STATE OF MINNESOTA
IN COURT OF APPEALS
A10-972, A10-973

State of Minnesota,
Respondent,

vs.

Jerome Burks,
Appellant.

Filed April 9, 2012
Affirmed
Hudson, Judge

Olmsted County District Court
File No. 55-CR-09-296

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this consolidated appeal, appellant challenges his convictions of criminal sexual conduct and burglary and the denial of his petition for postconviction relief, arguing that

he was denied a fair trial by the district court's error in instructing the jury on corroboration of victim testimony and improper evidentiary rulings. He also argues that the district court abused its discretion by denying postconviction relief without an evidentiary hearing on his claim of ineffective assistance of counsel, based on the defense request to join unrelated offenses for trial. We affirm.

FACTS

The state charged appellant Jerome Burks with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2008), and third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2008), and, by separate complaint, with first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(a) (2008). The charges arose from two incidents occurring on the same night. In the first incident, a complainant, B.K., alleged that appellant sexually assaulted her in his apartment unit; in the second incident, a different complainant, M.D., alleged that about two hours later, appellant entered and took property from her apartment unit, which was located in a different building about a block away. After consulting with counsel, appellant moved to have the charges joined for trial under Minn. R. Crim. P. 17.03. The state agreed, and the district court ordered joinder of the offenses.

At appellant's jury trial, B.K. testified that she was staying at the apartment of a friend, G.S., in Rochester, when she walked to a liquor store and struck up a conversation with appellant as she was leaving. Appellant then invited her up to his apartment, which was located in a building near G.S.'s apartment. She noticed that appellant walked with a cane. B.K. and appellant returned to his apartment, where they ate and talked. She

walked over with appellant to G.S.'s apartment to get some cigarettes but returned again to appellant's apartment. B.K. and appellant listened to music, drank, and watched a sexually explicit video. B.K. testified that appellant then became "more aggressive" and wanted her to take off her clothes; she refused, but finally disrobed because she believed he was getting angry and she was scared. B.K. testified that appellant began performing oral sex on her, and she told him to stop, but he then pulled her to the floor. She did not try to get up because she was afraid, but she felt pain on her back and elbows. She testified that appellant held her down, penetrating her, and finally urinated on her. When she said she was cold, he gave her a wet blanket. She testified that she got up, wrapped only in the blanket, and ran into the hallway to leave the apartment, but he pulled her back in. A surveillance video of the building hallway at 12:33 a.m. shows appellant, who was naked, and B.K., who was wrapped in the blanket. B.K. testified that she then got dressed, that there was no more sexual activity, and that appellant's demeanor became calm, but he told her not to tell anyone.

About two hours later, B.K. and appellant went together to G.S.'s apartment. Surveillance video taken at 2:39 a.m. shows B.K. and appellant leaving appellant's building. B.K. testified that appellant went into a bedroom and used G.S.'s phone and eventually left. About five minutes after appellant left, B.K. called police, telling the 911 dispatcher that she did not need assistance, but she wanted police to talk to appellant.

An officer who interviewed B.K. in G.S.'s apartment testified that, after she heard B.K.'s version of events, she determined there was a basis for further investigation. The prosecutor asked her what her conclusion was, and she replied, "[t]hat there was PC for

sexual assault." The district court overruled a defense objection to this testimony and denied the defense's request for a mistrial.

An examining emergency-room nurse testified that B.K. complained of pain in her elbow, spine, and back, and had emerging bruising on her right elbow and an abrasion on her spine, which was consistent with B.K.'s version of events. The nurse was unable to recall many details of the exam and, over a hearsay objection from the defense, was allowed to testify relying on her report, which included testimony about B.K.'s statements during the exam. The report was also received in evidence over objection.

M.D., who lives on the same floor as G.S. in G.S.'s apartment building, testified that G.S. has taken care of her cat when she is away and that G.S. at one time had a key to her apartment but had given it back to her. M.D. testified that late on the same night as the first incident, she was awakened by her cat and saw that the light was on in her bedroom and a man was standing there. The man said he had the wrong apartment and left; M.D. then got up and saw him in the hall by the door to G.S.'s apartment. She called police, who received the call at 3:54 a.m. M.D. noticed that the man was African-American, heavy set, and wearing a light jacket; she told an investigating officer that he walked with a limp.

