STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1995

State of Minnesota,
Respondent,

vs.

Brenda Lanise Bethune,
Appellant.

Filed August 2, 2021
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Mille Lacs County District Court
File No. 48-CR-18-1819

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Timothy Kilgriff, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from a judgment of conviction for aiding and abetting attempted second-degree murder, and following a stay and remand to the district court for

postconviction proceedings, appellant Brenda Lanise Bethune argues (1) that the district court abused its discretion by summarily denying her petition for postconviction relief based on ineffective assistance of counsel for failing to move to suppress evidence found during warranted searches; (2) that the district court erred by imposing sentences for both aiding and abetting attempted murder and aiding and abetting assault; and (3) in a pro se supplemental brief, that the state engaged in prosecutorial misconduct during closing argument. Because the district court did not abuse its discretion by determining that defense counsel's decisions were strategic and summarily denying postconviction relief, and because no prosecutorial misconduct occurred, we affirm in part. However, because the district court erred by imposing a sentence for assault when that offense arose out of the same behavioral incident as the attempted-murder offense, we reverse and remand for the district court to correct Bethune's sentence.

FACTS

The following facts were established at Bethune's jury trial. On August 3, 2018, C.A. and his wife N.A. were at C.A.'s mother's residence when a white Cadillac Escalade pulled up in front of the house. Bethune and a male, J.S., exited the vehicle and began to approach C.A. C.A. knew Bethune. About six months earlier, C.A. had arranged to illegally purchase prescription drugs from her. At that time, C.A. met Bethune and her son for the drug purchase; the son gave C.A. pills, and C.A. drove off without paying for them. That was the last time that C.A. saw Bethune before August 3.

Bethune and J.S. walked up the driveway and met C.A., shouting at him and demanding money. J.S. was carrying a gun. After some arguing among the parties, J.S.

fired his gun at the ground. J.S. then pointed the gun at "point-blank range" at C.A.'s head and fired. C.A. moved his head, and the bullet struck him in his right ear. C.A. moved his upper body into the doorway of his car and attempted to call 911 by accessing his vehicle's Bluetooth. J.S. fired a third shot, striking C.A. near his kneecap. Bethune and J.S. then kicked and punched C.A. while C.A. was trying to place the call. A neighbor, who witnessed the altercation, reported seeing J.S. with the gun.

C.A., through his vehicle's speakerphone feature, reached a police dispatcher, and Bethune was heard demanding money from C.A., shouting, "About that money you stole from my (inaudible) right now," "no police," and "(inaudible) will be a dead mother f----r." Bethune and J.S. fled after C.A. contacted the dispatcher. C.A. described the white Cadillac, gave the direction in which Bethune and J.S. had fled, and identified the female with J.S. as "Brenda."

Police intercepted the white Cadillac approximately a quarter mile away from the scene of the shooting. During an inventory search of the vehicle, officers located a small plastic bag containing a suspected controlled substance.

Returning to the scene, police located three 40-caliber Smith and Wesson shell casings. C.A. told officers that the gun J.S. used to shoot him was "silver" and had a "black handle." The following morning, officers located a black and silver 40-caliber Smith and Wesson on the side of the road somewhere between the scene and where the white Cadillac was intercepted by police.

The shell casings found in the driveway at the scene were later determined to have been fired from the gun found on the side of the road. The owner of the gun was of some

relation to J.S. J.S.'s clothes were later analyzed for blood, and his shirt returned around "100 spatter stains" consistent with a "spatter producing event" such as a "gunshot."

Officers later secured a warrant to search the white Cadillac and located "blue pills in a plastic bag" and prescription bottles belonging to Bethune. The pills in the vehicle returned as oxycodone-acetaminophen, hydrocodone (Vicodin), and Xanax. Bethune had prescriptions for two of the substances but not for the Vicodin. And, although Bethune had a prescription for the oxycodone-acetaminophen, the bottle was filled the day of the shooting, and, of the 60 pills dispensed, only 23 remained. During this search, a phone on the passenger seat was also collected. Pursuant to a second warrant, texts messages were recovered from Bethune's phone, including a series of messages exchanged between Bethune and C.A. surrounding the incident six months earlier, when C.A. stole approximately $400 worth of drugs from Bethune's son. In those messages, Bethune and C.A. referred to guns.

Respondent State of Minnesota charged Bethune with aiding and abetting attempted second-degree murder of C.A., second-degree assault of C.A., and fifth-degree possession of a controlled substance.

