STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1711

State of Minnesota,
Respondent,

vs.

Mark Dewayne Counters,
Appellant.

Filed November 25, 2013
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR1054197

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Hillary B. Hujanen, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Stauber, Judge.

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

STAUBER, Judge

In this combined direct and postconviction appeal seeking relief from his conviction of first-degree criminal sexual conduct, appellant argues that he was denied

effective assistance of counsel due to the cumulative effect of trial counsel's errors and because his trial counsel failed to adequately prepare him to enter a guilty plea in acceptance of the state's plea bargain. Appellant also contends that he was denied the right to counsel when the district court refused to grant a continuance so that appellant could substitute counsel. We affirm.

FACTS

On November 19, 2010, police officers responded to a domestic-assault complaint at a residence in Minneapolis. The caller informed the police that her nephew, later identified as appellant Mark Dewayne Counters, and his girlfriend were fighting. When the police arrived, they observed the girlfriend fleeing the residence, naked from the waist down, and bleeding from her face. Then, officers observed appellant fleeing the residence, naked except for his underwear around his ankles, and bleeding from the groin. Officers located the girlfriend at a neighbor's house, and observed that her left eye was swollen shut, she had lumps on her forehead, and blood was flowing down the left side of her face. She reported that she and appellant were in a relationship, that appellant asked to see her, and that when she arrived at his residence he punched her in the head and face repeatedly, and forced her to perform oral sex on him and to have sexual intercourse with him. The victim said that when she heard appellant's aunt in the residence she bit appellant's penis and ran. Appellant was taken into custody, and admitted without being questioned that he had intercourse with the victim, but maintained that he only struck the victim after she bit his penis.

Appellant was charged with one count of first-degree criminal sexual conduct. He retained a private attorney to represent him—Todd Counters, appellant's mother's cousin. After three pretrial appearances, appellant was scheduled for trial on April 4, 2011. On April 5, 2011, appellant attempted to enter a guilty plea pursuant to the state's offer. But, the district court rejected appellant's plea for lack of an adequate factual basis because appellant would not admit that the sexual contact was nonconsensual. On April 7, 2011, the day of trial, appellant requested a continuance to substitute a different attorney. The district court denied the request, and appellant proceeded to trial represented by Counters.

The jury convicted appellant of first-degree criminal sexual conduct, and appellant was sentenced to 173 months in prison. Appellant filed a direct appeal to this court, but requested a stay pending postconviction proceedings in district court. The stay was granted. On June 5, 2012, the district court entered an order denying in part appellant's postconviction petition and granting an evidentiary hearing on the remaining issues, which included appellants arguments that his trial counsel was ineffective. An evidentiary hearing was held on October 22, 2012 and November 21, 2012. Following the hearing, the district court denied the relief requested in appellant's postconviction petition in its entirety. By order of this court, the stay was dissolved, and this appeal followed.

D E C I S I O N

I.

"When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the

same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). Issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "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).

To prevail on a claim of ineffective assistance of counsel, "[t]he defendant 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 v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation omitted). When considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). This court "generally will not review attacks on counsel's trial strategy." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

Appellant argues that his attorney was ineffective for failing to adequately communicate with him prior to trial. Appellant asserts that his attorney did not return his phone calls, met with him only two or three times in jail, and cut off communication with appellant's mother who was conveying his messages to his attorney. But the number of meetings between an attorney and his client does not, by itself, show that the attorney

was ineffective. *See State v. Caldwell*, 803 N.W.2d 373, 387-88 (Minn. 2011) (concluding that attorney who met with his client three times was not ineffective because the overall representation was competent).

In addition, appellant's attorney cut off communication with appellant's mother by stating: "Please bear in mind that you are not my client. . . . Please do not call, write or email me unless it is in response to my request." Under the rules of professional conduct, a lawyer may be paid from a source other than the client, but such an arrangement must not "compromise the lawyer's duty of loyalty or independent judgment to the client." Minn. R. Prof. Conduct 1.7 cmt. 13. Appellant's mother sent numerous emails, and apparently made numerous phone calls, to appellant's attorney asking the attorney to make certain motions and introduce specific evidence as part of his trial strategy. Appellant's attorney testified that "it ha[d] become a power struggle between she and I as to how we were going to defend the case. She wanted it done her way, and I had other ideas." It was appropriate for appellant's attorney to cut off contact with appellant's mother to preserve the integrity of the attorney-client relationship. Moreover, appellant has failed to show that the lack of communication negatively impacted the trial; therefore, we conclude that the amount of contact between appellant and his attorney does not show that his attorney was ineffective.

Appellant also argues that his attorney failed to sufficiently prepare for trial and investigate his case. Specifically, he argues that his attorney did not contact the state's witnesses, did not obtain the victim's phone records, did not timely pick up the state's evidence, did not obtain expert witnesses to testify to the DNA evidence or appellant's

mental state, and did not present supposedly exculpatory evidence from appellant's Facebook account.

