STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1510

State of Minnesota,
Respondent,

vs.

Cory Leo Kellermann,
Appellant.

Filed July 31, 2017
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-15-22974

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Kalitowski, 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

JOHNSON, Judge

The district court found Cory Leo Kellermann guilty of a pattern of stalking conduct. Kellermann argues that he is entitled to a new trial because his trial attorney provided him with ineffective assistance of counsel. We affirm.

FACTS

The state charged Kellermann with one count of a pattern of stalking conduct, in violation of Minn. Stat. § 609.749, subd. 5 (2014). The complaint alleged that Kellermann engaged in multiple incidents of hostile or abusive conduct toward his wife, C.E.H., between August 2012 and August 2015. Kellermann waived his right to a jury trial. The case was tried to the district court on two days in April 2016.

The state called nine witnesses and introduced 72 exhibits concerning multiple incidents, which may be summarized as follows: In August 2012, Kellermann threw full cans of soda and a steel ashtray at C.E.H., which caused cuts to her head. She told a police officer that she feared that Kellermann might return to the house and kill her. Later in the same month, Kellermann telephoned C.E.H. multiple times after being served with an OFP and a petition for the dissolution of their marriage. She testified that the telephone calls made her upset and nervous. In September 2012, Kellermann sent C.E.H. multiple letters in which he sought to resume their relationship, which made her feel upset, scared, and anxious. In December 2012, Kellermann sent C.E.H. 179 text messages over a six-day period, some of which included photographs of Kellermann with a gun to his head or in his mouth. C.E.H. testified that the text messages made her upset and scared. In May and

August of 2013, C.E.H. reported to police that vehicles at her house were on fire and that she suspected Kellermann of setting them on fire. In August 2015, Kellermann arrived uninvited at C.E.H.'s home, banged on her front door, screamed, swung a baseball bat, and threatened to hit her car with the bat. She testified that the incident made her scared and upset.

Kellermann did not testify. After the evidentiary phase of trial, the district court requested supplemental briefing on two specific issues. The state submitted a memorandum. Kellermann's trial attorney submitted a memorandum and a written closing argument. In May 2016, the district court issued an order in which it found Kellermann guilty. The district court sentenced Kellermann to 45 months of imprisonment. Kellermann appeals.

D E C I S I O N

Kellermann argues that his trial attorney provided him with ineffective assistance of counsel and that, as a consequence, he is entitled to a new trial.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. A criminal defendant's "'right to counsel is the right to the *effective* assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)) (emphasis added). In most cases, an offender claiming a violation of the constitutional right to counsel must prove two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064.

In three circumstances, however, a criminal offender may establish a claim of ineffective assistance of counsel without proving the two requirements of *Strickland*. *See United States v. Cronic*, 466 U.S. 648, 658-62, 104 S. Ct. 2039, 2046-49 (1984). The first and "'[m]ost obvious'" situation is the "'complete denial of counsel'" at a "'critical stage.'" *Bell v. Cone*, 535 U.S. 685, 695, 122 S. Ct. 1843, 1851 (2002) (quoting *Cronic*, 466 U.S. at 659, 662, 104 S. Ct. at 2047, 2049). The second situation is when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* at 696, 122 S. Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047). And the third situation is when "counsel is called upon to render assistance under circumstances where competent counsel very likely could not" do so. *Id.* at 696, 122 S. Ct. at 1851. In each of these three situations, the lack of assistance is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S. Ct. at 2046. These three situations constitute a "narrow exception" to the *Strickland* test in which it is unnecessary to inquire into the effect of counsel's performance because prejudice may be presumed. *Florida v. Nixon*, 543 U.S. 175, 190, 125 S. Ct. 551, 562 (2004).

Kellermann's argument for reversal relies both on *Strickland* and on *Cronic*'s second exception to *Strickland*. He first argues that his trial attorney was ineffective because he did not "subject the prosecution's case to meaningful adversarial testing." *See Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047. He argues in the alternative that his trial attorney's performance was deficient and that the attorney's deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A.

Kellermann first argues that his trial attorney was ineffective by not subjecting the state's case to meaningful adversarial testing at trial. Specifically, Kellermann asserts that his trial attorney "waived opening statement, waived cross-examination of the majority of the state's witnesses, briefly cross-examined the other witnesses on points that were conceded by the state, failed to introduce evidence of [his] version of events, and submitted a one-and-one-half-page written closing argument that was wholly irrelevant to a determination of [his] guilt."

