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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1583**

State of Minnesota,
Respondent,

vs.

William Frances Anderson,
Appellant.

**Filed January 21, 2020
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-18-119

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his drug-possession convictions, arguing that his attorney was ineffective for failing to deliver on his promise made to the jury in his opening statement that appellant would testify. We affirm.

FACTS

On June 5, 2017, officers were dispatched to a residence on a report of an emotionally disturbed person (EDP), described as a methamphetamine user, who was combative and had felony warrants. When officers arrived, an officer heard a woman inside the residence say “cops, cops, hide it, hide it.” Officers ordered everyone out of the house, and four individuals exited; officers were aware that all were methamphetamine users. The EDP was found in a neighbor’s garage. One of the occupants told the officers that there was “dope in the house.” A search warrant for the residence was prepared.

In executing the warrant, officers noticed that the door to the basement was locked and none of the occupants had a key. Officers pried the door open slightly and saw that a rope tied to the door handle prevented it from opening. At that point, appellant William Frances Anderson walked up the basement stairs. An officer requested that Anderson untie the rope, and he complied. Officers then confirmed that there was nobody else in the basement. An officer told Anderson that they were searching the house for narcotics and contraband. Anderson stated that “the basement’s full of stuff,” but that nothing was his except “what’s on the bed or around the bed.” He told officers that “[t]here might be some narcotics in plastic drawers near [his] bed.”

In Anderson's bedroom area, officers found several items associated with controlled-substance activity, including scales, small plastic baggies, a gas mask, a notebook with notations of individuals who owed other individuals money, and two baggies with contents weighing 15.9 grams that field tested positive for methamphetamine. Officers also found a loaded firearm. And in a plastic drawer by the bed, officers found a glass jar that contained suspected methamphetamine. A forensic scientist employed by the Bureau of Criminal Apprehension later analyzed and weighed the substance found in the glass jar. The substance contained methamphetamine and weighed 110.934 grams. Anderson was charged with five counts: being an ineligible person in possession of a firearm and ammunition, aggravated first-degree controlled-substance crime with a firearm, first-degree sale of a controlled substance, and first-degree possession of a controlled substance.

At the beginning of Anderson's jury trial, he stipulated that he is prohibited from possessing a firearm and ammunition because he has a controlled-substance conviction. In his opening statement, Anderson's attorney stated:

You're going to hear that there were other people living in this house You're going to hear a witness . . . say that [other individuals in the house] distributed drugs, and you're going to hear . . . this witness say that in the days prior to the execution of the search warrant of this house, she saw the [other individuals] chopping up drugs and preparing them for distribution. You'll hear the same witness say that Mr. Anderson wasn't involved in any of that. You're going to get a chance to hear from Mr. Anderson. You're going to get a chance to hear him tell you that he was struggling with a methamphetamine addiction, that he had a firearm that he kept under his mattress for his protection, and that he knew he wasn't supposed to be possessing a firearm. But what you're

not going to hear is any proof, at all [that] . . . Mr. Anderson possessed anywhere near the amount of drugs that they're alleging.

. . . .

In fact, Mr. Anderson will tell you that when he had an interview with the police, they told him, well, we found a half pound of meth down in that room, and he'll tell you that he was incredibly surprised when they suggested that number. He said, that's impossible. There's no way you found . . . that amount.

The state presented evidence regarding the items found in the basement. Forensic scientists testified that the gun and ammunition were processed for DNA and fingerprint analysis, and that Anderson's DNA was on the handgun. But although a scientist testified that a glass jar would be a good place to find latent prints, an officer testified that the glass jar was not held for DNA or fingerprint testing, and the lab would not process it, fearing contamination. The state also offered evidence that Anderson told an investigator that he was a methamphetamine user.

Before trial, the state had moved to impeach Anderson, if he testified, with prior convictions and statements he made in jail phone calls indicating that he was "willing to be untruthful in order to get something in return." Halfway through the state's case, the district court ruled that the state could impeach Anderson with two convictions. Anderson's attorney did not object to the state questioning Anderson about the jail phone calls.

