STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0387

State of Minnesota,
Respondent,

vs.

Douglas Allan Treu,
Appellant.

Filed February 6, 2023
Affirmed
Reilly, Judge

Wabasha County District Court
File No. 79-CR-19-1081

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

Karen S. Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his conviction for first-degree assault, arguing that the district court denied him his right to present a complete defense by its erroneous evidentiary

rulings, the district court erred in denying his request for a continuance, and he was denied effective assistance of counsel. We affirm.

FACTS

On December 3, 2019, an officer responded around midnight to a call for emergency services and report of a knife attack at an apartment building in Wabasha County. At the scene, the officer discovered D.A.Z. and R.M. with blood on their faces. They informed the officer that appellant Douglas Allan Treu attacked them. Treu and his wife lived in the apartment below D.A.Z.'s girlfriend, R.M., who also managed the apartment building. D.A.Z. informed the officer that Treu attacked him with a box cutter and caused D.A.Z.'s dog to bite Treu. D.A.Z. had a deep laceration across his face along with lacerations on his back, arm, and hand. R.M. had a laceration near her eye. Upon entering Treu's apartment, the officer found Treu bloody, crying, and with large bite wounds on his calf. Officers searched the area outside the building where the fight occurred and discovered a box cutter in the grass. Respondent State of Minnesota charged Treu with first-degree and second-degree assault with a dangerous weapon. Treu pleaded not guilty and claimed self-defense.

Pretrial Continuances

Before trial, defense counsel made multiple trial continuance requests. During a pretrial hearing on May 17, 2021, defense counsel informed the district court that both parties were unprepared to try the case set for June 7 and asked the district court to schedule the case for trial in September to "get experts, line them up, and have everything all prepared to go." The district court set a pretrial hearing for July 21. After more pretrial

hearings, the district court set the case for trial on September 13 at the request of both parties.

On September 13, Treu did not appear for trial on the instruction of defense counsel because Treu was ill and awaiting the results of a COVID-19 test. Defense counsel requested that the case be continued to October, stating that he was "not prepared to try Treu this week." The state made a speedy trial demand based on the victim's request. The district court scheduled the trial for October 4.

On September 28, defense counsel moved the court for a trial continuance and requested that the matter be tried in December. Defense counsel cited several reasons that supported a continuance, including defense counsel's inability to prepare with Treu while he was ill[1], defense counsel's unfinished subpoena and funding request to retain the doctor who treated Treu's injuries as a testifying witness, and defense counsel's unfinished investigation into the facts of the case. The district court granted defense counsel's continuance request. In response, the state moved to remove the district court judge from the case for violating the state's speedy trial demand and continuing the case absent a finding of good cause. At the removal hearing before the district's chief judge on October 18, the state withdrew its motion and the chief judge set the matter for trial starting November 1.

[1] Treu ultimately did not test positive for COVID-19, but defense counsel asserted that the severity of Treu's illness prevented his defense team from meeting with Treu to prepare for trial.

On October 25, defense counsel moved the district court to continue the trial to January based on a late disclosure by the state. The state had informed Treu that D.A.Z.'s dog was euthanized as a potentially dangerous dog and disclosed incident reports about the dog's behavior that dated to the spring of 2020. Defense counsel argued that the dog's acts of violence were relevant to Treu's self-defense claim. The district court denied the continuance because the state's unintentional late disclosure would not prejudice Treu by materially affecting the outcome of the trial.

During a pretrial hearing on October 28, defense counsel once again requested a continuance stating he felt rushed and "pushing [him] into trial on this case at this point is in danger of giving Mr. Treu ineffective assistance of counsel." Defense counsel explained that he still had subpoenas to send out and an investigation to complete. The district court denied the motion.

Jury Trial

The district court conducted a four-day jury trial and heard testimony from D.A.Z., R.M., an officer who responded to the call for emergency services, a doctor who treated D.A.Z.'s injuries, and Treu. D.A.Z. testified that he was at R.M.'s apartment on December 3, 2019, and went outside the building to smoke a cigarette while he took his dog out. The dog, a pit bull, was on a retractable leash and standing in the grass away from D.A.Z. when Treu approached angrily. D.A.Z. testified that Treu confronted D.A.Z. for taking his name off of the apartment mailbox. D.A.Z. informed Treu that he would be evicted later in the month for failure to pay rent and said he heard Treu was "touching little girls' butts." Treu pushed D.A.Z., then D.A.Z. pushed Treu. D.A.Z. testified that Treu pulled a box cutter

out of his right pocket with his right hand and cut D.A.Z.'s face using a downward slicing motion. D.A.Z. fought back with his fists and eventually put Treu in a headlock, but Treu managed to stab D.A.Z. in the back with the blade. D.A.Z. testified R.M. emerged from the building when she heard the fight and Treu attacked R.M., cutting her face. D.A.Z. noted that the dog then went after Treu and bit him in the back of the leg. He pulled the dog off Treu and went upstairs to tend to his wounds.

R.M. testified that she heard D.A.Z. and Treu arguing outside about Treu's music being too loud and "touching my girls' butts." R.M. stated she saw Treu lunge at D.A.Z. from her apartment window and she ran outside to find Treu cutting D.A.Z. with what looked to be a four-inch blade. R.M. screamed and tried to pull Treu off D.A.Z., but Treu lashed out and cut R.M.'s face. Shortly after, the dog bit Treu's leg.

Treu testified that on the morning of December 3, 2019, he visited his family's farm and used a box cutter to cut nets that wrapped bales of hay. When he returned to his apartment building later that day, he noticed his mail and nametag were on the ground outside of his apartment mailbox. Treu replaced the nametag. Soon after, he heard D.A.Z. and R.M. arrive at their apartment and Treu went downstairs to find his name had been removed from the mailbox once again. Treu testified D.A.Z. came down the apartment stairway toward him alone, without the dog, and Treu asked if D.A.Z. removed his name from the mailbox. Treu stated D.A.Z. ranted about evicting Treu and his wife. Treu also asked D.A.Z. if he loosened the lug nuts on Treu's car. D.A.Z. affirmed that he did and pulled Treu off the apartment's steps and onto the concrete in front of the building. D.A.Z. grabbed Treu and put him in a headlock while punching him. Treu testified he could not

get out of the headlock because he recently had reconstructive surgery on his right shoulder and his right arm was immobile, having only been out of a sling for 11 days at the time of the fight. Treu testified he could not raise his right arm above his head or throw a punch. Treu stated R.M. emerged from the apartment building with the dog and D.A.Z. ordered the dog to "kill" while holding Treu in a headlock. The dog bit Treu's leg repeatedly and shook a box cutter out of Treu's pocket, which fell onto the ground and broke a portion of the blade. Treu pulled D.A.Z. to the ground, picked up the broken blade with his left hand, and "just did one cut" across D.A.Z.'s face and arm. D.A.Z. released Treu and Treu shook the dog off of his leg. Then Treu retreated into the apartment building to call the police.

The officer who responded to the call for emergency services testified that Treu told the officer he confronted D.A.Z. and "[b]efore he knew it, they were fighting." Treu informed the officer that D.A.Z.'s wounds were caused by Treu "swinging with his hands." The jury found Treu guilty of first-degree assault using the box cutter as a dangerous weapon but acquitted him of second-degree assault. The district court sentenced Treu to 86 months in prison. This appeal follows.

DECISION

I. Treu was not denied his constitutional right to present a complete defense and confront witnesses based on the district court's evidentiary rulings.

Treu argues that four of the district court's evidentiary rulings were erroneous, preventing him from presenting a complete defense and confronting witnesses. A criminal defendant has "the right to be treated with fundamental fairness and 'afforded a meaningful opportunity to present a complete defense.'" *State v. Richards*, 495 N.W.2d 187, 191

(Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). The constitutional right to a meaningful opportunity to present a complete defense does not exempt criminal defendants from the rules of evidence. *State v. Wilson*, 900 N.W.2d 373, 384 (Minn. 2017). Constitutional errors are subject to harmless-error review. *State v. Taylor*, 869 N.W.2d 1, 12 (Minn. 2015).

a. The district court did not abuse its discretion in prohibiting Treu from questioning D.A.Z. and R.M. about D.A.Z.'s past specific instances of violence.

