

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-2001**

State of Minnesota,
Respondent,

vs.

Lance Arnold Kingbird,
Appellant.

**Filed April 30, 2018
Affirmed
Larkin, Judge**

Beltrami County District Court
File No. 04-CR-14-3347

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

David Hanson, Beltrami County Attorney, Wyatt T. Arneson, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Robert D. Miller, Minneapolis, Minnesota; and

Christopher J. Perske, The Law Office of Christopher J. Perske, LLC, Jordan, Minnesota
(for appellant)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this reinstated direct appeal from final judgment of conviction and sentence for three counts of first-degree criminal sexual conduct, appellant argues that he is entitled to a new trial because the district court erred by admitting the victim's out-of-court video-recorded statement at trial and because he received ineffective assistance of counsel. Appellant raises additional issues in a pro se supplemental brief. We affirm.

FACTS

Respondent State of Minnesota charged appellant Lance Arnold Kingbird with three counts of first-degree criminal sexual conduct based on allegations that he sexually assaulted his 11 year-old daughter, A.L., several times in October 2014. A.L. initially reported the abuse to her mother, her mother contacted law enforcement, and A.L. gave a videotaped statement to a forensic interviewer at the Family Advocacy Center of Northern Minnesota. A.L. described three incidents in which Kingbird sexually penetrated her.

At trial, A.L. testified that Kingbird assaulted her three times in October of 2014. She testified that one incident occurred when Kingbird was giving her driving lessons on back roads, told her to stop the car, pulled down her pants, and put his "private part" in her "private parts." A second incident took place on a mattress in the family's living room while A.L.'s mother was sleeping next to her. A.L. testified that she tried to push Kingbird off of her, but that he succeeded in penetrating her. The final incident occurred on the couch in the family's living room while A.L.'s mother was sleeping on a mattress nearby. A.L. testified that on at least one occasion, she had semen on her body. A.L. testified that

she did not remember the precise day she told her mother about the assaults, but that it was while her mother and Kingbird were fighting.

During cross-examination, Kingbird questioned A.L. regarding inconsistencies between her trial testimony and the statement she made at the Family Advocacy Center before trial. The state offered the videotape of A.L.'s interview with the forensic interviewer at the Family Advocacy Center as evidence. Kingbird objected, arguing the video was inadmissible because it provided information that was not included in A.L.'s trial testimony. The district court ruled that the video was admissible as a prior consistent statement, except for portions of the video that went beyond the scope of A.L.'s testimony. For example, the district court excluded A.L.'s statements that Kingbird rubbed his penis on her, that she bled from the penetration, that Kingbird stuck his tongue in her mouth, that A.L. was bruised when Kingbird punched her, and that Kingbird digitally penetrated A.L. The district court also excluded A.L.'s description of forced fellatio.

In the video that was received and played for the jury, A.L. told the interviewer that Kingbird touched her breasts and her "private part." She said that Kingbird first penetrated her when he had her bend over a car while they were out for driving lessons in the back woods. She said that it hurt because it was her first time. She said that Kingbird penetrated her on a couch while she was sleeping, that it hurt, and that she tried to push him off. She said that Kingbird penetrated her while she was on a bed near the couch. A.L. said that Kingbird's "private part" emitted a slippery substance, which got on her stomach.

Kingbird called two defense witnesses. One witness worked near the location where Kingbird was driving with A.L. during the first assault. The witness testified that he

regularly saw Kingbird driving his car in the area. The second witness supervised Kingbird at the casino where he was employed as a shuttle driver. She testified that Kingbird was working during some of the dates in question, though she did not observe him while he was working and could not verify his location at particular times.

The jury found Kingbird guilty as charged. The district court entered judgment of conviction on all three offenses and sentenced Kingbird to serve a total of 360 months for the three criminal-sexual-conduct convictions. Kingbird appealed, and this court stayed his appeal while he pursued postconviction relief.

In the postconviction proceeding, Kingbird claimed that he received ineffective assistance of counsel at trial because his attorneys failed to call certain witnesses and failed to present certain evidence in his defense. At the postconviction hearing, Kingbird testified regarding what the witnesses would have said had they testified and what the evidence would have shown had it been offered. Kingbird called his defense attorneys to testify at his postconviction hearing, but they declined to disclose any confidential information. Kingbird presented no evidence to corroborate his testimony. The postconviction court denied Kingbird's petition for relief, and this court reinstated his appeal.

D E C I S I O N

I.

Kingbird contends that the district court abused its discretion by admitting A.L.'s recorded statement to the forensic interviewer at the Family Advocacy Center. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an

abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). On appeal, Kingbird must prove both that the district court abused its discretion and that he was prejudiced by the result. *Id.* at 46. “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Id.* (quotation omitted).

Kingbird argues that the video was inadmissible hearsay and that it was prejudicial. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Minn. R. Evid. 801(a). Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

A statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness. Minn. R. Evid. 801(d)(1)(B). A statement admitted under Rule 801(d)(1)(B) is substantive evidence. Minn. R. Evid. 801(d)(1)(B) 1989 comm. cmt. “Before the statement can be admitted, the witness’ credibility must have been challenged, and the statement must bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged.” *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997).

