STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1578

State of Minnesota,
Respondent,

vs.

Christopher Lee Konakowitz,
Appellant.

Filed August 29, 2022
Affirmed
Reyes, Judge

Brown County District Court
File No. 08-CR-20-335

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Charles W. Hanson, Brown County Attorney, Jill M. Jensen, Assistant County Attorney, New Ulm, Minnesota (for respondent)

Michelle K. Olsen, Jacob M. Birkholz, Birkholz & Associates, L.L.C., Mankato, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues on direct appeal for reversal of his criminal-sexual-conduct convictions because (1) the statute of limitations had expired; (2) the state delayed charging

him in violation of his due-process rights; and (3) he received ineffective assistance of counsel. We affirm.

FACTS

In 2003, appellant Christopher Lee Konakowitz pleaded guilty to fourth-degree criminal sexual conduct for an offense involving J.M., a minor. As part of his probation for that offense, he participated in sex-offender treatment, including a polygraph examination in June 2008. During that polygraph examination, appellant admitted to the fourth-degree criminal-sexual-conduct offense. He also identified fifteen additional minor victims of sexual abuse, including "[C.], a four or five year-old sister of [M.]." Appellant admitted that "when [he] was 19, he fondled her bare vagina and performed oral sex on her one time." Appellant's probation officer reviewed the polygraph results and wrote a short report, which noted the victims' ages and the sexual conduct appellant admitted to but did not include the victims' names. The probation officer did not disclose the polygraph results or his report to the district court or to police.

In November 2019, respondent State of Minnesota charged appellant with sexual abuse of other minors. C.R. learned that appellant had been charged and posted on Facebook that appellant had done the same thing to her.

In January 2020, Brown County Human Services received a child-protection report that included the probation officer's 2008 polygraph report. The county then disclosed both reports to Brown County police.

On April 21 and April 24, 2020, a Brown County Sheriff's Office investigator interviewed C.R. regarding her Facebook post about appellant. C.R. told the investigator

that appellant sexually assaulted her when she was about five years old, which would have been around 2001 or 2002. C.R. stated that appellant had been babysitting her and they watched a movie. C.R. remembered falling asleep on an air mattress and waking up to appellant's hand in her pants, touching her genitals. C.R. told the investigator that she had not told anyone about appellant's sexual abuse until she was ten years old, when she told her mother, and that she never reported it to law enforcement.

During the April 24 interview, the investigator and C.R. also discussed the 2001 investigation regarding J.M. As part of that investigation, police had investigated an incident when appellant gave J.M. and C.R. a bath and used a butter knife to lock the door while he bathed them. C.R. vaguely remembered the bathroom incident but could not recall anyone talking to her about it at the time. She also stated that she did not remember anything sexual happening during the bathroom incident. The investigator explained to C.R. that social workers had spoken to her about the bathroom incident, but she had not disclosed any abuse. C.R. told the investigator that she had not told anyone about the air-mattress incident except her mother, who had assumed she was referring to the bathroom incident until 2020 when C.R. told her the details of the air-mattress incident. The investigator contacted C.R.'s mother, who confirmed that she learned about the air-mattress incident only a few weeks earlier. The investigator obtained a search warrant for and then reviewed a copy of appellant's 2008 polygraph results. The investigator also received and reviewed police records of the 2001 investigation that led to appellant's 2003 conviction.

On May 1, 2020, the state charged appellant with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2000), and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 2 (2000), based on C.R.'s allegations regarding the air-mattress incident.

On May 7, 2020, C.R. contacted the investigator to report a second incident of sexual abuse by appellant, which C.R. had just recalled. C.R. recalled that appellant had been helping her get ready for bed and had jabbed his finger into her vagina repeatedly. C.R. stated that she had not previously reported this second incident to law enforcement.

Shortly after, on June 4, the state amended its complaint to add a second charge of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b), based on C.R.'s additional recollection. During a subsequent interview with the investigator, C.R. stated that the second incident may have been on the same day as the bathroom incident. The investigator noted that police interviewed C.R.'s mother about the bathroom incident in 2001 but had found that nothing happened. C.R. confirmed again that nothing happened during the bathroom incident.

Appellant moved to dismiss the charges, arguing that the statute of limitations had expired because appellant reported the offense to law enforcement authorities during his 2008 polygraph examination by identifying "[C.], a four or five year-old sister of [M.]," as a prior victim. At a contested omnibus hearing, the state presented testimony from the investigator and the probation officer who wrote the 2008 polygraph report. The parties also stipulated to the admission of appellant's polygraph results and the probation officer's 2008 report. The district court denied appellant's motion to dismiss after determining that

the probation officer was not a "law enforcement authority" and that the state filed charges within three years after C.R. reported the offense to the investigator in 2019, as required by the statute of limitations.