After the state rested, Anderson waived his right to testify. Anderson agreed that he "weighed the pros and cons," and considered the state's intention to impeach him with prior convictions and the jail phone calls. In his closing argument, Anderson's attorney

argued that the state failed to prove its case because it proved only that the gun had Anderson's DNA on it and that Anderson was a methamphetamine addict.

The jury found Anderson guilty of all counts, except first-degree drug sale. The district court sentenced Anderson to 134 months in prison. This appeal followed.

DECISION

Ineffective assistance of counsel

Anderson argues that his attorney was ineffective for promising the jury in his opening statement that Anderson would testify about his methamphetamine addiction, the reason a firearm was near his bed, and not possessing the methamphetamine in the glass jar. Anderson raises his claim on direct appeal. Generally, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition, because a postconviction hearing provides the district court with explanations for counsel's decisions and allows for proper consideration of counsel's performance. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). But if an ineffective-assistance-of-counsel claim can be determined on the basis of the trial record, then the claim can be reviewed on direct appeal. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). Here, we are able to address Anderson's claim because it does not appear that further development of the record is required. See *State v. Thomas*, 590 N.W.2d 755, 759 (Minn. 1999) (addressing ineffective-assistance claim on direct appeal when record was clear).

This court reviews claims of ineffective assistance of counsel de novo. *Williams v. State*, 764 N.W.2d 21, 29 (Minn. 2009). A defendant must show by a preponderance of the evidence that his counsel's representation "fell below an objective standard of

reasonableness” and that, but for counsel’s deficient performance, the outcome would have been different. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). Whether representation was objectively unreasonable requires a determination as to whether the representation was “reasonable in the light of all the circumstances.” *Dent v. State*, 441 N.W.2d 497, 500 (Minn. 1989). A strong presumption exists that counsel’s representation was reasonable. *King v. State*, 562 N.W.2d 791, 795 (Minn. 1997).

Anderson argues that *Ouber v. Guarino* is “precisely on point” in resolving his claim in his favor. *See* 293 F.3d 19 (1st Cir. 2002). In *Ouber*, the defendant testified at her first trial on a drug-trafficking charge, which resulted in a mistrial. *Id.* at 21-22. Ouber was retried with the same evidence and the jury deadlocked again. *Id.* at 22. At Ouber’s third trial, her attorney, the same who had represented her throughout, promised the jury four times in his opening statement that Ouber would testify. *Id.* In doing so, he emphasized the importance of her testimony, and stated that the case came down to whether the jury believed Ouber or a narcotics agent. *Id.* But Ouber did not testify at her third trial as she had done in both earlier trials, and the jury found her guilty. *Id.* at 23. The First Circuit held that Ouber’s attorney’s representation was deficient because he repeatedly vowed to the jury that it would hear from Ouber and then subsequently advised her against testifying. *Id.* at 35-36. The court also held that Ouber was prejudiced because the first two trials, without counsel’s error, produced materially different results. *Id.* at 36.

In *State v. Bahtuoh*, the appellant also argued that his “trial counsel was ineffective when he told the jury during his opening statement that Bahtuoh would testify and then

later advised Bahtuoh not to testify.” 840 N.W.2d 804, 816 (Minn. 2013). The supreme court determined that “it was reasonable for defense counsel to believe, at the time of his opening statement, that Bahtuoh would testify.” *Id.* at 817. The supreme court stated that it has cautioned against relying on hindsight when reviewing decisions made by trial counsel, and that “[i]t is only in hindsight, with the knowledge that Bahtuoh did *not* testify, that defense counsel’s representations in his opening statement appear imprudent.” *Id.* The supreme court decided that *Ouber* did not support Bahtuoh’s claim, and explained how the two cases were different. *Id.* at 817-18. First, Ouber’s counsel made Ouber’s testimony the focus of the case, and second, nothing unexpected happened during Ouber’s trial to change counsel’s strategy, and counsel had the two prior trials to form an idea as to how the jury would react to Ouber’s testimony. *Id.* at 818.

