STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1679

State of Minnesota,
Respondent,

vs.

Kyle Alan Johnson,
Appellant.

Filed August 20, 2018
Affirmed
Bratvold, Judge

Isanti County District Court
File No. 30-CR-16-779

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

Janet Reiter, Chisago County Attorney, Brian J. Duginske, Assistant County Attorney, Center City, Minnesota (for respondent)

John C. Lillie, III, Kelsey Law Office, P.A., Cambridge, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Cleary, Chief Judge; and Smith, Tracy M., Judge.

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

BRATVOLD, Judge

In this direct appeal from a conviction for providing alcohol to a minor, appellant argues that he is entitled to a new trial because he received ineffective assistance of counsel. Because the record is not sufficiently developed to decide appellant's ineffective-

assistance-of-counsel claim, we do not address his claim and observe that today's decision is without prejudice to his right to a postconviction proceeding that would decide his claim. Accordingly, we affirm.

FACTS

In November 2016, the state charged appellant Kyle Alan Johnson with providing alcoholic beverages to persons under 21 years of age, in violation of Minn. Stat. § 340A.503, subd. 2(1) (2016).[1] The state's case was tried to a jury on June 12-13, 2017, and included evidence about events from the spring and summer of 2014. At that time, Johnson, who was a Cambridge-Isanti High School graduate from 2011, was the assistant coach for the high school basketball program, an assistant coach for the boys' and girls' track and field team, a lunch room supervisor, and an assistant classroom paraprofessional.

B.B. testified that Johnson provided him with alcohol "six to ten" times during the spring and summer of 2014, while he was a high school student. B.B. explained that he would "text [Johnson]" to bring the alcohol to the parties and Johnson would bring the alcohol in a "floor compartment" of his sport utility vehicle.

B.B. also testified that he first discussed these events when contacted by the school district and again when contacted by a police investigator in June or July 2016. He also

[1] The state's complaint included another count alleging that Johnson provided alcohol to a second high school student. Before the trial began, the state disclosed that the second student was unavailable to testify and moved to admit his affidavit and sworn testimony from a school-board hearing under Minn. R. Evid. 804(b)(3). Johnson's trial counsel opposed the admission of the second student's prior statements. The district court excluded all statements from the second student and later granted the state's motion to dismiss the second count.

mentioned testifying at a school board hearing about the same events.[2] An audio recording of B.B's statements to the investigator was played to the jury. During cross-examination, Johnson's trial counsel asked B.B. if he had "felt some pressure" when speaking with the school board or the investigator. B.B. denied feeling pressure, although he stated that the school board was "digging pretty hard for some answers." B.B. testified that someone from the school district promised he would not "get in trouble."[3]

Johnson testified in his defense that, while working at the high school, he had reported "at least half a dozen" students to the school administration for violating the school's "code of conduct," including possession of tobacco, ammunition, and pocket knives while in school. Johnson added that students accused him of "narcing on" them.

Johnson also testified that it was not against the code of conduct for him to "socialize with the students" "off the school grounds," and that he attended the "occasional party" with students. He testified that if he saw alcohol at these parties he would "mind [his] own business." Johnson specifically denied drinking with students and denied providing them

[2] The trial included brief mention that, in mid-2014, Johnson ran for school board and was elected. In mid-2016, the school board conducted hearings in response to complaints that Johnson had provided alcohol to minors. In a settlement that was discussed on the record but not disclosed to the jury, Johnson resigned from the school board.

[3] The state also called K.F., a high-school student, and she testified that she had been at parties at B.B.'s house, saw Johnson at these parties, but denied seeing Johnson "give alcohol to anyone." James Mott, an investigator from the Chisago County Sheriff's Office, testified that he had interviewed several students, including B.B., for the school board and several students told him that Johnson "had provided alcoholic beverages to some" students. Mott also described his investigation into the type of vehicle registered to Johnson and the vehicle's storage compartments.

alcohol. During closing arguments, Johnson's attorney argued that the school board had threatened B.B. in order to elicit testimony against Johnson.

The jury found Johnson guilty. The district court sentenced Johnson to 180 days in jail, but stayed execution for two years. This appeal follows.

D E C I S I O N

Johnson challenges his conviction and requests a new trial, by raising one issue: whether he received effective assistance of counsel "throughout the proceedings." The two-prong test for reversing a conviction for ineffective assistance of counsel requires that Johnson demonstrate: (1) that his trial counsel's performance was deficient, and then (2) that the deficient performance prejudiced the defense. *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)).

In his brief to this court, Johnson makes numerous allegations about his counsel's deficient performance. First, Johnson alleges that, before trial began, his trial counsel failed to respond to his calls and emails, failed to investigate the case, did not discuss trial strategy with him, and failed to prepare for trial. Second, Johnson claims that during trial his counsel did not call any witnesses other than him, even though he asserts that "two independent witnesses who would have testified that the allegations against [Johnson] stemmed from a desire to get [him] in trouble as revenge for [Johnson] getting some students in trouble at school." Johnson also argues that his trial counsel only minimally cross-examined the state's witnesses and did not introduce any exhibits. Finally, he argues that his trial counsel was "flippant" and "showed a pattern of unprofessionalism."

Johnson did not raise ineffective assistance of counsel in a postconviction petition. Usually, an ineffective-assistance-of-counsel claim must be raised in a postconviction petition for relief "because an evidentiary hearing, if granted, provides the district court with additional facts to explain the [trial counsel's] decisions." *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Gustafson*, 610 N.W.2d at 321). But when an ineffective-assistance-of-counsel claim may be resolved based on the trial record, the claim must be brought on direct appeal. *Ellis-Strong*, 899 N.W.2d at 535 (citing *Anderson v. State*, 830 N.W.2d 1, 10 (Minn. 2013)).

In *State v. Gustafson*, the appellant argued in a direct appeal from a conviction that she received ineffective assistance of counsel during her assault trial because her attorney "failed to ensure that the jury was adequately instructed as to the defense of accident, and failed to argue self-defense." 610 N.W.2d at 320. The supreme court affirmed the conviction after declining to reach the merits of the ineffective-assistance-of-counsel claim because "the record before [the court was] devoid of the information needed to explain the attorney's decisions," and any conclusions regarding whether the attorney's performance was deficient would be "pure speculation." *Id.* at 321. Similarly, in *State v. Jackson*, the supreme court denied appellant's ineffective-assistance-of-counsel claim because his allegations about his counsel's investigation and witness contacts "require[d] consideration of facts not in the trial record." 726 N.W.2d 454, 463 (Minn. 2007). The court's decision to affirm the conviction was without prejudice to appellant's "right to raise [the claims] in a postconviction proceeding." *Id.*

Here, as in *Gustafson* and *Jackson*, the record is not sufficiently developed to resolve Johnson's ineffective-assistance claim. To begin with, the record is completely devoid of any information regarding the pretrial communications between Johnson and his trial counsel; there is no evidence in the record about his attorney's investigation or his trial strategy, or his communications with Johnson. Further, the record is insufficient as to Johnson's claims of ineffective-assistance during trial. The trial record does not contain any evidence regarding Johnson's counsel's trial decisions, the reasons for those decisions, or the advice he provided to Johnson. Consequently, any decision by this court regarding whether the trial counsel's performance was deficient would be "pure speculation." *See Gustafson*, 610 N.W.2d at 321.

We deny Johnson's ineffective-assistance-of-counsel claims without prejudice to Johnson's right to pursue those claims in a postconviction proceeding.

Affirmed.