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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0535**

State of Minnesota,
Respondent,

vs.

Brian James Krutchek,
Appellant.

**Filed December 8, 2025
Affirmed
Cleary, Judge***

Yellow Medicine County District Court
File No. 87-CR-22-315

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

Mark A. Gruenes, Yellow Medicine County Attorney, Tara J. Ulmaniec, Assistant County Attorney, Granite Falls, Minnesota (for respondent)

Christina Zauhar, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Cleary,
Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this direct appeal from the judgment of conviction for second-degree criminal sexual conduct, and following a stay and remand for postconviction proceedings, appellant argues (1) the postconviction court erred in denying appellant's claim of ineffective assistance of counsel, (2) the district court abused its discretion in excluding the victim's prior statements about being good at lying, (3) the prosecutor committed several instances of misconduct, and (4) the cumulative effect of these errors deprived appellant of a fair trial. We affirm.

FACTS

In August 2023, a jury found appellant Brian James Krutchek guilty of second degree criminal sexual conduct under Minnesota Statutes section 609.343.1(h)(iii) (2019) for abusing his daughter throughout most of her childhood. At trial, Krutchek's trial counsel called two-character witnesses and submitted no exhibits. One of the witnesses was Mary Crockett Norton, Krutchek's girlfriend.

The state called two witnesses, A.K., the complainant, and Teresa Kuehl, the practitioner who performed the forensic interview with A.K. after A.K. reported that her father had abused her. The state's exhibits included a video recording of the forensic interview, which was played in court; the transcript of the forensic interview; a photo of a bruise on A.K.'s leg, and a photo of a text message exchange between A.K. and Krutchek.

Krutchek appealed and this court granted a stay of the appeal so that he could pursue postconviction relief. Krutchek filed a petition for postconviction relief, and the district

court issued an order granting an evidentiary hearing on two of the issues raised: ineffective assistance of counsel regarding jury selection and ineffective assistance of counsel regarding Krutchek's criminal-history score calculation. At the postconviction hearing, Krutchek called one witness, his trial counsel Andrew Leone. Krutchek also submitted the following into evidence: (1) an email from trial counsel to Crockett Norton, (2) Crockett Norton's reply email, (3) a general juror questionnaire, and (4) a confidential juror questionnaire. The postconviction court denied relief on the ground of ineffective assistance of counsel but concluded that the district court had committed a sentencing error. The postconviction court filed an amended sentencing order reducing Krutchek's sentence from 150 months to 110 months. Because it had resolved the sentencing error, the postconviction court determined that the ineffective-assistance-of-counsel claim regarding the sentencing issue was moot.

We then reinstated this appeal.

DECISION

I. The postconviction court did not abuse its discretion in denying Krutchek's claim of ineffective assistance of counsel.

This court reviews a postconviction court's denial of a claim of ineffective assistance of counsel, including a denial without an evidentiary hearing, for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). Whether counsel's performance constitutes ineffective assistance of counsel is a mixed question of law and fact. *Id.* Factual findings will be upheld unless they are clearly erroneous, and legal conclusions are reviewed de novo. *Id.*

Krutchek contends that the postconviction court abused its discretion by denying his petition for postconviction relief. He argues that he was deprived of a fair trial due to ineffective assistance of counsel. The Sixth Amendment guarantees a right to a fair trial and, to ensure that a fair trial is conducted, a right to the assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). Because legal counsel “plays the role necessary to ensure that the trial is fair,” the Sixth Amendment’s guarantee of “the right to counsel is the right to *effective* assistance of counsel.” *Id.* at 685-86 (emphasis added). When asserting ineffective assistance of counsel, an appellant must satisfy a two-prong test: “(1) [T]hat trial counsel’s performance fell below an objective standard of reasonableness; and (2) that a reasonable probability exists that, but for counsel’s errors, the outcome . . . would have been different.” *State v. Radke*, 821 N.W.2d 316, 323 (Minn. 2012).