An officer investigating M.D.'s incident followed tracks in the snow from M.D. and G.S.'s building to appellant's building, where he saw appellant and a security guard sitting in the front lobby. B.K. also testified that, as an officer was driving her to the hospital for a sexual-assault examination, the squad drove past the front of appellant's building, and she recognized appellant through the glass door. Police arrested appellant

and transported him to the police station. In a search of appellant's person, police found in his pocket two unmatched earrings, which he stated belonged to him. He stated that he had had consensual sexual contact with B.K.

M.D. at first did not notice any property missing from her apartment, but she later discovered several missing items, including two pairs of earrings, one white gold and one yellow gold. She was unable to identify appellant from a show-up, but identified one white gold earring and one yellow gold earring recovered from appellant's pocket as hers.

During trial, the district court ruled that the defense could cross-examine B.K. about whether she had agreed to exchange sex for money with appellant but otherwise prohibited evidence of any prior sexual conduct by B.K. G.S. testified that he had been friends with B.K. for about five years. Defense counsel attempted to ask whether it was true that they had an intimate relationship, but that it did not become serious and G.S. wanted a serious relationship. The district court sustained the state's objection to this question.

The state sought to introduce, as impeachment evidence should appellant choose to testify, evidence of three prior convictions: a 2002 conviction of third-degree burglary, a 2002 conviction of providing false information to police, and a 2009 conviction of third-degree assault. The district court permitted evidence of the false-information and third-degree assault convictions, but not the burglary conviction.

The jury convicted appellant of all three counts. Appellant filed a postconviction petition, arguing that he was deprived of effective assistance of counsel by defense counsel's request for the joinder of unrelated offenses for trial when the record showed

no basis for the request and appellant was prejudiced by the joinder. The district court denied the motion without an evidentiary hearing. This consolidated direct and postconviction appeal follows.

D E C I S I O N

I

Appellant argues that the district court committed reversible error by instructing the jury that, based on Minn. Stat. § 609.347, subd. 1 (2008), the testimony of an alleged criminal-sexual-conduct victim need not be corroborated. A jury instruction is erroneous if it materially misstates the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "Erroneous jury instructions merit a new trial if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (citation and quotation omitted).

Although Minn. Stat. § 609.347, subd. 1, provides that the testimony of an alleged victim of criminal sexual conduct need not be corroborated, a jury instruction to that effect is improper because lack of corroboration is an evidentiary, rather than a substantive, matter. *State v. Johnson*, 679 N.W.2d 378, 388 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). But the Minnesota Supreme Court has concluded such an error in jury instruction was harmless beyond a reasonable doubt when it was only an unnecessary, rather than an inaccurate, statement of the law; it did not require the jury to draw a particular inference from the instruction; it was not accorded undue emphasis; and the jury was properly instructed as to the burden of proof and the presumption of the defendant's innocence. *Fields*, 730 N.W.2d at 785.

Before the state's rebuttal at closing argument, the prosecutor pointed out Minn. Stat. § 609.347, subd. 1, to the district court and requested a jury instruction that the victim's testimony, if believed, is sufficient to convict. Over a defense objection, the district court instructed the jury that, "under Minnesota law, in a prosecution for criminal sexual conduct, the testimony of a[n] alleged victim need not be corroborated."

We agree with appellant that this instruction was error and that its position immediately before the state's rebuttal at closing highlighted the state's argument. But the instruction was merely unnecessary, not an inaccurate statement of the law, and did not mandate a particular inference from the jury. *See Fields*, 730 N.W.2d at 785. In addition, "[j]ury instructions must be construed as a whole." *State v. Williams*, 363 N.W.2d 911, 914 (Minn. App. 1985), *review denied* (Minn. May 1, 1985). We assume that the jury followed the district court's correct instructions on the presumption of innocence and the requirement of proving guilt beyond a reasonable doubt. *Fields*, 730 N.W.2d at 785. Finally, B.K.'s testimony was corroborated by police officers' testimony on her emotional state immediately after the incident, by the nurse's testimony that B.K. complained of pain, and by the hallway surveillance tape. *See Johnson*, 679 N.W.2d at 388, 387 (declining to conclude that error was prejudicial when "corroboration was abundant" and noting that "[t]estimony from others about a victim's emotional condition after a sexual assault is . . . corroborative evidence"). We conclude that the instruction was harmless beyond a reasonable doubt and does not entitle appellant to a new trial.