When evaluating an ineffectiveness claim, "[t]he proper focus . . . should be on the adversarial process rather than the defendant's assessment of his lawyer's preparation." *Caldwell*, 803 N.W.2d at 387 (quotation omitted). "[M]atters of trial strategy, including which witnesses to call, what defenses to raise at trial, and specifically how to proceed at trial, will not be reviewed later by an appellate court as long as the trial strategy was reasonable." *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). However, where an attorney fails to investigate evidence or witnesses that are essential to the attorney's theory of the case, the attorney is ineffective. *State v. Nicks*, 831 N.W.2d 493, 508 (Minn. 2013). Moreover, appellant must show that prejudice resulted from his attorney's failure to prepare or investigate his case. *Gates*, 398 N.W.2d at 562-63.

On this record, we conclude that the errors appellant cites are unreviewable as trial strategy. At the postconviction evidentiary hearing, appellant's attorney testified that the theory of the case he planned to pursue was to acknowledge that appellant had physically assaulted the victim, a fact appellant admitted to the police, but to deny that the sexual contact was nonconsensual. Therefore, the evidence showing a relationship between appellant and the victim, including the Facebook messages, the victim's phone records, and the DNA evidence, were all irrelevant because "[t]he fact that they had contact or not didn't appear to have any connection as to whether the alleged events occurred or not." Appellant's attorney chose not to interview the victim to avoid revealing to her his trial strategy; and he chose not to interview the sexual-assault nurse because her examination

of the complainant "did not establish very much" and her examination of appellant was "a pretty cursory examination." And appellant's attorney testified that he had insufficient funds to pay for a psychological evaluation of appellant. Furthermore, the record shows that appellant's attorney timely picked up the state's evidence, and that these exhibits were admitted. Because appellant's attorney considered but rejected the evidence and arguments that appellant claims his attorney should have presented, these choices are trial strategy and do not show that appellant's attorney was ineffective. *See Nicks*, 831 N.W.2d at 508 (stating that trial counsel's choices made after conducting a thorough investigation of the law and facts are "virtually unchallengeable").

Appellant also alleges that his attorney did not "adequately cross-examine the State's expert witnesses," but does not state how the cross-examination fell short. Whether to cross-examine an expert witness is a matter of trial strategy that an appellate court will not review. *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010).

Appellant also argues that his attorney failed to object to the use of evidence of appellant's violation of a no-contact order involving the victim. Appellant does not explain what that evidence was or how its inclusion prejudiced him at trial. According to the state, while appellant was in custody he hired a fellow inmate to call the victim and read a letter to her written by appellant. The letter told the victim to recant her testimony and say the sexual contact was consensual. Appellant's counsel objected to the use of the phone call as hearsay, but the court admitted the evidence over counsel's objection as evidence of consciousness of guilt. *See State v. Mayhorn*, 720 N.W.2d 776, 783 (Minn. 2006) (stating that evidence of a threat made by the defendant against a witness may be

relevant to show consciousness of guilt). Although neither party has provided this court with transcripts of the trial proceedings, even if appellant's attorney did not object to the use of this evidence as appellant claims, appellant has not shown how the inclusion of this evidence was sufficiently prejudicial to change the outcome of the trial. On appeal, appellant is responsible for providing the court with an adequate record. *State v. Taylor*, 650 N.W.2d 190, 204 n. 12 (Minn. 2002). We cannot base our decision on matters outside the record. *Id.*

Appellant also argues that his attorney opened the door to testimony about appellant's prior conviction for domestic assault of the victim. The district court ruled that evidence of the prior assault was admissible as relationship evidence, but ruled that the fact of the conviction resulting from the incident was not admissible. The parties agree that, during appellant's direct examination, he testified about the incident and about pleading guilty to the charge. "[W]hat testimony to elicit from witnesses" is a matter of trial strategy that is generally not reviewed. *Schleicher v. State*, 718 N.W.2d 440, 448 (Minn. 2006). Moreover, appellant does not show how the admission of evidence of appellant's prior conviction resulted in prejudice when the evidence of the underlying circumstances leading to the conviction was properly admitted as relationship evidence.

Appellant also argues that his attorney was ineffective by portraying him in a negative light. Specifically, he called appellant's actions "deplorable" in his opening statement. Appellant's attorney testified that calling appellant's assault of the victim "deplorable" was "a strategic decision to acknowledge the physical assault as being, perhaps, not exemplary behavior." Moreover, appellant acknowledged on the record at

trial that his attorney discussed this strategy with appellant and that appellant was "okay" with this strategy. Because this statement was consistent with his trial strategy, the use of the term "deplorable" to describe appellant's assault of the victim does not support appellant's ineffectiveness claim.

Appellant also argues that his attorney was ineffective for failing to request a jury instruction on a lesser included offense. Whether to request a jury instruction is a matter of trial strategy that is generally not reviewable. *See State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (concluding that whether to request an instruction on intoxication is trial strategy). An attorney is not ineffective for pursuing an "all or nothing" trial strategy instead of requesting an instruction on lesser included offenses. *Morgan v. State*, 384 N.W.2d 458, 460-61 (Minn. 1986). Appellant's attorney testified that he did not request an instruction on a lesser included offense because

> my assessment was that the state was going for an all or nothing, and I felt pretty good about our chances at trial. And I thought that if the jury had nothing to choose between other than acquittal and the single charge that the state brought, that perhaps they would choose for acquittal.