Before trial, Treu moved the district court for an "order allowing character trait evidence of violence and an aggressive nature to be introduced as a trait of the alleged victim [D.A.Z.]" under Minn. R. Evid. 404(a)(2) to show that D.A.Z. was the initial aggressor and Treu acted in self-defense. Treu specifically sought to introduce acts of violence referred to in four of D.A.Z.'s past criminal court files. The district court ruled that any specific instances of D.A.Z.'s violence that Treu was unaware of on the day of the incident were prohibited at trial. We agree.

To succeed on a self-defense claim, a defendant must present evidence that he was not the aggressor. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). To show that the victim was the aggressor, he may present evidence of the victim's violent character in the form of reputation or opinion testimony, not in the form of specific prior violent acts. Minn. R. Evid. 404(a)(2); *Penkaty*, 708 N.W.2d at 202. Prior-acts evidence is admissible only to establish that the defendant reasonably feared great bodily harm if the defendant

was aware of the victim's prior acts at the time of the alleged offense. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). Treu does not dispute that he did not know about D.A.Z.'s past violent acts before the incident on December 3.[2] As such, the acts would not have "legitimately affect[ed] [Treu's] apprehensions" and caused him to fear great bodily harm from D.A.Z. *Id.* Accordingly, the district court did not abuse its discretion in prohibiting Treu from questioning D.A.Z. and R.M. about D.A.Z.'s past specific instances of violence.

b. The district court did not abuse its discretion in prohibiting Treu from impeaching D.A.Z.'s credibility with specific instances of his past violent conduct.

Treu also contends that the district court impermissibly barred him from impeaching D.A.Z.'s credibility with specific instances of D.A.Z.'s past violent conduct. During cross-examination at trial, D.A.Z. testified about whether he was a person who fights:

> Q: And that you are not a person that fights; correct?
> A: Not unless provoked.
> Q: Okay. What did you mean by I never ran?
> A: I'm a people person . . . . Don't really have anybody that hates me. Don't have any enemies so I guess I don't – don't really fight anybody. I get along with everybody.
> Q: Okay. You're not a person that fights; correct?

[2] Treu only argues that the district court should not have applied Minn. R. Evid. 405(a) "mechanistically" to prevent Treu from presenting the specific-acts evidence because it was the most convincing evidence available to prove self-defense: relevant evidence on D.A.Z.'s character for violence. We disagree and recently rejected a nearly identical argument in *State v. Burdunice*, A18-1269, 2019 WL 3000714, at *3 (Minn. App. July 8, 2019), *rev. denied* (Minn. Sept. 17, 2019). In *Burdunice*, the defendant claimed self-defense and sought to show that the victim was the aggressor through the victim's past violent conduct as the "most convincing evidence supporting his self-defense claim." *Id.* This court held that "convincing" is not the standard for admissibility, and evidence that has "probative force" is routinely excluded based on other considerations such as its potential for unfair prejudice. *Id.*

A: That would be correct.
Q: Before December 3 of 2019, had you ever been in a fight?

The state objected to the defense's prior-acts question. Defense counsel responded that D.A.Z. adopted a statement that he is not a person who fights and questions about his past convictions for brawling and fighting went to his credibility. The district court sustained the state's objection.

Under the Minnesota Rules of Evidence, a party may attack the credibility of a witness. Minn. R. Evid. 607. Rule 608(b) states that "prior misconduct, other than conviction of a crime, may be admissible for the purpose of attacking [a] witness's credibility if the prior misconduct is probative of untruthfulness." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). "[I]n the discretion of the court," a party may inquire about specific instances of conduct on cross-examination but may not prove them by extrinsic evidence. Minn. R. Evid. 608(b). Additionally, the district court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403; *see* Minn. R. Evid. 401 ("[Relevant evidence] ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Treu argues that the district court prematurely prohibited his line of questioning to show the jury D.A.Z. falsely portrayed himself as nonviolent when he shared he is "not a person that fights." But D.A.Z. also testified that he does not fight "unless provoked" and

that he put Treu in a headlock and punched him. D.A.Z.'s prior instances of fighting and brawling are not probative of untruthfulness as his testimony does not show he is a peaceful person who never fights. On these facts, we cannot conclude that the district court abused its discretion by applying the plain language of rule 608(b).