II

Appellant alleges that the district court committed a number of evidentiary errors, which deprived him of his right to a fair trial. Evidentiary rulings lie within the district court's discretion "and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). An error in admitting evidence is prejudicial if there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v . Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

A. Admissibility of nurse's report and statements in report

Appellant first challenges the admission of the sexual-assault nurse's report as hearsay. Because the nurse had no independent recollection of what B.K. told her during the examination, the district court allowed the nurse to testify directly from her report, which contains a number of B.K.'s statements. Over a defense hearsay objection, the district court also admitted the report itself, but did not rely on a specific hearsay exception.

Hearsay, an out-of court statement offered into evidence to prove the truth of the matter asserted, is inadmissible unless it falls within an exception to the hearsay rule. Minn. R. Evid. 801(c), 802. Appellant argues that neither the report nor the statements it contains fall within exceptions to the hearsay rule and they are therefore inadmissible. *Cf.* Minn. R. Evid. 805 (stating that hearsay within hearsay is not excluded if each part of combined statements falls within an exception to the hearsay rule); *id*., cmt. (stating example that a hospital record including a patient's spontaneous statement that indicates present pain would not be excluded as hearsay).

The state argues that B.K.'s statements in the report fall within two hearsay exceptions: those for prior consistent statements and for medical diagnoses. An out-of-court statement is not hearsay if the declarant testifies at trial, is subject to cross-examination, and the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B). The admission of a prior consistent statement requires a challenge to the witness's credibility; a determination that the statement would be helpful in evaluating credibility; and consistency between the prior statement and the witness's testimony. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). Here, B.K.'s credibility was challenged at trial, her statements to the nurse were consistent with her testimony, and they were helpful to the jury in evaluating her credibility. Therefore, the district court did not abuse its discretion in admitting the statements. We note, in addition, B.K.'s statements relating solely to her injuries would also be admissible under the medical-diagnosis exception to the hearsay rule, Minn. R. Evid. 803(4). *See State v. Robinson*, 718 N.W.2d 400, 404, 407 (Minn. 2006) (concluding that portion of assault-victim's statement relating to mechanism of her injury, but not identification of accused perpetrator, was admissible under medical-diagnosis exception).

Appellant also argues that the report itself does not fall within the state's previously asserted hearsay exception for past recollection recorded, which permits admission of a memorandum or record relating to a matter about which a witness had previous knowledge, but now lacks sufficient recollection to testify fully and accurately. Minn. R. Evid. 803(5). We agree. The state concedes on appeal that, under this

exception, a record may be read into evidence, but it may not be received as an exhibit unless it is offered by an adverse party. *Id*. Because the state, not the defense, offered the nurse's report into evidence, to the extent that the district court may have admitted the report as a past recollection recorded, the district court erred by doing so.

But we agree with the state that the report was admissible under another hearsay exception: the business-records exception. *See State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (permitting respondent to "raise alternative arguments on appeal in defense of the underlying decision" if sufficient facts exist in record for consideration of alternative theories, arguments have legal support, and alternative grounds would not expand previously granted relief). The business-records exception allows admission of a report, memorandum, or record of events, acts, conditions, or diagnoses, if the record was made in the course of regularly conducted business activity, according to a regular practice, with information from a person with knowledge of that activity. Minn. R. Evid. 803(6). Business records generally qualify for admission even if they include opinions or diagnoses. *Id*.; *see Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 26, 62 N.W.2d 688, 696 (1954) (concluding that properly identified hospital records were admissible to prove matters related to patient's hospitalization and treatment).

"[A] business record containing an opinion on an ultimate issue is admissible only if the witness offering the opinion is available to permit the fact-finder to test the weight and credibility of the opinion through cross-examination." *In re Child of Simon*, 662 N.W.2d 155, 161 (Minn. App. 2003). The report of the sexual-assault examination was a record made by the nurse in the course of a regularly conducted business activity. Both

the nurse and B.K. were available for cross-examination. We therefore conclude that the report qualifies for admission under the business-records hearsay exception. And because B.K.'s observations contained within the report fall within the exception for prior consistent statements, the district court did not abuse its discretion by admitting the report.

B. Impeachment with prior assault conviction

Appellant also challenges the district court's decision to admit impeachment evidence of his 2009 conviction of third-degree assault. "We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion." *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). When ten or fewer years have elapsed since a felony conviction, evidence of the conviction may be admitted for impeachment purposes, provided that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). In determining whether the probative value of the evidence outweighs its prejudicial effect, a district court considers:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

In granting the state's motion to admit evidence of appellant's third-degree assault conviction, the district court stated that it was balancing the *Jones* factors, but it did not

explicitly address them, and so erred. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (stating that a district court errs if it fails to demonstrate on the record that it weighed the *Jones* factors). But we may conduct our own review of the *Jones* factors to determine whether the district court's error was harmless. *Id.* at 655–56 (reviewing *Jones* factors in absence of district court analysis and concluding that the district court did not abuse its discretion under rule 609).

Impeachment value of prior conviction

Appellant argues that the third-degree assault conviction had minimal impeachment value. But the Minnesota Supreme Court has concluded that "impeachment by prior crime aids the jury by allowing it to see 'the whole person' and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). Thus, a prior crime need not involve truth or falsity to have impeachment value. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993); *but see State v. Utter*, 773 N.W.2d 127, 132 (Minn. App. 2009) (noting that the "impeachment value of the prior crime varies with the nature of the offense"), *overruled by State v. Hill*, 801 N.W.2d 646 (Minn. 2011). This factor therefore weighs in favor of admitting the evidence.

Date of conviction and subsequent history

The supreme court has stated that "recent convictions [are considered] to have more probative value than older ones." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Because appellant committed the third-degree assault in 2008 and was sentenced in 2009, the conviction was recent, and this factor also weighs in favor of admission.

Similarity of crime to charged offense

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Gassler*, 505 N.W.2d at 67. Appellant argues that the third-degree assault conviction was similar enough to the current charges so that its admission would carry the risk that the jury would use evidence of the conviction substantively to convict him. We agree and conclude that this factor weighs against admissibility. *See* Minn. Stat. § 609.223, subd. 1 (2008) (stating that a person is guilty of third-degree assault if he "assaults another and inflicts substantial bodily harm"); *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (concluding that factor of similarity of crimes weighed against admissibility because past assault convictions were similar to charged offense of murder).

Importance of defendant's testimony

If the admission of a prior conviction prevents a jury from hearing a defendant's version of events, and that testimony is important to the jury's determination, this factor weighs against admission of the evidence. *Gassler*, 505 N.W.2d at 67. But if the defendant's version of events was presented to the jury through other witness's testimony, and no offer of proof was made as to appellant's additional testimony if he had taken the stand, this factor favors admissibility. *Id*. Although appellant did not testify, his version of events was presented through the testimony of police officers. In addition, appellant did not present an offer of proof as to the testimony that he would have added if he had taken the stand. Therefore, this factor weighs in favor of admitting the evidence.

Centrality of credibility

As to the final *Jones* factor, when a defendant's credibility is a central issue, "a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *Ihnot*, 575 N.W.2d at 587 (quotation omitted). Appellant does not dispute that his credibility was central to the case, and this factor favors admissibility.

Because four of the *Jones* factors favor admitting the evidence and only one factor weighs against admissibility, the district court's error in failing to make the *Jones*-factor analysis is harmless, and the district court did not abuse its discretion by concluding that the third-degree assault conviction was admissible for impeachment purposes.

C. Vouching testimony

Appellant argues that the district court erred by permitting improper vouching testimony of the police officer who initially interviewed B.K. and G.S. Because "the credibility of a witness is for the jury to decide," *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995), it is improper for a witness to "vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Vouching is the expression of a personal opinion as to a witness's credibility. *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998) (quotation and citation omitted).

