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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0267**

State of Minnesota,
Respondent,

vs.

Vincent Illya Cotten,
Appellant.

**Filed January 7, 2019
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-17-1582

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford Colbert, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and
Stauber, Judge.*

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

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Vincent Illya Cotten appeals from his multiple convictions, arguing that he was denied effective assistance of counsel. We affirm.

FACTS

Appellant was charged with and convicted of possession of a firearm by a prohibited person in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2016), and second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2016),¹ after he shot E.A.G. in the leg during a drug transaction.

On direct appeal, appellant alleges that his trial counsel was ineffective. Specifically, appellant asserts that his trial counsel asked only “perfunctory” questions during voir dire, failed to adequately cross-examine the state’s witnesses, failed to establish a coherent theory of the case, and argued to the jury about evidence not introduced at trial.

DECISION

“An ineffective assistance of counsel claim is an alleged violation of the right to reasonably effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To succeed on such a claim, an appellant first must show that his counsel’s representation fell

¹ The state initially charged appellant with second-degree assault with a dangerous weapon causing substantial bodily harm in violation of Minn. Stat. § 609.222, subd. 2 (2016). Before trial, and without objection, the charge was amended to second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1.

below an objective standard of reasonableness, despite the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984); *see also State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). “We presume that trial counsel’s performance was reasonable and we give particular deference to trial strategy.” *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). Appellate courts do not review an ineffective-assistance-of-counsel claim based on an attorney’s trial strategy. *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014).

Typically, an ineffective-assistance-of-counsel claim is raised in a petition for postconviction relief rather than on direct appeal. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000); *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). “A postconviction hearing provides the court with additional facts to explain the attorney’s decisions, so as to properly consider whether a defense counsel’s performance was deficient.” *Gustafson*, 610 N.W.2d at 321 (quotation omitted). On direct appeal, we must base our decision solely on the record before us, without the benefit of a postconviction hearing. We do so here.

I. Appellant’s trial counsel did not render objectively unreasonable assistance.

A. Voir dire

Appellant first contends that his trial counsel was so “inattentive or indifferent during the jury selection process that [appellant] was denied his constitutional right to the effective assistance of counsel.” Specifically, appellant alleges that trial counsel’s voir dire

questions lacked purpose and were “at best, perfunctory.” Appellant also argues that trial counsel should have done additional follow-up questioning of jurors.

“We presume that trial counsel’s performance was reasonable and we give particular deference to trial strategy.” *Schneider*, 725 N.W.2d at 521. Courts give an attorney’s strategic decisions, especially in matters of jury selection which depend “heavily on counsel’s experience, perception of and rapport with prospective jurors,” a strong presumption of reasonableness. *State v. Geleneau*, 873 N.W.2d 373, 382 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Mar. 29, 2016).

In *State v. Caldwell*, Caldwell alleged that his counsel was ineffective because counsel failed to use voir dire effectively, alleging “[defense] counsel’s questioning of prospective jurors was perfunctory.” 803 N.W.2d 373, 381 (Minn. 2011). The Minnesota Supreme Court, however, concluded that, because defense counsel had asked questions regarding the jurors’ questionnaires, had a list of prospective jurors to strike, attempted to strike several jurors for cause, and seemed well prepared, defense counsel was not ineffective. *Id.* at 386-87.

Appellant relies on *Jama v. State*, 756 N.W.2d 107 (Minn. App. 2008) to support his contention that “defense counsel was so inattentive or indifferent during the jury selection process that [appellant] was denied his constitutional right to the effective assistance of counsel.” *See Jama*, 756 N.W.2d at 114. Appellant over-reads the portion of *Jama*’s holding to which he refers. The language that appellant cites to support his *Jama*-based argument is actually a lengthy quote from the Utah Supreme Court’s decision in *State v. Litherland*, 12 P.3d 92, 100 (Utah 2000). Although our opinion in *Jama* referred

to and quoted *Litherland*, we did not specifically adopt the Utah Supreme Court’s decision or reasoning concerning ineffective assistance of counsel. We noted that “[t]he *Litherland* opinion may be helpful in evaluating a claim of ineffective assistance of counsel, and we do not read it to conflict with our own jurisprudence.” *Id.* We then went on to apply well-established Minnesota caselaw regarding claims of ineffective assistance of counsel. *Id.* at 114-16. As discussed, Minnesota caselaw requires that we generally defer to counsel’s trial strategy.

At voir dire in this case, the district court began by asking preliminary questions of the jurors such as whether the jurors would be able to apply the law as instructed, whether they accepted the presumption of innocence until a defendant is proven guilty, whether any juror would be unable to be impartial, the jurors’ occupations and hobbies, if any, and other basic questions. Appellant’s trial counsel began voir dire by asking:

Are there any gun owners? And then among those that don’t have their hands raised, does anybody have strong beliefs about whether guns should be legal?

