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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1467**

State of Minnesota,
Respondent,

vs.

Maslah Abdirahman Mohamed,
Appellant.

**Filed April 8, 2019
Affirmed in part, reversed in part, and remanded
Florey, Judge**

Dakota County District Court
File No. 19HA-CR-16-1348

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

James C. Backstrom, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant Maslah Abdirahman Mohamed argues that the postconviction court abused its discretion when it summarily denied his request for relief on his claim of

ineffective assistance of trial counsel. Appellant also argues that the district court erred by convicting him of lesser-included offenses. We affirm in part, reverse in part, and remand.

FACTS

On April 9, 2016, at around 9:40 p.m., Burnsville police officers responded to a reported disturbance at a Burnsville apartment unit. While en route to the apartment, one of the officers encountered a vehicle matching the description of the car that had reportedly fled the scene. The officer initiated a traffic stop and was notified by the driver, J.M., that J.M. had just been assaulted by three men outside his girlfriend's Burnsville apartment unit. J.M. reported that he was concerned his girlfriend was inside of her unit and in danger.

Earlier that day, J.M. and his girlfriend, E.B., had been texting about their plans to celebrate her birthday at her apartment that night. At some point throughout their texting exchange, E.B. stated to J.M. that she did not want him to come over. Around 4:00 p.m. or 5:00 p.m., E.B. stopped responding to J.M.'s calls and text messages. J.M. became suspicious.

At around 8:00 p.m., J.M. drove to E.B.'s apartment to check on her. When J.M. knocked on E.B.'s door, he was greeted by an individual whom he had never met before holding a Hennessy bottle. The individual told J.M. that E.B. was inside the unit, but that she did not want to see J.M. and then closed the door on him. J.M. yelled E.B.'s name through the door and knocked loudly in an effort to get E.B.'s attention.

The same individual answered the door, stepped outside into the hallway where J.M. was standing, and then closed the door behind him. Around that time, two more individuals, who J.M. knew by the names of Kaiser and Abduhl, came up the staircase and

entered the hallway where J.M. and the other individual were standing. According to J.M., Kaiser and Abduhl had threatened him the day before, and his relationship with them was “[l]ess than friendly.”

When Kaiser and Abduhl arrived, they told J.M. that E.B. did not want to see him and that he had to leave. After J.M. insisted that he was not going to leave until he spoke with E.B., a physical altercation ensued. The three men punched J.M. in the face, and once J.M. was able to briefly step inside the unit, one of the men hit J.M.’s head with the Hennessy bottle, causing J.M. to bleed “pretty heavily.” J.M. left the apartment and called 9-1-1 to report the incident. While driving from E.B.’s apartment complex, J.M. was stopped by law enforcement. J.M. explained what had just transpired at the apartment complex and his concern for E.B.’s safety.

Officers arrived at E.B.’s apartment to conduct a welfare check. Upon their arrival, officers observed “droplets of blood” near her unit. The officers knocked on the door of E.B.’s unit and yelled loudly, announcing their presence and instructing someone to come to the door. After several warnings and a couple minutes of no response, officers forced entry into the apartment, which was recorded by the officers’ body cameras.

Upon entry, officers located two individuals, both naked from the waist down, sleeping in a bed in the bedroom. The individuals, who were later identified as E.B. and appellant, appeared to be “unconscious.” Appellant was lying on top of E.B. When officers removed appellant from the bed, they handcuffed him and observed “a white, crusty film on his penis.” Officers observed “a used condom on the floor of the bedroom

as well as a condom wrapper.” Officers also located “some white pills” on the bed “as well as a container with what appeared to be marijuana residue inside.”

Officers removed appellant from E.B.’s bedroom and seated him in the living room. They informed him that they were there on a welfare check to make sure that E.B. was okay. One of the officers, Officer John Mott, tried to identify appellant by asking him, several times, for his name, but appellant evaded the question. Eventually, appellant stated that his name was “Mohamed Mohamed,” which officers later discovered, through their own investigation, was false. Officer Mott waited with appellant in the living room while the other officers spoke with E.B. in her bedroom. While seated in the living room, appellant continuously tried to initiate conversation with Officer Mott, despite being instructed by the officer to stop talking.

