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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0426**

State of Minnesota,
Respondent,

vs.

William Joseph Sullivan,
Appellant.

**Filed April 8, 2019
Affirmed
Hooten, Judge**

Stearns County District Court
File No. 73-CR-13-5272

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Ole C. Tvedten, Chief Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant was convicted of multiple counts of criminal sexual conduct and ordered to pay restitution. He appeals, asserting that he received ineffective assistance of trial counsel and the district court erred in awarding restitution after sentencing. We affirm.

FACTS

In June 2013, Stearns County charged appellant William Joseph Sullivan with two counts of first-degree criminal sexual conduct (CSC) under Minn. Stat. § 609.342, subd. 1(e)(i) (2012). The complaint alleged that Sullivan had repeatedly sexually assaulted his wife in October 2012. The sexual assaults described in the complaint were violent in nature and caused her pain. Sullivan was abroad when the state charged him, so he was not arrested until January 2016 upon returning to the United States.

In early August 2016, the state sent Sullivan’s trial counsel an email outlining a proposed plea offer. The offer was for Sullivan to make an *Alford* plea¹ on one of the charges, which would be amended to third-degree CSC. In exchange, the state would dismiss the remaining count and not charge Sullivan for an incident that occurred while he was in jail. The offer also indicated that Sullivan would: (1) receive a 48-month stayed sentence; (2) receive credit for time served in jail; (3) be on probation for 15 years; (4) have a no contact order and a domestic abuse no contact order for his wife and another woman;

¹ “An *Alford* plea is a plea in which an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence while not admitting guilt.” *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015) (quotation omitted); see also *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

(5) undergo a psychosexual evaluation and follow its recommendations; (6) pay a \$50 fine, provide a DNA sample, and remain law abiding; (7) receive a 10-year conditional-release term if his stayed sentence was ever executed; and (8) register as a predatory offender for 10 years.

The prosecutor sent trial counsel a follow-up email 15 days later indicating that he had not received a response and wondered if Sullivan would accept the offer. Trial counsel responded a few minutes later, without consulting Sullivan, saying “I did receive it; and the lack of a response should pretty much tell you what we think.” At a hearing in late September, trial counsel indicated to the district court that the state had made a plea offer and that he had “explained that to Mr. Sullivan. I -- I gave it to ‘em when I first got the email from [the prosecutor], and we’re not accepting any offer to plea at this point.”

Rather than plead guilty, Sullivan elected to have a court trial. He was convicted of both counts of first-degree CSC. On the first count, the district court sentenced Sullivan to 144 months in prison with 10 years of conditional release after confinement. And on the second count, the district court sentenced him to 180 months in prison with a lifetime conditional-release term. The two sentences run concurrently. Five days after the sentencing hearing, the state submitted an order for payment from the Minnesota Crime Victims Reparations Board for \$2,402. The district court granted this restitution request.

Sullivan appealed his conviction and moved to stay his case and remand it for postconviction proceedings. This court granted that motion. The postconviction court granted Sullivan an evidentiary hearing. Sullivan argued that he received ineffective assistance of counsel and that the district court erred by granting the restitution order. Trial

counsel and Sullivan testified at the postconviction hearing. The postconviction court denied Sullivan’s petition for postconviction relief. It reasoned that although some of trial counsel’s representation was deficient, this deficient performance did not affect Sullivan’s decision to not accept the state’s plea offer. And it concluded that the district court had the authority to order restitution. The appeal was reinstated.

D E C I S I O N

When an appellant stays a direct appeal in order “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).

I. Ineffective Assistance of Counsel

Sullivan first argues that he received ineffective assistance of counsel from his trial counsel. A claim for ineffective assistance of counsel is a mixed question of law and fact. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). We review factual findings to determine whether they are supported by the record, and we conduct a de novo review of the legal implications of those facts on the ineffective-assistance claim. *Id.* at 503–04.

There are two prongs to the ineffective-assistance-of-counsel test. Sullivan “must show that (1) counsel’s representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). There is a strong presumption that counsel’s performance was reasonable. *Id.* And if the claim fails one of the prongs of this test, the other need not be considered. *Id.*

Sullivan argues that trial counsel was ineffective in two ways which caused him to reject the plea offer from the state. First, he asserts that trial counsel did not inform him that if he went to trial he could face a lifetime conditional-release term—a consequence he would not have faced if he had accepted the proposed plea offer. And second, he asserts that trial counsel did not explain what an *Alford* plea is and that he could make one as a part of the plea offered by the state. The decision to reject a plea offer implicates the right to effective assistance of counsel and that representation is deficient when an “attorney’s inaccurate or misleading factual statements tend to affect a defendant’s decision to reject a plea bargain and go to trial.” *Leake v. State*, 737 N.W.2d 531, 540–41 (Minn. 2007) (remanding for an evidentiary hearing when “defense counsel did not advise [appellant] that he faced a sentence of life in prison without the possibility of release”). But we need not decide whether trial counsel’s performance actually fell below an objective level of reasonableness because, even if it did, Sullivan’s argument fails under the second prong of the ineffective-assistance-of-counsel test. *See Swaney*, 882 N.W.2d at 217.