Appellant argues that the district court erred by overruling the defense objection to the interviewing police officer's testimony that she had concluded "[t]hat there was PC for sexual assault." Appellant maintains that this testimony amounted to vouching because it endorsed B.K.'s credibility. But even if we were to conclude that this testimony was improper, we would be required to determine prejudice, based on whether

a reasonable possibility exists that the testimony significantly affected the jury's verdict. *Post*, 512 N.W.2d at 102 n.2. The officer was available for cross-examination. The statement formed only a "small part" of the trial as a whole. *See State v. Soukup*, 376 N.W.2d 498, 503 (Minn. App. 1985) (declining to reverse when improperly admitted testimony formed only a "small part" of the state's evidence), *review denied* (Minn. Dec. 30, 1985). And, as the state points out, "PC" is a term of art that the jurors may not have understood. Moreover, even if the jurors understood it, it falls short of a full endorsement of the victim's credibility. Therefore, any error in admitting the testimony was harmless.

D. Not permitting testimony about witness's potential intimate relationship with victim

Appellant argues that the district court's failure to allow the defense to present evidence of B.K.'s past intimate relationship with G.S. violated appellant's right to present a complete defense. Absent certain specified circumstances, a victim's past sexual conduct is generally inadmissible in a criminal sexual conduct case. Minn. Stat. § 609.347, subd. 3 (2008). A criminal defendant, however, has a constitutional right to present a complete defense. *State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). Therefore, defendants are sometimes entitled to present material, favorable evidence that rape-shield laws would otherwise exclude. *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992). Nonetheless, evidence of a victim's previous sexual conduct cannot be admitted "unless special circumstances enhance its probative value," and even if the evidence is relevant, a defendant has no constitutional

right to its admission if its prejudicial effect outweighs its probative value. *Crims*, 540 N.W.2d at 868–69.

Appellant argues that the scope of G.S.'s relationship with B.K. was admissible to show G.S.'s bias in favor of B. K.'s testimony. But evidence that G.S. may have wished his relationship with B.K. to become more serious was not relevant because it would not have assisted the jury in assessing G.S.'s credibility, but was only cumulative of existing evidence that G.S. and B.K. were friends and that B.K. was staying at G.S.'s apartment. *See* Minn. R. Evid. 403 (permitting district court to exclude needless presentation of cumulative evidence). In addition, the prejudicial effect of admitting the evidence outweighed its probative value because, rather than attempting to portray B.K. as a person interested only in a sexual relationship, the defense could have merely asked G.S. whether he was in love with B.K. Appellant has therefore failed to show the circumstances necessary to demonstrate that the exclusion of evidence relating to B.K.'s relationship with G.S. deprived him of the right to present a complete defense.

Appellant argues that the cumulative effect of evidentiary errors deprived him of his right to a fair trial. A defendant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying [him] a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted). Having carefully reviewed the record, we conclude that, to the extent that any errors occurred in this case, they did not deny appellant his right to a fair trial.

III

Appellant argues that the district court abused its discretion by denying him an evidentiary hearing on his postconviction petition, which alleged that trial counsel provided ineffective assistance by moving to join the unrelated criminal-sexual-conduct and burglary charges for trial. We review the postconviction court's decision to deny an evidentiary hearing for an abuse of discretion. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002).

A petitioner is entitled to a hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). A postconviction petitioner must be afforded a hearing when "material facts are in dispute that must be resolved in order to determine the issues raised on the merits." *Ferguson*, 645 N.W.2d at 446 (quotation omitted). The statute "require[s] the petitioner to allege facts that, if proven, would entitle him to the requested relief." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). The district court liberally construes the petition, but it must contain "more than argumentative assertions without factual support." Minn. Stat. § 590.03; *Ferguson*, 645 N.W.2d at 446 (quotation omitted).

"To receive an evidentiary hearing on an ineffective assistance of counsel claim, a petitioner must allege facts that would affirmatively show that his attorney's representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.

Ct. 2052, 2064 (1984). "That objective standard is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Opsahl*, 677 N.W.2d at 421 (quotations omitted). A strong presumption exists "that . . . counsel's performance falls within the wide range of reasonable professional assistance." *Fields*, 733 N.W.2d at 468 (quotation omitted).

