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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1528**

State of Minnesota,
Respondent,

vs.

Jovan Badillo,
Appellant.

**Filed March 10, 2014
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-12-6745

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

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard A. Schmitz, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and
Randall, Judge.*

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

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal, appellant Jovan Badillo argues that (1) he received ineffective assistance from his trial attorney during plea negotiations and (2) the district court erred in prohibiting appellant from eliciting evidence at trial about the victim's cocaine use after the victim testified that he did not recall using drugs on the day of the incident. We affirm.

FACTS

On February 11, 2012, Michael S. and Jose C. ate dinner and had some alcoholic drinks at Pancho Villa Restaurant in Minneapolis. There, they encountered Angel B. and Alan B.¹ Michael and Jose left the restaurant between 1:30 and 2:00 a.m., after Angel got into a dispute with another group of restaurant customers. Michael went to his apartment with Jose, where Michael went to sleep in his bedroom and Jose laid down on the living room couch. About 45 minutes later, Michael woke up to the sound of rocks being thrown against his window. Angel and Alan then knocked on Michael's door, and Michael let them in. Angel and Alan were upset that Michael and Jose had left the restaurant without helping them in the dispute with the other customers.

¹ For ease of reading, we have chosen to first identify the people involved in this case by their first name and last initial and thereafter use first names. Some of the people have identical first and last initials. Appellant and Alan are brothers. Each is a cousin of both Angel and Michael, but Angel and Michael are not cousins. Michael is also the cousin of Jose. All five men are originally from Puerto Rico and have known each other their entire lives.

Michael testified that Angel punched him in the nose and knocked him down. During his attack on Michael, Angel used his cell phone to call appellant. According to Michael's testimony, Angel said, "I got him for you." About 30 seconds later, appellant arrived at the apartment. Michael testified that he saw appellant stab Jose. Jose testified that he was stabbed twice in the leg, once in the stomach, and once in the rib cage. He also testified that he heard appellant say that appellant "was going to kill [Jose]." Alan then intervened and left the apartment with appellant and Angel. Michael drove Jose to an emergency room. At the time of trial, Jose still suffered nerve damage in his leg and had difficulty walking, which he attributed to the injuries he sustained in the stabbing.

On March 6, 2012, appellant was charged with second-degree assault. Appellant rejected the state's offer of an executed sentence of one year and one day in prison in exchange for his plea of guilty. On April 11, the state amended the complaint and charged appellant with one count of first-degree assault and two counts of second-degree assault. The state, understanding that appellant had a criminal history score of two, then made appellant a "final" plea offer of 61 months in prison in exchange for appellant's plea of guilty to attempted first-degree assault.² On April 20, the state again amended the complaint, the substituted charges being one count of aiding and abetting assault in the first degree and two counts of aiding and abetting assault in the second degree.

Appellant rejected the state's final plea offer on April 23, 2012, the first day of his jury trial. Appellant's formal rejection of the plea offer was placed on the record. At

² There is some confusion about whether this plea offer was for 60 or 61 months in prison. The district court concluded that the plea offer was for 61 months, and we adopt this conclusion as being supported by the record.

length, appellant's attorney explained that appellant was facing around ten years in prison if convicted. At one point, the attorney explained that the Minnesota Sentencing Guidelines "call for between 94 months and 132 months based on the charge, and the fact that you have two criminal history points. That's somewhere between nine and eleven years." The attorney also discussed with appellant the state's request that the district court consider the aggravating circumstances and depart upward from the Minnesota Sentencing Guidelines. Appellant's attorney explained that appellant was "looking at between nine and ten years in prison" if convicted and that the district court could "give you more than ten years in prison" by departing from the guidelines as the state requested. The attorney continued:

Q: And, I've talked to you about [the plea offer] on at least two prior occasions when we met, and then again today, right?

A: Yeah.

Q: And, you told me each time that you do not want to plead guilty and go to prison for five years knowing that your exposure is ten years or more?

