STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0922

State of Minnesota,
Respondent,

vs.

Daniel Brian Keith,
Appellant.

Filed April 3, 2017
Affirmed
Reilly, Judge

Anoka County District Court
File No. 02-CR-15-2026

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Kassius O. Benson, Madelyn Adams, Kassius Benson Law, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

REILLY, Judge

Appellant challenges his controlled-substance convictions, arguing that (1) the district court violated his Confrontation Clause rights by admitting into evidence text messages received by a confidential-informant during a controlled drug buy and redacted audio recordings of the drug buy, when the confidential-informant did not testify at trial, (2) his trial counsel's assistance was ineffective, and (3) the cumulative effect of the errors deprived him of a fair trial. We affirm.

FACTS

On two separate occasions in the fall of 2014, confidential-informant K.M. assisted the Anoka-Hennepin Narcotics and Violent Crimes Task Force (the Task Force) by making controlled drug buys in the City of Coon Rapids, Minnesota.

The first incident occurred on September 23, 2014, when K.M. arranged to purchase methamphetamine from appellant Daniel Brian Keith. Through a series of text messages, K.M. agreed to meet appellant at his home in Coon Rapids to purchase methamphetamine. Detective Matt Lund, a member of the Task Force and the lead agent on the case, personally observed three incoming text message responses on K.M.'s phone regarding the sale, and the state introduced photographs of these text messages at trial. Prior to the controlled drug buy, agents of the Task Force searched K.M. and provided her with $260 in cash and an audio recording device. K.M. drove to appellant's home in her own vehicle. Appellant stepped out of his home and got into K.M.'s vehicle. Lund monitored K.M. through the recording device and Detective Gerald Gnerre, who was positioned in an unmarked vehicle

60 to 90 feet from appellant's home, personally watched the meeting. After the exchange, agents met with K.M. for a post-buy meeting and recovered a bag containing a substance that was later identified as 3.184 grams of methamphetamine.

The second controlled drug buy took place on October 7, 2014, at appellant's home. Agents provided K.M. with $585 in funds to purchase a larger quantity of methamphetamine and again fitted her with an audio recording device to monitor the exchange. Agent Christopher McCall saw K.M. enter appellant's home for a short period of time. At the post-buy meeting, agents recovered two bags containing a substance that was later identified as 8.430 grams of methamphetamine.

Based on the evidence obtained from the controlled drug buys, agents obtained a search warrant for appellant's home and executed a daytime knock-and-announce search warrant on October 14. As they approached the house, agents noticed a surveillance camera hidden in a potted plant by the front door. Agents knocked on the door, identified themselves as police officers, and ordered appellant to come to the door. When appellant did not comply, agents entered the home and found appellant inside a locked bathroom, standing over a flushing toilet. A medium-size scale sat next to the toilet. Agents placed appellant under arrest and conducted a search of his home. The search uncovered credit cards and prepaid cards, several of which were not in appellant's name; a clear plastic baggy containing a green plant-like material; a glass bubble pipe with white residue on the inside; a clear plastic baggy containing "white shards of a hard substance" later identified as 1.541 grams of methamphetamine; a glass bottle containing 35.889 grams of diphenhydramine, a non-narcotic ingredient known as Benadryl and codeine; a prescription

pill bottle containing alprazolam, a schedule four controlled substance; and a prescription bottle containing 13.415 grams of methadone, prescribed to another individual.

The state charged appellant by criminal complaint with: (1) first-degree controlled substance crime (sale of ten grams or more, on more than one occasion, for the period between September 23, 2014 and October 7, 2014); (2) first-degree controlled substance crime (sale/prior conviction of mixture of a total weight of ten grams or more, on more than one occasion, for the period between September 23, 2014 and October 7, 2014); (3) second-degree controlled substance crime (possession of a mixture of a total weight of six grams or more containing methamphetamine, for the period between September 23, 2014 and October 14, 2014); (4) second-degree controlled substance crime (possession/prior conviction of a mixture of a total weight of six grams or more containing methamphetamine, for the period between September 23, 2014 and October 14, 2014); and (5) fifth-degree controlled substance crime (possession/prior conviction of one or more mixtures containing a controlled substance classified in schedules I, II, III, or IV, including codeine, alprazolam, and/or methadone, on October 14, 2014).

The matter came on for a six-day jury trial from January 11-19, 2016. The district court determined that the state failed to properly disclose the terms of the confidential-informant agreement between the Task Force and K.M. in violation of its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), and barred the state from calling K.M. as a witness. The state presented its case through the testimony of a forensic laboratory employee and multiple police officers who testified to their personal observations of the controlled drug buys and the subsequent search of

appellant's home. The jury convicted appellant on all charges. The district court imposed a 144-month prison sentence for the first-degree controlled substance crime (sale/prior conviction of mixture of a total weight of ten grams or more, on more than one occasion, for the period between September 23, 2014 and October 7, 2014), but did not adjudicate the remaining offenses.

