jurors—who are not experts in the rules of evidence or legal terminology—interprets the question in layman's terms: "can we consider what we heard about past abuse?"

While the judge did not read the entire second note to the lawyers—and the lawyers should have asked to actually see the note—what it actually said was that the jury wanted to rehear the following testimony: "DCF is taking [the child] and [the child] accused him of molesting him since the age of 9." This is followed by "Abuse since 3rd grade?" The additional comment about "[a]buse

since 3rd grade" merely underscores that the jury was clearly asking about the evidence they had already heard. The judge's response thus emphasized that the testimony *could* be considered.

It is clear that the jury considered this evidence important and likely relied upon it in their determination of guilt. Combined with the length of time the jury took to deliberate, their question about a possible deadlock prior to rehearing the testimony—"we have different opinions on the evidence shown to us"—and the judge's own unusual comment that a deadlock would not have been surprising given the evidence, that conclusion is only reinforced. The impact of the jury hearing of many years of abuse beginning at the age of nine cannot be underestimated. The court concludes that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Combs, 2011 VT 75, ¶ 9. Given this conclusion, the court need not address the other claims of ineffective assistance at trial or the claim of juror misconduct.

Order

The petition for post-conviction relief is granted based upon ineffective assistance of counsel. The case is remanded to the Criminal Division to vacate the conviction and sentence in Docket 1577-11-15 Rdcr, to appoint new counsel

for Bartshe, and to schedule a status conference to address next steps. The bail and conditions of release in effect at the time of trial shall be reinstated.

Electronically signed February 3, 2022 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge