

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0982**

State of Minnesota,
Respondent,

vs.

Jonathan Gerald Carlson,
Appellant.

**Filed December 9, 2024
Affirmed
Wheelock, Judge**

Washington County District Court
File No. 82-CR-19-801

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

Kevin Magnuson, Washington County Attorney, Andrew T. Jackola, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions for possession of pornographic works involving minors in violation of Minn. Stat. § 617.247, subd. 4(a) (2016), arguing that he received ineffective assistance due to trial counsel's failure to (1) call his mother as a

witness, (2) consult with experts in autism or mental health, and (3) communicate an alleged plea offer to him. We affirm.

FACTS

In April 2017, law enforcement seized, pursuant to a valid search warrant, electronic devices that belonged to appellant Jonathan Gerald Carlson and found child pornography on them. Respondent State of Minnesota charged Carlson with multiple counts of possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a). Carlson is diagnosed with autism spectrum disorder, bipolar disorder, anxiety disorder, and attention-deficit hyperactivity disorder (ADHD). Due to these diagnoses, he lived in a group home “for disabled and disadvantaged young adults” from February 2015 to August 2016.

The district court held a jury trial from January 23 to 26, 2023.¹ Carlson’s trial counsel asked potential jurors about their knowledge and experience with autism throughout voir dire, over a continuing objection from the state. Later, the state filed a motion in limine to prohibit any evidence “related to [Carlson’s] cognitive abilities, developmental delays, and/or mental illness.” Carlson’s defense, that another resident of the group home had downloaded the prohibited content, depended in part on this evidence.

When arguing against the motion in limine, Carlson’s trial counsel maintained that Carlson was not presenting a diminished-capacity defense. Instead, he wanted to ensure that the jury knew Carlson was living in a group home due to his diagnoses, as opposed to

¹ Continuances requested by both parties and the COVID-19 pandemic delayed Carlson’s trial.

residing there for prejudicial reasons such as substance use or criminal rehabilitation. The district court denied the state's motion and determined that the jury could hear a statement about Carlson's developmental delays and mental health only to explain why he was living in a group home and that other individuals could have accessed his computer during that time.

Before trial, the state stated its plea offer to Carlson, which did not include a stay of adjudication, on the record:

PROSECUTOR: Okay, so the offer extended by the previous prosecutor in this case was for Mr. Carlson to enter a plea of guilty to the top count, when there were three counts filed on the complaint. The sentence that would go along with a plea of guilty to the top count would be a sentence of probation, not a prison sentence. And it would be a period of fifteen months stayed for three years with no additional jail time. That offer had an expiration date and it was communicated that the complaint would be amended after that time.

The offer was not accepted and so the complaint has been amended to twelve counts which will involve a presumptive prison sentence. It's my understanding that Mr. Carlson has not indicated an interest in resolving both under the offer that was initially extended but as we sit here today, has not indicated an interest in entering a straight plea.

DEFENSE ATTORNEY: Mr. Carlson, do you feel like you understood that offer?

CARLSON: Yes.

....

PROSECUTOR: And you previously, when I explained that offer to you, you turned that down, correct?

CARLSON: That is correct.

DEFENSE ATTORNEY: Sir, when you turned that down, you knew that would mean we would end up going to trial on this amended complaint, correct?

CARLSON: Correct.

Trial proceeded. Among the state's witnesses were Carlson's girlfriend at the time of the search and an examiner from the BCA who testified about the forensic process used to search the electronic devices for pornographic works involving minors. Carlson's former girlfriend testified that Carlson apologized to her about having pornographic works involving minors on his computer.

After the state presented its case, Carlson's trial counsel moved for directed verdicts on all counts. The district court granted the motions for directed verdict on two counts and denied them on the remaining ten counts.

Carlson decided to rest his case. Carlson's mother, L.B., had been identified as a possible witness for Carlson, but after consulting with Carlson during trial, his counsel decided not to call her. The jury found Carlson guilty of the ten remaining counts. The district court sentenced Carlson to five years of supervised probation, and Carlson appealed his convictions. This court stayed the direct appeal so that he could pursue postconviction relief.

Carlson filed a petition for postconviction relief alleging ineffective assistance of counsel along with affidavits from himself and his mother. The affidavits alleged that (1) the door locks at the group home where Carlson resided were ineffective; (2) on one occasion when L.B. entered Carlson's room at the group home, she saw a friend of Carlson's abruptly close Carlson's laptop while using it without Carlson present; and (3) that "two different prosecutors offered [Carlson] a Stay of Adjudication." By the end of 2021, these prosecutors were no longer at the county attorney's office.