This appeal follows.

D E C I S I O N

I. Appellant's Confrontation Clause rights were not violated when the district court admitted text messages and redacted audio recordings into evidence because any error resulting from the district court's admission of the contested evidence was harmless beyond a reasonable doubt.

Appellant argues the district court violated his Sixth Amendment Confrontation Clause rights by admitting into evidence text messages and redacted audio recordings of the controlled drug buys when the confidential-informant was not present to testify. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. "A violation of the Confrontation Clause occurs when the accused is not afforded the right to confront the witnesses against him." *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013). Whether the admission of evidence violates a criminal defendant's Sixth Amendments rights is a question of law subject to de novo review. *Id.*

While the district court precluded K.M. from testifying, it permitted the state to introduce text messages and audio recordings of the controlled drug buys and transcripts of the recordings. The audio recordings and transcripts contained statements made by

agents of the Task Force and someone identified as "B." K.M.'s statements were redacted.[1] Appellant argues that admission of this evidence violated his Confrontation Clause rights because K.M.'s out-of-court statements could be implied through the text messages and the audio recordings.

To determine whether the statements were admissible, we first consider whether the statements were testimonial in nature. *See Davis v. Washington*, 547 U.S. 813, 840, 126 S. Ct. 2266, 2284 (2006) (noting that a reviewing court must first consider whether the evidence at issue is testimonial). A district court "violates the Confrontation Clause when it admits testimony that inescapably implies a nontestifying witness's testimonial hearsay statement." *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010). When the state fails to advance "any other non-truth purpose for introducing the questions and no other relevant, non-truth purpose appears to apply, we conclude that the questions were offered to prove the truth of the matter asserted." *Id*. at 553. Appellant characterizes the evidence as testimonial hearsay statements offered to prove the truth of the matter asserted, namely, that K.M. arranged controlled drug buys with appellant. The state argues the text messages and audio recordings were not offered for the truth of the matter asserted, but were instead

[1] The text messages stated: "I'll see if I can work it out so we can meet at same place and time cause her money would help. Relax. It's all good."; "One now and if I run there I can grab one more."; and "How long?" During the first controlled buy, B's statements were: "Hello . . . [inaudible] . . . I'm coming . . . Well ya. It's the same stuff . . . [inaudible] can't be doing this . . . Ya . . . Okay . . . Are you gonna . . . oh that's [inaudible]." During the second controlled buy, B's statements were: "Oh, Jesus Christ! You scared the sh-t outta me! . . . It's everything I got . . . And John never called me . . . [inaudible] anything today? . . . Ok . . . Alright. Sorry about that. I was just headin' out there and then . . . I gotta change my notifications now 'cause it's [inaudible] . . . or whatever."

presented to the jury in an effort to provide insight into the process of conducting a controlled drug buy. *See, e.g.*, *id.* at 552 ("[A]dmission of testimonial statements does not implicate the Confrontation Clause if the statements are not offered to prove the truth of the matter asserted."); *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) (determining defendant's Confrontation Clause rights were not infringed where police officer's statements during custodial interview were offered to provide context to defendant's responses). For the purposes of this appeal, we assume, without concluding that the statements were testimonial in nature.

This assumption does not end our inquiry. Violations of the Confrontation Clause are subject to a harmless-error analysis and "reversal is not required if the error was harmless beyond a reasonable doubt." *Swaney*, 787 N.W.2d at 555.

> In order to deem a Confrontation Clause error harmless beyond a reasonable doubt, [the reviewing court] must determine that the guilty verdict actually rendered was surely unattributable to the error. When determining whether the jury's verdict was surely unattributable to an error, [the reviewing court] examine[s] the record as a whole. In doing so, [the reviewing court] consider[s] the manner in which the evidence was presented, whether the evidence was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defense.

State v. Wright, 726 N.W.2d 464, 476 (Minn. 2007) (quotations omitted). Here, each of the four factors weighs in favor of a harmless-error determination.

First, the manner in which the state presented the evidence did not create a reasonable likelihood that the admission of this evidence substantially affected the verdict. The evidence was presented through Detective Lund's testimony. References to the text

messages and the audio recordings were relatively brief and did not represent a substantial portion of his testimony. Lund described the general process of conducting a controlled drug buy and outlined the Task Force's procedures for working with a confidential-informant. He did not testify as to the content of the audio recordings or identify appellant as the voice on the recordings.