Kellermann's allegations concerning his trial attorney's performance do not reflect a failure to subject the state's case to meaningful adversarial testing. The second *Cronic* exception applies only if "the attorney's failure [is] complete" in the sense that "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing,'" not merely that "counsel failed to do so at specific points." *Bell*, 535 U.S. at 697, 122 S. Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047). The second *Cronic* exception does not apply if defense counsel waives the opportunity to make a closing argument. *Id.* at 697-98, 122 S. Ct. at 1851-52; *State v. Dalbec*, 800 N.W.2d 624, 628 (Minn. 2011). In

this case, Kellermann contends that his trial attorney's performance was deficient because, among other things, he submitted a very short written closing argument that was unhelpful. Kellermann's trial attorney did more than the attorney in *Dalbec*; he actually submitted a closing argument, whereas the attorney in *Dalbec* did not. *See Dalbec*, 800 N.W.2d at 628. If the second *Cronic* exception did not apply in *Dalbec*, it also does not apply in this case.

Kellermann's other contentions also do not fit within the second *Cronic* exception because they are based on his trial attorney's alleged failure "at specific points" in the trial rather than his trial attorney's "fail[ure] to oppose the prosecution throughout" the trial. *See Bell*, 535 U.S. at 697, 122 S. Ct. at 1851. For example, his allegation that his trial attorney cross-examined only some of the state's witnesses and only briefly is similar to the allegation in *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464 (1986), that the offender's trial attorney did not introduce mitigating evidence at a sentencing hearing. *Id.* at 184, 106 S. Ct. at 2473. The United States Supreme Court analyzed the offender's ineffectiveness claim by applying the *Strickland* test, not one of the exceptions in *Cronic*. *Id.* at 184-87, 106 S. Ct. at 2473-74.

Thus, Kellermann cannot establish that his trial attorney was ineffective on the ground that he did not subject the state's case to meaningful adversarial testing.

B.

Kellermann argues in the alternative that his trial attorney was ineffective by "failing to assert a legally viable defense" in his written closing argument. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Specifically, Kellermann argues that his trial attorney did not sufficiently understand the applicable law when he argued that there was a break in

time between the first four incidents, which occurred in 2012, and the last incident, which occurred in 2015. Kellermann contends that the argument was flawed because the state may establish a pattern of stalking by proving that he engaged in two or more criminal acts within a five-year period, regardless whether there is a break in time between the criminal acts. *See* Minn. Stat. § 609.749, subd. 5(b); *State v. Mullen*, 577 N.W.2d 505, 507 (Minn. 1998).

As stated above, an offender seeking to establish ineffective assistance of counsel generally must prove that his attorney's "performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. An attorney's performance is deficient if he or she fails to "exercise[] the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). In evaluating the effectiveness of counsel, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. That presumption is justified in part by the need to "give trial counsel wide latitude to determine the best strategy for the client." *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). Accordingly, an attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

Kellermann contends that his trial attorney's written closing argument was deficient because the attorney cited *State v. Bustos*, 861 N.W.2d 655 (Minn. 2015), an opinion that Kellermann contends is inapplicable because it concerns a different offense, domestic-

abuse murder. Kellerman's trial attorney likely cited *Bustos* because the district court referred to *Bustos* in a comment during the state's oral closing argument. Given the district court's interest in the *Bustos* opinion, an attorney reasonably could decide to cite the opinion in a written closing argument for the purpose of influencing the trial judge's understanding of the opinion and how it should be applied. Kellermann's trial attorney did not cite *Bustos* for purposes of the elements of the charged offense but, rather, for the narrower principle that the state must prove each act within a pattern beyond a reasonable doubt. *See Bustos*, 861 N.W.2d at 661. By citing *Bustos*, the trial attorney did not fail to "exercise[] the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *See Swaney*, 882 N.W.2d at 217.

Even if Kellermann could establish that his trial attorney's performance was deficient, he would need to establish that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. In general, the possibility of prejudice is significantly reduced in a court trial as compared to a jury trial. *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009); *Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). In this case, Kellermann contends that, if his trial attorney had not been focused on the closing argument that he made, he might have developed and pursued a better theory, such as an argument that the state did not prove that Kellermann's conduct caused C.E.H. to fear bodily harm. The record indicates that such an argument likely would not have prevailed because the state presented evidence that Kellermann had engaged in violence and threats of violence and because C.E.H. testified on direct examination that Kellerman's violent conduct made her feel "upset" and "scared" and caused her to believe

that he might kill her. Kellermann asserts no other reasons why the verdict might have been different if his trial attorney had not cited *Bustos* in his written closing argument.

Thus, Kellermann has not established that his trial attorney's performance was deficient or that any deficiency prejudiced his defense.

In sum, Kellermann is not entitled to a new trial on the ground that his trial attorney provided him with ineffective assistance of counsel.

Affirmed.