A. Trial counsel was not ineffective in his motion practice.

Krutchek contends that trial counsel was ineffective because he did not file any pretrial motions and did not respond to the state’s motion to introduce Krutchek’s prior conviction for impeachment purposes. While Krutchek’s trial counsel did not give a written response to the state’s motion, he attended a pre-trial hearing and argued against the state’s motion orally. Furthermore, we have long rejected ineffective-assistance-of-counsel claims where counsel fails to file a motion because “these actions are trial strategy decisions.” *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006). We conclude that the decision not to file any motions in limine was not performance below an objective standard of reasonableness.

B. Trial counsel was not ineffective in presenting the case-in-chief in 15 minutes, in giving a short opening statement, in not cross-examining the forensic interviewer, and in questioning A.K., the complainant, for only a few minutes before resting.

Krutchek argues that his trial counsel's representation was unreasonable in part because he "presented the entire defense case-in-chief in approximately fifteen minutes, calling only two-character witnesses and offering no exhibits." Krutchek claims that trial counsel utterly [failed] to put the State's case to any meaningful adversarial test." Furthermore, Krutchek contends that "what appears on the record is a void, because nothing was done."

"Trial strategy" includes matters such as selection of evidence presented to the jury, what witnesses to call, what questions to ask witnesses, and whether to make objections. *State v. Bobo*, 770 N.W.2d 129, 138-39 (Minn. 2009). The decision about whether to cross-examine a witness has also been held to be a matter of trial strategy. *See Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (concluding that whether to cross-examine the state's expert witnesses constituted trial strategy).

The record demonstrates that trial counsel provided both an opening statement and closing argument, objected to testimony, and cross-examined witnesses. While Krutchek argues that a short opening statement was unreasonable, this is a complaint about trial strategy, which this court declines to review on appeal.

Krutchek also complains that trial counsel asked very few questions of A.K., and did not cross-examine the state's other witness, the forensic examiner. Trial counsel did not cross-examine the forensic examiner, but did make objections during the state's direct

examination, which the district court sustained. In addition, trial counsel cross-examined A.K., questioning her about whether she had made statements to Crockett Norton about being “really good at lying.” Counsel also inquired about A.K.’s boyfriend who was “four or five years older” than she, and whether it was he who reported the incidents. The cross-examination choices that trial counsel made are also trial strategy.

While we understand that trial counsel’s presentation may have been shorter than Kruthek expected, trial counsel did not bear the burden of proof. Instead, “[t]he state bears the burden of proving guilt beyond a reasonable doubt.” *State v. Reed*, 737 N.W.2d 572, 581 (Minn. 2007). Trial counsel’s performance did not fall below an objective standard of reasonableness.

C. By not investigating potential defenses or obtaining additional evidence, trial counsel was not acting unreasonably.

Kruthek claims that trial counsel failed to investigate several avenues of potential evidence, including A.K.’s connection to Crockett Norton’s ex-husband, A.K.’s psychiatric history, and what part A.K.’s older boyfriend may have played in creating the narrative that resulted in charges against Kruthek.

“It is within trial counsel’s discretion to forego investigation of leads not reasonably likely to produce favorable evidence.” *Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991). Furthermore, if an appellant does not provide factual support for their claim, the claim fails. *Davis v. State*, 15 N.W.3d 635, 646 (Minn. 2025). In *Davis*, the appellant alleged that his trial counsel’s performance fell below an objective standard of reasonableness when counsel failed to investigate a potential eyewitness seen running from

the scene after a shooting. *Id.* at 645. The appellant proposed reasons that the woman may have been running, including that she may have been an eyewitness. *Id.* However, the supreme court noted that the appellant did not submit affidavits in support of his claim and that he provided “no admissible evidence containing factual support for his claim.” *Id.* Ultimately, the supreme court held that the appellant could not show that his attorney’s decision “amounted to ineffective assistance rather than unreviewable trial strategy” because he provided no “specific facts” about the witness. *Id.* at 646.

