STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0589

State of Minnesota,
Respondent,

vs.

Joshua Steven Mittelsted,
Appellant.

Filed June 19, 2017
Affirmed
Larkin, Judge

Mower County District Court
File No. 50-CR-14-2947

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Alexander H. De Marco, Law Office of Alex De Marco, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Klaphake, Judge.*

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

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

LARKIN, Judge

Appellant challenges his criminal-sexual-conduct convictions, arguing that the postconviction court erred by denying his claims without an evidentiary hearing, that he received ineffective assistance of counsel at trial, and that the district court erred in its evidentiary rulings. Appellant also challenges his sentence. We affirm.

FACTS

In December 2014, the State of Minnesota charged appellant Joshua Steven Mittelsted with nine counts of criminal sexual conduct. The complaint alleged that Mittelsted lived with his girlfriend, S.C., and her three daughters, M.C., L.C., and A.C., and that Mittelsted sexually abused M.C. and L.C. on multiple occasions over a period of two years. The alleged abuse occurred at the home that Mittelsted shared with S.C. and her daughters, and it was initially reported to the police by the children's biological father. In May 2015, the state amended its complaint to add a tenth count of criminal sexual conduct, identifying A.C. as a victim.

The case was tried to a jury. M.C., L.C., and A.C., testified against Mittelsted, as well as the girls' therapists and a child-sex-abuse expert. M.C. testified that Mittelsted first touched her "private parts" on Halloween of 2012 and that after the Halloween incident, Mittelsted touched her nearly every week. M.C. described an incident in which she sat on a chair with Mittelsted while they watched a movie, and he put his hands down her pants and his fingers inside her. M.C. described another incident in which Mittelsted touched her private parts while she was waiting to leave for church. M.C. recounted that on another

occasion, Mittelsted forced her hand to touch his genitals. M.C. testified that the abuse continued for approximately two years and that she did not report it because she was afraid that no one would believe her.

L.C. testified that she saw Mittelsted "kissing or doing something on [M.C.'s] neck" while the two were watching TV in the living room. L.C. also testified that "stuff like that" had happened to her. A.C. testified that Mittelsted touched her "privates" once.

M.C.'s therapist testified that M.C. disclosed that Mittelsted "would masturbate in front of her and ejaculate on her" and "would kiss her neck." L.C.'s therapist testified that L.C. described "being fondled and digital penetration." L.C.'s therapist also testified that she conducted group therapy with M.C., L.C., and A.C. and that there was no indication that they fabricated the abuse. A.C.'s therapist testified that A.C. disclosed that "she was touched."

Mittelsted, his daughter, and S.C. testified on Mittelsted's behalf. Mittelsted testified that his relationship with M.C. "[s]tarted off really good" and that they "got along really well until about a month or so before [the sexual-abuse] disclosure." He explained that M.C. "was getting in a lot of trouble on her phone," that they "had a lot of trust issues between [them]," and that M.C. was mad at him for taking away her phone. Mittelsted suggested that the girls' biological father fabricated the sexual-abuse allegations because he wanted custody of the girls. Mittelsted also suggested that the girls fabricated the allegations because M.C. was angry with Mittelsted for taking her phone away and that M.C. convinced L.C. to lie. Mittelsted admitted that he was affectionate with the girls and gave them "[h]ugs and kisses." He also admitted that M.C. occasionally sat on his lap.

Mittelsted's daughter testified that she never saw M.C. and L.C. fight with Mittelsted. She also testified that A.C. did not like Mittelsted and that A.C. never disclosed the alleged inappropriate-touching to her.

S.C. testified that her daughters adored Mittelsted and there was no animosity between them. She also testified that Mittelsted was hardly ever alone with her daughters. But she admitted that Mittelsted had stayed home alone with L.C. and A.C. when they were sick. S.C. explained that "in the last year or so, [M.C.] started lying a lot." However, S.C. testified that she did not have problems with L.C. or A.C. lying. S.C. also testified that she watched videos in which M.C. and L.C. described the sexual abuse to the police and that she believed the girls were lying in the videos. At the time of S.C.'s testimony, she had lost custody of her daughters and continued to reside with Mittelsted.

The jury found Mittelsted guilty of two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct against M.C., and two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct against L.C. The jury found Mittelsted not guilty of criminal sexual conduct against A.C.

Mittelsted moved for a downward dispositional sentencing departure. The district court denied his motion and imposed a presumptive, executed 388-month prison term.

Mittelsted petitioned for postconviction relief, generally alleging that his trial attorney was ineffective, that he is entitled to a new trial because of juror bias, that the district court erred in its evidentiary rulings, and that the district court did not consider his motion for a sentencing departure. Two weeks later, Mittelsted filed a direct appeal with

this court. The postconviction court denied Mittelsted's postconviction petition because his direct appeal was pending. This court granted Mittelsted's motion to stay his direct appeal, and he refiled his postconviction petition.

The postconviction court denied Mittelsted's second postconviction petition without an evidentiary hearing. This court dissolved the stay on his appeal.

D E C I S I O N

I.

Minnesota's postconviction statute provides:

> Except at a time when direct appellate relief is available, a person convicted of a crime . . . may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate.

Minn. Stat. § 590.01, subd. 1 (2014). It further provides, "Nothing contained herein shall prevent the Supreme Court or the Court of Appeals . . . from granting a stay of a case on appeal for the purpose of allowing an appellant to apply to the district court for an evidentiary hearing under the provisions of this chapter." *Id.*; *see* Minn. R. Crim. P. 28.02, subd. 4(4) (authorizing stay of appeal for postconviction proceedings). "When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

A postconviction court is required to hold an evidentiary hearing on a 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 (2014); *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him to the relief requested. *Davis v. State*, 784 N.W.2d 387, 392 (Minn. 2010). This court "must consider [the petitioner's] allegations in the light most favorable to him, and also consider the files and records of the proceeding, including the State's arguments." *State v. Nicks*, 831 N.W.2d 493, 505-06 (Minn. 2013) (quotation omitted). But allegations in a postconviction petition must be "more than argumentative assertions without factual support." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995) (quotation omitted).

Mittelsted contends that he "was entitled to a post-conviction relief hearing." However, the issues raised in this appeal are essentially identical to the claims in Mittelsted's postconviction petition, and many of the claims are no more than argumentative assertions without adequate factual support. Moreover, as discussed below, the record establishes that Mittelsted is not entitled to relief on any of his claims. The postconviction court therefore did not err by denying Mittelsted's claims without an evidentiary hearing.

II.

Nine of the issues in Mittelsted's appellate brief are based on arguments that he received ineffective assistance of counsel at trial. An ineffective-assistance-of-counsel claim involves a mixed question of law and fact that is reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Appellate courts generally analyze ineffective-assistance-of-counsel claims as trial errors under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Id*. Under *Strickland*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068; *see also Rhodes*, 657 N.W.2d at 842 (applying *Strickland* to an ineffective-assistance-of-counsel claim). Appellate courts "need not analyze both prongs if either one is determinative." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

This court applies "a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). Moreover, we generally will not review attacks on counsel's trial strategy, so long as the strategy was reasonable. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003); *see also Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

We consider each of Mittelsted's ineffective-assistance-of-counsel arguments in turn.

A.

Many of Mittelsted's arguments challenge his attorney's trial strategy. For example, Mittelsted argues that "his trial attorney failed to elicit testimony regarding his scant opportunity to commit the crimes alleged." Specifically, Mittelsted argues that his attorney should have presented evidence regarding Mittelsted's work schedule and the layout of the

house where the alleged abuse occurred, and that his attorney should have called Mittelsted's son to testify.

"Decisions about which witnesses to call at trial and what information to present to the jury are questions of trial strategy that lie within the discretion of trial counsel." *Leake*, 737 N.W.2d at 539. Mittelsted therefore fails to satisfy the first prong of *Strickland*. Moreover, Mittelsted testified that he lacked the opportunity to commit the crimes. For example, his attorney elicited the following testimony:

> Q: [S.C.] testified yesterday that she was home with the girls 99.9 percent of the time. Is . . . that accurate testimony?
> A: That's pretty accurate.
> Q: And why do you say that?
> A: I worked a lot . . . .
> . . . .
> Q: Were there ever times when you were just home—where you would have been just home with [M.C.]?
> A: I don't recall any time being home just with [M.C.].

