STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0584

Alexander James Ray, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 27, 2022
Affirmed
Gaïtas, Judge

Hennepin County District Court
File No. 27-CR-19-4820

Adam T. Johnson, David R. Lundgren, Lundgren & Johnson, P.S.C., Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.*

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

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Alexander James Ray challenges the district court's denial of his postconviction petition, filed after we affirmed his conviction for first-degree criminal sexual conduct on direct appeal. Ray argues that his appellate public defender provided ineffective assistance of counsel by failing to (1) argue on appeal that the district court erroneously denied his for-cause challenge of a biased juror and (2) raise a claim of ineffective assistance of trial counsel. Because the district court did not abuse its discretion in denying Ray's postconviction petition, we affirm.

FACTS

In winter 2019, Ray sexually assaulted his then-girlfriend and videorecorded the encounter.[1] Respondent State of Minnesota subsequently charged Ray with first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(e)(i) (2018), third-degree criminal sexual conduct, Minn. Stat. § 609.344, subd. 1(c) (2018), threats of violence, Minn. Stat. § 609.713, subd. 1 (2018), and domestic assault by strangulation, Minn. Stat. § 609.2247, subd. 2 (2018). A jury found Ray guilty of all four offenses. The district court sentenced Ray to 90 months in prison to be followed by 10 years of conditional release.[2]

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[1] Additional facts can be found in our nonprecedential opinion affirming Ray's convictions on direct appeal, *State v. Ray*, No. A20-0144, 2021 WL 416718, at *1-2 (Minn. App. Feb. 8, 2021).

[2] This sentence is a downward durational departure from the presumptive range of 144 to 187 months for first-degree criminal sexual conduct. *See* Minn. Sent'g Guidelines 4.B (2018).

Ray, represented by an appellate public defender, filed a direct appeal. In preparing the appeal, Ray's appellate public defender requested the transcripts of the trial but specifically excluded from the request transcripts of jury selection. The appellate public defender filed a brief with this court arguing that the prosecutor had committed misconduct during Ray's trial. We affirmed Ray's convictions. *Ray*, 2021 WL 416718, at *4.

Ray subsequently obtained private defense counsel and filed a petition for postconviction relief. His postconviction petition raised claims of ineffective assistance of appellate counsel and trial counsel, among other issues that he does not pursue in this appeal. Of relevance here, Ray's postconviction petition alleged that his appellate public defender provided ineffective assistance by not requesting the transcripts of jury selection, and in turn, by not raising two jury-selection issues on direct appeal. Ray first claimed that the appellate public defender should have discovered and argued that the district court erred in denying Ray's motion to strike a biased juror for cause and in allowing that juror to serve on Ray's jury. And Ray argued that the appellate public defender should have argued that trial counsel was deficient because trial counsel did not personally question the prospective jurors and allowed three additional biased jurors to serve on the jury.[3]

[3] Ray filed several exhibits in support of his postconviction petition, including documents from the appellate public defender's file. In one of those documents—Ray's application for appellate-public-defender representation—Ray complained that he had received ineffective assistance of trial counsel because his private trial counsel did not represent him at trial. He stated that, at the request of his retained counsel, another lawyer took over the case just one day before trial. Ray's application also stated that his case presented a possible juror-misconduct issue because a witness had overheard jurors discussing the case in the hallway. Another document—a letter from the appellate public defender to Ray's retained private attorney—inquired whether "anything occurred during voir dire that would

The district court concluded that Ray failed to establish that his appellate counsel and his trial counsel were ineffective. It denied Ray's postconviction petition without an evidentiary hearing.[4]

DECISION

Ray challenges the district court's denial of his petition for postconviction relief. Appellate courts "review the denial of a petition for postconviction relief for an abuse of discretion. A postconviction court abuses its discretion when it has 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." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotations and citation omitted).

In his postconviction petition, and now on appeal, Ray argues that his appellate counsel and his trial counsel provided constitutionally defective representation. Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right means "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

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necessitate" ordering the transcripts. Ray pointed out in his postconviction filings that the appellate public defender's file contained no response to that letter.

[4] Although the conclusion section of Ray's brief to this court states that the district court erred in denying an evidentiary hearing, he did not brief this issue. We therefore conclude that Ray forfeited any argument that the district court erred in denying his petition for postconviction relief without an evidentiary hearing. *See State v. Myhre*, 875 N.W.2d 799, 806 (Minn. 2016) (stating that failure to brief an issue on appeal may result in forfeiture of the issue).