Officer Bill Berg attended to E.B., who appeared to be “extremely incoherent.” According to Officer Berg, E.B. “was unable to answer even the most basic of questions.” When officers asked her who she was lying in bed with, E.B. responded that she was alone. After officers brought E.B. into the living room to identify appellant, E.B. reported having met him one time, and she denied consenting to any sexual acts with him.

Officers transported appellant to the Burnsville Police Department. Officer Mott waited with appellant while other officers obtained a search warrant to collect appellant’s DNA. At the police station, appellant continued to initiate conversation with Officer Mott. Despite being instructed by the officer to stop talking, appellant voluntarily made several incriminating statements, including that “[E.B.] was drunk, just like [him]”; that “[he] went

to bed with her”; “[he] didn’t have sex with [E.B.] . . . she just sucked [his] d-ck”; and that “[E.B.]’s not good right now . . . because she drink too much.”

E.B. was transported to the hospital where she underwent a sexual-assault examination. During her exam, E.B. reported that she went to work at 7 a.m. on the morning of April 9, 2016, and left work at 4:30 p.m. that afternoon. She reported that three males picked her up from work and then they all went to a liquor store and “picked up a bottle.” She reported that she went to her apartment with two of the males and “took 2-3 shots” of alcohol. E.B. reported that she “got extremely tired” so she went to sleep. She reported that the next thing she remembered was being woken by officers in her apartment. She reported that officers informed her that her boyfriend called the police after he was attacked by males that were inside her apartment.

DNA collected from both appellant and E.B., as well as other evidence collected by officers at the scene, was submitted to the Bureau of Criminal Apprehension (BCA). The BCA test results revealed that E.B.’s ethyl-alcohol concentration was 0.087 at 3:30 a.m. on April 10, 2016, and that appellant’s was 0.031 at 5:46 a.m. on April 10, 2016. Tetrahydrocannabinol (THC) and Alprazolam were also detected in both E.B. and appellant’s toxicology reports. Appellant’s sperm-cell fractions were located inside of the condom located in E.B.’s bedroom. Neither E.B. nor appellant could be excluded from being the mixture of DNA on the outside of the condom.

The state charged appellant with one count of third-degree criminal sexual conduct (victim mentally impaired/helpless), in violation of Minn. Stat. § 609.344, subd. 1(d) (2014). Appellant’s counsel filed a motion to suppress evidence of appellant’s statements

to police officers during and following his arrest. The motion alleged that the “initial unrecorded statements made by [appellant] to police” were taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), and “were not voluntarily made,” and “all subsequent statements made by [appellant] . . . were involuntary and tainted by the illegally obtained previous statements.”

Appellant’s counsel subsequently withdrew the suppression motion. At a hearing, originally scheduled for a contested omnibus hearing to address appellant’s motion to suppress, appellant’s counsel stated:

Your Honor, we did have, basically, a resolution of the contested issues. They were occasioned by me not having discovery at the time I noticed this up. It was body camera videos and it was related to statements. Now that I’ve had a chance to review those statements, [the state] and I resolved that issue so there wasn’t going to be a contested hearing today.

Appellant was notified of, but was not present at, the hearing.

Before trial, the state amended its complaint, adding three additional counts: fourth-degree criminal sexual conduct (victim mentally impaired/helpless), in violation of Minn. Stat. § 609.345, subd. 1(d) (2014); fifth-degree criminal sexual conduct (nonconsensual sexual contact), in violation of Minn. Stat. § 609.3451, subd. 1(1) (Supp. 2015); and providing false information to police, in violation of Minn. Stat. § 609.506, subd. 1 (2014).

In January 2017, a bench trial was held. At trial, the state called J.M., E.B., three of the responding Burnsville police officers, and an investigating detective to testify. The state offered, and the court received by stipulation, video footage from the responding officers’ body cameras. The state also offered, and the court received by stipulation, E.B.’s

sexual-assault-examination report, as well as the BCA test results. The defense did not call any witnesses, and appellant did not testify.