Mittelsted does not persuade us that additional evidence regarding his lack of opportunity to commit the crimes would have changed the outcome at trial. He therefore fails to satisfy the second *Strickland* prong.

B.

Mittelsted argues that "trial counsel failed to fully flush out the bias of the initial reporting party." He contends that his attorney should have elicited more testimony that the victims' biological father "encourage[d] his daughters to fabricate allegations of child molestation" and regarding the girls' "congruent motives to participate in this plan." A trial attorney's decision regarding whether to cross-examine a witness is 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 constitutes trial strategy); *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Mittelsted's attorney asked the victims' biological father, "[W]ould it be accurate to say that you had some misgivings about [Mittelsted] from the beginning?" and "You would have been more comfortable if [your daughters] were living with you, as opposed to [their mother] and [Mittelsted]?" Mittelsted's attorney asked M.C., "Did you ever talk to your dad about moving into his house, rather than living with your mom and [Mittelsted]?" And, Mittelsted's attorney asked A.C., "Are you saying [Mittelsted] touched your privates because [M.C.] and [L.C.] said that?" These questions suggested that the victims and their biological father were biased against Mittelsted. Whether Mittelsted's attorney should have asked additional questions to establish bias is a matter of unreviewable trial strategy.

Mittelsted argues that "[t]rial counsel was also deficient when he did not object to the motion by the state to suppress evidence of prior actions of a sexual nature by [M.C.]." Before trial, the state requested that the district court exclude evidence regarding sexual text messages and photographs that M.C. had sent and received. The district court granted the state's request.

Generally, "[i]n a prosecution for criminal sexual conduct, 'evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury.'" *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015) (quoting Minn. Stat. § 609.347, subd. 3 (2014) and Minn. R. Evid. 412), *cert. denied*, 136 S. Ct. 595 (2015). But a defendant may introduce evidence of a victim's prior sexual

conduct when "admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986).

Mittelsted argues that the text messages were necessary to show that he punished M.C. for her cellphone use, that M.C. resented this discipline, and that the punishment motivated M.C. to falsely accuse him of sexual abuse. We are not persuaded because Mittelsted testified that he punished M.C. by restricting her cellphone use, as illustrated in the following exchange between Mittelsted and his attorney:

> Q: Did you use the phone as a form of discipline?
> A: Correct.
> . . . .
> Q: Was [M.C.] mad at you for any reason?
> A: Yes.
> Q: What?
> A: Taking her phone away was a big one?
> Q: When did you take her phone away?
> A: I took it away a lot. Probably a couple weeks prior to the disclosure she got in trouble on it, got it taken away.

Mittelsted did not need to introduce evidence regarding the sexual content of M.C.'s text messages to establish her purported motive to fabricate the sexual-abuse allegations against him. He therefore fails to satisfy both prongs of *Strickland*.

C.

Mittelsted argues that "trial counsel failed to cause key evidence to be investigated, namely, the cell phone of one of the victims which was seized as evidence, and a tablet on which he and his girlfriend discovered the kids had searched for sexually explicit material."

He argues that it "is not clear at all that full analysis was done on the oldest victim's cell phone."

"The extent of counsel's investigation is considered a part of trial strategy." *Opsahl*, 677 N.W.2d at 421. "It is within trial counsel's discretion to forgo investigation of leads not reasonably likely to produce favorable evidence." *Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991). "[T]he failure to further investigate various leads is not error by defense counsel without a showing that significant exculpatory evidence could have been uncovered." *Crisler v. State*, 520 N.W.2d 22, 26 (Minn. App. 1994), *review denied* (Minn. Sept. 28, 1994).

Mittelsted again challenges unreviewable trial strategy. His trial attorney could have forgone the investigation under the belief that the investigation was not reasonably likely to produce favorable evidence. *See Gustafson*, 477 N.W.2d at 713. Mittelsted has not provided any reason to conclude otherwise. He therefore fails to satisfy the first prong of *Strickland*.