Here, Kruthek is similarly unable to show that trial counsel’s decision amounted to ineffective assistance rather than trial strategy. Kruthek states that trial counsel failed “to investigate any potential defenses or attempt to procure any evidence to assist Mr. Kruthek in the defense of his case,” but provides no evidence to support his assertions. Instead, he speculates about what different strategic choices of evidence or testimony would have produced. We conclude that Kruthek submitted no evidence containing factual support for his claims and, therefore, the postconviction court did not err when it denied his claim of ineffective assistance of counsel due to an alleged failure to investigate.¹

D. Trial counsel acted reasonably at sentencing and the erroneous criminal-history score was rectified.

Kruthek argues that trial counsel was ineffective during the sentencing stage because he offered no mitigating evidence and did not challenge the criminal-history score

¹ We note that Kruthek similarly failed to support his claims that trial counsel was unresponsive or made unrealistic promises about trial outcomes.

calculation. At sentencing, trial counsel submitted five letters from individuals discussing Krutchek's good character. In addition, trial counsel's motion requesting a dispositional departure provided information as to Krutchek's willingness to cooperate with probation, his eagerness to begin sexual offender treatment, his ties to the area and family support, and that community resources were likely adequate to manage his risks. However, trial counsel failed to challenge Krutchek's criminal-history score calculation. The postconviction court granted an evidentiary hearing on the issue of whether Krutchek received ineffective assistance of counsel due to his trial counsel's failure to contest the criminal-history score calculation.

After the postconviction hearing and reviewing the parties' briefs, the postconviction court determined that the district court had committed an error in assigning custody-status points to Krutchek without a jury determining the dates of the offense. This is because the jury considered whether the criminal sexual conduct occurred within a wide range of dates and Krutchek was on probation for a previous conviction for only part of that time. The postconviction court held that by assigning custody-status points to Krutchek, without the jury determining the dates of the offense, it had committed a *Blakely*² violation. The postconviction court corrected Krutchek's sentences accordingly. Because this issue was rectified by the postconviction court, Krutchek's ineffective assistance-of-counsel claim in this respect is moot.

² Referencing *Blakely v. Washington*, 542 U.S. 296 (2004), where the United States Supreme Court held that, to comply with the Sixth Amendment, a jury must determine beyond a reasonable doubt the facts used by a judge to increase a prison sentence.

E. Trial counsel was not ineffective in not objecting to seating a juror who had a past relationship with Krutchek.

Krutchek claims that trial counsel acted ineffectively by not objecting to or even questioning a juror whom he had been told had a past adversarial relationship with Krutchek.

An attorney's representation of a litigant in jury selection is below an objective standard of reasonableness only if the litigant can prove: "(1) that defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference"; (2) that a prospective juror expressed such a strong bias that there was no justification for the failure to remove the juror; or (3) that counsel's choice was not justifiable as demonstrated by some other specific evidence. *State v. Geleneau*, 873 N.W.2d 373, 383 (Minn. App. 2015) (citing *Jama v. State*, 756 N.W.2d 107, 114-17).

Just prior to trial, Krutchek's counsel emailed Crockett Norton asking for Krutchek's input on potential jurors. Crockett Norton responded by email, asking trial counsel to "avoid" people in certain towns and included a list of jurors whom Krutchek knew. Juror S.D. was one of three jurors named. Krutchek claims that S.D., who was seated as a juror, was his prior landlord who had an "unfriendly relationship" with Krutchek. Crockett Norton alleges in her affidavit that she emailed trial counsel to strike that juror. The postconviction court granted an evidentiary hearing on this issue.

At the hearing, Krutchek did not take the stand and did not call Crockett Norton to the stand. Instead, Krutchek called one witness, his trial counsel, who testified that it was

his understanding of the email that Krutchek wanted to try “to avoid people who lived in a certain area.” Trial counsel also noted that all jurors were asked whether they knew any of the parties involved and they said no.

In its order following the hearing, the postconviction court noted that it found trial counsel as a witness to be credible. Furthermore, the email exhibit presented at the hearing was inconsistent with Crockett Norton’s affidavit and neither Crockett Norton nor Krutchek testified to explain the inconsistency. Based on the testimony and exhibits, trial counsel was not so inattentive or indifferent that failure to remove S.D. was not the product of a conscious choice or preference. Because the email and affidavit were in conflict and trial counsel explained his reasoning at the hearing, the postconviction court did not err when it held that the facts did not support Krutchek’s claims that his counsel was ineffective.

II. The district court did not abuse its discretion in excluding the victim’s alleged prior statements about being good at lying.