Kingbird argues that “A.L.’s credibility was only challenged on two issues: (1) whether her mother woke up during an alleged incident of abuse, and (2) whether A.L.

was biased because she kn[ew] her mother was angry with [Kingbird].” Kingbird further argues that because he “never attacked A.L.’s credibility on the ‘bodily-fluid’ issue—information about that should not have been repeated through the videotape . . . because credibility on that issue had never been challenged.” Kingbird also argues that portions of the videotape are inconsistent with A.L.’s trial testimony.

A witness’s credibility is challenged when the witness’s recollection is disputed. *Id.* “One of the traditional methods of challenging a witness’s credibility is the use of prior inconsistent statements.” *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000). During cross-examination, and before the district court admitted A.L.’s prior recorded statement, Kingbird challenged A.L.’s credibility by questioning her about inconsistencies between her trial testimony and her recorded statement. Moreover, A.L.’s recollection, and therefore her credibility, was central to the case because she was the only eyewitness to give testimony regarding the alleged sexual abuse. *See id.* (Witness’s credibility was central when he “was the only witness to present firsthand evidence”).

As to whether A.L.’s trial testimony and prior recorded statement were consistent, “The trial testimony and the prior complaint need not be verbatim.” *Id.* Instead, the prior statement must be “reasonably consistent” with the trial testimony. *See In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). However, “[if] inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule.” *Bakken*, 604 N.W.2d at 110 (noting that

inconsistencies “were significant because, if the jury believed the inconsistent videotaped statements, the criminal conduct would legally escalate from third-degree to first-degree”).

Although there may have been some inconsistencies between A.L.’s trial testimony and her recorded statement, her recorded statement provided greater detail, and the two were reasonably consistent. Moreover, this is not a situation in which the inconsistencies and new details enhanced the elements of the criminal charge and were therefore significant enough to render the statements inconsistent and inadmissible under Rule 801(d)(1)(B).

As to whether A.L.’s prior statement was helpful to the trier of fact, “[A] prior consistent statement might bolster credibility by showing a fresh complaint, obviating an improper influence or motive, providing a meaningful context, or demonstrating accuracy of memory.” *Id.* at 109. A.L.’s recorded statement was generally consistent with her trial testimony regarding the identity of the perpetrator, the nature of the acts of penetration, and the locations of the assaults. A.L.’s recorded statement was helpful in evaluating her credibility because it showed prompt complaint, provided context, and demonstrated accurate memory.

In sum, A.L.’s credibility was central to the case, and it was challenged by Kingbird at trial. Her trial testimony and recorded statement were reasonably consistent. Any inconsistencies and new details in her recorded statement did not directly affect the elements of the charges and were therefore insignificant. Moreover, the district court carefully omitted those portions of A.L.’s recorded statement that were not consistent with her trial testimony in an effort to avoid prejudice. On this record, the district court did not

abuse its discretion in admitting the redacted version of A.L.’s prior recorded statement at trial.

II.

Kingbird contends that he received ineffective assistance of counsel because his lawyer failed to call certain witnesses and to offer important exculpatory evidence, thereby compromising his defense that A.L.’s mother prompted A.L. to fabricate the allegations. A defendant is entitled to have the assistance of counsel in all criminal prosecutions. U.S. Const. amend. VI; Minn. Const. art I, § 6. This right to counsel, more specifically, is the right to “*effective* assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (emphasis added) (quotation omitted). When this court reviews a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, it considers the factual findings supported by the record, conducts a de novo review of their application, and determines whether the court abused its discretion. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Kingbird 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.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. “[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) (quotation omitted).

“Generally, [appellate courts] will not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014).

“Trial strategy . . . includes the extent of counsel’s investigation and the selection of evidence presented to the jury.” *Id.* A postconviction court’s statements regarding counsel’s trial strategy are not owed deference and are reviewed de novo. *Nicks*, 831 N.W.2d at 504 n.1.

Failure to Call Witnesses

Kingbird argues that he received ineffective assistance of counsel because his lawyers did not call the following three witnesses to testify at trial: C.L. (A.L.’s mother), D.W. (A.L.’s neighbor), and J.F. (Kingbird’s cousin’s girlfriend). Kingbird asserts that C.L. was a “critical witness for the defense because of her motive against [him], her access and influence over A.L. and her connection to the investigation and reporting of the crime to law enforcement” and that “the failure to call [C.L. to testify] was prejudicial because it precluded [him] from challenging any of the initial statements and evidence collected, which were contradictory to the later statements.”

Kingbird asserts that D.W. was an important witness because D.W. would have testified that she heard A.L. tell her mother that she “wasn’t going to do that to her dad,” which would have supported the defense’s theory that A.L.’s mother manipulated A.L. into making a false report. Finally, Kingbird asserts that J.F. should have been called to testify because she had received an online message from A.L. stating that “she was sorry and that her mother made her lie.” At his postconviction hearing, Kingbird admitted that he had not seen the message himself and that his cousin told him about it. Kingbird alleges that his lawyers did not call J.F. as a witness even though J.F. called defense counsel’s office.

