STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0022

Kauser Mohamoud Yusuf, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 17, 2017
Affirmed
Kirk, Judge

Ramsey County District Court
File No. 62-CR-13-9491

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

KIRK, Judge

Following a joint trial by jury, appellant Kauser Mohamoud Yusuf and codefendant Jonathan Edwards were both convicted of aiding and abetting first-degree sex trafficking of a

juvenile, T.S. Because we conclude that the postconviction court did not err in denying appellant's petition for postconviction relief, we affirm.

FACTS

In November 2013, Backpage.com received an e-mail that referenced an ad that was posted on its site. The e-mail stated: "These pictures was taking of me and posted on backpage the people that posted them have been making me sleep with the guys that called im only 15 years old . . . . Please help . . . ." The investigation uncovered several ads posted from September 7 to November 24, 2013 on Backpage.com containing photographs of T.S., a 15-year-old, that promoted sexual services from "Star," identified as a 19-year-old black female. Law enforcement traced the Backpage.com ads to an Edmund Avenue address in St. Paul where appellant and codefendant resided. Officers conducted a welfare check at the residence on November 25, 2013. Appellant reluctantly allowed law enforcement in; T.S. was not present. At the rear of the residence, officers observed a poorly lit bedroom separated by a black sheet that contained a blow-up mattress and female clothing. In December 2013, police executed a search warrant at the residence and found photographs of T.S. in lingerie in a kitchen drawer. Appellant provided her phone number to officers, which was later confirmed as one of the numbers listed on the Backpage.com ads.

At trial, several witnesses testified as to out-of-court statements that T.S. made in a notebook and to law enforcement, family members, and a registered nurse at Midwest Children's Resource Center. The district court admitted these statements, some of which were objected to. In these statements, T.S. revealed that appellant and codefendant trafficked her for sex. They took her to two hotels, where codefendant took photos of her in lingerie; other

photos were taken at the Edmund Avenue address. The photos were used for ads on Backpage.com. T.S. lived in appellant and codefendant's home for a period of time. They gave her "pretty clothes" and helped prepare her for customers. Appellant took customer calls on codefendant's phone and made arrangements for customers to come to the Edmund Avenue address, where T.S. had sex with them in the back bedroom. T.S. said she had sex with 7 to 20 men a day, collected the money from customers, and gave it to codefendant and appellant. T.S. said she did not want to have sex with the men but wanted to help out with money.

Over appellant's objection, appellant's and codefendant's cases were tried jointly, and both were convicted by jury of aiding and abetting first-degree sex trafficking of T.S. Appellant was sentenced to 90 months in prison in February 2015.[1] Codefendant appealed his conviction to this court in May 2015. Appellant petitioned for postconviction relief in April 2016, and the postconviction court stayed consideration pending the decision in codefendant's appeal. On May 23, 2016, this court affirmed codefendant's conviction and sentence in an unpublished opinion, *State v. Edwards*, No. A15-0836, 2016 WL 2945947 (Minn. App. May 23, 2016), *review denied* (Minn. Aug. 9, 2016).[2] This court found that the district court did not abuse its discretion or commit plain error in admitting objected-to and unobjected-to hearsay statements and did not commit plain error in joining the cases for trial. *Id.* at *3-6, *9. On November 7, 2016, the postconviction court denied appellant's petition

[1] Codefendant was sentenced to 240 months in prison.

[2] The United States Supreme Court denied codefendant's petition for a writ of certiorari on November 14, 2016. *Edwards v. Minnesota*, 137 S. Ct. 484 (2016).

for postconviction relief. The postconviction court did not address appellant's hearsay challenges because they were addressed and affirmed by this court in codefendant's appeal. This appeal follows.

D E C I S I O N

We review the denial of a petition for postconviction relief for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "We will not disturb a postconviction court's decision unless the . . . court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *Dobbins v. State*, 788 N.W.2d 719, 725 (Minn. 2010) (quotation omitted).

I. The postconviction court did not err in holding that the district court did not abuse its discretion in jointly trying appellant's and codefendant's cases.

The postconviction court held that the district court did not abuse its discretion in granting the state's motion for joinder over appellant's objection.[3] In reviewing joinder decisions, the appellate court makes "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (quotation omitted); *see* Minn. R. Crim. P. 17.03, subd. 2. If

[3] Because appellant objected to joinder at the district court, we review joinder under an abuse-of-discretion standard here. *See State v. Martin*, 773 N.W.2d 89, 94 (Minn. 2009) (reviewing the grant of a joinder motion for an abuse of discretion where the defendant objected); *State v. Jackson*, 773 N.W.2d 111, 116 (Minn. 2009) (same). Codefendant did not object to joinder prior to his trial or suggest that he moved for severance. *Edwards*, 2016 WL 2945947, at *9. Thus, this court reviewed joinder for plain error in codefendant's appeal. *Id.*

joinder was erroneous, it is subject to harmless-error analysis. *State v. Blanche*, 696 N.W.2d 351, 370 (Minn. 2005). Under Minn. R. Crim. P. 17.03, it is within the district court's discretion to order a joint trial when two or more defendants are charged with the same offense, but the court must consider: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. This rule neither favors nor disfavors joinder. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). This court conducts an independent inquiry into the district court's decision to grant a joint trial.

