

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1422**

Theodore Pierre Jerry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 29, 2019
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-13-3541

Theodore Pierre Jerry, Faribault, Minnesota (*pro se* appellant)

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Theodore Pierre Jerry challenges the district court's decision denying his petition for postconviction relief. The postconviction court, without an evidentiary hearing, concluded that appellant's ineffective-assistance-of-trial-counsel claim was barred

under *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976), and that appellant’s ineffective-assistance-of-appellate-counsel claim was vague and conclusory. The issues raised in appellant’s petition for postconviction relief are insufficient to warrant relief. We affirm.

FACTS

On February 1, 2013, the state charged appellant with criminal sexual conduct in the third degree in violation of Minn. Stat. § 609.344, subd. 1(c) (2012), and burglary in the first degree in violation of Minn. Stat. § 609.582, subd. 1(c) (2012). Appellant waived his right to a jury trial and proceeded to a three-day bench trial. The district court found appellant guilty of both counts.

This court has previously recited the facts of this case in two prior appeals. *State v. Jerry*, 864 N.W.2d 365 (Minn. App. 2015) (*Jerry I*), review denied (Minn. Sept. 15, 2015); *State v. Jerry*, No. A16-0006, 2016 WL 4497315 (Minn. App. Aug. 29, 2016) (*Jerry II*), review denied (Minn. Nov. 23, 2016). We identify only those facts in this opinion which are relevant to the issues raised by appellant.

DECISION

I. The postconviction court properly denied appellant’s petition for postconviction relief without an evidentiary hearing.

“[W]e review a denial of a petition for postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion.” *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). Legal issues raised in a postconviction petition are reviewed *de novo*, but factual issues are limited to whether the record sufficiently sustains the postconviction court’s findings. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015).

This court does not reverse an order denying postconviction relief ““unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.”” *Id.* (quoting *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010)). When a direct appeal has been taken, “all matters raised therein, *and all claims known but not raised*, will not be considered upon a subsequent petition for postconviction relief.” *Knaffla*, 243 N.W.2d at 741 (emphasis added). Ineffective-assistance-of-appellate-counsel claims, however, are not barred by *Knaffla* because they could not be raised on direct appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

“To establish ineffective assistance of appellate counsel a petitioner must demonstrate that appellate counsel’s performance was objectively unreasonable and that the unreasonable performance prejudiced him.” *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004); *see Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066-68 (1984). If the ineffective-assistance-of-appellate-counsel claim is contingent on trial counsel’s ineffectiveness, then the appellant must first prove that trial counsel was ineffective. *McDonough*, 675 N.W.2d at 56.

“Appellate counsel does not have a duty to raise all possible issues, and may choose to present only the most meritorious claims on appeal.” *Morrow v. State*, 886 N.W.2d 204, 206 (Minn. 2016). The focus is on whether the representation provided by counsel was reasonable in light of the circumstances rather than on raising claims appellant wanted counsel to raise. *Carridine v. State*, 867 N.W.2d 488, 495 (Minn. 2015).

An evidentiary hearing on a petition for postconviction relief is required when factual disputes must be resolved to address the issues raised on the merits. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). If doubts arise as to whether a postconviction evidentiary hearing should be held, it should be resolved in favor of the party requesting a hearing. *Id.*

Appellant argues his appellate counsel was ineffective for failing to raise six claims on his direct appeal. We will address each claim raised by appellant in turn.

A. Admission of Forensic Expert Testimony

Appellant argues his appellate counsel failed to raise on direct appeal the argument that the district court abused its discretion by allowing forensic-expert testimony and scientific testing he asserts was novel and without acceptance in the scientific community. Also, appellant contends the state's DNA expert testified improperly by identifying appellant as the source of the DNA at the exclusion of others. Appellant's issues functionally involve a state expert performing an initial testing on a sexual-assault exam (SAE) kit, a P30 test and visual examination that found semen, and a subsequent state expert matching appellant's known DNA to the single-source DNA profile from the SAE sample.

Pursuant to Minn. R. Evid. 702, an expert may testify to "scientific, technical, or other specialized knowledge" when the opinion has "foundational reliability." "In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community." Minn. R. Evid. 702; *State v. Obeta*, 796 N.W.2d 282, 289 (Minn.