During the state's case-in-chief, E.B. testified that, on April 9, 2016, she and J.M. had plans to celebrate her birthday. She testified that, around 4:30 p.m. or 5:00 p.m., she received a ride home from work from Abduhl—an individual she knew from working at a previous job. She testified that Abduhl was with three other men, including appellant.

On their way to her apartment, they stopped at a liquor store and purchased a bottle of Hennessy. E.B. testified that, on her ride home, she took “half of a Xanax” because she was “just really tired from . . . the hard workweek.” She testified that appellant gave her the Xanax. She testified that her plans to see J.M. later that night had not changed, nor did she indicate to J.M. that she did not want to see him.

E.B. testified that Abduhl and Kaiser wanted to stop at a gas station, but two of the men did not want to go. E.B. invited the two men to wait for Abduhl and Kaiser in her apartment unit. She testified that when the three of them arrived at her apartment, they sat down on her couch and had a few drinks. She stated that, after two or three drinks of the Hennessy, she “became unknowledgeable of what was going on, or unaware of [her] surroundings in [her] own home.” She “couldn't understand what was going on around [her].”

E.B. testified that she never saw or heard J.M. come to her apartment on April 9, 2016, and that she did not recall telling J.M. to not come over. She testified that her last memory of being in her apartment before being woken by the police was seeing Kaiser and Abduhl return. She testified that she did not remember nor consent to engaging in any

sexual acts with appellant, that she did not recall taking him into her bedroom nor getting undressed, that she had never met appellant before April 9, 2016, and that she did not know his name.

The district court found appellant guilty of all four counts and sentenced him to 41 months' imprisonment for count one and 90 days in jail for count four. In September 2017, appellant appealed to this court.¹ At appellant's request, we stayed appellant's direct appeal pending his postconviction proceedings in district court. *See* Minn. R. Crim. P. 28.02, subd. 4(4) ("If, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings.").

In March 2018, appellant petitioned the district court for postconviction relief. *See* Minn. Stat. § 590.01, subd. 1 (2016). In his petition, appellant requested an evidentiary hearing to develop the record regarding why his trial counsel withdrew the suppression motion and to determine whether his trial counsel's conduct amounted to ineffective assistance. The district court summarily denied appellant's request, finding that, under Minn. Stat. § 590 (2016), he was not entitled to a hearing on the matter. The district court found:

While it is true that [appellant] was in custody while at the police station, it is not accurate to label the conversations and voluntary admissions of [appellant] as questioning or the functional equivalent of questioning by police. The entire situation in the police department was captured on body cam. . . . It is quite clear from the video that [appellant] is the

¹ Appellant filed a motion for an extension of time to file the notice of appeal. *See* Minn. R. Crim. P. 28.02, subd. 4(3)(g). Finding good cause, we granted appellant's motion.

one who is initiating all of the conversations with police and it appears that in doing so, he is attempting to convince the officer that he should not be under arrest or in custody. . . . [Appellant] attempts to “egg on” the officer and makes repeated statements trying to exculpate himself from the situation he is in. These statements are not in response to any questions by the police and are spontaneous utterances of [appellant]. The officer responded, perhaps at times inappropriately, but he was not seeking statements from [appellant].

. . . .

It is erroneous to assume that if a suppression hearing were to have taken place, that the Court would have excluded the statements and utterances made by [appellant]. It is also erroneous to assume that even if the statements were suppressed, that there was not enough evidence for the Court to convict [appellant].

The district court found that appellant failed to show that his attorney’s conduct amounted to ineffective assistance of counsel; rather, the district court found, his attorney’s decision to withdraw the suppression motion constituted trial strategy. Appellant moved to reinstate his appeal, and we granted his motion.

D E C I S I O N

I. The postconviction court did not abuse its discretion when it summarily denied appellant’s claim of ineffective assistance of counsel.