At a pretrial hearing, defense counsel discussed the "phone dump" and requested a continuance to review the evidence. Both defense counsel and the prosecutor indicated that they had received the evidence from the "phone dump" approximately ten days earlier, and defense counsel stated that she was not prepared to go forward. The district court granted a continuance on the basis of the additional evidence received, noting that it did not "want [the state's] case to be vulnerable to any claim of ineffective assistance of counsel because

something wasn't gone over and something was missed." Defense counsel did not thereafter challenge the text messages, the warrants, or the search of appellant's cellphone. Defense counsel also did not object to the state's introduction of the text messages at trial and, in fact, referred to those messages during direct examination of Bethune and referred to information reflected in the text messages during cross-examination of prosecution witnesses.

The jury found Bethune guilty of aiding and abetting second degree assault, aiding and abetting attempted second-degree murder, and fifth-degree drug possession.[1] The district court sentenced Bethune to a presumptive 173 months' imprisonment on the third count.

Bethune appealed, and this court stayed the appeal pending postconviction proceedings. Bethune petitioned for postconviction relief, arguing that she was entitled to a new trial because her lawyer provided ineffective assistance of counsel by failing to challenge the search warrants executed in this case. The district court denied Bethune's petition without an evidentiary hearing. We then reinstated this appeal.

DECISION

Bethune raises two challenges to her convictions: first, that the district court abused its discretion by summarily rejecting her ineffective-assistance-of-counsel claim; and second, in her uncounseled brief to this court, that the state engaged in prosecutorial misconduct. She also argues, and the state agrees, that the district court erred by sentencing

[1] The state had also charged Bethune with offenses against N.A., but the jury acquitted Bethune of those charges.

her for aiding and abetting second-degree assault because that offense occurred during the same behavioral incident as aiding and abetting second-degree attempted murder. We address each argument in turn.

I. The district court did not abuse its discretion by summarily denying postconviction relief.

Appellate courts review a district court's decision to deny postconviction relief for an abuse of discretion. *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020). A district court may summarily deny postconviction relief if the allegations in the petition are legally insufficient to entitle the petitioner to relief. *Id.* If a petitioner's claim is premised on ineffective assistance of counsel, the petitioner is entitled to an evidentiary hearing if the petitioner "allege[s] facts that, if proven by a fair preponderance of the evidence would satisfy the two-prong test set forth in *Strickland v. Washington*." *Id.* (quotation omitted).

The two-prong *Strickland* test requires a petitioner to prove that (1) "counsel's performance was deficient"—in other words, that the representation fell below an objective standard of reasonableness—and (2) "the deficient performance prejudiced the defense"—that is, that there was a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *see also State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013). If one prong is determinative, we need not review the other. *Chavez-Nelson*, 948 N.W.2d at 671. "Because claims of ineffective assistance of counsel involve mixed questions of law and fact," appellate courts review decisions by the postconviction court de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

We begin with the first prong of the *Strickland* test—the performance prong.

Bethune argues that her trial counsel's performance was objectively unreasonable because her counsel did not move to suppress text messages discovered during a warranted search of Bethune's cellphone. She contends that the two warrants under which the cellphone was searched violated her Fourth Amendment rights because both warrant applications were insufficiently particular regarding the scope of the search and because the warrants were not supported by probable cause that evidence of a crime would be found on the cellphone.

The district court summarily denied Bethune's postconviction petition. It determined that defense counsel's decision not to bring a suppression motion was based on trial strategy and was not objectively unreasonable. The district court noted that counsel referred to information from the text messages in opening statements to "present [Bethune]'s legal case," that defense counsel requested a recess when the messages were first admitted by the state to "ensure that all the text messages [defense counsel] intended to have in evidence were submitted," and that defense counsel used those text messages during her direct examination. The district court concluded that summarily denying postconviction relief was appropriate because, even if the facts alleged in the petition were accepted as true and were construed in the light most favorable to the petitioner, the record conclusively established that Bethune could not satisfy the performance prong of the *Strickland* test.

Appellate courts generally do not review ineffective-assistance-of-counsel claims "when the attorney's conduct in question is based on trial strategy." *Chavez-Nelson*, 948

N.W.2d at 671. Counsel's strategic decisions include "what evidence to present to the jury, what witnesses to call, and whether to object" to the state's evidence. *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (quotation omitted). "To meet the burden of *Strickland's* first prong, a defendant arguing ineffective assistance of counsel must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003) (quotation omitted). The reasonableness of counsel's conduct is considered based on the facts of each case and "viewed as of the time of counsel's conduct." *Id.* (quotation omitted).