2011). Minnesota applies the two-prong *Frye-Mack* standard in addressing scientific evidence to show the methodology used is generally reliable and produces reliable results in specific cases. *State v. Bailey*, 677 N.W.2d 380, 397-98 (Minn. 2004).

First, appellant contends the testimony regarding the P30 test performed on the SAE kit should not have been admitted because it is a novel scientific method. Appellant did not request a *Frye-Mack* hearing at the district court on the P30 test performed. On appeal, appellant would only be able to obtain relief on a showing of plain error that affected his substantial rights. *State v. Ali*, 775 N.W.2d 914, 920 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). Appellant cites to no authority which supports the denial of P30 testing as a novel scientific method. The P30 test performed in this matter was merely a preliminary step to assess whether the samples contained a protein known to be in seminal fluid. After the positive P30 test, the Minnesota Bureau of Criminal Apprehension (BCA) forensic scientist visually observed the presence of semen on the samples. Appellant does not identify any issues with the expert's ability to visually identify the presence of sperm based on his training and experience. Due to the limited value of the P30 test testimony and the lack of a demonstrated basis to have requested a *Frye-Mack* hearing, appellate counsel's decision to not raise this issue on direct appeal was objectively reasonable.

Second, appellant challenges the testimony from a BCA forensic scientist that he was the source of the DNA found following the creation of a single-source DNA profile. The Minnesota Supreme Court in *State v. Roman Nose* noted the use of single-source DNA, a sample containing the DNA profile of one person, allows an expert to testify to statistical evidence based on that sample. 667 N.W.2d 386, 398 (Minn. 2003). The record provided

by the state included the generation of a single-source DNA sample from the SAE kit that the state expert used to compare the known sample of appellant's DNA to find a match. Appellant's DNA sample matched all 16 of the short-tandem-repeat (STR) areas analyzed by the BCA, which the forensic scientist opined would not occur more than once among unrelated individuals in the world population. This testimony was not improper. Therefore, appellate counsel's decision to not raise this issue on direct appeal was objectively reasonable.

B. Admission of Photographs

Appellant argues his appellate counsel failed to challenge the admission of still photographs admitted as part of a detective's testimony over his trial counsel's objection. Appellant focuses his challenge on authentication and foundation.

Evidentiary rulings are reviewed "for an abuse of discretion, and any error is subject to harmless error analysis." *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001) (citation omitted). A reversal on an evidentiary error made by the district court is appropriate when it "substantially influence[d] the [fact-finder] to convict." *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Pursuant to Minn. R. Evid. 901(a): "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." District courts possess "considerable discretion under Minn. R. Evid. 901(a) in deciding whether evidence has been adequately authenticated or identified." *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984).

Appellant relies on an incorrect reading of *In re Welfare of S.A.M.*, to find the district court abused its discretion. 570 N.W.2d 162 (Minn. App. 1997). In *S.A.M.*, this court rejected the concept that a videotape can only be authenticated “by a continuous observer who testifies from personal knowledge that the events are accurately portrayed.” *Id.* at 166. This court held:

A videotape may be authenticated by testimony describing the reliability of the process or system that created the tape, as well as by testimony from an observer that the videotape is an accurate portrayal of the event, if the evidence sufficiently demonstrates that the videotape is what its proponent claims.

Id.

The district court heard arguments from counsel related to the admissibility of the still photographs on the first day of trial and reserved its ruling. A component of the detective’s investigation involved obtaining a videotape from Metro Transit. The detective captured still photographs from the videotape identified, met appellant during the course of the investigation, and determined that the man depicted in the Metro Transit video was appellant.

The district court, in its order finding appellant guilty, referenced the Metro Transit still photographs in one brief paragraph. The paragraph reads in its entirety: “A Metro Transit bus surveillance video shows the [appellant] with facial hair and wearing a ‘Knicks’ basketball jacket on January 8, 2013, one week after S.E. was sexually assaulted.” The district court’s finding does not distinguish between its reliance on the photograph, testimony from the detective, or a combination of the two.