When a defendant alleges ineffective assistance of counsel, the court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013)). Under that test, a defendant must show that (1) counsel's representation was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "If a claim fails to satisfy one of the *Strickland* requirements, [a court] need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). The ultimate consideration is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A petitioner alleging ineffective assistance of counsel must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). An attorney meets the objective reasonableness standard when the attorney "provides [the] client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). Prejudice exists if there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Id.*

Because the *Strickland* test involves mixed questions of law and fact, an appellate court reviews a district court's determinations de novo. *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019). "[T]o determine whether [a defendant's] appellate counsel was

ineffective, [a reviewing court] must look to the merits of [the defendant's] underlying claims." *Onyelobi v. State*, 932 N.W.2d 272, 280 (Minn. 2019).

I. Because the district court did not err in denying trial counsel's motion to remove a juror for cause, Ray's appellate public defender did not provide ineffective assistance of counsel by failing to pursue the issue on direct appeal.

Ray argues that his appellate public defender was ineffective because he did not request the transcript of jury selection and consequently failed to argue on direct appeal that the district court erred by denying a for-cause challenge to a biased juror. The juror at issue—juror 14—was a 61-year-old woman who stated during jury selection that she was sexually assaulted by a friend's brother as a teenager. Ray's trial counsel challenged juror 14 for cause, but the district court denied the motion, and juror 14 was ultimately seated on Ray's jury. According to Ray, the district court's decision to allow a biased juror to serve on his jury was structural error that violated his constitutional right to an impartial jury. And, according to Ray, if the appellate public defender had raised this issue on direct appeal, Ray would have prevailed and received a new trial.

Before turning to Ray's allegation of ineffective assistance of appellate counsel, we examine the merits of the underlying claim. A criminal defendant has a constitutional right to an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "Because the impartiality of the adjudicator goes to the very integrity of the legal system, . . . the bias of a single juror violates the defendant's right to a fair trial." *State v. Evans*, 756 N.W.2d 854, 863 (Minn. 2008) (quotations omitted). The presence of a biased juror is a structural error and requires automatic reversal. *Id.*

An attorney may challenge a juror "for cause" on 11 separate grounds, including that "[t]he juror's state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party." Minn. R. Crim. P. 26.02, subd. 5(1). If a party challenges a prospective juror on this basis—for actual bias—the party "must show that the juror exhibited strong and deep impressions that would prevent her from laying aside her impression or opinion and rendering a verdict based on the evidence presented in court." *State v. Munt*, 831 N.W.2d 569, 577 (Minn. 2013) (quotations omitted).

Here, Ray's trial counsel challenged juror 14 for cause on the ground of actual bias, and the district court rejected the challenge. To determine whether the district court erred by seating a challenged juror, the appellate court applies a two-step analysis. *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015). The first step is to determine whether the juror expressed actual bias. *Id.* In considering this question, the appellate court "must view the juror's voir dire answers in context." *Id.* "If the juror expressed actual bias, [the appellate court] must then determine whether the juror was properly rehabilitated." *Id.* A juror is properly rehabilitated when the juror unequivocally agrees to follow the district court's instructions, set aside any preconceived judgments, and fairly consider the evidence. *Id.* (quoting *State v. Prtine*, 784 N.W.2d 303, 310 (Minn. 2010)). "If a district court has ruled on a for-cause challenge to a prospective juror, an appellate court gives great deference to a district court's findings of fact regarding juror bias and reviews a district court's decision to seat a juror for abuse of discretion." *State v. Geleneau*, 873 N.W.2d 373, 379 (Minn. App. 2015) (quotations omitted), *rev denied* (Minn. Mar. 29, 2016).

Turning to the factual circumstances here, juror 14 initially revealed on her juror questionnaire that she had been sexually assaulted decades earlier when she was 14 years old. She stated that "something happened to [her] as far as contact that [she] was unsure [she] could be impartial" and that the incident "certainly has colored [her] future." During questioning outside of the presence of other prospective jurors, the district court asked juror 14 whether she could continue to examine her own biases and "not see [her]self" in the circumstances alleged in Ray's case. Juror 14 responded that "it would be [her] hope." She stated that she understood her role as a juror "to find the truth." Ray's trial counsel followed up by asking juror 14 whether she could "put aside" her "painful experience." Juror 14 stated, "I think of myself as being a person that can look at things objectively, but it is amazing over—I'm also 61 years old, and it's amazing how things still—." The prosecutor then asked, "I think what you're telling us, you're saying you hope you can set any sort of bias aside. So then are you saying that you will do your best to set any sort of bias that you recognize aside and make an objective decision?" Juror 14 responded, "yes."

After this discussion, Ray's trial counsel moved the district court, over the state's objection, to strike juror 14 for cause. Ray's counsel argued, "she didn't say she couldn't [be impartial] and she didn't say she could, but she certainly didn't say she could." The district court denied Ray's motion, stating:

> She was extremely thoughtful about this exact issue, right. We all like to think that we're impartial, but we all come with our stuff. And then she said repeatedly she hopes that she'd be able to keep her own situation out of it and that she would set aside her bias and be fair. I think she's going to be really conscious of any proclivity she has one way or the other.

> Interesting. You're right. She didn't say she -- she didn't flat-out say, I can be impartial. She didn't flat-out say she couldn't be impartial. She's just super aware of her inherent biases. But I don't think there's enough for cause at this point, but I'll keep an eye out for her as she answers the other questions.

In his postconviction petition and now on appeal, Ray argues that juror 14 exhibited actual bias and was not sufficiently rehabilitated. Given these circumstances, he argues, the district court erroneously denied his motion to remove juror 14.

But the district court did not find that juror 14 had actual bias—that she could not "try the case impartially and without prejudice to the substantial rights of the challenging party." Minn. R. Crim. P. 26.02, subd. 5(1). The district court found that juror 14 was conscious of her own inherent biases, but she did not "flat-out say she couldn't be impartial."

We give great deference to a district court's findings regarding juror impartiality because these findings are "based upon determinations of demeanor and credibility." *Evans*, 756 N.W.2d at 870 (quotation omitted). As the Minnesota Supreme Court has explained:

> Our review of the district court's determination of juror impartiality is especially deferential. That determination depends largely on the prospective juror's demeanor, and demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. In contrast to appellate review of a cold transcript, the district court stands in the best position to hear the juror's testimony, observe her demeanor, and evaluate her ability to be impartial. This is why the United States Supreme Court has described the deference due to the district court's determination of juror impartiality as being at its pinnacle.

Munt, 831 N.W.2d at 576 (quotations and citations omitted).

Here, the district court was in the best position to evaluate whether juror 14 exhibited actual bias. Deferring to the district court's determination on this issue, we see no abuse of discretion in the district court's denial of Ray's motion to remove juror 14. *See Fraga*, 864 N.W.2d at 623. Based on our review of the record, juror 14 did not express "strong and deep impressions that would prevent her from laying aside her impression or opinion and rendering a verdict based on the evidence presented in court." *Munt*, 831 N.W.2d at 577 (quotations omitted). Moreover, "being the victim of a crime does not, standing alone, create 'preconceived bias in the mind of the prospective juror.'" *Holt v. State*, 772 N.W.2d 470, 477 (Minn. 2009) (quoting *State v. Roan*, 532 N.W.2d 563, 568 (Minn. 1995)). We also observe that, in denying Ray's motion, the district court left open the possibility that juror 14 might reveal actual bias later in the jury-selection process. But juror 14 expressed no additional concerns about her ability to be impartial, and Ray's trial counsel never renewed the motion to remove juror 14 for cause. Thus, the district court did not abuse its discretion in denying Ray's for-cause challenge.

In his effort to convince us otherwise, Ray cites two of our nonprecedential decisions where we reversed based on a juror's actual bias.[5] *See State v. Danberry*, No. A19-1676, 2020 WL 6846376 at *1 (Minn. App. Nov. 23, 2020); *State v. Bergendahl*, No. A19-1450, 2020 WL 5626091 at *1 (Minn. App. Sept. 21, 2020). Neither case changes

[5] Nonprecedential opinions are not binding authority but may be cited for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

our analysis here, however, because they both involved jurors who expressed actual bias and were not sufficiently rehabilitated. In *Danberry*, where the defendant was accused of repeated sexual abuse of a middle-school child, the juror's child had been repeatedly sexually abused by a neighbor. 2020 WL 6846376 at *1. The juror stated, "I honestly don't know that I can be not prejudiced in this kind of case." *Id.* at *2. When asked if she believed her child's abuse would "creep into [her] consciousness" during trial, the juror replied, "[m]y thought is that if it was anything sounding familiar, yes, it would." *Id.* And in *Bergendahl*, also a sexual assault case, the juror—whose daughter had been physically and sexually abused by a boyfriend—repeatedly questioned her ability to be impartial, stating that "she just didn't know." 2020 WL 5626091 at *1. While our decisions in *Danberry* and *Bergendahl* were based on the second step of the applicable analysis—whether there was adequate juror rehabilitation—the district court's denial of Ray's motion was based on the first step. Thus, *Danberry* and *Bergendahl* do not advance Ray's position here.