Therefore, we conclude this tactic is not reviewable.

Finally, appellant argues that, even if each alleged error on the part of his attorney would not render the representation ineffective, the cumulative effect of all the errors does. But, all of the cited errors involved matters of trial strategy that this court does not review. *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (concluding that an ineffective assistance claim failed because all the cited errors involved trial strategy). Moreover, appellant has not shown that these errors, even taken together, resulted in

prejudice sufficient to change the outcome of the case given the photographic evidence of the assault, appellant's abusive relationship with the victim, and the jury's determination of the credibility of the victim's testimony. Therefore, appellant's counsel was not constitutionally ineffective.

II.

Appellant also argues that he is entitled to accept the state's original offer of a plea deal, or alternatively, that he is entitled to a new trial, because his attorney failed to prepare appellant to accept the plea and never scheduled another plea hearing after the judge rejected the plea.

The "right to effective assistance of counsel is implicated by the decision to reject a plea bargain." *Leake v. State*, 737 N.W.2d at 540-41. "[C]ourts have held that 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. "[A] defendant is prejudiced by such ineffective assistance if there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised." *Id.*

The postconviction court rejected appellant's claim without a hearing. The court concluded that the claim lacked merit because appellant did not allege that he was given "inaccurate or misleading advice" but alleged instead that he was not prepared by his attorney to provide a factual basis to accept the plea. Moreover, the postconviction court observed that appellant persisted in maintaining his innocence, and that "[n]o one can or

should force a defendant to plead guilty and admit to something he does not think he did, and a judge should never accept a guilty plea from a defendant [who] maintains his innocence." We agree.

In *Leake*, the defendant argued that the reason he rejected the state's plea offer was because he was mistakenly advised by his attorney that, at worst, he would receive a sentence of life with the possibility of release; but, after trial he was sentenced to life without the possibility of release. 737 N.W.2d at 539. The supreme court concluded that an attorney's "inaccurate or misleading factual statements" regarding a plea could render an attorney's assistance ineffective if the defendant could show that "there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised." *Id*. at 540. But appellant did not reject a plea offer; he steadfastly insisted he was innocent. Although appellant has presented evidence that he would have accepted the plea deal, he has not shown that his attorney's advice was inaccurate or misleading, and that this advice caused him, erroneously, to maintain his innocence. On these facts, we cannot conclude that appellant's attorney's representation fell below a standard of reasonableness that resulted in prejudice to appellant.

III.

Appellant finally argues that the district court abused its discretion when it denied appellant's request for a continuance to substitute counsel. A ruling on a request for a continuance is within the district court's discretion and a conviction will not be reversed for denial of a motion for a continuance unless the denial is a clear abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). "The reviewing court must examine

the circumstances before the [district] court at the time the motion [for a continuance] was made to determine whether the [district] court's decision prejudiced [the] defendant by materially affecting the outcome of the trial." *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980). The decision whether to grant a request for substitute counsel is also within the district court's discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

Appellant requested a continuance in order to substitute counsel just a few minutes before his trial was to start. The proposed substitute counsel appeared and informed the court that "[i]f this case is proceeding to trial today, there is no way that I can possibly represent him . . . I've had no conversation with him whatsoever . . . ." The following exchange occurred:

> THE COURT: Given that we're going to trial here in about 15 minutes, what is it you'd like to say?
> SUBSTITUTE COUNSEL: Me?
> THE COURT: Yes, sir.
> SUBSTITUTE COUNSEL: See you later.
> THE COURT: Okay.

Appellant claims that he would have attempted to substitute counsel sooner but was not aware that his attorney was unprepared to represent him "until just a few weeks before trial." If this is true, then appellant should have requested the continuance "weeks before trial," when he became aware of what he believed were his counsel's inadequacies. *See State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (request for substitute counsel made on the first day of trial was untimely). And according to emails sent by appellant's mother, appellant and his family were disappointed in counsel's performance months earlier.

Appellant cites *City of Minneapolis v. Price*, a case which held that the district court abused its discretion by failing to grant a request for continuance where the defendant's attorney withdrew on the day of trial. 280 Minn. 429, 433-34, 159 N.W.2d 776, 780 (1968). In that case, the district court forced the defendant to proceed without representation, but in this case, appellant was represented by an attorney. Appellant also cites *In re Welfare of T.D.F.*, in which the supreme court concluded that that district court abused its discretion by denying a motion for a continuance where the attorney had not had sufficient time to prepare a defense. 258 N.W.2d 774, 775 (Minn. 1977). Citing *Price*, the court stated that "[w]hen denial of a continuance deprives defendant's counsel of adequate trial preparation, we must reverse the conviction." *Id.* The court observed that defendant's counsel presented "no evidence" at the hearing, making it clear that, indeed, defendant's counsel was not prepared. *Id.* But here, appellant's counsel presented evidence and testimony, and cross-examined the state's witnesses. We conclude that appellant's attorney was not ineffective. We further conclude that appellant was not entitled to a continuance to substitute counsel.

Affirmed.