The district court's admission of the still photographs did not constitute an abuse of discretion. The district court must only find sufficient evidence from the proponent that the item is what the proponent claims it to be. Appellant did not object that the still photographs were from a Metro Transit videotape collected as part of law enforcement's investigation. Further, appellant did not object that the photographs showed an individual wearing a Knicks jacket getting on and off a Metro Transit bus. The still photographs meet the necessary requirements for foundation and authentication for admission into evidence at the time of trial. The primary dispute is whether the identification of the person depicted was appellant. This question is one for the fact-finder's determination. The district court, upon reviewing all the evidence, made a factual determination appellant was the individual depicted. Appellate counsel did not act in an objectively unreasonable manner by not appealing this issue on direct appeal.

C. Miranda

Appellant argues his appellate counsel failed to raise a challenge under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Both the United States and Minnesota Constitutions protect criminal defendants from compelled self-incrimination. *State v. Risk*, 598 N.W.2d 642, 647 (Minn. 1999). To further this fundamental protection, the United States Supreme Court in *Miranda* created a procedural safeguard when a person is in a custodial interrogation to be informed of certain constitutional rights, which includes the Fifth Amendment right against self-incrimination. *Miranda*, 384 U.S. at 444, 467-79, 86 S. Ct. at 1612, 1624-30. A "custodial interrogation" occurs when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise

deprived of his [or her] freedom of action in any significant way.” *Id.* at 444, 86 S. Ct. at 1612; *see State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006). “An ‘interrogation’ under *Miranda* refers to (1) ‘express questioning’ or ‘any words or actions on the part of police (other than those normally attendant to arrest and custody)’ that (2) ‘the police should know are reasonably likely to elicit’ (3) ‘an incriminating response from the suspect.’” *State v. Heinonen*, 909 N.W.2d 584, 589 (Minn. 2018) (footnote omitted) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980)).

The detective testified that she met appellant at the Hennepin County Jail in September of 2013 and showed him the still images from the Metro Transit videotape. The detective admitted that she did not read appellant his *Miranda* rights. Appellant, initially, was willing to talk to her until she explained the nature of the discussion resulting in him denying knowledge of the events. Subsequently, the detective placed the still photographs on the table and appellant responded it was him but he did not know why she was meeting with him.

Appellant was in custody and it appears law enforcement engaged in an interrogation after placing the photographs in front of him under *Miranda*. A person is *reasonably likely* to respond to photographs provided by law enforcement that may depict them after denying any involvement in criminal activity. Contrary to the state’s assertions, appellant’s statement was not spontaneous because it was prompted by law enforcement behavior.

Even though appellant’s response to the photographs was improperly obtained without a *Miranda* warning and received at trial, the detective testified as to her certainty

that appellant was the same person depicted in the photographs. Further, the state possessed evidence of appellant's DNA found from the victim's SAE kit and a latent fingerprint of appellant found on the window entering the victim's residence. This information, in its totality, constitutes a strong case against appellant. Even if we assume appellate counsel acted unreasonably by not raising this claim, the result did not prejudice appellant based on the totality of the evidence offered at trial in support of the conviction. *McDonough*, 675 N.W.2d at 56 (recognizing an ineffective-assistance-of-counsel claim requires showing of both objectively unreasonable performance and that the performance resulted in prejudice).

D. Denial of a Fair Trial by an Impartial Judge

Appellant argues his appellate counsel failed to challenge the impartiality of the district court. The concept of impartiality is "the very foundation of the American judicial system." *Payne v. Lee*, 24 N.W.2d 259, 264 (Minn. 1946). "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Minn. Code Jud. Conduct Rule 1.2.

"When reviewing a claim that a judge was partial against the defendant, we presume the judge 'discharged his or her judicial duties properly.'" *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013) (quoting *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998)). "An impartial judge has no actual bias against the defendant or interest in the outcome of his [or her] particular case." *Id.* (quotation omitted). And "[p]rior adverse rulings . . . clearly

cannot constitute bias.”” *Greer v. State*, 673 N.W.2d 151, 157 (Minn. 2004) (quoting *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986)).

As to his first claim that the judge was biased, appellant claims the district court limited effective cross-examination. Appellant’s trial counsel cross-examined a state’s witness related to the transfer of the SAE evidence from the hospital to the BCA laboratory and back into law enforcement’s custody. The state’s witness did not recall the name of the person who retrieved the SAE kit from the hospital, the person he gave the kit to at the BCA laboratory, or the specific clerk in his agency’s evidence unit he returned it to after the BCA issued a report. The district court interjected to ask if the questions would be satisfied after other “chain of c[ustody] people” testified. The cross-examination ended shortly after an off-the-record discussion between co-counsel. Appellant’s claim that the district court acted in a biased manner by disallowing cross-examination is not supported by the record.