In denying Kingbird's ineffective-assistance-of-counsel claims, the postconviction court reasoned:

The only evidence before this Court of what these witnesses might have said is [Kingbird's] own testimony at the post-conviction hearing, during which he referred to apparent recorded statements of one or more witnesses. These recorded statements were not offered as evidence at the hearing. This Court is not required to take at face value what [Kingbird] claims the witnesses would have said. In fact, [Kingbird's] testimony in this regard is highly suspect

The postconviction court did not err in rejecting Kingbird's ineffective-assistance-of-counsel claim for lack of evidentiary support. See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068 (defendant must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness). Moreover, even if Kingbird had provided evidentiary support for his allegations regarding the proffered witness testimony, decisions about which witnesses to call are generally not reviewed by appellate courts because they are matters of trial strategy. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (declining to review an attorney's representation when defendant claimed that the attorney failed to call certain witnesses and did not thoroughly cross-examine the state's witnesses).

Kingbird argues that "there does not appear to be a trial strategy for leaving any of these three witnesses out of the defense's case." Kingbird called his trial attorneys as witnesses at the postconviction hearing. The attorneys declined to comment on the reasons for their decisions. One attorney stated, "[A]ttorney-client privilege is the foundation of relationships that I make with my clients. Based on that, I would choose to not relate

information because I do not believe it would be beneficial to my clients for me to do that
....”

In sum, Kingbird does not establish that his attorneys’ decisions not to call C.L., D.W., and J.F. were anything other than unreviewable strategic decisions.

Failure to present evidence

Kingbird also argues that his attorneys were ineffective because they did not present or challenge certain evidence at trial. For example, during the state’s investigation, A.L. tested positive for a sexually transmitted infection. Kingbird was compelled by warrant to take a test to determine if he had any sexually transmitted infections, which came back negative. At a hearing before trial, Kingbird’s attorneys and the state agreed that there was no basis for the defense to introduce the test results, because the state was not going to introduce any evidence of disease, which rendered the test results irrelevant.

Minnesota Rule of Evidence 412(1) provides:

[E]vidence of the victim’s previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:

....

When the prosecution’s case includes evidence of semen, pregnancy or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim’s previous sexual conduct, to show the source of the semen, pregnancy or disease.

It is unclear that evidence that A.L. tested positive for a sexually transmitted infection was admissible under rule 412. In fact, Kingbird does not argue that it was admissible. Instead, he argues that “[e]ven if it was determined that the evidence was inadmissible . . . , [he] was precluded from having that decision reviewed on appeal as well as denied the opportunity to present the alternate source theory to the jury.” On this record, we cannot conclude that counsels’ decision not to offer the evidence was unreasonable. *Cf. State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003) (rejecting ineffective-assistance-of-counsel claim where counsel did not object to properly admitted evidence).

Kingbird also argues that his attorneys’ failure to offer evidence regarding his “fertility status” compared to a collected sample shows that he received ineffective assistance of counsel. Kingbird acknowledges that this issue is “difficult for [him] . . . to understand and explain.” Though his attorneys refused to divulge any confidential information, at the postconviction hearing, one of Kingbird’s trial attorneys testified, “In the evidence that we received from the BCA, there was no identification of fertility or infertility [N]othing in the evidence at trial was related to infertility or fertility.”

Once again, decisions regarding what evidence to present at trial are strategic and generally not subject to review. *See Vang*, 847 N.W.2d at 267. Moreover, the record does not suggest that lack of evidence regarding Kingbird’s fertility was relevant and would have affected the outcome at trial. In sum, we discern no basis to reverse the postconviction court’s conclusion that Kingbird was not entitled to relief on his ineffective-assistance-of-counsel claim.

III.

Kingbird raises six additional issues in a pro se brief. Many of these issues are addressed in his primary brief. In fact, most of the arguments in Kingbird's pro se brief are attempts to recast his ineffective-assistance-of-counsel claim as erroneous district court rulings and discovery violations by the state.¹ The vast majority of these arguments are unsupported by the record, and some of the supporting allegations are simply inaccurate. Lastly, many of Kingbird's claims of error are unaccompanied by persuasive legal argument.

Nonetheless, we have carefully reviewed all of Kingbird's pro se arguments and conclude that none of his assignments of error—individually or cumulatively—establishes grounds to reverse his conviction. *See Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (rejecting pro se arguments based on review of record without detailing each claim).

Affirmed.

¹ For example, Kingbird repeatedly asserts that the district court excluded exculpatory evidence, but he supports the assertions with examples of his attorneys' failure to proffer evidence. Similarly, Kingbird asserts that the prosecutor impermissibly failed to disclose exculpatory evidence, but he supports the assertion with examples of evidence known to Kingbird and not proffered by his attorneys.