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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0363**

Grant Lloyd Greenwood, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 1, 2021
Affirmed
Frisch, Judge**

Anoka County District Court
File No. 02-CR-15-7596

David R. Lundgren, Adam T. Johnson, Lundgren & Johnson, PSC, Minneapolis,
Minnesota; and

Andrew Irlbeck, Andrew Irlbeck, Lawyer Chartered, St. Paul, Minnesota (for appellant)

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey Kelley, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Reilly,
Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this appeal following the denial of postconviction relief, appellant claims that the
district court abused its discretion by rejecting his claim that his appellate counsel was

ineffective for failing to raise multiple issues related to an erroneous jury instruction. We affirm.

FACTS

The state charged appellant Grant Greenwood with three counts of criminal sexual conduct related to sexual assaults of his girlfriend's underage daughter between 2009 and 2013: (1) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2010) (penetration or contact with a person under 13) (count 1); (2) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2010) (penetration of a victim under the age of 16/significant relationship/multiple acts over time) (count 2); and (3) second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010) (sexual contact with a victim under the age of 16/significant relationship/multiple acts over time) (count 3).

At the May 2016 jury trial, both parties had the opportunity to argue, edit, and finalize the jury instructions. The jury instruction for count 2 did not include an instruction requiring that the jury find that “the sexual abuse involved multiple acts committed over an extended period of time,” which is an element of the crime as defined by Minn. Stat. § 609.342, subd. 1(h)(iii). Greenwood's trial counsel did not object to the erroneous instruction.

During closing argument, the prosecutor stated that “[t]wo of the counts talk about the significant relationship, whereas count 1 we had different ages. . . . Count 3 talks about multiple acts over time. That was the difference between 1 and 2.” The prosecutor then described each count individually and stated with respect to count 2 that “[a]gain, two

different forms of penetration; oral sex, digital penetration. You don't need to have both. You only need to have one. You would only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that's enough."

The jury returned guilty verdicts on counts 2 and 3, but it was unable to reach a verdict on count 1. The district court sentenced Greenwood to 172 months' imprisonment on count 2.

In October 2016, Greenwood filed a direct appeal. His appellate counsel argued that the evidence was insufficient to sustain the verdict for count 2, and Greenwood submitted a pro se supplemental brief citing concerns about the investigation and prosecutorial misconduct regarding the statements in closing argument. *State v. Greenwood*, No. A16-1651, 2017 WL 3862802, at *2-3 (Minn. App. Sept. 5, 2017), *review denied* (Minn. Nov. 14, 2017). We affirmed the conviction. *Id.* at *4.

In May 2019, Greenwood filed a petition for postconviction relief, arguing that his appellate counsel was ineffective for failing to raise on direct appeal issues related to the erroneous jury instruction for count 2 and prosecutorial misconduct based on the prosecutor's misstatement of the law during closing argument. The district court held an evidentiary hearing, during which Greenwood's appellate counsel testified about his 35 years of experience as a criminal appellate public defender, which included his handling of at least 500 cases. He testified that he reviewed the entire trial record and identified issues related to the erroneous jury instruction, and that notwithstanding the erroneous instruction, he ultimately concluded based on his experience and research that claims related to the erroneous jury instruction were not meritorious.

The district court denied Greenwood's petition for postconviction relief. Greenwood appeals.

DECISION

The basis for each of Greenwood's arguments on appeal relates to the erroneous jury instruction for count 2. The relevant statute for count 2, criminal sexual conduct in the first degree, provides:

A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

. . . .

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the act, and:

. . . .

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat. § 609.342, subd. 1(h)(iii). The element set forth in clause (iii) was erroneously omitted from the jury instruction for count 2.

The relevant statute for count 3, criminal sexual conduct in the second degree, also contains the same element set forth in clause (iii) for count 2:

A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

. . . .

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:

. . . .

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat § 609.343, subd. 1(h)(iii). The element set forth in clause (iii) was included in the jury instruction for count 3.

Against this backdrop, Greenwood argues that he is entitled to postconviction relief because his appellate counsel (1) did not raise claims regarding the erroneous jury instruction for count 2 on direct appeal; (2) failed to raise claims regarding prosecutorial misconduct on direct appeal; and (3) did not raise claims regarding ineffective assistance of trial counsel for failing to object to the erroneous jury instruction at trial. Greenwood also argues that the cumulative errors by appellate counsel merit relief.