Appellant argues that the postconviction court abused its discretion when it summarily denied his request for an evidentiary hearing. “Generally, a person convicted of a crime who claims the conviction violates his rights under the constitution or laws of the United States or Minnesota may file a petition for postconviction relief.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012); see Minn. Stat. § 590.01, subd. 1. Moreover, the petitioner is entitled to a hearing on the matter “[u]nless the petition and the files and

records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1. “The showing required for an evidentiary hearing is lower than that required for a new trial.” *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). “Any doubts about whether to conduct an evidentiary hearing should be resolved in favor of the defendant.” *Id.*

“We review postconviction decisions under the abuse-of-discretion standard of review.” *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). “A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley*, 819 N.W.2d at 167 (quotation omitted). This court reviews the postconviction court’s factual determinations under a clearly erroneous standard, and this court will not disturb those findings unless they are unsupported by the record. *Id.*; see *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013). The postconviction court’s legal conclusions are reviewed de novo. *Riley*, 819 N.W.2d at 167. When reviewing a postconviction court’s summary denial of an ineffective-assistance-of-counsel claim, we evaluate the court’s factual findings, conduct a de novo review of the legal implication of those facts on the petitioner’s claim, and either affirm the postconviction court’s decision or conclude that the court abused its discretion. *Nicks*, 831 N.W.2d at 503-04.

To be granted an evidentiary hearing on a postconviction claim of ineffective assistance, a petitioner must “allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test” established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Bobo*, 820 N.W.2d at 516. The two-prong *Strickland*

test requires the defendant to prove that (1) “counsel’s performance was deficient,” that is, that the representation fell below an objective standard of reasonableness and (2) “the deficient performance prejudiced the defense,” that is, there was a reasonable probability that, but for counsel’s deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *see also Nicks*, 831 N.W.2d at 504.

Reviewing courts must look at the alleged deficiencies “in light of all the circumstances.” *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 2588 (1986) (quotation omitted). “Since there are countless ways to provide effective assistance in any given case, unless consideration is given to counsel’s overall performance, before and at trial, it will be all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 386, 106 S. Ct. at 2589 (quotations and citation omitted).

“Essentially, Minn. Stat. § 590.04, subd. 1 contemplates a two-step analysis.” *Riley*, 819 N.W.2d at 167. First, “the postconviction court must determine whether the facts considered in the light most favorable to the petition, together with the arguments presented by the parties, conclusively show that the petitioner is not entitled to relief.” *Id.* (quotation omitted). If the court finds there are no material facts in dispute and the state is entitled to dismissal of the petition as a matter of law, the court need not hold an evidentiary hearing. *Id.* However, “if the court concludes material facts are in dispute which [were] not . . . resolved in the proceedings resulting in conviction and which must be resolved in order to determine the issues raised on the merits,” the court must schedule a hearing. *Id.* at 167-68.

Because appellant's claim in his postconviction petition is that he received ineffective assistance of counsel, facts are material in this matter "if they relate to the application of the *Strickland* test." *Nicks*, 831 N.W.2d at 506. Therefore, the postconviction court was required to determine whether facts material to the application of the *Strickland* test are in dispute. *Id.* After considering appellant's allegations in the light most favorable to him, against the two-prong *Strickland* test, we conclude that the postconviction court did not abuse its discretion when it summarily denied appellant's request for relief.

A. Prong I: Counsel's Performance

Counsel is presumed competent "and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms." *Kimmelman*, 477 U.S. at 384, 106 S. Ct. at 2588. Further, courts give trial counsel wide latitude to make decisions regarding trial strategy. *Nicks*, 831 N.W.2d at 506; *see also Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) ("We have repeatedly stated that we generally will not review attacks on counsel's trial strategy."). "Our reluctance to scrutinize trial tactics is grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Opsahl*, 677 N.W.2d at 421 (quotation omitted).