A. Nature of the offense charged

Minnesota courts have found that "[j]oinder is appropriate when codefendants act in close concert with one another." *Blanche*, 696 N.W.2d at 371. Emphasis is placed on the similarity of charges and evidence. *Id.*; *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999) ("The identical nature of the charged offenses and the nearly identical evidence against each defendant supports the trial court's decision to join [the defendants] for trial."). Here, appellant and codefendant were charged with the same criminal offense for the sex trafficking of the same minor victim, T.S. The district and postconviction courts found that the evidence would have been substantially the same and admissible against both. The record supports this conclusion. Despite appellant's denial of involvement, there is substantial evidence that appellant and codefendant worked closely in concert to traffic T.S. for sex—they took T.S. to hotels; codefendant took photos of T.S. for the Backpage.com ads; they bought T.S. lingerie; helped prepare T.S. for customers; answered calls and arranged for T.S. to meet customers at their home; and collected the money from T.S. *See Martin*, 773 N.W.2d at 99-100 (affirming

joinder where codefendants were charged with the same crimes, there was substantial evidence that they worked in close concert, and the majority of evidence was admissible against both); *Jackson*, 773 N.W.2d at 118-19 (same).[4]

B. Impact on the victim

Here, the district court and the postconviction court concluded that T.S. would have been particularly affected by two trials, given her fragile mental state as a runaway and the humiliation and trauma of having to recount her sexual abuse in court. The district court emphasized that T.S. was a minor victim of sexual assault, and the emotional toll would have been significant. The Minnesota Supreme Court has considered "the impact on both the victim of the crime as well as the trauma to the eyewitnesses who would be compelled to testify at multiple trials." *Blanche*, 696 N.W.2d at 371. This court has rejected "sweeping and cavalier statement[s] about the lack of any impact on . . . [a] victim of being required to testify in separate trials." *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). The district court's analysis, reiterated by the postconviction court, is sound. At the time of trial, T.S. was a developmentally delayed[5] 16-year-old teenager who had prostituted herself under appellant and codefendant's direction. T.S. was scared to testify at trial. T.S. changed her testimony at trial, saying she still cared for appellant and

[4] *Martin* and *Jackson* were parallel appeals from two codefendants. Both were convicted of first-degree premeditated murder and sentenced to life imprisonment after a joint trial. *Martin*, 773 N.W.2d at 97; *Jackson*, 773 N.W.2d at 118. Each codefendant appealed, and the analysis of the joinder issue in both appellate opinions is very similar. *Id.* at 99-100; *id.* at 118-19.

[5] T.S.'s mother testified that T.S. had an individual education plan and was at a third-grade level.

codefendant and did not want them to get into trouble. The evidence in the record supports the conclusion that testifying at multiple trials would have been particularly painful to T.S.

C. Potential prejudice to the defendant

"Joinder is not appropriate when there would be substantial prejudice to the defendant, which can be shown by demonstrating that codefendants presented 'antagonistic defenses.'" *Martin*, 773 N.W.2d at 100 (quoting *Santiago*, 644 N.W.2d at 446); *Jackson*, 773 N.W.2d at 119 (quoting *Santiago*, 644 N.W.2d at 446). "Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants." *Martin*, 773 N.W.2d at 100 (quotations omitted). Appellant contends that her defense implicated codefendant's guilt because she admitted that they both knew T.S. and rented a room to her, while codefendant initially denied ever knowing T.S.[6] Appellant does not explain why that constitutes an antagonistic defense, and the district and postconviction courts were unconvinced. The postconviction court said that the "exact opposite [of antagonistic defenses] occurred" here. We agree. The record shows that appellant and codefendant did not present alternative defenses—both generally denied any involvement in trafficking T.S., and neither tried to shift the blame to the other to exculpate him or herself. The choice for the jury was between the state's theory and each defendant's theory of the case, not between antagonistic defenses of the codefendants. *See Greenleaf*, 591 N.W.2d at

[6] Appellant said that T.S. only stayed a week. Appellant said she hardly knew T.S. and thought she was 19 years old. Appellant initially denied knowing about Backpage.com but later admitted to seeing ads on T.S.'s computer. Appellant also generally denied any involvement in trafficking T.S. but later admitted to law enforcement that she left out a "whole lot of information" and asked if she could get "a deal" if she "came clean."

499-500 (upholding joinder when defendant claimed innocence, intoxication, and duress but codefendant simply claimed innocence). Appellant did not suffer substantial prejudice from the joinder.