A: Yes.

In response to appellant's request for the "worst" scenario, his attorney explained that appellant's worst case would be that the district court could grant the state's request to depart from the sentencing guidelines based on aggravating circumstances and sentence appellant to "more than ten years in prison." After a lengthy discussion on the record, appellant rejected the state's final plea offer.

On April 27, 2012, and after a trial during which the district court excluded evidence of cocaine metabolites in Jose's system upon his admission to the emergency

room, the jury found appellant guilty of one count of aiding and abetting first-degree assault in violation of Minn. Stat. § 609.221 (2010) and two counts of aiding and abetting second-degree assault in violation of Minn. Stat. § 609.222 (2010). The jury then found the state to have proven four aggravating factors supporting an upward sentencing departure.

Before sentencing, the district court ordered a presentence investigation (PSI), which revealed appellant's correct criminal history score to be three points rather than two points. Under a criminal history score of three, the presumptive sentence was 122 months, with a permissible range from 104 to 146 months. On May 30, the district court denied appellant's motion for a new trial and sentenced appellant to 140 months in prison for aiding and abetting first-degree assault. The district court denied the state's motion for an upward sentencing departure and relied on the presumptive guidelines sentence (with three criminal history points). Appellant appealed.

On February 11, 2013, we granted appellant's motion to stay his direct appeal and remand for postconviction proceedings to pursue a claim of ineffective assistance of counsel. In his petition for postconviction relief to the district court, appellant argued that his trial counsel was deficient in advising him of his maximum presumptive guidelines sentence. Appellant argued that he would have accepted the state's plea offer if he had been informed that he could receive a 140-month sentence without the district court departing from the guidelines. He did not dispute that his correct criminal history score is three points.

The district court determined that appellant could not “affirmatively show that his trial counsel’s representation fell below an objective standard of reasonableness,” relying on appellant having been informed on the record that his sentence could exceed ten years. Appellant “cit[ed] no authority to support his argument that because he was not informed by trial counsel that he could receive more than 132 months without an upward departure, counsel’s representation was ineffective.” In addition, the district court determined that appellant had failed “to establish that he suffered any prejudice because he has not shown there is a reasonable likelihood he would have accepted the state’s plea offers.” Because the record did not show that appellant was entitled to relief, the district court declined to hold an evidentiary hearing on appellant’s postconviction petition. The district court denied appellant’s motions to set aside his conviction and for specific performance of the plea offer, or, alternatively, a new trial. This appeal followed.

D E C I S I O N

I.

“We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact.” *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013). We analyze a claim of ineffective assistance of counsel under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). A claimant “must affirmatively prove that his counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the

result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068).

Concerning the requirement of proof that “counsel’s representation fell below an objective standard of reasonableness,” *id.* (quotation omitted), “[a]n attorney’s performance is substandard when the attorney does not exercise the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances,” *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted). When plea bargaining, “an attorney’s advice falls below objectively reasonable standards, thereby constituting ineffective assistance, when the attorney’s inaccurate or misleading factual statements tend to affect a defendant’s decision to reject a plea bargain and proceed to trial.” *Id.* at 540. But “[t]here is a strong presumption that a counsel’s performance falls within the wide range of reasonable professional assistance.” *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (quotations omitted).

It is clear from the record that, during plea negotiations, appellant’s counsel believed that appellant had a criminal history score of two. The belief was mutual, as the prosecutor operated under the same factual misunderstanding. A pre-plea criminal-record summary correctly listed appellant’s previous offenses, but incorrectly computed the criminal history score by omitting one offense because of the preparer’s belief that the offense had been used to enhance another later offense to a felony. This was incorrect. Appellant’s postconviction PSI revealed that the correct calculation of appellant’s criminal history score, based on all of appellant’s prior offenses, was three, rather than two, as all had believed during plea negotiation.