We review the denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017); *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). An abuse of discretion exists where a postconviction court “has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous findings.” *Pearson*, 891 N.W.2d at 596 (quotation omitted). In reviewing

a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, we will consider the court’s factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court’s decision or conclude that the court abused its discretion because postconviction relief is warranted.

State v. Nicks, 831 N.W.2d 493, 503-04 (Minn. 2013).

Criminal defendants are guaranteed the right to effective assistance of appellate counsel under the Due Process Clause of the Fourteenth Amendment. *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002). We evaluate the performance of appellate and trial

counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). Counsel is ineffective when (1) counsel’s performance fell below an objective standard of reasonableness, *and* (2) a reasonable probability exists that the outcome would have been different but for counsel’s errors. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). Counsel’s actions are objectively reasonable where “he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *Pierson*, 637 N.W.2d at 579 (quotation omitted). “There is a strong presumption that counsel’s performance ‘falls within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.” *Mosley*, 895 N.W.2d at 591 (quotations omitted). “If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement.” *Id.*

Appellate counsel “is not ineffective for failing to raise issues that themselves have no merit.” *Evans v. State*, 788 N.W.2d 38, 45 (Minn. 2010). Rather, appellate counsel “is permitted to argue only the most meritorious claims” and need not include all possible claims. *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quoting *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007)). To demonstrate the second prong of *Strickland*, Greenwood must show “a reasonable probability” that the outcome of the direct appeal would have been different had appellate counsel raised the issue. *Id.*

I. Appellate counsel was not ineffective for failing to raise claims related to the erroneous jury instruction.

Greenwood first argues that appellate counsel did not “exercis[e] the customary skills and diligence that a reasonably competent attorney would” have because the district court plainly erred by instructing the jury regarding the elements of count 2 and the omission of element (iii) from the jury instruction for count 2 requires reversal of his conviction.

Because trial counsel did not object to the erroneous jury instruction, we apply a plain-error analysis. *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). Plain error exists when a district court commits (1) an error (2) that was plain and (3) that affected the defendant’s substantial rights. *Id.* If we conclude that one element of this test is not met, we need not address the other elements. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017). If all three elements are satisfied, “[we] then assess[] whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A district court commits plain error if it fails to properly instruct the jury on all elements of the offense charged. *Peltier*, 874 N.W.2d at 799-800. We review the jury instructions as a whole to determine whether they fairly and adequately explained the law. *Id.* at 797. We agree with the parties that the district court committed plain error by omitting an essential element in the jury instruction for count 2.

The omission of that element for count 2, however, did not affect Greenwood’s substantial rights. We determine whether an omission of an element of a crime in a jury

instruction affected an appellant's substantial rights by conducting a thorough examination of the record to determine whether the omission was sufficiently prejudicial in light of the standard of review. *State v. Watkins*, 840 N.W.2d 21, 28-29 (Minn. 2013). The omission does not automatically require a new trial. *Id.* at 28. "The reviewing court may consider, among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the state submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Id.* at 29.

Here, the district court included the identical element omitted from its instruction for count 2 in its instruction for count 3. The jury convicted Greenwood of count 3, a lesser-included offense of count 2, necessarily finding beyond a reasonable doubt that Greenwood engaged in sexual abuse involving multiple acts committed over an extended period of time. *See State v. Holl*, 949 N.W.2d 461, 470 (Minn. App. 2020) (recognizing that second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct), *review granted* (Minn. Nov. 17, 2020); *see also State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (holding that the difference between the statutes for first-degree and second-degree criminal sexual conduct is simply one of sexual contact versus sexual penetration); *compare* Minn. Stat. § 609.342, subd. 1(h)(iii), *with* Minn. Stat. § 609.343, subd. 1(h)(iii). The jury's verdict therefore encompassed a finding on the element at issue here and no prejudice to Greenwood occurred. In recognizing that the jury unanimously agreed that the state proved this element beyond a reasonable doubt, appellate

counsel did not act below an objective standard of reasonableness in determining that raising the issue on appeal was not meritorious.