Even if Treu could have permissibly asked whether D.A.Z. had been in a fight before, the record also reflects the district court excluded the evidence based on its discretionary decision under rule 403 when it stated it was "concerned about the jury getting confused and the prejudicial aspect of evidence or testimony related to prior incidents." "[D]eciding which facts or issues could confuse the jury—and whether that risk of confusion is necessary to the adjudication of the case—is a function that rests soundly within the discretion of the [district] court." *Doe 136 v. Liebsch*, 872 N.W.2d 875, 881 n.3 (Minn. 2015). The probative value of showing D.A.Z. misrepresented himself to cast doubt on the truthfulness of his testimony that Treu was the aggressor is undercut by D.A.Z.'s overall testimony that he does engage in fighting when provoked. We discern no abuse of discretion in the district court's conclusion that the probative value of prior-acts evidence to attack D.A.Z.'s credibility is substantially outweighed by the danger of unfair prejudice and confusing the jury.

c. The district court did not abuse its discretion in prohibiting Treu from questioning D.A.Z. about Facebook posts involving his attitude toward pedophiles.

After D.A.Z. testified he confronted Treu about "touching little girls' butts," Treu sought to question D.A.Z. about two Facebook posts on D.A.Z.'s profile that he shared months after the altercation. On July 6, 2020, D.A.Z. shared a post originating from

another Facebook user that stated, "Pedophilia is not a f—ing fetish, it will never be accepted, and if you f—ing believe that it's okay, let me know so I can stomp a d-mn hole in you." On October 27, 2021, D.A.Z. also shared a post from another user that stated, "I wanna go to a pumpkin patch, watch horror movies, drink hot coco, and murder pedophiles. You know, fall sh-t." Defense counsel sought to examine D.A.Z. about his posts as prior statements made by the witness under Minn. R. Evid. 613(a) and ask whether D.A.Z. would act aggressively toward somebody he believed to be a pedophile. The district court prohibited Treu's proposed line of questioning based in part on his late disclosure of the Facebook posts to the state, lack of relevance, and the "probative value being outweighed by the prejudicial effect" of the posts.[3]

On appeal, Treu only argues that the evidence is admissible under Minn. R. Evid. 616, which provides evidence of bias against any party is admissible to attack the credibility of a witness. "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [his] testimony, leading [him] to be more or less favorable to the position of a party for reasons other than the merits." *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995). Though extrinsic evidence may be admitted to show a witness is

[3] Treu argues that the district court erred in prohibiting questions about D.A.Z.'s Facebook posts as a late-disclosure discovery sanction for failing to provide them to the state before trial under Minn. R. Crim. P. 9.02 because Treu did not intend to introduce the Facebook posts as evidence. Rather, he only sought to ask whether D.A.Z. shared the sentiments expressed in the posts. If Treu sought to examine D.A.Z. under Minn. R. Evid. 613(a), we agree. Treu disclosed the posts to the state at the time of impeachment. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 904 (Minn. App. 2006) (holding under Minn. R. Evid. 613(a) defense counsel may examine a witness "without disclosing the contents of her prior statement"). But the district court's additional ruling to prohibit the questioning under Minn. R. Evid. 403 is dispositive.

motivated by bias, "not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose." *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010). Whether the district court abused its discretion in restricting a defendant's attempted cross-examination that seeks to show bias turns on whether the jury has sufficient other information to make a "discriminating appraisal" of the witness's bias or motive to fabricate. *Lanz-Terry*, 535 N.W.2d at 641 (quotation omitted). The district court "may exclude evidence of extraneous matters based on concerns about such things as harassment, decision making on an improper basis, confusion of the issues, and cross-examination that is repetitive or only marginally relative." *Id.* The district court may, in its discretion, also exclude relevant evidence to impeach a witness in "instances . . . where the probative value of the impeachment evidence may be outweighed by its tendency to prejudice or confuse the jury." *State v. Underwood*, 281 N.W.2d 337, 341 (Minn. 1979); *see also* Minn. R. Evid. 403.