D.

Mittelsted argues that his "attorney failed to adequately investigate and challenge the additional counts alleging criminal sexual conduct with a brand new victim, counts added on the day of trial." (Emphasis omitted.) The record refutes this argument. The state amended the complaint to add the third victim, A.C., months before trial. Moreover, the jury acquitted Mittelsted of the charge regarding A.C. Mittelsted therefore fails to establish both of the *Strickland* prongs.

E.

Mittelsted argues that his "trial attorney failed to make a motion for a new trial despite post trial discovery of inappropriate influence and prejudice by a juror, and independent from this, this prejudiced juror justifies a new trial." He asserts that a juror who was interviewed after the trial "indicated she was hung up on whether he was guilty or not." Mittelsted's trial attorney investigated the situation and sent Mittelsted a letter explaining:

> I questioned [the juror] regarding whether or not she felt you had a fair trial. Once again she indicated that she felt the trial was fair, but that [S.C.'s] testimony was not at all helpful to your case. Based upon my conversation with her there does not appear to be grounds for us to motion for a new trial based upon jury coercion or a faulty verdict.

If a defendant suspects a guilty verdict was tainted by juror misconduct, the defendant may make a post-trial motion for a *Schwartz* hearing. *See* Minn. R. Crim. P. 26.03, subd. 20(6) (providing for verdict impeachment); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960) (establishing *Schwartz* hearing procedure). The defendant must establish a prima facie case of jury misconduct before a hearing will be granted. *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000). "To establish a prima facie case, a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted).

The evidence admissible at a *Schwartz* hearing is limited as follows:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the

> effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form.

Minn. R. Evid. 606(b). Jurors are not permitted to "disclose any matters which inhere in the verdict, such as their mental processes in connection with it or any other matter resting alone in their minds or consciences." *State v. Hoskins*, 292 Minn. 111, 125, 193 N.W.2d 802, 812 (1972).

Mittelsted has not made a prima facie showing of juror misconduct. He has not presented evidence that would be admissible at a *Schwartz* hearing. Instead, he relies on a juror's statement regarding the juror's mental processes. Thus, his attorney's decision not to move for a new trial based on the juror's statement was neither objectively unreasonable nor prejudicial. Mittelsted therefore fails to establish ineffective assistance of counsel based on the alleged juror misconduct and that, "independent from [his ineffective-assistance-of-counsel claim]," he is entitled to a new trial.

F.

Mittelsted argues that his "trial attorney failed to make appropriate and necessary objections before and during trial," specifically, to M.C.'s, L.C.'s, and A.C.'s out-of-court statements to police and a child-protection worker regarding the sexual-abuse allegations.

"Decisions about objections at trial are matters of trial strategy." *Leake*, 737 N.W.2d at 542.

Under Minn. R. Evid. 801(d)(1)(B), a witness's prior statement that is consistent with her trial testimony is admissible as nonhearsay evidence if the statement is helpful to the jury in evaluating the witness's credibility, "and if the witness testifies at trial and is subject to cross-examination about the statement." *State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). "[B]efore the statement can be admitted, the witness' credibility must have been challenged, and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged." *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997).

The state filed a motion in limine to admit the victims' out-of-court statements regarding the sexual abuse, and Mittelsted's attorney did not object to the victims' statements to police and a child-protection worker. The district court granted the motion, reasoning that Mittelsted challenged the credibility of M.C., L.C., and A.C. and that their proffered consistent statements would help the jurors evaluate their credibility. We discern no error in the district court's reasoning or its admission of the prior consistent statements under Minn. R. Evid. 801(d)(1)(B). Indeed, Mittelsted's defense at trial was that M.C., L.C., and A.C. fabricated the abuse allegations. Thus, trial counsel's failure to object was not objectively unreasonable or prejudicial, and Mittelsted therefore fails to satisfy both prongs of *Strickland*.

G.

Mittelsted argues that "the case load of [his] trial attorney prevented him from being effective trial counsel and exceeded [American Bar Association] recommended ethical case load limits." Mittelsted relies on a document generated from a court website that shows his trial attorney's scheduled court appearances over a period of approximately two months.