Here, Anderson’s case is more similar to *Bahtuoh* than *Ouber*. Like *Bahtuoh*, the record does not show that when Anderson’s attorney made his opening statement he knew that Anderson was not going to testify. In fact, in his opening statement, Anderson’s attorney stated that another witness would testify about who possessed the methamphetamine, but his attorney did not call any witnesses. *See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (stating that what evidence to present to jury and whether to call witnesses to testify are part of counsel’s trial strategy, which lie within counsel’s discretion and are not generally reviewable for competence). This demonstrates that Anderson’s attorney altered his strategy after making his opening statement.

Counsel’s decision was likely based on the district court ruling on the admissibility of Anderson’s prior convictions, and the state’s intention to impeach Anderson with

statements he made in jail phone calls indicating that he would be willing to be untruthful if he received something in return. *See State v. Tice*, No. A07-1712, 2009 WL 65217, at *3 (Minn. App. Jan. 13, 2009) (stating that appellant failed to show that his attorney was ineffective for promising the jury “13 times in his opening statement that appellant would testify [but then declining to present appellant’s testimony] . . . even though counsel had notice that if appellant testified the state intended to impeach him with evidence of two prior felony convictions”), *review denied* (Minn. Mar. 31, 2009). When Anderson waived his right to testify, he agreed that he “weighed the pros and cons,” and considered the district court’s ruling on the admissibility of two felony convictions and the state’s intention to introduce the jail phone calls to show Anderson’s “untrustworthiness or untruthfulness.”

Anderson’s attorney evidently did not want the jury to hear about Anderson’s prior convictions, because Anderson stipulated to having a controlled-substance conviction that prohibited him from possessing a firearm and ammunition. If Anderson’s attorney did not want the jury to hear that Anderson has a controlled-substance conviction, he likely did not want the jury to hear that Anderson has two other convictions. And if Anderson testified, and wanted the jury to believe him, his attorney likely did not want the jury to hear that Anderson made comments indicating that he would be untruthful if it benefitted him.

Finally, similar to *Bahtuoh*, Anderson’s attorney argued that the state did not prove its case. In *Ouber*, trial counsel emphasized the importance of the defendant’s testimony and stated that the jury would have to decide “the truth and veracity” of the defendant and the undercover narcotics agent. 293 F.3d at 22. Here, Anderson’s attorney’s strategy was

not based on whether the jury believed Anderson or the police officers, but rather that the state failed to prove that the glass jar of methamphetamine belonged to Anderson. Anderson's attorney stated in closing argument that the glass jar could have easily been tested for fingerprints, but was not. He stated that the glass jar was not stored in a way to ensure that it was not contaminated, so there was no way of knowing whose fingerprints or DNA were on the glass jar, who it belonged to, or what was in it because the substance was not tested for purity.

Moreover, Anderson's attorney told the jury that the state proved that Anderson's DNA was on the gun, and that Anderson was addicted to methamphetamine. This evidence represents what Anderson's attorney stated Anderson would testify about—"that he was struggling with a methamphetamine addiction [and] that he had a firearm that he kept under his mattress for his protection." Thus, the jury heard evidence that Anderson would have provided had he testified. Therefore, Anderson fails to show that his attorney's representation fell below an objective standard of reasonableness. Because we conclude that Anderson failed to meet his burden with respect to the first *Strickland* prong, we need not address the second. See *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (stating reviewing court may dispose of an ineffective-assistance-of-counsel claim on one prong without analyzing the other).

Pro se supplemental brief

In his pro se supplemental brief, Anderson raises several issues related to the search warrant, including (1) a *Brady* violation, (2) that the sources for the application were unreliable, (3) that the search was unreasonable, (4) that the warrant lacked specificity, and

(5) that he never had a chance to challenge the warrant. Anderson fails to cite authority and present legal argument, or point to anything in the record to support his claims. Thus, his claims are deemed forfeited. *See State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017) (“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. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (holding that unsupported assignments of error are forfeited “unless prejudicial error is obvious on mere inspection”), *aff’d*, 728 N.W.2d 243 (Minn. 2007).

Affirmed.