The district court denied Carlson’s postconviction petition without an evidentiary hearing, noting that “[n]ot producing any statement from trial counsel, helps to illustrate [Carlson’s] failure to meet his burden of establishing facts by a fair preponderance of the evidence.” We dissolved the stay of his appeal. Appellant raises the same issues that he raised in the postconviction proceeding in this appeal.

DECISION

On direct appeal, Minnesota courts use the *Strickland* test to evaluate ineffective-assistance-of-counsel claims. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the two-prong *Strickland* test, a defendant must show that (1) “counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel’s errors.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Regarding the first prong, an attorney’s performance is presumed to be reasonable. *State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001). Regarding the second prong, a defendant must show by a preponderance of the evidence that the attorney’s error “so prejudiced the defendant at trial that a different outcome would have resulted but for the errors.” *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). If a defendant is unable to satisfy either of the *Strickland* prongs, a court may dispose of the ineffective-assistance claim without considering the other prong. *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015).

Trial strategy decisions “lie within the proper discretion of the trial counsel.” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). This includes deciding “[w]hich witnesses

to call at trial and what information to present to the jury.” *Id.* Therefore, an appellate court’s review of counsel’s performance under the first prong of *Strickland* does not involve reviewing trial strategy. *White v. State*, 711 N.W.2d 106, 111 (Minn. 2006).

I. Carlson did not receive ineffective assistance of counsel when his trial attorney chose not to call L.B. as a witness.

Carlson argues that his trial counsel’s failure to call L.B. falls below an objective standard of reasonableness and prejudiced the outcome of his trial. Whether to call L.B. to testify was trial strategy, however, and thus, that decision falls outside the scope of our review. *See id.*

Even if trial-strategy decisions were reviewable, Carlson’s argument would fail under *Strickland* because he did not establish either prong—that trial counsel’s actions were unreasonable or that he was prejudiced because “a different outcome would have resulted” if L.B. testified. *Doppler*, 590 N.W.2d at 633. Carlson did not allege facts or provide any evidence from his trial counsel to rebut the presumption that his trial counsel’s actions were reasonable. Carlson also did not show that the absence of L.B.’s testimony prejudiced his case such that a different outcome would have resulted had L.B. testified. At trial, a digital forensic examiner testified that the prohibited images found on Carlson’s electronics were downloaded over a span of many months and at all hours of the day and night and that several images had been transferred between his devices. The testimony that L.B. would have offered—that she saw someone else using Carlson’s laptop once between 2015 and 2016—does not account for the multiple downloads of child pornography. In addition, the jury heard Carlson’s ex-girlfriend testify that Carlson apologized to her for

having child pornography on his devices after law enforcement discovered it. Carlson did not show that L.B.'s testimony would have caused a different result in this case.

To support his argument, Carlson relies heavily on *State v. Nicks*, 831 N.W.2d 493, 506-08 (Minn. 2013), but his reliance is misguided. In that case, trial counsel failed to obtain critical evidence necessary to prove that the defendant did not commit the crime, and the supreme court determined that the attorney's conduct could not be considered a "choice" that would fall under trial strategy. *Nicks*, 831 N.W.2d at 506-07. The supreme court concluded that "when counsel fails to conduct such a thorough investigation of facts that are so directly related to the defendant's theory of the case, that conduct falls below an objective standard of professional conduct that defendants are entitled to under the United States Constitution." *Id.* at 507. Here, although trial counsel included L.B. on Carlson's witness list and told the district court that they "had prepared" to call L.B. as a witness, trial counsel ultimately decided against presenting L.B.'s testimony after consulting with Carlson. Carlson does not allege that his trial counsel did not follow up on information received or take the necessary steps to present Carlson's main theory of his case. This case is distinguishable from *Nicks* because Carlson's trial counsel made a strategic decision after consulting with his client.

II. Carlson did not receive ineffective assistance of counsel when his trial counsel did not consult an autism or mental-health expert.

Carlson next argues that his counsel's failure to consult with an autism expert or other mental-health expert constituted ineffective assistance. He maintains that trial counsel should have provided more information to the jury to demonstrate that, because of

Carlson's diagnoses, he was vulnerable and someone took advantage of him and downloaded the prohibited images onto his computer. This argument is not persuasive because it is based on trial strategy and thus is beyond the scope of our review. *See White*, 711 N.W.2d at 111. Carlson concedes that this argument is rooted in analyzing trial strategy, stating in his brief that trial counsel failed to use this evidence to "bolster[] the defense *strategy* of the case." (Emphasis added.) Finally, even if this argument was not based on unreviewable trial strategy, it would fail the *Strickland* test.