Greenwood argues his appellate counsel was ineffective because counsel erroneously interpreted *State v. Shamp*, 422 N.W.2d 520, 524-25 (Minn. App. 1988), *review denied* (Minn. June 10, 1988), to conclude that element (iii) was the same for both counts 2 and 3. Greenwood asserts that count 2 is a “penetration based offense” but that count 3 is a “contact based offense” and therefore the definition of sexual abuse involving multiple acts in element (iii) has a different meaning depending on the charge. But no authority supports that argument, and the omitted element does not require a specific finding of multiple acts of penetration. And we have previously held that a prior version of Minn. Stat. § 609.342, subd. 1(h)(iii), requires only multiple acts of sexual abuse and not multiple acts of penetration. *Shamp*, 422 N.W.2d at 524-25.

The statute in *Shamp*, which contains the same language as the version under which Greenwood was charged, required that “[t]he actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and: . . . (v) the sexual abuse involved multiple acts committed over an extended period of time.” Minn. Stat. § 609.342, subd. 1(h)(v) (1986). Because the term “sexual abuse” does not require penetration but instead more broadly includes “sexual contact other than penetration,” the jury’s finding in count 3 that “the sexual abuse involved multiple acts committed over an extended period of time” is the same finding required for a conviction under count 2.

Greenwood also argues that the time periods differed as to the acts covered by counts 2 and 3. This argument has no merit, as both offenses encompassed the same date range, January 1, 2009 to December 31, 2013. Appellate counsel therefore was not ineffective for failing to raise this unmeritorious argument on direct appeal, and we find no abuse of discretion in the denial of postconviction relief.

II. Appellate counsel was not ineffective for failing to raise claims related to prosecutorial misconduct.

Greenwood claims that appellate counsel should have argued on direct appeal that the prosecutor engaged in misconduct by stating that the jury need only find one act of penetration to convict Greenwood of count 2. Minn. Stat. § 609.342, subd. 1(h)(iii). Greenwood argues that the prosecutor misstated the law during her closing argument when she stated that (1) “Count 3 talks about multiple acts over time. That was the difference between 1 and 2” and (2) “Again, two different forms of penetration; oral sex, digital penetration. You don’t need to have both. You only need to have one. You would only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that’s enough.” Trial counsel did not object to these statements.

We review a claim of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing a plain error and, if successful, the burden shifts to the state to demonstrate that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *Id.*

We discern no misconduct by the prosecutor. The prosecutor’s reference to “only need[ing] to have one act” related to the first element of penetration rather than the omitted element of sexual abuse involving multiple acts. The plain language of the statute does not require multiple acts of *penetration*, but instead multiple acts of *sexual abuse*. *Shamp*, 422 N.W.2d at 524-25. And even if the prosecutor’s statements to the jury were erroneous, the state has demonstrated that any error did not deprive Greenwood of a fair trial in light of the verdict for count 3. We therefore see no abuse of discretion in the denial of postconviction relief.

III. Appellate counsel was not ineffective for failing to raise claims related to the ineffective assistance of trial counsel.

Greenwood argues that on direct appeal, appellate counsel should have argued that his trial counsel was ineffective for failing to object to the erroneous jury instruction or the prosecutor’s misstatement of the law. “When an ineffective assistance of appellate counsel claim is based on appellate counsel’s failure to raise an ineffective assistance of trial counsel claim, the [petitioner] must first show that trial counsel was ineffective.” *Evans*, 788 N.W.2d at 45 (alteration in original) (quoting *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007)).

Greenwood argues that trial counsel should have corrected the erroneous jury instruction and should have objected to the prosecutor’s statements during closing arguments. We again review (1) whether trial counsel’s performance fell below an objective standard of reasonableness and (2) whether a reasonable probability exists that the outcome would have been different but for counsel’s errors. *Mosley*, 895 N.W.2d at

591. “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089 (2014).

We agree with Greenwood that trial counsel’s performance fell below an objective standard of reasonableness insofar as counsel failed to object to an incomplete and erroneous jury instruction. But trial counsel’s error did not affect the outcome of the proceedings because the omitted element was included in the instruction for count 3, a lesser-included offense of count 2, and the jury unanimously found that the state had proven the element beyond a reasonable doubt. Accordingly, we see no abuse of discretion in the denial of the petition for postconviction relief on this basis.

In light of the foregoing, appellate counsel was not ineffective for failing to raise a claim based on the cumulative effect of the alleged errors.

Affirmed.