Appellant's postconviction petition alleged that trial counsel provided ineffective assistance by moving to join the criminal-sexual-conduct charges with the burglary charge for trial; that the trial record evinced no objectively reasonable tactical ground for joining the unrelated offenses; and that a reasonable probability existed that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The district court denied a hearing on the petition, finding that defense counsel had enumerated the reasons for joinder of the offenses for trial, and the state offered no objection. The district court also found that defense counsel informed the court that he had told appellant: of the "good reasons" and "bad reasons" for joining the offenses for trial; of his constitutional right to have two separate trials with two juries; that he could not be deprived of that right; and that he could waive that right if he so chose. The district court found that counsel inquired of appellant as to whether he was comfortable with the joinder and whether it was his request to join the complaints, and appellant answered in the affirmative. The district court found that the decision to join the two complaints was a matter of trial strategy, which was in this case reasonable; that matters

of joinder are procedural, not substantive; and that appellant had made no showing that, had the two complaints not been joined, the result of the trial would have been different.

Appellant argues that the district court abused its discretion by denying an evidentiary hearing on his postconviction petition because joinder of the offenses amounted to prejudicial error. Offenses may be joined in a complaint "[w]hen the defendant's conduct constitutes more than one offense." Minn. R. Crim. P. 17.03, subd. 1. If the district court concludes that two or more offenses could be joined in a single complaint, the district court may order joinder, Minn. R. Crim. P. 17.03, subd. 4, but on motion by either party, the district court must sever offenses if the charges are unrelated or severance is necessary for a fair trial. Minn. R. Crim. P. 17.03, subd. 3(1).

Appellant argues that the criminal-sexual-conduct and the burglary charges should not have been joined for trial because they were unrelated, and that appellant was prejudiced by the joinder because evidence of each offense would not have been admissible as *Spreigl* evidence in a trial on the other charges. *See State v. Profit*, 591 N.W.2d 451, 461 (Minn. 1999) (applying analysis developed for *Spreigl* evidence as framework for evaluating possible prejudice from improper joinder). Appellant further argues that the exception for admission of immediate-episode evidence did not apply because the criminal-sexual-conduct offense could be proved without reference to the burglary, and evidence of the criminal-sexual-conduct offense would be irrelevant and prejudicial at trial on the burglary charge. *Cf. State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006) (stating that "evidence relating to offenses that were part of the immediate episode for which defendant is being tried may be admissible") (quotations omitted)).

But joinder of charges for trial is a procedural issue that does not implicate a fundamental right. *See Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002) (stating that joinder and severance of defendants involve procedural issues, rather than substantive rights). Generally, a failure to move to sever charges results in a waiver of that issue. *State v. Hudson*, 281 N.W.2d 870, 873 (Minn. 1979) (citing *State v. Moore*, 274 N.W.2d 505 (Minn. 1979)); *see also* Minn. R. Crim. P. 10.01, subd. 2, 10.03 (stating that all available "[d]efenses, objections, issues, or requests that can be determined without trial on the merits" not made by motion before trial are waived).

Appellant does not contest the portion of the district court's order indicating that he expressly waived his right to a separate trial on the charged offenses. The district court observed that defense counsel reviewed with appellant: (1) the "good reasons" and "bad reasons" for joining the offenses; (2) that appellant had a constitutional right to have two juries consider the offenses separately, which could not be taken away from him; and (3) that appellant had the ability to waive that right. Appellant also does not challenge the district court's statement that he affirmatively indicated he was comfortable with the decision to join the charges. *Cf. Moore*, 274 N.W.2d at 507 (stating that "[a] defendant may decide not to move to sever in a case in which severance would otherwise be in order because he wishes to avoid having to defend himself in separate trials").

"[A]n evidentiary hearing is unnecessary if the petitioner fails to allege facts . . . sufficient to entitle him or her to the relief requested." *Leake*, 737 N.W.2d at 535; *see also King v. State*, 649 N.W.2d 149, 158 n.8 (Minn. 2002) (declining to remand for postconviction evidentiary hearing "[i]n the absence of a bare threshold of evidence

warranting" examination of appellant's claim). Appellant's postconviction petition contains no allegations of fact, based on any conversations with counsel, that would tend to show, if proved, that counsel provided objectively unreasonable representation by failing to adequately inform him of his right to separate trials or the possible consequences of joinder. And appellant failed to furnish an affidavit stating what his attorney told him, which could have offered a preliminary showing explaining why his attorney's advice constituted ineffective assistance of counsel. Under these circumstances, we conclude that appellant has failed to allege specific facts entitling him to an evidentiary hearing on his postconviction petition, and the district court did not abuse its discretion by denying the petition without a hearing.

Affirmed.