The reasonableness of counsel’s conduct must be judged “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Rhodes*, 657 N.W.2d at 844 (quotation omitted). As the district court pointed out, appellant’s counsel provided accurate information “based on the information that the parties had at the time of the offer.” The supreme court has previously held that an attorney acts reasonably when relying on a defendant’s criminal-record summary. *See State v. Miller*, 754 N.W.2d 686, 709 (Minn. 2008) (holding that when the state inadvertently provided the defendant with an inaccurate copy of his criminal history record, counsel’s performance in reliance on the inaccurate record “was not ineffective”). Here, the district court found that appellant’s counsel reasonably relied on the initial criminal-record summary. Appellant fails to identify how his attorney should have known that the summary was incorrect. Because appellant’s counsel provided advice based on facts that both of counsel (and the district court) believed were accurate at the time, his conduct does not fall below an objective standard of reasonableness.³ *See Rhodes*, 657 N.W.2d at 844.

³ Appellant appears to argue that his attorney should have discovered the correct criminal history score and advised appellant to accept the plea offer, taking advantage of the state’s continuing reliance on the incorrect score. Appellant fails to recognize that the state is not required to fulfill a plea agreement it entered by fraud or mistake. *See Leake*, 737 N.W.2d at 542 (explaining that the state can object to specific performance of a previously rejected plea offer). In *Leake*, the supreme court concluded that the defendant could accept a previously rejected plea offer because he did not know that he could be sentenced to life in prison without the possibility of release. *Id.* at 541-42. But if the state or the district court objected to specific performance of the plea offer, the defendant was entitled to a new trial. *Id.* at 542. Here, it seems unlikely that the state would agree now to specific performance of its final plea offer after discovery of appellant’s correct criminal history score.

We also agree with the district court that “the record is replete with facts showing [that appellant] was well informed before trial and before he rejected the state’s offers that his exposure, if convicted, could be more than ten years.” At length on the record, appellant’s counsel discussed with appellant the possibility that appellant could be sentenced to 132 months (11 years) in prison, based on the presumed criminal history score. After appellant’s criminal history score was correctly calculated, he was sentenced to 140 months in prison, a sentence of 11 2/3 years. Appellant provides no authority holding that an attorney’s representation falls below an objective standard of reasonableness when a defendant is aware that he faces a potential sentence *with* an upward departure but is unaware that he faces a similar potential sentence *without* a departure. Here, appellant’s attorney told him that, if convicted, his sentence could exceed ten years. Appellant has not overcome the strong presumption that his counsel’s performance was reasonable. *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. Therefore, appellant has failed to satisfy the first prong.

Concerning the required showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Gates* 398 N.W.2d at 561 (citations and quotations omitted). In the plea-bargaining context, “a defendant is prejudiced . . . if there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised.” *Leake*, 737 N.W.2d at 540.

The district court rejected appellant's assertion that he would have accepted the state's plea offer if he had known that he could receive a 140-month sentence without a departure, noting that appellant rejected the state's final plea offer even though he was told repeatedly that he could face more than ten years in prison if convicted. The district court's conclusion that appellant was unlikely to have accepted the state's plea offer is amply supported by the record. The record reveals ongoing plea discussions over a number of weeks, conducted in the presence of the district court. Because appellant rejected the state's plea offer of a 61-month executed sentence with knowledge that he faced more than ten years in prison, the district court did not err in concluding that appellant failed to affirmatively establish a "reasonable probability" that he would have accepted the state's plea offer had he known that he could face 11 2/3 years in prison—a sentence easily within the contemplation of "more than ten years." *See Gates* 398 N.W.2d at 561 (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). Therefore, appellant has not met his burden to show that he suffered prejudice, and has not satisfied the second prong. *See id.*

The district court properly concluded that appellant failed to affirmatively prove either prong of the *Strickland* test to establish ineffective assistance of counsel. *See id.* The district court did not err in denying appellant's petition for postconviction relief.

II.