Despite the posts being shared on D.A.Z.'s page after the altercation, the content reflecting D.A.Z.'s negative feelings toward pedophiles is relevant to the credibility of his trial testimony and whether he fabricated Treu's purported role as the aggressor because he believed Treu had touched children inappropriately. Even so, the district court did not abuse its discretion by restricting Treu's attempted cross-examination. Treu could elicit testimony about any statement made on December 3, including those involving inappropriate touching. The jury also had sufficient other information of D.A.Z.'s bias against Treu or motive to fabricate independent of perceived pedophilia based on the testimony that D.A.Z. repeatedly removed Treu's name from his mailbox, threw Treu's

mail on the ground, and loosened lug nuts on Treu's car. Because the central issue involves determining whether Treu was the aggressor in the altercation, rather than determining whether Treu had inappropriately touched children, we discern no abuse of discretion in the district court's conclusion that the probative value of the impeachment evidence was substantially outweighed by the danger of confusing the jury and unfair prejudice.

d. The district court's error in prohibiting R.M. from testifying about D.A.Z.'s reputation for violence was harmless.

During a bench conference where Treu also sought to impeach D.A.Z.'s credibility with specific instances of his past violent conduct, Treu said he intended to elicit evidence about D.A.Z.'s reputation for violence through R.M. Treu intended to question R.M. about a sworn statement she made in a court file seeking an order for protection. Treu argued the testimony was "not a specific instance" of past violence because R.M. stated in the statement that D.A.Z. abused her. Thus, R.M. knew of D.A.Z.'s propensity for aggressive or violent behavior. The record reveals that, while ruling on the impeachment issue, the district court relied on a discovery sanction and its conclusion based on Minn. R. Evid. 403 to preclude R.M.'s testimony.[4]

Indeed, to show that the victim was the aggressor, a defendant may present evidence of the victim's violent character in the form of reputation or opinion evidence. *Penkaty*, 708 N.W.2d. at 202; *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983). Here, the district

[4] Here too, we agree with Treu's contention that the district court erred in excluding the testimony based on a discovery sanction. Treu's trial witness list adopted individuals noted on the state's witness list, which included R.M., and afforded the state notice under Minn. R. Crim. P. 9.02 that R.M. may be called to testify for the defense.

court erred in excluding R.M.'s testimony based on the danger of confusing the jury and unfair prejudice. The probative value of D.A.Z.'s reputation for violence is high and would permit the jury to infer D.A.Z. was more likely to be the aggressor. The danger of confusing the jury is arguably low. Treu sought to question R.M. about her knowledge of D.A.Z.'s reputation for violence rather than recount particular times when D.A.Z. abused her. The testimony went to the central issue of the case: determining which party was the aggressor. And, assuming Treu did not ask about specific instances of violent conduct, the testimony would have posed little risk that the jury would confuse the central issue in this trial with the issue about whether D.A.Z. abused R.M. in the past. For these reasons, the district court abused its discretion.

Treu contends that the district court's error deprived him of a meaningful opportunity to present a complete defense, which we review under the harmless-beyond-a-reasonable-doubt standard. *See Taylor*, 869 N.W.2d at 12. "An error in excluding [defense] evidence is harmless only if the reviewing court is 'satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, a [reasonable] jury would have reached the same verdict.'" *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012) (quoting *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994)). A new trial is required unless the state can show beyond a reasonable doubt that the error was harmless. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). This court must "look to the basis on which the jury rested its verdict and determine what effect the error had on the actual verdict." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (stating reviewing court must consider several factors, including importance of testimony,

its cumulative nature, whether there is corroborating or contradicting evidence, extent of cross-examination, and strength of the prosecution's case).

Even if R.M. testified to D.A.Z.'s reputation for violence, the state's case against Treu was strong. Both D.A.Z. and R.M. testified that Treu was the aggressor. In a case involving competing versions of events, Treu's account of the fight and his credibility are undercut by conflicting evidence. First, Treu told the officer at the scene that he only struck D.A.Z. with his hands. The surgeon that treated D.A.Z. testified his wounds were likely caused by a sharp object and officers discovered a box cutter in the area where the altercation occurred. At trial, Treu stated he lashed out only once at D.A.Z. with the blade to cut his face and arm. But the physical evidence shows that D.A.Z. also received multiple, serious lacerations on his back and hand. While R.M.'s testimony may have helped the jury in weighing which version of events to credit, the jury heard D.A.Z.'s admission that he fights when provoked and is not wholly peaceful. The jury's verdict reflects that it believed D.A.Z. and R.M.'s testimony that Treu was the aggressor and did not act in self-defense. We see no reasonable probability that excluding R.M.'s testimony contributed to Treu's conviction and conclude that the error was harmless beyond a reasonable doubt.