The second factor requires us to consider whether the evidence was highly persuasive. Lund's testimony was not the sole evidence presented regarding appellant's controlled substance crimes. Several police officers testified to their personal observations of the controlled drug buys or their participation in executing the search warrant. A lab technician testified that he performed a drug test on the drugs purchased through the controlled drug buys, as well as the drugs found in appellant's home, and confirmed the presence of methamphetamine. The text messages and audio recordings were not highly persuasive, in light of the strong evidence presented through the officers' testimony, which supported the jury's verdict.

Third, to the extent the state referenced the text messages and audio recordings in summation, such references were brief. The prosecutor began his closing argument by reviewing the agents' testimony of the controlled drug buy operations, describing the agents' meetings with the confidential-informant, and reviewing their personal observations of K.M.'s meetings with appellant. The prosecutor then referenced the text messages and audio recordings and stated that the evidence "corroborate[s] the testimony given by officers." The remainder of the state's closing argument focused on the search of appellant's home and the fruits of that search. Although the prosecutor referenced the

contested evidence in closing, the references were cursory, covering only several pages of a 24-page transcript. The prosecutor did not emphasize or dwell on the evidence in closing.

The fourth factor considers whether the defense effectively countered the evidence. The defense did not ask Detective Lund any questions about the text messages or the audio recordings on cross-examination. During a brief recross-examination, however, the defense asked Lund if he knew "who the other person [was] on the other end of the tape," and Lund admitted that he did not. The defense also attempted to discredit the evidence during closing argument, arguing that the state failed to present evidence linking the text messages in K.M.'s phone to appellant.

Lastly, we note that the strength of other evidence of the defendant's guilt is an important factor in a Confrontation Clause analysis. *Hawes*, 826 N.W.2d at 786. Here, other evidence sufficiently establishes appellant's guilt. Agents with firsthand knowledge provided testimony of the controlled drug buys, while other agents testified that they uncovered drugs and drug paraphernalia during the subsequent search of appellant's home. This evidence sufficiently established appellant's guilt, notwithstanding the text messages and audio recordings. We therefore conclude that any potential violation of appellant's right to confrontation was harmless beyond a reasonable doubt and appellant is not entitled to a new trial.

II. Appellant received effective assistance of counsel.

We next turn to appellant's ineffective-assistance-of-counsel challenge. A criminal defendant has a constitutional right to the effective assistance of counsel. *Fort v. State*, 861 N.W.2d 674, 677 (Minn. 2015). We analyze an ineffective-assistance-of-counsel

claim under the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington*. *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (citing *Strickland*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Appellant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation and citations omitted). A reviewing court need not address both parts of the *Strickland* test if one is determinative. *Hawes*, 826 N.W.2d at 783. Here, appellant fails on both *Strickland* prongs.

Under the deficiency prong, appellant must show by a preponderance of the evidence that his counsel's performance "fell below an objective standard of reasonableness." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). Minnesota reviewing courts assume an attorney's performance meets this standard "when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Id*. (quotations omitted). The first prong is thus "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

Appellant argues his trial counsel failed to adequately object to portions of Lund's direct testimony. The record does not support this claim. Defense counsel raised several objections to the state's evidence, and the district court admitted the evidence over defense counsel's objections. Moreover, "[d]ecisions about objections at trial are matters of trial

strategy," *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007), and we afford great deference to an attorney's strategic litigation decisions, *see Rhodes*, 657 N.W.2d at 845 (concluding that an ineffective-assistance-of-counsel claim fails when an attorney's conduct falls within the range of reasonable professional assistance). Because the ineffective-assistance challenge relates to trial strategy, appellant's claim necessarily fails. *See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) ("[A]ppellate courts do not review an attorney's trial strategy for competence.").

Appellant's claim also fails under the second *Strickland* prong, which requires appellant to show by a preponderance of the evidence that but for his counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052). Appellant has not identified any facts creating a reasonable probability that the outcome of the trial would have been different if his counsel had employed different trial strategies, and the totality of the evidence supports the jury's verdict. *See Rhodes*, 657 N.W.2d at 842 (noting that a reviewing court considers the totality of the evidence when performing an analysis of the second *Strickland* prong).

We therefore conclude that appellant's ineffective-assistance-of-counsel claim fails because appellant has neither demonstrated that his counsel's performance fell below an

objective standard of reasonableness nor has he established that he was prejudiced by his counsel's representation. Consequently, appellant is not entitled to relief.[2]

Affirmed.

[2] Appellant also seeks a new trial on the ground that the cumulative effect of the errors deprived him of a fair trial. *See State v. Valentine*, 787 N.W.2d 630, 642 (Minn. App. 2010) (recognizing that the cumulative effect of errors may warrant reversal of conviction and entitle defendant to a new trial), *review denied* (Minn. Nov. 16, 2010). We determine that he is not entitled to relief on this basis.