Sullivan argues that the second prong of the ineffective-assistance-of-counsel test was met because he would have accepted the state’s plea offer if trial counsel had properly counseled him. Under the second prong, Sullivan has to show that but for trial counsel’s error the result of the proceeding would have been different. *See id.* Deciding not to accept a plea offer can be an example of this. *Leake*, 737 N.W.2d at 540–41.

Sullivan’s own testimony is the most significant evidence that he would have accepted the plea offer. Sullivan testified repeatedly that he would have accepted the plea offer if he had known that he was facing the possibility of lifetime conditional release and

that he could plead guilty without admitting to forcibly raping his wife. But the district court specifically found that Sullivan was not credible and his statements during the postconviction evidentiary hearing were self-serving. Although the district court acknowledged that it was likely that trial counsel did not elaborate on the details of an *Alford* plea, it concluded that trial counsel failed to do so because he knew “Sullivan had no interest in accepting any plea offer from the State.” A “postconviction court is in the best position to evaluate witness credibility,” so its credibility determinations are reviewed for clear error and will not be disturbed if supported by reasonable evidence. *Bobo v. State*, 860 N.W.2d 681, 684–85 (Minn. 2015) (quotation omitted). Sullivan does not point to any reasons why this determination was clearly erroneous, and our review of the record has not uncovered any. Accordingly, the postconviction court’s credibility determination was not clearly erroneous, and we will not consider Sullivan’s testimony in analyzing his second-prong argument.

Instead, we look to the other evidence presented at the postconviction hearing. Trial counsel testified that for Sullivan, the “main question” was “what he was going to have to admit to because he wasn’t going to admit to the allegations in the complaint.” More specifically, trial counsel testified that Sullivan did not want to admit to physically assaulting his wife and forcing himself on her sexually. While this testimony suggests that an *Alford* plea, as opposed to a traditional guilty plea, would have addressed some of Sullivan’s concerns, there is nothing in the record that suggests that Sullivan was actually open to entering a guilty plea in any form. For example, when the prosecutor asked trial counsel, “Did Mr. Sullivan ever express a willingness to resolve the case and register as a

sex offender to you,” he replied “it wouldn’t have been in the terms of that I mean because the most important consequence would have been how long he sat in prison than whether you’re gonna register as a sex offender.” And Sullivan rejected the plea offer despite understanding that he would be released from jail if he pleaded guilty. Moreover, there is nothing in the record to indicate that Sullivan asked trial counsel to come up with a counter-offer to what the state had proposed or showed any other interest in pleading guilty. Based upon this record, we conclude that the district court did not abuse its discretion by determining that Sullivan failed to meet his burden of showing that he would have accepted the plea offer. Therefore, he fails the second prong of the ineffective-assistance-of-counsel test, and the postconviction court did not abuse its discretion in denying his claim.

II. Restitution

Sullivan next argues that the district court did not have the authority to order restitution. An order for restitution is reviewed for an abuse of discretion, “[b]ut determining whether an item meets the statutory requirements for restitution is a question of law that is fully reviewable by the appellate court.” *State v. Nelson*, 796 N.W.2d 343, 346–47 (Minn. App. 2011) (quotation omitted).

Under the restitution statute, “A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . against the offender if the offender is convicted.” Minn. Stat. § 611A.04, subd. 1(a) (2018). Typically, an offender can challenge restitution by requesting a hearing within either 30 days of receiving written notification of the amount requested or 30 days of sentencing, whichever is later. Minn. Stat. § 611A.045, subd. 3(b) (2018). But this requirement does not apply when the “offender

challenges the district court's legal authority to award restitution." *State v. Gaiovnik*, 794 N.W.2d 643, 647 (Minn. 2011). While Sullivan did not request a hearing, he was not required to do so because he is challenging the district court's authority to order restitution.