Based on our determination that the district court did not abuse its discretion in denying Ray's motion to strike juror 14, we also conclude that the district court did not err in rejecting Ray's postconviction claim of ineffective assistance of appellate counsel. Because we conclude, applying de novo review, that there is no reasonable possibility that challenging the denial of Ray's motion on direct appeal would have changed the outcome of the appeal, Ray cannot establish the second prong of the *Strickland* analysis—that he was prejudiced by the appellate public defender's failure to raise the issue. *See Onyelobi*,

932 N.W.2d at 280. Therefore, the district court did not abuse its discretion in denying Ray's petition for postconviction relief on this basis.

II. Because the record does not reveal that Ray's trial counsel provided ineffective assistance of counsel during jury selection, Ray's appellate public defender was not ineffective for failing to pursue this issue.

Ray argues that his appellate public defender was ineffective for not pursuing a claim of ineffective assistance of trial counsel based on trial counsel's performance during jury selection. He contends that trial counsel was ineffective because trial counsel did not question the prospective jurors and did not peremptorily remove three additional jurors who expressed bias. Because the record does not establish that trial counsel's performance during jury selection was deficient, the district court did not abuse its discretion in denying Ray's postconviction claim of ineffective assistance of appellate counsel on this ground.

"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 appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). And, as noted, a petitioner bears the burden of proof on an ineffective-assistance-of-counsel claim. *State v. Cram*, 718 N.W.2d 898, 907 (Minn. 2006).

An attorney's tactical decisions are within the discretion of counsel and will not be reviewed for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *see also Onyelobi*, 932 N.W.2d at 280 ("[W]e generally do not second-guess matters of trial strategy."). "The deference that courts give to an attorney's strategic decisions is especially strong in matters of jury selection, which "depends heavily on counsel's experience, perception of and rapport with prospective jurors." *Geleneau*, 873 N.W.2d at 382 (quoting

Jama v. State, 756 N.W.2d 107, 114 (Minn. App. 2008)). "Attorneys must make tactical decisions during jury selection, and a claim of ineffective assistance of counsel cannot be established by merely complaining about counsel's failure to challenge certain jurors or his failure to make proper objections." *Id.* (quotations omitted).

Ray argues that his trial counsel was ineffective because he passed on the opportunity to question jurors and was unengaged in the process. In denying Ray's postconviction petition, the district court disagreed, stating:

> [Trial counsel] had access to juror questionnaires and the benefit of the Court's individual and group questioning of all jurors. In this case, [trial counsel] was actively engaged in voir dire, agreeing to dismiss jurors for cause, unsuccessfully challenging a juror for cause, and successfully challenging another juror for cause. [Trial counsel] individually questioned several jurors after the Court's questioning. He did not individually question all the prospective jurors, but he did actively participate in jury selection. [Trial counsel] exercised all his peremptory strikes. [Trial counsel] was attentive and engaged in jury selection.

The record supports the district court's findings. Because we do not second-guess the tactical decisions that an attorney makes during jury selection, *Geleneau*, 873 N.W.2d at 382, we cannot conclude that the performance of Ray's trial counsel was deficient, *see Onyelobi*, 932 N.W.2d at 280.

Ray also argues that trial counsel was ineffective in failing to exercise peremptory strikes against three jurors who exhibited bias. The district court's order denying postconviction relief states:

> The jurors at issue in this petition all had previous exposure to sexual abuse in some form. They were forthright in their potential biases. All were questioned by the Court about

> concerns relating to possible partiality. In response to questions from the Court, each juror affirmatively expressed an ability to listen and act impartially. No juror who served on Petitioner's panel expressed bias so 'strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove [them].' *Jama*, 756 N.W.2d at 114.

The record supports these findings. Moreover, as the state points out, trial counsel appropriately exercised peremptory strikes to remove other prospective jurors who may not have been a good fit for Ray's jury. Because a claim of ineffective assistance of counsel cannot be based solely on disagreement with an attorney's failure to challenge certain jurors, *Geleneau*, 873 N.W.2d at 382, we agree with the district court that Ray failed to establish that his trial counsel's performance was deficient.

In turn, because Ray failed to establish during the postconviction proceedings that his trial counsel's representation was unreasonable, his claim of ineffective assistance of appellate counsel also fails. *See Fields*, 733 N.W.2d at 468. His appellate public defender was not deficient for not pursuing a meritless issue. And the district court did not abuse its discretion by denying Ray's postconviction claim on this basis.

Affirmed.