Appellant also challenges the district court's exclusion of evidence at trial concerning Jose's alleged cocaine use. Jose testified that he "might have had a beer or two" on the night of the assault. Appellant's counsel then asked Jose about his drug use:

Q: Do any other drugs that night?
A: No.
Q: Earlier that day?
A: Not that I know of.
Q: Not that you know of?
A: No.

Appellant then sought to introduce medical testimony regarding an emergency room blood test that revealed cocaine metabolites in Jose's system. After a lengthy discussion, the state offered a compromise that it would be "willing to stipulate that upon arrival at the emergency room" Jose's blood test revealed a .045 blood-alcohol content. Appellant's counsel responded that he was "satisfied" with this stipulation. Appellant's attorney again sought to introduce the evidence of cocaine metabolites, but the district court stated that the cocaine evidence "is out, the alcohol is in." Appellant's counsel again responded that he was "satisfied with the stipulation." Nevertheless, appellant argues on appeal that he was prejudiced by the district court's evidentiary ruling.⁴

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). Even when a district court errs in excluding evidence, "a new trial is required only when the error substantially influenced the jury's verdict." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

⁴ Both attorneys referred to the admission of the alcohol evidence and the exclusion of the cocaine-metabolite evidence as a "stipulation." One reading of the record would be that the district court's challenged "ruling" was the enforcement of an evidentiary stipulation between the parties. But the state does not advance that argument on appeal.

“The general rule is that a party may, through cross-examination and through extrinsic evidence, show that the other party’s witness was intoxicated at the time to which his testimony relates.” *State v. Frank*, 364 N.W.2d 398, 400 (Minn. 1985). Evidence of intoxication “bears on the witness’s capacity to observe and recollect the events in question.” *Id.* But a defendant’s right to introduce intoxication evidence is not absolute. *See id.* (holding that a defendant’s constitutional right to show that a witness was intoxicated does not extend to the admission of expert testimony regarding alcohol consumption); *see also State v. Bahri*, 514 N.W.2d 580, 583 (Minn. App. 1994) (concluding “that the district court did not abuse its discretion by excluding expert testimony regarding” the victims’ alcohol concentrations because the victims had already testified regarding their alcohol consumption), *review denied* (Minn. June 15, 1994).

Appellant argues that the district court abused its discretion by excluding evidence of Jose’s cocaine use because appellant was denied the opportunity to show that Jose “was intoxicated at the time to which his testimony relates.” *Frank*, 364 N.W.2d at 400. We disagree. The jury heard testimony that Jose had drunk several alcoholic drinks on the night of the assault. And the jury was informed that Jose had an alcohol concentration of .045 upon arrival at the emergency room. Appellant had ample opportunity to show that Jose may have been “intoxicated at the time to which his testimony relates.” *Id.* As a result, the district court was not required to allow additional medical testimony regarding Jose’s possible use of another intoxicant. *See Bahri*, 514 N.W.2d at 583 (excluding expert testimony when the victims had already testified regarding their alcohol consumption).

More importantly, the evidence of cocaine metabolites was not shown to be relevant. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Only relevant evidence is admissible. Minn. R. Evid. 402. The state argued to the district court that, if appellant introduced the evidence of cocaine metabolites in Jose’s system, it was prepared to introduce additional medical testimony showing that Jose could have ingested cocaine up to three days before the assault. The record reveals no other expert or other evidence tending to show that the challenged evidence would have shown that Jose lied about his drug use on the day of the assault and that the presence of cocaine metabolites would have either shown Jose to have been intoxicated by cocaine or impeached Jose’s denial of use of “other drugs that night.” Therefore, the evidence of the presence of cocaine metabolites in Jose’s system has no tendency to make any fact in issue more or less probable, Minn. R. Evid. 401, and was properly excluded as irrelevant, Minn. R. Evid. 402. The district court acted within its discretion in preventing appellant from introducing medical testimony regarding cocaine metabolites.

Affirmed.