II. The district court did not abuse its discretion in denying Treu's continuance request.

Treu contends the district court abused its discretion in denying the trial continuance defense counsel requested on October 28, 2021. Defense counsel advised the district court that pushing him to trial would lead to the danger of giving Treu ineffective assistance of

counsel and requested that the trial be set for January. "The decision to grant or deny a motion for a continuance lies within the sound discretion of the [district] court and will only be reversed upon a showing of abuse of discretion." *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980). In discerning whether the district court abused its discretion, this court must examine the circumstances when the motion was made to "determine whether the defendant was so prejudiced in preparing or presenting a defense as to materially affect the outcome of the trial." *State v. Smith*, 932 N.W.2d 257, 268 (Minn. 2019) (quotation omitted).

Relevant circumstances include the number of continuances already granted to the moving party and the timing of the request. *See State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999) (holding appellant was not prejudiced by denying continuance request when the court had granted two motions for continuance); *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (concluding that district court properly denied request to substitute counsel on the first day of trial); *State v. Beveridge*, 277 N.W.2d 198, 199 (Minn. 1979) (concluding the district court properly denied a continuance request after defendant had already received five continuances).

The chronology preceding the requested continuance does not favor granting Treu's request. Before the continuance at issue, the district court had already granted two of defense counsel's motions for continuance.[5] On September 13, Treu did not appear for trial because he was ill and defense counsel stated he was unprepared to try the case set for

[5] These two trial continuance requests are attributed to Treu alone rather than the occasions Treu spoke on behalf of both parties and requested that the trial be continued.

trial that day. The district court granted Treu's continuance request and set the trial for October. On September 28, Treu submitted a written request to continue the trial to December and the district court granted this request. Ultimately, the district's chief judge set the trial for November 1, rather than December, and defense counsel obtained the benefit of a continuance to a date later than the October trial calendar. Treu's final request for a continuance was made only three days before trial was scheduled to begin.

Citing *In re Welfare of T.D.F.*, Treu argues that defense counsel's lack of preparedness for trial justified his continuance request and the district court's refusal entitles him to a new trial. 258 N.W.2d 774, 775 (Minn. 1977) ("When denial of a continuance deprives defendant's counsel of adequate trial preparation, we must reverse the conviction."). We are unpersuaded. In *T.D.F.*, the defense counsel was out of town at the time of a hearing and the attorney taking their place had not prepared at all for a hearing that required extensive investigative work. *Id.* Treu was not similarly prejudiced. Defense counsel's failure to obtain corroborating witness testimony from the surgeon who operated on Treu's shoulder and the doctor who treated Treu's injuries after the fight did not prevent the jury from hearing evidence on these subjects. Treu submitted photos of his wounds from the dog bite and testified to the severity of his injuries and the length of his treatment. Treu further testified to the limited mobility of his right arm following shoulder surgery, contradicting D.A.Z. and R.M.'s testimony that he wielded the box cutter in his right hand.

When the district court denied Treu's continuance request, it noted that nothing had changed since the matter was set for trial by the district's chief judge. As early as May 17, defense counsel knew he needed to make arrangements for experts when he asked the

district court to set the trial for September to "get experts, line them up, and have everything all prepared to go." Given the state's speedy trial demand on September 13, which required the trial to begin before November 12, 2021, granting defense counsel's requested continuance to January would have put the trial well outside of 60 days from the demand and violated the victim's speedy trial rights. *See* Minn. Stat. § 611A.033(a) (2022).

On these facts, it is not apparent that the denial of Treu's continuance motion was so prejudicial in preparing his defense as to "materially affect the outcome of the trial." *Smith*, 932 N.W.2d at 268. The district court did not clearly abuse its discretion by denying Treu's motion for a continuance.