Mittelsted does not persuade us that his attorney's caseload resulted in ineffective representation. In fact, his attorney's caseload could suggest that his trial attorney is a competent, efficient attorney, who is in high demand. Moreover, Mittelsted does not explain how his attorney's caseload affected the attorney's representation in this case or the outcome of trial. Mittelsted therefore fails to satisfy both prongs of *Strickland*.

H.

Mittelsted argues that his "trial attorney did not disclose to [him] that he had a close friendship and ongoing social relationship with the prosecutor and in fact a pending business relationship." Mittelsted contends that "mere months after [his] trial, . . . the trial prosecutor in this case, became law partner to the defendant's trial attorney." He "categorically assert[s] that the relationship between his trial counsel and the prosecuting attorney was so close and social" that it "impacted the zealotry of his trial counsel and essentially caused [trial counsel] to not want to give the state too much trouble."

A criminal defendant's constitutional right to effective assistance of counsel includes "representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981). "A defendant who raised no objection at trial must

demonstrate that defense counsel 'actively represented conflicting interests' and this conflict 'adversely affected [the] lawyer's performance.'" *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997) (alteration in original) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S. Ct. 1708, 1718, 1719 (1980)), *review denied* (Minn. Aug. 5, 1997). If the defendant shows that "a conflict of interest actually affected the adequacy of his representation," he "need not demonstrate prejudice in order to gain relief." *Gustafson*, 477 N.W.2d at 713 (quotation omitted). Representation is actually affected if "counsel was influenced in his basic strategic decisions" or "the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Wood*, 450 U.S. at 272, 101 S. Ct. at 1103-04; *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181 (1978).

Mittelsted did not object to the alleged conflict at trial. And he has not established that his trial attorney actively represented a conflicting interest. Instead, he generally asserts that because his attorney and the prosecutor appeared to be friends and became business partners months after trial, a per se conflict existed. Because Mittelsted did not object at trial and has not shown an actual conflict, his ineffective-assistance-of-counsel claim fails.

I.

Mittelsted argues that his "counsel was deficient in not presenting further mitigating circumstances" to support his request for a downward dispositional sentencing departure, alluding to his mental-health issues. In "order to constitute a mitigating factor in sentencing, a defendant's [mental-health] impairment must be 'extreme' to the point that

it deprives the defendant of control over his actions." *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007).

Mittelsted's psychosexual evaluation recommended, in part, that he "participate in individual therapy sessions . . . to assist him with resolving his Persistent Depressive Disorder." The evaluation does not support Mittelsted's assertion that there were "significant concerns for [his] mental health" that would give rise to a departure ground. (Emphasis omitted.) And Mittelsted does not otherwise provide support for his assertion that he had serious mental-health issues that his attorney failed to investigate.

In sum, none of Mittelsted's arguments persuades us that he received ineffective assistance of trial counsel that justifies appellate relief.

III.

Mittelsted contends that the district court erred in certain evidentiary rulings. "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). We address each of Mittelsted's assignments of evidentiary error in turn.

A.

Mittelsted argues that "[e]xpert testimony of scant probative value, and lacking appropriate foundation, was presented which was highly prejudicial to [his] case." He argues that the expert testimony of Judy Dawley "served to simply bolster the alleged victims' credibility and was ultimately used to argue that their behavior was consistent with being sexually assaulted." At trial, Dawley testified that it is fairly common for a child-sex-abuse victim to delay reporting and that a child may refrain from disclosing abuse

because of shock, confusion, denial, or fear that they will get into trouble or that the person who has hurt them will hurt other members of their family.

The admission of expert testimony is reviewed for an abuse of discretion. *State v. Mosley*, 853 N.W.2d 789, 798-99 (Minn. 2014). "[E]xpert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011) (citing Minn. R. Evid. 702).