The parties agreed to a court trial under Minn. R. Crim. P. 26.01, subd. 3, based on stipulated evidence consisting of audio recordings of the investigator's interviews with C.R. and his investigation reports. The district court found appellant guilty of all three charges and sentenced him to 158 months in prison. This appeal follows.

DECISION

I. The state charged appellant within the statute of limitations.

Appellant first argues that the state charged him after the statute of limitations expired. We agree with the state that appellant forfeited this argument.

Appellate courts "generally consider only those issues that the record shows were presented and considered by the [district] court." *Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020) (quotation omitted). Issues not raised in the district court and raised for the first time on appeal are considered forfeited. *State v. Balandin*, 944 N.W.2d 204, 220 (Minn. 2020). A statute of limitations defense may be forfeited if a defendant fails to raise it in the district court. *See State v. Johnson*, 422 N.W.2d 14, 16-17 (Minn. App. 1988), *rev. denied* (Minn. May 16, 1988).

Appellant argues for the first time on appeal that the statute of limitations expired because law enforcement became "aware of allegations" against appellant in 2001. Appellant did not make this argument in the district court. Rather, he argued only that the statute of limitations expired because he reported the offense during his 2008 polygraph

examination. The district court rejected that argument after determining that the probation officer was not a "law enforcement authority," and appellant does not challenge that decision on appeal. *See State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2013) (declining to consider issues not briefed on appeal). We therefore conclude that appellant forfeited his argument that the statute of limitations expired. However, appellant also argues that he received ineffective assistance of counsel because his trial counsel failed to argue that the 2001 investigation triggered the statute of limitations. Because that claim requires us to address the merits of his argument, we will address them here.

"We review de novo the construction and application of a statute of limitations." *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. App. 2014) (quotation omitted). At the time of appellant's offenses, the applicable statute of limitations required the state to file the indictment or complaint "within nine years after the commission of the offense or, if the victim failed to report the offense within this limitation period, *within three years after the offense was reported to law enforcement authorities*." Minn. Stat. § 628.26(d) (2000) (emphasis added). The parties agree that the state did not charge appellant within nine years of the offense. At issue here is whether the state charged appellant "within three years after the offense was reported to law enforcement authorities." *Id.*

Appellant contends that the offense was reported to law enforcement in 2001, when "Brown County Family Services along with a police officer interviewed [C.R's] mother regarding incidents between [appellant] and [C.R.]." Appellant's argument requires us to interpret Minn. Stat. § 628.26(d). The first step of statutory interpretation is to determine whether the language of a statute is ambiguous. *State v. Pakhnyuk*, 926 N.W.2d 914, 920

(Minn. 2019). "The plain language of the statute controls when the meaning of the statute is unambiguous." *Id.* (quotation omitted). If a statute does not define a phrase, that phrase is given its plain and ordinary meaning. *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019).

Minn. Stat. § 628.26(d) unambiguously states that the statute of limitations begins to run when "the offense [is] reported to law enforcement authorities." The plain language of the statute focuses on "*the offense*" that is reported to law enforcement. The term "*the offense*" refers to the conduct involving each particular offense charged by the state. *See State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012) (noting that definite article "the" is "a word of limitation that indicates a reference to a *specific* object" (emphasis added)). It does not refer to general conduct.

Appellant argues that the 2001 police investigation of allegations against him regarding the bathroom incident triggered the statute of limitations for appellant's 2020 charges because the 2001 allegations "put law enforcement on notice" that a crime occurred. We disagree.

General allegations of appellant's potential sexual misconduct towards J.M. and C.R. do not constitute a report of "the offense" to law enforcement. To trigger the statute of limitations, conduct underlying the *particular offense* for which the state charged appellant must have been reported to law enforcement. And, here, nothing in the record indicates that anyone reported the conduct underlying appellant's current convictions to police in 2001. At that time, police investigated allegations relating to the bathroom incident. C.R. does not remember appellant sexually abusing her during that incident.

This is consistent with the investigator's statement that social workers talked to C.R. about the bathroom incident in 2001 and she did not disclose any abuse. C.R. told the investigator that she had not disclosed either of the two recently recalled incidents of sexual abuse to anyone in 2001. C.R.'s mother confirmed that she had not known about those incidents until the 2020 investigation. Finally, the investigator testified that police reports from 2001 did not include any reference to the offenses that C.R. described.

The record reflects that the conduct underlying appellant's current convictions was first reported to law enforcement in 2019 at the earliest, and the state charged appellant within three years of that report, as required by Minn. Stat. § 628.26(d). The state therefore charged appellant within the statute of limitations.

II. The state did not delay bringing charges in violation of appellant's due-process rights.

Appellant argues that the state's delay in charging him violated his due-process rights. We disagree.

Appellant's argument is based on his assumption that the offense was reported in 2001 and the state delayed charging appellant until 2020. But we have already concluded that the offense was not reported to law enforcement until 2019 at the earliest, and the state charged appellant less than a year later, in May and June 2020. Appellant has therefore failed to show that the state delayed charging appellant.