Minnesota courts have rejected claims of ineffective assistance of counsel for "failing to hire a private investigator, failing to interview prospective witnesses, failing to call prospective witnesses, and failing to pursue alternative-perpetrator theories." *Nicks*,

831 N.W.2d at 506 (citations omitted). Courts have concluded that “the extent of any investigation is a part of trial strategy and, thus, should not be readily second-guessed.” *Id.*

In *Nicks*, the supreme court held that there were sufficient allegations in the petition that trial counsel’s failure to obtain the victim’s cellphone records constituted deficient performance. *Id.* at 508. The court reasoned that retrieving the cellphone records “was not a course of action that trial counsel considered and rejected; rather, it remained a central part of counsel’s theory of the case and his strategy at trial.” *Id.* at 507; *cf. Kimmelman*, 477 U.S. at 385, 106 S. Ct. at 2588 (concluding counsel’s failure to file a timely suppression motion was “not due to strategic considerations,” but rather, it was because counsel was unaware of the state’s intention to introduce incriminating evidence due to his failure to conduct any pretrial discovery).

Contrary to situations in which courts have found trial counsel erred due to inadvertence, the record in the case before us establishes that trial counsel’s suppression motion was a “course of action” that counsel deliberately “considered and rejected” after viewing the videos from the officers’ body cameras. Counsel stated at the contested omnibus hearing that his motion was “occasioned by [him] not having discovery at the time.” Counsel’s language in the suppression motion, describing appellant’s initial statements as “unrecorded,” further establishes that counsel had not yet viewed the body-camera footage because all of appellant’s statements to officers were, in fact, recorded. After viewing the footage, trial counsel deliberately withdrew the motion, explaining to the district court, “Now that I’ve had a chance to review those statements, [the state] and I resolved [the suppression] issue.” The record thus supports the postconviction court’s

finding that trial counsel's decision to withdraw the suppression motion constituted trial strategy.

The record also supports the postconviction court's finding that, had a suppression hearing taken place, appellant's statements to officers would not have been suppressed because the statements were not made in violation of his *Miranda* rights. In *Miranda v. Arizona*, the United States Supreme Court pronounced "prophylactic measures to protect suspects from the inherently coercive nature of custodial interrogations." *State v. Ortega*, 798 N.W.2d 59, 67 (Minn. 2011) (citing *Miranda*, 384 U.S. 436, 86 S. Ct. 1602). Specifically, before an officer can conduct any custodial questioning, the officer must warn the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. After a suspect has "unambiguously requested the assistance of counsel," officers must cease a custodial interrogation. *Ortega*, 798 N.W.2d at 71. And, unless the suspect "voluntarily, knowingly and intelligently" waives these rights, statements stemming from a custodial interrogation are inadmissible. *Id.* at 67 (quotation omitted); see also *State v. Seekon*, 392 N.W.2d 624, 626 (Minn. App. 1986) ("Statements made by a suspect during custodial interrogation are inadmissible unless the suspect is first given a *Miranda* warning."), review denied (Minn. Oct. 17, 1986).

"While custody is an essential element of the *Miranda* analysis, custody, by itself, does not require a *Miranda* warning; instead, it is only when custodial *interrogation* occurs that a *Miranda* warning is required." *State v. Miller*, 659 N.W.2d 275, 280-81 (Minn. App.

2003) (emphasis in original), *review denied* (Minn. July 15, 2003). Interrogation “refers not only to express questioning, but also to any words or actions on the part of the police (other than normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Paul*, 716 N.W.2d 329, 336-37 (Minn. 2006) (quotation omitted). “[T]he focus of the inquiry is on the perceptions of the suspect, rather than the intent of the police, and the totality of the circumstances surrounding custody of the suspect must be considered.” *Id.* at 337. “If the statements were spontaneous and voluntary, even though made in custody, they need not be suppressed.” *Seekon*, 392 N.W.2d at 627.

As found by the postconviction court, there is no dispute that appellant was in custody at the time he made the statements in question. Rather, the question is whether appellant was being interrogated by officers at the time he made the statements. Appellant argues that his statements were made in response to comments and questions posed by an officer that the officer should reasonably have known would elicit incriminating statements. However, the postconviction court found:

It is quite clear from the video that [appellant] is the one who is initiating all of the conversations with police These statements are not in response to any questions by the police and are spontaneous utterances of [appellant]. The officer responded, perhaps at times inappropriately, but he was not seeking statements from [appellant].