In *State v. Hall*, the district court permitted expert testimony explaining why adolescents may delay reporting sex abuse. 406 N.W.2d 503, 504 (Minn. 1987). The supreme court affirmed the ruling, concluding that

> expert testimony as to the reporting conduct of [adolescent sexual-assault] victims and as to continued contact by the adolescent with the assailant is admissible in the proper exercise of discretion by the trial court, [but] we caution that we do not intend to establish a categorical rule that expert testimony concerning all characteristics typically displayed by adolescent sexual assault victims is admissible.

Id. at 505.

In a pretrial order, the district court ruled that Dawley would be "allowed to testify as an expert at trial solely on the typicality of delayed reporting of sexual assault by adolescents and children, and the typicality of continued contact by adolescent and child victims of sexual assault with their assailants." (Emphasis omitted.) The district court reasoned that the "probative value of [the expert testimony] will not be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Mittelsted argues that the "limitations [that] the court placed on the expert's testimony in this case were insufficient." But because the district court's ruling regarding Dawley's expert testimony is consistent with *Hall*, Mittelsted has not shown a clear abuse of discretion.

B.

Mittelsted contends that "[i]nappropriate hearsay evidence was admitted at trial." He generally asserts that "hearsay evidence of the father and family members, as well as the social worker and the therapist, was cumulative and sought only to bolster credibility." He does not cite to the record to specifically identify the evidence that he challenges. Nor does he cite legal authority or provide legal analysis in support of his assertion.

An appellate court may decline to consider an issue on the merits if the appellant does not "cite either the record or legal authority to support [the] claim." *State v. Sontoya*, 788 N.W.2d 868, 876 (Minn. 2010). Because Mittelsted does not cite to the record or provide legal authority, we decline to consider this issue.

C.

Mittelsted argues that "[t]he court erroneously deprived [him] of the right of confrontation when it suppressed evidence of supposed prior sexual conduct." This argument is similar to Mittelsted's ineffective-assistance-of-counsel claim regarding his trial attorney's failure to object to the state's motion to exclude evidence of M.C.'s sexual text messages.

This court may review an unobjected-to trial error for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To establish plain error, the appellant must show

(1) error, (2) that the error was plain, and (3) that the error affected his substantial rights. *Id.* An error affects substantial rights "if the error was prejudicial and affected the outcome of the case." *Id.* at 741. If the three prongs are met, this court determines whether it "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

As we explained regarding Mittelsted's ineffective-assistance-of-counsel claim, he did not need to introduce evidence regarding the sexual content of M.C.'s text messages to establish her purported motive to fabricate the sexual-abuse allegations. Mittelsted therefore fails to show that alleged error affected his substantial rights.

In sum, Mittelsted has not shown error in the district court's evidentiary rulings that justifies appellate relief.

IV.

Mittelsted asserts that his "motion for [sentencing] departure was not even considered by the court and rested in part on an insufficient and biased psycho-sexual evaluation." This court "may not interfere with the sentencing court's exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). At sentencing, the district court stated:

> [W]e had a Pre-Sentence Investigation that has been filed, plus there was an addendum . . . the parties now have. There was also a Psychosexual Evaluation that I have also reviewed. And, also, the Motion For Departure from the defense . . ., and I also reviewed that.

The state opposed the motion and argued, "When looking through the PSI, [Mittelsted] denies any of the conduct occurring. The Psychosexual indicates that any treatment that should occur, there is a recommendation that it occur while [Mittelsted] is incarcerated." Mittelsted's attorney argued that "[Mittelsted] indicate[d] that he is very sorry for what has happened here. However, as I acknowledged, he does maintain his innocence."

The district court reasoned that it was "not going to put somebody on probation [who] accepts no responsibility for what [he has] done and shows no remorse for it. That is not amenability to probation, and it's certainly not particular amenability to probation, which is what [the court] would need to find." *See State v. Soto*, 855 N.W.2d 303, 308-09 (Minn. 2014) (requiring district court to support departure with finding that defendant is "*particularly* amenable to probation," and not "merely . . . amenable to probation"). The district court concluded that there was no legal basis for the departure and denied Mittelsted's motion.

The record refutes Mittelsted's assertion that the district court did not consider his request for a sentencing departure. Mittelsted's assertion of sentencing error is therefore not a basis for relief.

Affirmed.