Sullivan asserts that the district court did not have the authority to order restitution after sentencing. In order to have a restitution request considered at a sentencing or dispositional hearing, the information regarding restitution must be received by the court at least three business days before the hearing. Minn. Stat. § 611A.04, subd. 1(a). A district court may, however, also order restitution *after* sentencing if three conditions are met: (1) the offender is committed to the commissioner of corrections; (2) sufficient evidence of a right to restitution has been submitted; and (3) "the true extent of the victim's loss . . . was not known at the time of the sentencing or dispositional hearing." Minn. Stat. § 611A.04, subd. 1(b) (2018). The district court in this case did not order restitution until *after* sentencing, so subdivision 1(b) and its three requirements apply. Sullivan does not dispute that he is committed to the commissioner of corrections or that sufficient evidence of a right to restitution was submitted. Instead, he argues that the third requirement was not met.

Sullivan argues that "the true extent of the victim's loss" was known at the time of the sentencing hearing because a restitution request had been made in 2013. Both parties agree that a restitution request was made by the Minnesota Crime Victims Reparation Board in 2013. Sullivan maintains that because the request was made in 2013, the extent of the victim's loss was known years before the sentencing hearing. Thus, he argues that it was the state's knowledge of the extent of the victim's loss that is dispositive rather than

the district court's knowledge. But in *State v. Mason*, our court interpreted Minn. Stat. § 611A.04, subd. 1(b)(3), to mean that the “the court's knowledge, rather than the victim's or the state's, is determinative.” 652 N.W.2d 269, 272 (Minn. App. 2002), *review denied* (Minn. Dec. 30, 2002). And the district court was clear that it had no knowledge of the extent of the victim's loss at the time of sentencing. Accordingly, all three requirements of subdivision 1(b) were met.

But Sullivan attempts to get around *Mason*. He points out that in *Mason*, the district court had reserved the issue of restitution at sentencing under subdivision 1(a) of the restitution statute whereas the district court in his case had not. *See id.* From this, he appears to conclude that the district court in his case was required to reserve the issue of restitution in order to be able to address it later, after sentencing. In relevant part, subdivision 1(a) indicates that the “issue of restitution is reserved . . . if the victim's affidavit or other competent evidence submitted by the victim is not received on time.” Minn. Stat. § 611A.04, subd. 1(a). While our court in *Mason* discussed the fact that the district court had reserved the issue of restitution, we did so in a section addressing an argument made by Mason about that specific part of the statute. *Mason*, 652 N.W.2d at 272 (addressing Minn. Stat. § 611A.04, subd. 1(a)). To the extent that we mentioned subdivision 1(a) in our interpretation of subdivision 1(b)(3), we did so to show that we were interpreting subdivision 1(b)(3) in light of 1(a). But we did *not* add a reservation requirement to Minn. Stat. § 611A.04, subd. 1(b). *See id.* Therefore, subdivision 1(a) and the question of whether the district court reserved the issue of restitution is entirely irrelevant to this case.

Sullivan also argues that to read subdivision 1(b)(3) as not requiring an affirmative reservation on the part of the district court under subdivision 1(a) would render the reservation portion of subdivision 1(a) superfluous. It is not clear why exactly that would be. Subdivision 1(a) makes it clear that restitution is reserved “if the victim’s affidavit or other competent evidence submitted by the victim is not received in time.” This portion of subdivision 1(a) concerns timing and restitution requests that are known about but simply not completed, whereas subdivision 1(b) deals with new restitution requests and amendments to already-existing restitution orders. Accordingly, we conclude that Sullivan’s argument fails and the postconviction court did not abuse its discretion in upholding the restitution order.

III. Pro Se Arguments

Finally, Sullivan makes seven pro se arguments. He argues: (1) he was denied the right to cross-examine his wife; (2) his wife was not allowed to work in the United States but did so anyway; (3) his wife violated federal and New York laws by working in acupuncture and cupping without any medical documentation; (4) the judge failed to have two doctors come testify at trial despite the fact that they were both served subpoenas; (5) there should have been a mistrial because the officer who took his statement and pictures of the apartment did not appear at trial due to contracting leukemia; (6) the officers should have checked certain evidence for his wife’s DNA to show whether her claim that he had inserted a device into her vagina was true; and (7) he had an immigration expert ready to testify over the phone but did not have him testify because his wife was not available for cross-examination.

Sullivan does not cite to any law or make any cogent legal arguments. “Arguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred.” *State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017). Accordingly, he has forfeited his pro se arguments.

Even if the arguments were not forfeited, they would still lack merit. His argument that he was denied the right to cross-examine the victim is belied by the record, which shows he did cross-examine the victim. His arguments about the victim’s immigration and work history status are irrelevant. Sullivan fails to explain how he was prejudiced due to the non-appearance at trial of two doctors and an investigating officer who contracted leukemia. Sullivan also fails to explain how additional testing for his wife’s DNA would have absolved him of the sexual assault allegations brought against him by the victim and how he was prejudiced by the failure of law enforcement to perform such additional testing.

Affirmed.