The record supports the postconviction court’s finding that appellant was not subject to custodial interrogation at the time he made the incriminating remarks. The officers’ body camera videos show the officers enter E.B.’s apartment unit and discover appellant,

naked from the waist down, lying on top of E.B., also naked from the waist down. After officers bring appellant into the living room to separate him from E.B., Officer Mott asks appellant for his name and other general on-the-site questions. Officer Mott explains to appellant, “[W]e’re checking on [E.B.] to make sure she’s okay,” and asks appellant how he knows her and who else was in the apartment with them. *See State v. Kline*, 351 N.W.2d 388, 390 (Minn. App. 1984) (quoting *Miranda*, 384 U.S. at 477-78, 86 S. Ct. at 1629-30) (“General on-the-site questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [*Miranda*]” because “[i]n such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.”); *see also Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S. Ct. 3138, 3148-49 (1984) (stating that *Miranda* need be enforced “only in those types of situations in which the concerns that powered the decision are implicated”). Rather than merely address Officer Mott’s on-the-site questions, appellant continuously makes voluntary and unprovoked statements, despite being instructed by Officer Mott to stop talking.

At the police station, appellant initiates further conversation with Officer Mott, making several voluntary and unprovoked incriminating statements. Appellant states to Officer Mott, “I didn’t have sex with her . . . she just sucked my d-ck. That’s what she did to me.” In response to appellant’s repeated question, asking what the officers are going to do to him, Officer Mott explains that they are working on getting a search warrant in order to collect a sample of his DNA and process it for evidence. Officer Mott’s response to appellant’s question was factual, accurate, and not in violation of his *Miranda* rights. *See*

State v. Heinonen, 909 N.W.2d 584, 592 (Minn. 2018) (holding that the officer’s “honest and straightforward” response to defendant’s question asking why officers wanted to take a DNA sample was not reasonably likely to elicit an incriminating response).

Appellant then asks Officer Mott why he was arrested, and Officer Mott informs him that he was arrested for suspicion of having unconsented sexual intercourse with someone as well as his possible suspicion of assault. Appellant denies having sexual intercourse with E.B. and, again, states, “[S]he just sucked my d-ck. . . . I want to tell you the truth, she just sucked my d-ck. And then, I slept in her bed.” Officer Mott responds, “I’m not asking you questions about that. If you want to tell me that, that’s fine.” Appellant continues to voluntarily make statements, both denying having sexual intercourse with E.B., and asking Officer Mott questions, including why officers entered E.B.’s apartment.

Officer Mott tells appellant to stop talking, and then states: “After what I saw, I sure do [believe somebody was raping E.B.].” Officer Mott states: “You were naked, she was naked, there was a used condom right next to you guys. You have residue on your penis. It looked to me like somebody was just having sex. It looked to me like somebody just got raped.” Appellant continues to deny the allegations and then states, “[E.B.]’s not good right now . . . because she drink too much. I drink too much.” Several times throughout the next few minutes, Officer Mott advises appellant to stop talking, but appellant ignores the instruction.

We agree with the postconviction court that some of Officer Mott’s comments to appellant, both in E.B.’s living room and at the police station, were inappropriate. However, focusing on the perceptions of appellant at the time, and considering the totality

of the circumstances surrounding appellant's custody, we conclude that the record supports the postconviction court's finding that appellant was not subject to custodial interrogation during the making of his incriminating statements. *See Paul*, 716 N.W.2d at 337. Throughout the entirety of the video footage, appellant continued to disobey the officers' orders, including giving a false name and initiating conversation despite being told to stop talking. Appellant's statements, though made in custody, were spontaneous and voluntary, and therefore, need not be suppressed. *See Seekon*, 392 N.W.2d at 627.

Looking at the circumstances in which the statements were made, and giving deference to the postconviction court's findings that appellant's trial counsel was "a very skilled attorney" who provided appellant with "significantly more than reasonably effective assistance of counsel" and "conducted the trial in a very thorough and professional manner," we conclude that the record supports the postconviction court's finding that trial counsel's representation was not objectively unreasonable. *See Kimmelman*, 477 U.S. at 386, 106 S. Ct. at 2589 ("[U]nless consideration is given to counsel's overall performance, before and at trial, it will be all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (quotation omitted)). Based on the foregoing, the postconviction court did not abuse its discretion by denying appellant postconviction relief on the first *Strickland* prong.