III. Treu was not denied his right to effective assistance of counsel based on defense counsel's lack of preparedness.

Treu contends he received ineffective assistance of counsel and is entitled to a new trial. Claims of ineffective assistance of counsel involve mixed questions of law and fact, which this court reviews de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). When an ineffective-assistance-of-counsel claim is raised in a direct appeal, the court examines the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Under the first prong, an appellant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. The second prong requires an appellant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Failure on either prong is dispositive. *Id.* at 687. There is a strong presumption that a

counsel's performance falls within the "wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Treu argues his defense counsel's performance was deficient in three respects. First, Treu contends his attorney failed to conduct an adequate investigation in the case. "[A] failure to investigate a potential defense may constitute ineffective assistance if it results not from counsel's considered choice but rather from inattention or neglect." *Swaney v. State*, 882 N.W.2d 207, 218 (Minn. 2016). Treu asserts that his defense counsel neglected to investigate aspects of the case. But Treu does not elaborate what precisely defense counsel failed to investigate. An attorney's own admission that he did not complete his investigation is not per se ineffective assistance as it does not address how Treu was prejudiced by the error. Treu argues that defense counsel's failure to investigate D.A.Z.'s Facebook page before the start of the trial was unreasonable. But the result of the proceeding would not have been different with an earlier investigation because the district court permissibly excluded Treu's proposed inquiry about the posts.

Second, Treu argues his defense counsel's performance was deficient in failing to subpoena witnesses to corroborate his testimony. Perhaps if his attorney made appropriate arrangements, then Treu may have benefited from corroborating testimony from (1) his shoulder surgeon about the immobility of his right arm and (2) the emergency room doctor to bolster Treu's account of the severity of his injuries from the altercation. "[M]atters of trial strategy, including which witnesses to call . . . will not be reviewed later by an appellate court as long as the trial strategy was reasonable." *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). Where an attorney fails to investigate evidence or witnesses that are

essential to the attorney's theory of the case, the attorney is ineffective. *State v. Nicks*, 831 N.W.2d 493, 508 (Minn. 2013). Here, it appears that defense counsel did not omit these witnesses as a matter of reasonable trial strategy. Rather, defense counsel failed to follow through on completing subpoenas and funding requests to ensure witness testimony by the trial date.

Even so, it is unlikely that this added testimony would have changed the outcome of the proceedings. Treu told the jury about the severity of his injuries, describing the extensive treatment that his wounds required and showing pictures of his injuries. Whether testimony on Treu's past shoulder injury that corroborated his purported limited range of motion would have changed the outcome of the proceedings is a closer call. D.A.Z. and R.M. both testified they were sure Treu used his right arm to lash out at them with the blade. In a case with competing narratives, the testimony might have corroborated one aspect of Treu's version of events and bolstered his credibility. Yet, Treu's testimony that he lashed out only once at D.A.Z. with the blade to cut his face and arm is contradicted by the physical evidence showing that D.A.Z. had multiple lacerations on his back and hand after the fight. Treu's ineffective-assistance claim fails for his inability to show prejudice such that the jury "would have had a reasonable doubt respecting guilt" without the professional error. *Strickland*, 466 U.S. at 695.

Finally, Treu claims defense counsel's representation fell below an objective standard of reasonableness when he committed three discovery violations that ultimately precluded the jury from hearing of D.A.Z.'s reputation for violence or his bias against pedophiles. Here too, Treu cannot show the prejudice necessary to carry the second

Strickland prong. While the district court cited discovery sanctions as a reason for not allowing R.M. to testify on D.A.Z.'s reputation for violence and not allowing defense counsel to question D.A.Z. about his Facebook posts, the district court also ultimately relied on Minn. R. Evid. 403 to exclude those lines of inquiry because of the prejudicial risk that it might confuse the jury. Even if counsel had not made errors in discovery disclosures, the district court also decided to exclude the inquiries under the rules of evidence. Thus, there is not a reasonable probability that the jury would have heard the evidence that would have changed the outcome of the trial. Because Treu's claims fail under *Strickland*, he was not denied his right to effective assistance of counsel and is not entitled to a new trial.

Affirmed.