Krutchek argues that the district court abused its discretion by not allowing Crockett Norton to testify to statements that A.K. had allegedly made regarding being good at lying and being used to lying. “Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). “On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.” *Id.* Specific instances of conduct to attack a witness’s credibility cannot be proven by extrinsic evidence. *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998) (citing Minn. R. Evid.

608(b)). “The rule of law is well established that an examining attorney who enquires into collateral matters on cross-examination, including those matters relating to the witness’s credibility, is bound by the answers he receives.” *State v. Sharich*, 209 N.W.2d 907, 911 (1973).

At trial, Krutchek’s counsel asked A.K. whether she had made statements to Crockett Norton about being good at lying. A.K. responded, “I’ve never said that.” Outside the presence of the jury, Krutchek’s counsel argued that the statements should be admitted despite the state’s arguments under rule 608 because the probative value of A.K.’s truthfulness was paramount to the case as the whole case came “down to the truthful or untruthfulness of [A.K.].” The district court did not allow the testimony, ruling that it was extrinsic evidence, and the probative value was outweighed by its prejudicial nature.

Based on Minnesota Rules of Evidence 403, 608(b), and 801, the district court was well within its discretion to deny Krutchek’s request to introduce extrinsic evidence about A.K.’s alleged statements to Crockett Norton.

III. The prosecutor’s use of the phrase “evaluate the case through the eyes of the child” was plain error, but did not affect Krutchek’s substantial rights.

Krutchek contends that the state committed prosecutorial misconduct by inviting jurors to put themselves in the victim’s shoes, attempting to inflame the passions of the jury, and arguing facts not in evidence. Krutchek did not object to prosecutorial misconduct at trial.

“[O]n appeal, the plain error doctrine applies to unobjected-to prosecutorial misconduct.” *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). Once the defendant

shows that “the prosecutorial misconduct was error that was plain, the state bears the burden of showing that the error did not affect the defendant’s substantial rights.” *Id.*

A. The prosecutor did not ask jurors to put themselves in the victim’s shoes but used similar improper language.

“[A]rguments that invite the jurors to put themselves in the shoes of the victim are considered improper.” *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982). Such an invitation is improper because it asks the jury “to decide the case on the basis of passion rather than reason.” *Id.*

In its closing arguments, the state said, “When evaluating this case, please think about [A.K.], the eighteen-year-old who testified on that stand before you today. But please also think back and evaluate this case through the eyes of the child for approximately nine years, was sexually abused almost every night by her father, the defendant.” Krutcek alleges that this is asking the jurors to put themselves in the victim’s shoes. While this statement does not squarely invite the jurors to put themselves in the victim’s shoes, it is very close to the offending language which we have found to be such an improper invitation. *See, e.g., State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998) (holding that prosecutor’s statement that the witness was “awakened to probably one of the most terrible sights that any mother can see . . . your own daughter being killed right before your eyes,” was an improper invitation to stand in a witness’s shoes); *State v. Bashire*, 606 N.W.2d 449, 453-54 (Minn. App. 2000) (holding that prosecutor’s invitation to “take a moment to think about . . . [w]hat it must have been like to be in that stairway with your head being held by one person while another assaulted you,” was an improper invitation to stand in

the victim's shoes). We find plain error in the invitation to the jury to "evaluate this case through the eyes of the child" and next address whether the use of this phrase affected Krutchek's substantial rights.

In a harmless-error analysis, this court is guided by the principal that the error will be deemed harmless if the verdict rendered was unattributable to the error. *Thompson*, 578 N.W.2d at 743. We consider several non-exclusive factors to determine "whether a reasonable possibility exists that the [error] significantly affected the jury's verdict." *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024). These factors include (1) the manner in which the evidence was presented, (2) whether the evidence was highly persuasive, (3) whether the presenting party used the evidence in its closing argument, (4) whether the defense actively countered the evidence, and (5) whether there was other strong evidence of guilt. *Id.*

Here, we note that the offending phrase was stated only once by the prosecutor in the closing argument, and did not feature prominently in the prosecution's case. Furthermore, it is instructive to our analysis to evaluate the statement in context. After making the statement, the state went on to address that the jury might be wondering why A.K. did not disclose the abuse earlier, discussing testimony that A.K. did not feel safe to disclose until she was older. In context, we read this passage as the state explaining that A.K., as a child, would have been afraid to disclose the abuse based on what A.K. had said on the stand about the physical abuse and threats of suicide that occurred simultaneously with the abuse.