And then the defendant in this case is African-American. Is there anything about the defendant’s racial or ethnic status that would prevent you from being fair and impartial in this case?

Have you had experiences with African-Americans that might influence your ability to [be] fair and impartial?

Appellant’s trial counsel then asked prospective jurors individually about their favorite books and movies. Trial counsel later asked, “has anyone here been incarcerated at any time in your life for any period of time? Thank you.” Trial counsel asked some questions regarding biases to the jurors collectively. The record contains no indication of the jurors’

responses, although it seems from counsel's questioning that some, but not all, of the jurors were gun owners. The absence of follow-up questions suggests that no jurors indicated an affirmative response to the other questions.

Here, like *Caldwell* and *Jama*, appellant's trial counsel actively participated in voir dire and asked potential jurors several questions that were directed at jurors' ability to fairly serve in this case. In context, the group questioning appears designed to determine whether any potential jurors had any biases that might impact their ability to consider the case impartially.

Appellant argues that two jurors should have had additional questions asked of them. But neither of those jurors were seated on the jury. Appellant does not argue that these two jurors should have been seated but were not. The record indicates that one of those potential jurors was dismissed by the court for cause, and without objection, because of the juror's emotional difficulties. The state attempted to strike the second juror for cause, but appellant's trial counsel successfully opposed the for-cause motion to strike that juror. The juror was later dismissed by a peremptory challenge, presumably exercised by the state.

Although the voir dire by appellant's trial counsel was not robust, that seems to have been counsel's strategy. Appellant has not shown that his trial counsel's efforts during voir dire fell below an objectively reasonable standard.

B. Questioning of witnesses

Next, appellant argues that his trial counsel was ineffective by "incompetently" cross-examining the state's witnesses. Appellant contends that his trial counsel was "at

best, ineffectual,” that counsel failed to cross-examine a witness, and that other witnesses were questioned “in a manner that damaged the defense rather than helped the case.” Specifically, appellant identifies his trial counsel’s questioning of Detective Valleau and E.A.G., the man who was shot, as ineffective and damaging to appellant’s case.

Questioning witnesses at trial involves counsel’s trial strategy. “[W]hat information to present to the jury . . . [is trial strategy and thus] within the proper discretion of the trial counsel.” *Jones*, 392 N.W.2d at 236. But even an unsuccessful trial strategy can still constitute effective assistance, because “trial tactics that are providential for one defendant [may] prove to be unfortunate for another.” *Rhodes*, 657 N.W.2d at 845.

At trial, Detective Valleau, the officer assigned to administer a photo-lineup, testified that, when E.A.G. identified appellant’s photo as that of the shooter, he said, “I think so, yeah.” The state questioned Detective Valleau about E.A.G.’s reactions to the photo-lineup:

Q: Did you ask him if he was sure about that identification?

A: Yes.

Q: All right. What did he say to that?

A: I asked him is this the one that shot you, and he said *I think so, yeah*.

(Emphasis added.) In cross-examination, appellant’s trial counsel asked Detective Valleau:

Q: Isn’t it true that [E.A.G.] did not have a strong reaction to seeing the photos?

A: No.

....

Q: So, initially, [E.A.G.] hesitated before he said that he identified somebody. He said I think so. He didn’t say a strong yes, that’s him. He just said I think so.

A: When I initially showed him the picture of Number 3, he immediately threw himself over on the other side of the bed, turned over and said that's him.

Q: And then, did he look at the other pictures?

A: Yes.

Q: How many times did he look at all the pictures?

A: He looked at all the pictures one time.

Appellant's trial counsel attempted to attack Detective Valteau's testimony regarding E.A.G.'s identification of appellant by focusing on E.A.G.'s noncommittal verbal response. Although unsuccessful, counsel's strategy was a reasonable way of attempting to discredit E.A.G.'s identification of appellant as the shooter. The trial strategy of appellant's trial counsel appears to have been reasonable. *See Vang*, 847 N.W.2d at 266-67.

Our review of the transcript reveals that appellant's trial counsel's cross-examination of E.A.G. focused on highlighting his dishonesty to the police. Appellant's trial counsel was able to elicit repeated admissions by E.A.G. that he had been dishonest in the aftermath of the shooting. E.A.G. admitted that he "was making a drug transaction for marijuana, and [he] didn't want the police to get involved at that moment." Appellant's trial counsel thereby highlighted E.A.G.'s dishonesty with the police. This effort tended to undercut the weight of E.A.G.'s identification of appellant as his assailant.