Next, appellant asserts the district court made “a bias statement favorable to the prosecutor when she stated that she is not leaning on [sic] bringing in everyone in the chain of custody to testify.” Contrary to appellant’s assertion, the district court did not make such a statement. Instead, the district court—after taking the matter under advisement on the second day of trial—identified specific caselaw in reaching its determination on chain of custody. The district court stated that the state established “a reasonable probability that tampering or substitution did not occur” and continued to reserve a ruling on whether the kit was admissible into evidence. The district court’s decision was not a function of favoritism but, instead, an analysis of the caselaw to the particular facts of the case.

Appellant cannot rely on this mere adverse ruling to assert bias. *Greer*, 673 N.W.2d at 157.

Finally, appellant raises the issue of the district court asking questions related to the detective's personal knowledge of appellant's appearance and, therefore, acted "as an advocate for the state." A trial judge has the discretion to ask questions of a witness and "ordinarily a court of review will not scrutinize his [or her] conduct in this respect very closely." *State v. Sandquist*, 178 N.W. 883, 884 (Minn. 1920); *see also State ex rel. Hastings v. Denny*, 296 N.W.2d 378, 379 (Minn. 1980) (recognizing a district court may examine witnesses but it should exercise that authority "with great caution, particularly when the credibility of key witnesses is at issue"). The concern, broadly, by the district court engaging in questioning exists when cases are presented to a jury because the conduct "could have influenced the jury on such a closely contested issue" to disallow an opportunity for a fair trial. *Hastings*, 296 N.W.2d at 379.

However, appellant proceeded to trial without a jury. The Minnesota Supreme Court in *State v. Burrell*, recognized the important distinction between jury trials and bench trials. 772 N.W.2d 459, 467 (Minn. 2009). "The risk of unfair prejudice . . . is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his [or her] sense of reason overcome by emotion." *Id.*

The district court's examination of the detective involved questioning of the still photographs from the Metro Transit videotape. The questioning involved asking how she came to recognize the individual in the photographs to be appellant. In particular, the

district court asked if the detective had personal contact with appellant—a fact previously testified to by the officer on direct examination. After a discussion at the bench, the district court directed the state to provide more foundation. Following further examination by the state, the district court received the still photographs over an objection by appellant’s trial counsel.

Though the district court engaged in questioning of the state’s witnesses and, initially, made a determination that the exhibits would be received, the judge reversed her decision by requiring the state to provide more foundation for admissibility. Contrary to appellant’s argument, the district court’s behavior does not support a finding of bias. Appellate counsel acted in an objectively reasonable manner by not raising this challenge on direct appeal because it lacked merit.

E. Imposition of a Ten-Year Conditional-Release Term

Appellant argues his appellate counsel should have challenged the imposition of a ten-year conditional-release term in addition to his 225-month sentence because it violates his right to a jury finding of facts necessary to impose a conditional-release term. Pursuant to Minn. Stat. § 609.3455, subd. 6 (2012), a mandatory ten-year conditional-release term applies to offenders committed to the custody of the commissioner of corrections for a violation of criminal sexual conduct in the third degree under section 609.344, and other offenses. *Cf. State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016) (recognizing the mandatory nature of the conditional-release statute in criminal-sexual-conduct cases applies). Appellant’s reliance on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), are misplaced

in this context. Minn. Stat. § 609.3455, subd. 6, requires a conditional-release term without any requirement for a fact-finder to make any additional determination. Appellate counsel acted reasonably by not raising this issue.

F. Ineffective Assistance of Trial Counsel

Appellant argues his appellate counsel failed to challenge the ineffective assistance of trial counsel. This court has reviewed the allegations raised in appellant's submissions based on the record and finds no basis to support an ineffective-assistance-of-counsel claim. Appellant's trial counsel made timely objections and effectively cross-examined witnesses. Further, appellant provides no justification for his allegation that trial counsel failed to investigate facts related to his case or failed to notify him of the consequences of waiving an omnibus hearing.

After review of the record, appellant does not present grounds for postconviction relief to be granted. The district court properly denied appellant's request for postconviction relief without a hearing because the trial record provided sufficient evidence to have resolved his claims.

Affirmed.