Bethune argues that counsel's performance was unreasonable because the warrants were not sufficiently particular or supported by probable cause and a suppression motion therefore would have been granted. But a decision not to pursue even a likely-to-be-successful suppression motion is not per se ineffective assistance of counsel, particularly when the decision is based on sound strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87 (1986) (explaining that failure to file a meritorious suppression motion does not per se establish a Sixth Amendment violation). Here, the strategic nature of defense counsel's decision is evident from her theory of the case. At trial, defense counsel portrayed the state's main witness—victim C.A.—as the initial aggressor in this confrontation by highlighting that C.A. had stolen money from Bethune's son, had attempted to run over Bethune's son with his car, and had threatened Bethune since he was the first person to bring up firearms in their text-message exchange. Counsel questioned C.A. directly about the text exchanges, his threats over text involving firearms,

and his ownership of firearms. Counsel also questioned a deputy, who had known C.A. for "years," whether C.A. was known to have firearms. In light of this use of the text messages by the defense, we discern no error in the district court's determination that defense counsel's decision not to seek suppression of the text messages was based on trial strategy.

Bethune argues, though, that using the text messages as part of trial strategy was objectively unreasonable because the text messages were potentially harmful to her defense. But, again, as the district court observed, defense counsel used the text messages to advance the defense's theory of the case of C.A. as the aggressor. Defense counsel used information reflected in the text messages during her opening statement to portray C.A. as the aggressor and questioned various witnesses about C.A.'s gun ownership, C.A.'s threatening texts to Bethune mentioning firearms, and subsequent social media posts by the neighbor who witnessed the confrontation that C.A. got "what he deserved" and "someone finally got him."

Bethune contends, though, that trial counsel may simply have "had to make the best of a bad situation" by attempting to use some of the messages that she had failed to suppress. However, as the state points out in turn, the state presented substantial evidence of Bethune's guilt. Evidence of Bethune's guilt included the 911-dispatcher recordings of Bethune demanding money from C.A. and calling him a "dead mother f----r," as well as the testimony of three witnesses who stated that Bethune, demanding money, initiated the confrontation as J.S. directed a gun at C.A. Given the substantial evidence the state presented of Bethune's guilt, it may indeed have been reasonable strategy for the defense to use the text messages to portray the victim as the initial aggressor.

Bethune also argues that an evidentiary hearing is required "to determine whether counsel actually knew she could move to suppress the evidence under the Fourth Amendment" and, if so, whether she in fact subjectively considered and then rejected bringing a suppression motion. We disagree. Minnesota courts deny postconviction relief without an evidentiary hearing involving an inquiry into counsel's subjective state of mind when the record is sufficient to determine that the complained-of conduct is based on trial strategy. *See, e.g.*, *Carridine*, 867 N.W.2d at 493-94. Further, *Strickland* establishes an objective, rather than subjective, standard. 466 U.S. at 688, 104 S. Ct. at 2064. The "objective standard is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Opsahl*, 677 N.W.2d at 421 (quotation omitted). Under this objective standard, the record conclusively establishes that trial counsel's decision to utilize the text messages in Bethune's defense was objectively reasonable and based on trial strategy.

Bethune contends that *Nicks* compels a different result. 831 N.W.2d at 493. We disagree. In *Nicks*, a petition for postconviction relief was brought on an ineffective-assistance-of-counsel claim on the basis that Nicks's trial counsel failed to examine the decedent's cellphone or obtain her cellphone records, in a case in which "the State had to rely primarily on circumstantial evidence that included certain cellphone records." *Id.* at 496, 502. Nicks asserted that his "counsel attempted to get the cellphone records, wanted them, but due to inattention and misunderstanding did not get them." *Id.* at 505. The supreme court determined that it was evident from the record that trial counsel wanted to obtain the cellphone records and had made partial attempts to obtain them, but, even though

the records were "a pivotal issue" from the start of the police investigation, *id.*, trial counsel either "did not read, did not correctly interpret, or failed to understand the cellphone service provider's response to the subpoena," *id.* at 507. The supreme court thus concluded that counsel's course of action was distinguishable from cases where trial counsel's conduct fell within the range of unreviewable trial strategy. *Id.* The supreme court reasoned that Nicks's counsel wanted the evidence, presented a defense that turned on the evidence having been available, and then failed to take the steps necessary to obtain the evidence. *Id.* "Such a course of conduct," the supreme court concluded, "does not amount to trial strategy." *Id.* The supreme court determined that an evidentiary hearing was therefore required to resolve the ineffective-assistance-of-counsel claim. *Id.* at 508.

This case is distinguishable from *Nicks*. Here, defense counsel's course of conduct related to Bethune's theory of the case and Bethune does not argue that counsel suffered from any misunderstanding or deficiency or that her strategy was unreasonably executed. We conclude that, even when the facts alleged in Bethune's petition for postconviction relief are taken as true, the record conclusively demonstrates that Bethune cannot establish that she received objectively unreasonable assistance of counsel.