To the extent that appellant's trial counsel's questioning was unsuccessful in achieving appellant's acquittal, that is no indication of ineffectiveness. A hindsight-based review of an unsuccessful trial strategy has no place in our deferential review of an ineffective-assistance argument.

C. Case theory

Appellant also argues that his trial counsel was ineffective for failing to “establish a coherent theory of the case.” Appellant argues that “it is impossible to detect counsel’s theory of the case.” Here again, appellate courts give “particular deference” to trial counsel’s strategy. *Schneider*, 725 N.W.2d at 521. “[W]e generally will not review attacks on counsel’s trial strategy.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

We disagree with appellant’s assessment that his trial counsel had no coherent strategy. Our review of the record indicates that trial counsel’s theory was simple: “The State is required to prove beyond a reasonable doubt that [appellant] possessed a firearm, attempted to rob [E.A.G.] and assaulted him. The evidence does not prove beyond a reasonable doubt that this incident occurred.” As is common in criminal cases, appellant’s trial counsel argued that the attempted robbery did not occur or, alternatively, that the state had not carried its burden of proving the elements of the charged offenses beyond a reasonable doubt.

Appellant’s trial counsel repeatedly questioned the state’s witnesses about whether the gunshot wound to E.A.G. could have been self-inflicted or if the recovered physical evidence near the alleged crime scene (a shell casing and some suspected marijuana) could have could been from an unrelated incident. Appellant’s trial counsel elaborated on this theme in cross-examination of the state’s witnesses. In summation, appellant’s trial counsel postulated that E.A.G. accidentally shot himself and made up the robbery to explain the gunshot wound. Trial counsel also repeatedly reminded the jury that the applicable standard of proof was beyond a reasonable doubt.

Although it was ultimately unsuccessful, this was not an unreasonable strategy and overall approach to the case. We decline to second-guess trial counsel's evident theory of the case and how counsel chose to present that theory to the jury.

D. Evidence not in the record

Finally, appellant contends that his trial counsel was ineffective for referring to facts not in evidence when counsel addressed the jury. Specifically, appellant contends that “counsel referred several times to evidence that was never introduced at trial” in the form of two references that appellant and E.A.G. had known each other before the shooting incident.

Appellant is correct that, during trial, appellant's trial counsel briefly referred to two facts not in evidence. In her opening statement, in summation, and in questioning the one defense witness, trial counsel stated that appellant and E.A.G. might have played football together in high school and indicated that appellant had commented on E.A.G.'s birthday via Facebook. The parties agree, and our review confirms, that the record contains no evidence of these things. In summation, trial counsel argued that “there's no question they knew each other” as part of an overarching narrative that E.A.G. was habitually dishonest. Although the record does not support these statements by appellant's trial counsel, it is evident that they were mentioned by counsel because they tended to *help* appellant's trial theory.

Had the state objected to these statements by trial counsel, the objection would likely have been sustained. But we cannot say that trial counsel's performance was objectively unreasonable by reference to two facts, arguably helpful to appellant, that are

not supported by the record. Before the jury deliberated, the district court instructed the jury that “the arguments or other remarks of an attorney are not evidence.” We presume that the jurors followed this instruction. *See State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (noting that courts assume that jurors follow a judge’s instructions at trial). That being so, the unsupported statements of trial counsel were of no consequence.

II. Appellant was not prejudiced in the outcome of his trial by his trial counsel’s performance, even if that performance were to be regarded as ineffective.

Appellant also bears the burden of proving that his trial counsel’s claimed ineffective assistance prejudiced him. The second element of *Strickland* requires appellant to show that there is “a reasonable probability that, but for [his] counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Having determined that appellant’s trial counsel’s performance was not objectively unreasonable, we need not address the second element of *Strickland*. *See Rhodes*, 657 N.W.2d at 842. We do so briefly because appellant has not proven the second element of *Strickland*, even were we to assume that he proved the first.

Appellant makes only a general conclusory allegation that “[c]ounsel’s performance in this case fell so far below an objective standard of reasonableness that ‘a reasonable probability exists that the outcome would have been different but for counsel’s errors.’” Appellant does not specifically argue that the outcome of his trial was different because of trial counsel’s actions during voir dire or counsel’s brief references to facts not in evidence.

Appellant also fails to demonstrate how, in light of the state's strong evidence of his guilt, there would have been a different outcome had it not been for trial counsel's (allegedly ineffective) questioning of witnesses at trial or his overall trial strategy. The outcome here appears to us to reflect the strength of the evidence of appellant's guilt, rather than the effectiveness of appellant's trial counsel.

In sum, appellant's ineffective-assistance-of-counsel claims fail to satisfy either of *Strickland's* elements.

Affirmed.