We recognize that the evidence appeared in the closing statement, which can weigh in favor of it being a significant error, but taking the statement in context demonstrates that it was not presented for its own persuasive value, but rather to give context to A.K.'s reluctance to come forward earlier. Furthermore, defense counsel countered the statement in his own closing statement by emphasizing discrepancies in A.K.'s testimony and specifically how some statements were at odds with her testimony that she was abused regularly for many years. Finally, the prosecution did not rely on its statement to demonstrate guilt but instead presented testimony from multiple witnesses and other corroborating evidence to demonstrate Krutchek's guilt. We conclude that the error here did not affect Krutchek's substantial rights and there is no reasonable probability that it affected the jury's verdict.

B. The prosecutor did not inflame the passions of the jury.

Krutchek also argues that the prosecutor "repeatedly played to the jury's passions." It is "improper for a prosecutor to evoke sympathy" for a complainant. *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003). "Sexual-abuse cases inevitably evoke an emotional reaction, and any attempt by the prosecutor to exacerbate this natural reaction by making any emotive appeal to the jury is likely to be highly prejudicial." *Id.* at 234 (quotation omitted).

Krutchek focused on the following statements: "[s]he didn't know if it was normal or abnormal. She was a kid. She did what her father told her to do"; "[A.K.] had only her father to depend on, with her mother dying in 2019, and prior to that, being absent from her life. She, being so young, she doesn't even know why."; and "[t]he defendant, her

father, her sole caretaker and provider, her dad often threatened to kill himself and blamed his daughter. And [A.K.] was worried, sincerely worried, that he would.”

The first statement was an accurate recounting of A.K.’s testimony on the stand and in the exhibits submitted at trial. The second statement was part of the state’s explanation that, having only her father to depend on, it may have been challenging for A.K. to disclose the abuse earlier. The last statement was another accurate summation of A.K.’s testimony. We conclude that the prosecutor did not attempt to inflame the passions of the jury.

C. The prosecutor did not argue facts not in evidence.

Krutchek contends that the prosecutor argued facts not in evidence in its closing argument. It is misconduct for the prosecutor to argue facts not in evidence or to “mislead the jury as to the inferences it may draw.” *State v. Peltier*, 874 N.W.2d 792, 805 (Minn. 2016) (quoting *Bobo*, 770 N.W.2d at 142).

The prosecutor’s statements that Krutchek highlighted in his brief accurately reflect the evidence that was received as testimony in court and through the trial exhibits, although A.K.’s testimony was not always internally consistent. In fact, Krutchek’s trial counsel highlighted the inconsistencies in A.K.’s testimony in his closing argument, giving the jury a counterbalance to the state’s framing of the evidence. The prosecutor did not argue facts not in evidence.

IV. The cumulative effect of any errors did not deprive Krutchek of a fair trial.

Finally, Krutchek argues that he was deprived of his right to a fair trial because of the cumulative errors in the proceedings. An appellant is “entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial.” *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998). The cumulative effect of errors at trial can deprive a defendant of his constitutional right to a fair trial even when the errors, “none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *State v. Hill*, 801 N.W.2d 646, 659 (Minn. 2011).

Krutchek argues that because the corroborating evidence was tenuous, the trial was a “very close factual” case. As a result, he contends that it should be considered similar to *State v. Underwood*, where this court reversed and granted a new trial due to the cumulation of errors even though none of the errors themselves would have individually warranted such an outcome. 281 N.W.2d 337, 344 (Minn. 2011). In *Underwood*, the case was a close factual case because the defendant and victim had been involved in a physical altercation and the jury had to determine whether the defendant acted in self-defense. *Id.* at 340. The factual determination depended greatly on the credibility of the defendant. *Id.* at 344. We do not have such a case here. Furthermore, we did not find multiple errors that cumulatively warrant reversal.

Affirmed.