Because Bethune's ineffective-assistance-of-counsel claim fails under the performance prong of *Strickland*, we need not consider the second, prejudice prong.[2] The

[2] Bethune, citing *Kimmelman*, 477 U.S. 365, 106 S. Ct. 2574, asserts that "[a] court presented with a claim of ineffective assistance of counsel for failing to move to suppress evidence must first decide whether a suppression motion would have been granted." It is true that, if a court determines that a suppression motion would *not* have been granted, a petitioner's ineffective-assistance-of-counsel claim fails. *See Johnson v. State*, 673 N.W.2d 144, 150 (Minn. 2004). But, as the Supreme Court in *Kimmelman* makes clear, a

district court did not abuse its discretion by summarily denying Bethune's petition for postconviction relief.

II. Bethune's pro se claim of prosecutorial misconduct fails.

Bethune, in a pro se supplemental brief, argues that the prosecutor committed misconduct during closing argument by intentionally misstating the evidence and by improperly offering an opinion on Bethune's credibility. The state observes that Bethune did not object at trial and contends that her argument is actually just a disagreement over what the evidence established and that the prosecutor was properly arguing reasonable inferences to be drawn from the evidence.

Because the prosecutor's statements were not objected to at trial, any claim of prosecutorial misconduct is reviewed under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, the appellant first bears the burden of establishing an error and that the error is plain. *State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019). We need not address the remaining elements of the modified plain-error test if the appellant fails to establish an error.

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meritorious claim is a necessary, but not a sufficient, condition for establishing ineffective of assistance of counsel based on the failure to bring a suppression motion. *See Kimmelman*, 477 U.S. at 382, 106 S. Ct. at 2586-87 (stating that failure to file a likely meritorious suppression motion is not in itself ineffective assistance of counsel and that relief is available only to those persons who were denied a fair trial "by the gross incompetence of their attorneys"). Because a reasonable strategic decision not to bring a suppression motion is insufficient to establish inadequate counsel under *Strickland*'s performance prong—even if the motion likely would have been successful—we (like the district court in this case) need not evaluate whether a suppression motion would have been successful.

Appellate courts examine a prosecutor's closing argument as a whole, rather than examining selective phrases "that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). Prosecutors may present legitimate arguments based on the evidence and argue reasonable inferences based on that evidence but may not speculate without factual basis or "misstate the evidence." *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016) (quotation omitted).

Bethune first cites as error a statement in which she connects two disconnected sentences from the prosecutor's closing argument. The first sentence, in context, explains to the jury the meaning of "to aid and abet." The second sentence, in context, discusses the reasonable foreseeability of a shooting when threats are made with a firearm. Neither statement is erroneous.

Bethune next alleges that there is no evidence in the record of "a conversation" in which Bethune "asked, told or hired" J.S. to harm C.A. A careful review of the record shows that the prosecutor did not state that Bethune "asked, told or hired" J.S. to harm C.A. There are several instances of the prosecutor explaining the meaning of "to aid and abet," which incorporates similar language. This is not error.

Lastly, Bethune argues that the prosecutor improperly gave an opinion on Bethune's credibility. The prosecutor told the jury that there are a "[n]umber of factors that [it] can take in" when assessing Bethune's credibility and that the prosecutor "leave[s] that up to [the jury.]" This also is not error.

Because Bethune has not established error, her prosecutorial-misconduct claim fails.

III. The district court erred by imposing sentences for both aiding attempted murder and aiding second-degree assault.

Bethune argues that the district court erred when it sentenced her on both the conviction for aiding and abetting attempted murder and the conviction for aiding and abetting second-degree assault. The state agrees.

Minn. Stat. § 609.035 (2018) directs that, with exceptions not applicable here, "if a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1. A "person's conduct" under that statute "is limited to acts committed during a single behavioral incident." *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020). "Whether multiple offenses form part of a single behavioral act is a question of fact," but where the facts are undisputed, this court reviews de novo whether the offenses are part of the same behavioral incident. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). To determine whether offenses arose from a single behavioral incident, appellate courts consider "time and place . . . [and] whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) (quotation omitted).

The relevant facts are not in dispute. Both offenses occurred during the same confrontation, on the same day, at one residential address, and involved a physical attack against one victim. Bethune's actions underlying both offenses evince a unity in time and in place and were motivated by the same criminal objective. They therefore arose from a single behavioral incident. We therefore reverse and remand for the district court to correct

the warrant of commitment by vacating Bethune's sentence for aiding second-degree assault.

Affirmed in part, reversed in part, and remanded.