B. Prong 2: Prejudice

Appellant argues that the district court relied on his statements to convict him of all four charges. Appellant argues that, had his statements been suppressed, there is a reasonable probability that the factfinder would not have found that he knew or had reason to know that E.B. was physically helpless and could not consent to the sexual activity.

Even if trial counsel's performance fell below an objective standard of reasonableness, the record supports the postconviction court's finding that there is no reasonable probability that, but for counsel's error of withdrawing the suppression motion, the result of the trial might have been different. In order to convict appellant of third-degree criminal sexual conduct, the state had to prove that appellant engaged in sexual penetration with E.B. and that appellant knew or had reason to know that E.B. was mentally impaired, mentally incapacitated, or physically helpless. Minn. Stat. § 609.344, subd. 1(d). The postconviction court concluded that, even if the statements had been suppressed, the outcome would not have been different because "there was sufficient evidence, including credibility determinations and DNA, to support the convictions."

Although appellant argues that "the credibility of other witnesses . . . did not support the *mens rea* element," witness testimony suggests otherwise. For example, officers who responded to the assault testified to both appellant and E.B.'s states of mind when they arrived at E.B.'s apartment. The officers' testimony established that appellant was coherent enough to know he was under arrest, as he refused to give his name from the moment officers made contact with him, and that E.B. "appeared extremely incoherent" and "was unable to answer even the most basic of questions." Further, E.B. testified that,

prior to the assault, she consumed Xanax, which appellant gave to her, and she consumed alcohol with appellant in her apartment.

Based on the witnesses' testimony, there is not a reasonable probability that a factfinder would not have found that appellant had reason to know that E.B. was mentally incapacitated at the time of the sexual assault. As such, trial counsel's withdrawal of the suppression motion did not prejudice appellant. Because appellant satisfied neither of the two *Strickland* prongs, the postconviction court did not abuse its discretion when it concluded that appellant was entitled to no relief.

II. The district court erred by convicting appellant of lesser-included offenses.

Appellant argues that the district court committed reversible error by entering convictions on counts two (fourth-degree criminal sexual conduct) and three (fifth-degree criminal sexual conduct) because they are both lesser-included offenses of count one (third-degree criminal sexual conduct), and all three criminal-sexual-conduct convictions stemmed from the same criminal act. Thus, appellant argues, this court must vacate his convictions on counts two and three.

Minn. Stat. § 609.04, subd. 1 (2016), provides that a person “may be convicted of either the crime charged or an included offense, but not both.” An “included offense” includes “a lesser degree of the same crime.” Minn. Stat. § 609.04, subd. 1(1). The supreme court has interpreted Minn. Stat. § 609.04 to mean that “a defendant may not be convicted of two counts of criminal sexual conduct (different sections of the statute or different subsections) on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989).

Our review of the record indicates that appellant did not raise this particular issue of lesser-included offenses in district court.² *See id.* (stating that appellate courts have “expressly reserved the option not to decide an issue such as this in future appeals if the issue were not first raised in the trial court”). The supreme court, however, has made exceptions in cases where the issue was not raised below, stating, “[I]n a number of subsequent appeals in which it was necessary to decide other issues raised, we also decided the section 609.04 issue, notwithstanding the defendant’s failure to raise it in the trial court.” *Id.*

Because, in this appeal, we are addressing other issues raised by appellant, we will also decide the section 609.04 issue. Appellant is correct; the district court erred by convicting appellant of lesser-included offenses. Accordingly, we remand to the district court with instructions to vacate appellant’s convictions on counts two and three. *See id.* (vacating one of the two convictions of criminal sexual conduct).

Affirmed in part, reversed in part, and remanded.

² At sentencing, both parties agreed that only one *sentence* should be imposed for the three criminal-sexual-conduct counts, but there was no mention of imposing only one *conviction* for those counts.