Moreover, even assuming we accepted appellant's argument that the state delayed charging him, his claim still fails. To show that a precharge delay violates due process, the defendant has the burden of establishing that (1) the precharge delay "caused substantial

prejudice" to the defendant's right to a fair trial *and* (2) the state "intentionally delayed" bringing charges "to gain [a] tactical advantage." *State v. Jurgens*, 424 N.W.2d 546, 550-51 (Minn. App. 1988) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971)), *rev. denied* (Minn. July 6, 1988); *State v. F.C.R.*, 276 N.W.2d 636, 639 (Minn. 1979) (stating that defendant must prove both prejudice and improper state purpose). We have carefully reviewed the record and conclude that appellant failed to show that he was substantially prejudiced by the alleged delay or that the state intentionally delayed charging him to gain a tactical advantage. Appellant's due-process rights were therefore not violated.

III. Appellant did not receive ineffective assistance of counsel.

Appellant argues that his trial counsel provided ineffective assistance by (1) failing to argue that the state had reports of allegations against him regarding C.R. in 2001 and (2) stipulating to the submission of polygraph test results, which appellant argues are inadmissible in criminal trials. We are not persuaded.

First, appellant argues, and we agree, that his ineffective-assistance-of-counsel claim can be decided based on the trial record. *See Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). When an ineffective-assistance-of-counsel claim is raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017).

The "performance" prong of the *Strickland* test requires appellant to show that his trial counsel's representation "fell below an objective standard of reasonableness." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019) (quoting *State v. Lahue,* 585 N.W.2d 785, 789 (Minn. 1998)). There is a strong presumption that counsel's performance was

reasonable. *Zornes v. State*, 880 N.W.2d 363, 370 (Minn. 2016). The "prejudice" prong requires appellant to show that "but for [trial] counsel's errors, there [is] a reasonable probability the result would have been different." *Id.* If appellant's claim fails to satisfy one of the *Strickland* prongs, we need not consider the other. *See id.*

Appellant first argues that his trial counsel provided ineffective assistance by failing to investigate fully the 2001 allegations and failing to argue that the state had reports of allegations against appellant regarding C.R. in 2001. But these are matters of trial strategy, which we do not review. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (stating that appellate courts "will not review ineffective-assistance-of-counsel claims based on trial strategy); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (stating that trial strategy includes extent of counsel's investigation); *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014) ("The determination of which defenses to raise represents an attorney's trial strategy."). In addition, we already concluded that the record shows that C.R. did not report any sexual abuse in 2001 and told no one about the two offenses for which the state charged appellant until many years later. A motion to dismiss appellant's charges based on the 2001 police investigation would therefore have failed, *see Schleicher v. State*, 718 N.W.2d 440, 448 (Minn. 2006) (rejecting ineffective-assistance-of-counsel claim when asserted defense would have failed on merits), and thus appellant cannot meet the "performance" prong of the *Strickland* test.

Appellant also argues that his trial counsel provided ineffective assistance by stipulating to the submission of his 2008 polygraph test results, which are inadmissible in criminal trials, because that stipulation "opened appellant up to further prosecution."

Although appellant is correct that polygraph results are not admissible in criminal trials to prove guilt or innocence, *State v. Dressel*, 765 N.W.2d 419, 425 (Minn. App. 2009)[1], appellant's trial counsel stipulated to the admission of the 2008 polygraph results and the probation officer's report to support a colorable, but ultimately unsuccessful, defense that they constituted a report to law enforcement that triggered the statute of limitations. Trial counsel's decision to use the polygraph-examination disclosures was therefore a matter of strategy, which we do not review. *See State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (concluding that counsel's choice of defense was trial strategy and stating that "[a]ppellate courts, which have the benefit of hindsight, do not review for competency matters of trial strategy"). Because appellant fails to show that his trial counsel's decision to stipulate to the admission of the polygraph results was objectively unreasonable, his claim of ineffective assistance of counsel fails. *See Sanchez-Diaz*, 758 N.W.2d at 848 (stating that if ineffective-assistance-of-counsel claim fails on one *Strickland* prong, appellate courts need not consider other prong).

Affirmed.

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[1] We note that, while the results of a polygraph examination and any reference to a defendant's willingness or refusal to submit to a polygraph are not admissible in a trial, evidence obtained *in connection with* a polygraph is not inadmissible just because it is obtained during a polygraph examination. *Dressel*, 765 N.W.2d at 425. Confessions made during a polygraph examination are therefore generally admissible as long as they were voluntary. *See State v. Erickson*, 403 N.W.2d 281, 283-84 (Minn. App. 1987); *see also State v. Schaeffer*, 457 N.W.2d 194, 197 (Minn. 1990) (establishing lone exception to polygraph-exclusion rule that defendant may present polygraph information as part of circumstances surrounding confession).