D. Interests of justice

Finally, the district court and postconviction court properly rejected appellant's argument that separate trials were necessary in the interest of justice. The state listed over 20 witnesses. The evidence supports the conclusion that significant judicial time and resources were saved by joining the cases for trial. The length of separate trials is a legitimate factor in granting joinder. *Martin*, 773 N.W.2d at 100 (citing *Powers*, 654 N.W.2d at 675-76). The evidence here would have been nearly identical if two trials were held. *See id.* at 100 (upholding joinder where separate trials would have dragged on and nearly the same evidence would likely have been presented); *Jackson*, 773 N.W.2d at 119 (same). Further, because sex trafficking cases tend to generate significant media coverage, there was also a risk of prejudice to potential jury pools in requiring two trials.

Based on this court's independent inquiry under Minn. R. Crim. P. 17.03, subd. 2, the district court's decision to grant joinder was appropriate and appellant suffered no substantial prejudice as a result. Therefore, the postconviction court did not err in finding that the district court did not abuse its discretion when the postconviction court denied appellant's petition for postconviction relief.

II. The postconviction court did not abuse its discretion in declining to address appellant's hearsay challenges.

Appellant argues that the district court erred by admitting objected-to and unobjected-to out-of-court statements that T.S. made in a notebook and to a nurse, family members, and to law enforcement. The postconviction court declined to address appellant's challenge to the admission of these statements because it determined that this court had previously addressed this exact issue in our unpublished opinion in *Edwards*, 2016 WL 2945947, at *1-6. Appellant now challenges the admission of the same hearsay statements, and offers, almost verbatim, the exact argument and evidence that were presented by codefendant on appeal, which this court previously considered and rejected in *Edwards*. *Id.* at *3-6. Although not precedential, unpublished opinions may be persuasive. *State v. Roy*, 761 N.W.2d 883, 888 (Minn. App. 2009), *review denied* (Minn. May 19, 2009). In codefendant's appeal, this court concluded that the district court did not abuse its discretion by admitting the objected-to statements made by T.S. to the nurse at Midwest Children's Resource Center, because they were obtained for the purposes of medical treatment and admissible under the medical-diagnosis exception. *Id.* at *4-5; Minn. R. Evid. 803(4). This court also affirmed the district court's admission of unobjected-to statements made by T.S. in her notebook and to law enforcement and to family members, because it was "not clear or obvious that the statements would have been inadmissible under the residual hearsay rule," and therefore the codefendant was "not entitled to relief under the plain-error standard of review." *Id.* at *5-6. Although our unpublished opinion in *Edwards* is not precedential, we conclude that the reasoning is persuasive and fully addresses the exact issue and argument that this court is now asked to review in this appeal.

Thus, we adopt our previous reasoning here. Our previous analysis is especially persuasive, where, as here, two codefendants were found guilty of the same offense after a joint trial, with substantially the same evidence admitted against both, and where one codefendant previously raised the exact same challenge on appeal, which this court fully addressed. *See, e.g.*, *Martin*, 773 N.W.2d at 99-100; *Jackson*, 773 N.W.2d at 118-19 (adopting a very similar, at times identical, analysis of the joinder issue in two separate opinions published by the Minnesota Supreme Court on the same day, after each codefendant presented substantially the same argument and challenge to the district court's grant of joinder in his individual appeal). Accordingly, we cannot conclude that the postconviction court abused its discretion when it relied on our opinion in *Edwards*, declined to address appellant's hearsay challenges, and thereby denied appellant's request for postconviction relief on this issue.

III. The record is insufficient to conclude that appellant received ineffective assistance of counsel.

Appellant raises the issue of ineffective assistance of counsel for the first time in her supplemental brief.[7] Appellant argues that her counsel failed to conduct its own discovery, to investigate and present exculpatory evidence, to challenge the evidence against her, and to object to the admission of evidence and testimony at trial. To succeed on an ineffective-assistance-of-counsel claim, a defendant must show that her counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that,

[7] Appellant did indicate to the district court at the omnibus hearing that she wanted to hire private counsel and she had time to do so before the trial. At the sentencing hearing, appellant also asked for an opportunity to hire private counsel for sentencing because she was unsatisfied with her counsel. But the sentencing judge denied the request, stating that appellant had had ample time to hire private counsel prior to sentencing.

but for the counsel's unprofessional errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). The reason is that a "postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id*. (quotation omitted). Without those additional facts, "any conclusions reached by [an appellate] court . . . would be pure speculation." *Id*. If the trial record is sufficiently developed, an appellate court may consider and decide the claim on direct appeal. *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001).

Here, appellant did not explicitly raise the issue of ineffective assistance of counsel at the district court or in her petition for postconviction relief. Thus, the district court and postconviction court records are devoid of any facts, discussion, or argument to support appellant's contention that her counsel's performance was deficient. And appellant's supplemental brief makes only vague, unsubstantiated claims without a basis in the record or the law. Absent pure speculation, the record is not sufficiently developed for this court to conclude that counsel's representation was ineffective. And this court declines to reach the merits of the ineffective-assistance-of-counsel claim.

Affirmed.