Regarding *Strickland's* first prong, Carlson has not rebutted the presumption that trial counsel's actions were reasonable. The record shows that trial counsel attempted to provide the jury with insight into Carlson's diagnoses to the extent allowed by Minnesota law. During voir dire, trial counsel asked jurors about their familiarity with autism-spectrum disorder, over a continuing objection from the state. When the state filed a motion in limine to preclude all evidence of Carlson's diagnoses, Carlson's trial counsel argued against it with some degree of success. The district court decided to "allow literally, just like a sentence worth" of evidence that Carlson lived in a group home because he has autism. The district court strictly limited the admission of this evidence, stating, "I don't want us to go anywhere near he didn't have the requisite intent to understand it was pornography." Carlson's assertion that "nothing in the record indicates that trial counsel consulted with an autism expert or other mental health specialist even though trial counsel knew that Appellant suffered from numerous mental illnesses" is also inconsistent with the record. Carlson underwent a two-session psychosexual evaluation during discovery. The evaluation lasted at least three hours and was conducted over two days, and the

psychologist was aware of Carlson's diagnoses. Carlson cannot establish that his trial counsel's performance fell below an objective standard of reasonableness.

Regarding *Strickland*'s second prong, Carlson also failed to show prejudice. It is unclear how trial counsel could have incorporated more evidence pertaining to Carlson's diagnoses considering the limits that the district court put on this evidence and the absence of diminished-capacity defenses in Minnesota.

We conclude that Carlson cannot show that, because his trial attorney failed to consult an autism or mental-health expert, he received ineffective assistance of counsel.

III. The district court did not abuse its discretion when it summarily rejected Carlson's claim that he received ineffective assistance of counsel because trial counsel failed to communicate an alleged plea offer.

Finally, Carlson alleges that two former prosecutors communicated plea offers to his trial attorney that included a stay of adjudication, that his trial attorney never communicated the plea offers to him, and that, thus, he received ineffective assistance of counsel. When the prosecution offers a plea bargain, defendants have the right to effective assistance of counsel in considering the offer. *Eason v. State*, 950 N.W.2d 258, 267-68 (Minn. 2020). When making an ineffective-assistance-of-counsel claim, a petitioner is "not entitled to an evidentiary hearing if [their] allegations lack factual support and are directly refuted by [their] own testimony in the record." *Williams v. State*, 760 N.W.2d 8, 14 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009); *see also State v. Irestone*, 166 N.W.2d 345, 346 (Minn. 1969) (noting that an unsupported allegation unequivocally refuted by the record is a mere argumentative assertion). In other words, if "the facts . . . in the light most favorable to the petition, together with the arguments presented by the

parties, conclusively show that the petitioner is not entitled to relief,” a district court may deny a request for an evidentiary hearing. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). The petitioner bears the burden of alleging facts that would entitle him to relief and must show that the arguments made are not assertions without factual support. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012).

The only evidence supporting Carlson’s assertion that two former prosecutors offered him a stay of adjudication is contained in the affidavits of Carlson and L.B. Carlson did not submit any evidence of a prior plea offer beyond the affidavits. It is unclear whether Carlson attempted to obtain relevant evidence before bringing his petition, such as by interviewing his trial counsel or former prosecutor.² Carlson’s allegations here lack factual support and, in fact, are directly refuted by the record, which shows that he refused his only plea offer. Therefore, we conclude that the district court did not abuse its discretion by rejecting Carlson’s claim of ineffective assistance of counsel on the basis that his counsel failed to communicate an alleged plea offer.

Caselaw supports our decision to affirm the district court’s summary dismissal of Carlson’s petitions for postconviction relief because he did not meet his burden of alleging facts that could entitle him to relief. *State v. Reinhard*, No. A21-1672, 2024 WL 321992, at *3 (Minn. App. Jan. 29, 2024) (affirming a district court’s denial, without evidentiary hearing, of a postconviction petition claiming ineffective assistance because the claimant did not allege facts that could entitle them to relief); *see also State v. King*, 990 N.W.2d

² Carlson could not have interviewed the first prosecutor he alleges made this offer because the prosecutor passed away in April 2021.

406, 417-18 (Minn. 2023) (affirming a district court’s denial of a postconviction petition claiming ineffective assistance for lack of evidence because the defendant refused to testify about the facts he alleged in his self-serving affidavit and the self-serving affidavit could not establish a sufficient factual basis for his ineffective-assistance claim); *Smith v. State*, No. A20-0049, 2020 WL 6703535, at *2 (Minn. App. Nov. 16, 2020) (affirming a district court’s denial, without an evidentiary hearing, of a postconviction petition claiming ineffective assistance because the claimant did not set forth facts that could entitle them to relief).³

Because the record refutes the only evidence that Carlson provided to support his assertion that a former prosecutor offered him a stay of adjudication, the postconviction court did not abuse its discretion when it denied Carlson’s petition for postconviction relief.

Affirmed.

³ “Nonprecedential opinions . . . may be cited as persuasive authority.” Minn. R. Civ. App. P. 136.01, subd. 1(c).