STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1140

Christopher Roosevelt Malcom, Sr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 9, 2012
Affirmed in part and reversed in part
Huspeni, Judge[*]

Goodhue County District Court
File No. 25-CR-08-1457

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

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

Stephen N. Betcher, Goodhue County Attorney, Stephen F. O'Keefe, Assistant County Attorney, Red Wing, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Hudson, Judge; and Huspeni, 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

HUSPENI, Judge

On appeal from the district court's denial of appellant's second petition for postconviction relief, appellant argues that the postconviction court erred by concluding that postconviction relief was unavailable to him. Appellant also contends that he received ineffective assistance of counsel based on his postconviction counsel's untimely filing of his first petition for postconviction relief. We affirm in part and reverse in part.

FACTS

In March 2008, two confidential informants (CIs) assisted police in conducting six controlled buys of cocaine from appellant Christopher Roosevelt Malcom. For each controlled buy, a CI arranged the transaction with appellant by telephone, police searched the CI and fitted the CI with a transmitter, the CI purchased cocaine from appellant, and police searched the CI after the transaction and recovered the purchased cocaine. One of the CIs, J.C., participated in four controlled buys involving the appellant: one in a van, one at J.C.'s residence, and two at the Red Wing residence of appellant and his girlfriend. The other CI, W.S., participated in two controlled buys of cocaine from appellant at appellant's residence, and two of appellant's girlfriend's children were present during one of those transactions. Police recovered a total of approximately 10.2 grams of cocaine from these six controlled buys.

In April 2008, Red Wing Police Officer Anthony Grosso executed a search warrant on appellant's residence where police recovered 14.4 grams of cocaine and arrested appellant. Appellant was charged with one count of child endangerment, a

violation Minn. Stat. § 609.378, subd. 1(b)(2) (2006); first-degree sale of a controlled substance, a violation of Minn. Stat. § 152.021, subd. 1(1) (2006); and several additional counts of various first- and second-degree controlled-substance offenses. At a jury trial in June 2008, the state presented testimony from the two CIs and several other police investigators. Officer Grosso, who assisted with all six controlled buys, testified that he listened via the transmitter and heard the CIs talk to someone whose voice Officer Grosso recognized as that of appellant. Officer Grosso also testified that he heard conversations between the CIs and appellant that were consistent with drug activity. In addition, Olmstead County Sheriff Deputy Jens Dammen testified that he heard W.S. and a male "discussing a narcotics transaction" during one of the controlled buys. And Officer Grosso testified that he heard children in the background during one of the controlled buys that occurred at appellant's residence. The jury found appellant guilty of all charges, and on July 25, 2008, appellant was sentenced to 146 months' imprisonment for his conviction of first-degree sale of a controlled substance, and a concurrent 365 days' imprisonment for his conviction of child endangerment.[1]

On January 27, 2009, the State Public Defender's Office assigned counsel to appellant to challenge his convictions. Appellant's counsel filed a petition for postconviction relief on July 28, 2010—two days after the time for filing such a petition had expired—arguing that the district court erroneously admitted evidence that constitutes hearsay and vouching testimony, and that the evidence presented at trial is insufficient to support appellant's conviction of child endangerment. Appellant's counsel

[1] The remaining convictions were not formally adjudicated.

subsequently acknowledged to the postconviction court that the petition was untimely filed due to a "calendaring error" and took full responsibility for the error. Nonetheless, the postconviction court dismissed appellant's petition as untimely because it was filed more than two years after he was sentenced, finding that appellant did not raise a time-limit exception and it "would not be in the interests of justice to hear the Petition." On October 4, 2010, the postconviction court denied appellant's motion for reconsideration.[2]

Appellant obtained new counsel and, on March 29, 2011, filed a second petition for postconviction relief that raised the same issues as were raised in his first petition—challenging alleged hearsay and vouching testimony and claiming insufficiency of the evidence to support his conviction of child endangerment. In addition, appellant raised a new issue in the second postconviction petition: he argued that his postconviction counsel's failure to timely file his first petition constituted ineffective assistance of counsel. He further argued that the Minnesota Constitution guarantees one review of a criminal conviction. The postconviction court dismissed appellant's second petition, observing that it "raises the same substantive issues that were raised in the first petition," which were known and available to appellant at the time of sentencing, and that appellant "did not establish to the satisfaction of the [postconviction court] that his petition is not frivolous and that it would be in the interests of justice to hear the petition." The postconviction court did not address appellant's constitutional argument or his claim of ineffective assistance of counsel. This appeal followed.

[2] Appellant also moved for an extension of time to file a notice of appeal in this court on January 4, 2011. We denied that motion because appellant had not shown good cause for an extension, and we dismissed the appeal as untimely.

D E C I S I O N

I.

We first address appellant's argument that the postconviction court erred by dismissing appellant's second petition for postconviction relief, in which he asserted the "interests of justice" exception to the two-year time limitation. A reviewing court will not overturn the postconviction court's decision absent an abuse of discretion. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). We review the postconviction court's legal determinations de novo. *Id.*

A.

Minnesota law provides that, when direct appellate relief is not available, a defendant "may commence a proceeding to secure relief by filing a petition in the district court" for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2010). If no direct appeal is filed, as here, generally a petition for postconviction relief may not be filed more than two years after the entry of judgment of conviction or sentence. *Id.*, subd. 4(a) (2010); *Stewart v. State*, 764 N.W.2d 32, 34 (Minn. 2009). In this case, appellant was convicted following a jury trial and was sentenced on July 25, 2008. Pursuant to section 590.01, subdivision 4(a), the two-year time limitation for appellant to file a petition for postconviction relief expired on July 26, 2010.[3] Appellant's first postconviction petition was filed on July 28, 2010, was dismissed as untimely on September 15, 2010, a motion

[3] July 25, 2010, was a Sunday and, according to Minnesota Statutes section 645.15, "[w]hen the last day of [a prescribed statutory] period falls on Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation." Minn. Stat. § 645.15 (2010).

for reconsideration was denied on October 4, 2010, and an appeal to this court was dismissed on January 28, 2011. Unquestionably, appellant has had no review on the merits of his convictions.

An exception to the two-year limitation exists, however. A postconviction court may hear a petition that is otherwise time-barred if the petitioner establishes one of several enumerated statutory exceptions. Minn. Stat. § 590.1, subd. 4(b) (2010). One such exception—which appellant invoked in his second petition—is available if "the petitioner establishes to the satisfaction of the [postconviction] court that the petition is not frivolous and is in the interests of justice." *Id.*, subd. 4(b)(5).

Respondent argues that the "interests of justice" exception is unavailable to appellant because appellant's invocation of that exception is also untimely. Respondent is correct in asserting that a petition invoking an exception to the primary two-year deadline is subject to an additional deadline: it must be filed within two years of the date the petitioner's "claim" arose. *Id.*, subd. 4(c) (2010). In this context, a "claim" is "an event that supports a right to relief under the asserted exception." *Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011) (citing *Rickert v. State*, 795 N.W.2d 236, 242 (Minn. 2011), *review denied* (Minn. Jan. 17, 2012)). Respondent contends that appellant's claims arose at the time he was sentenced, July 26, 2008, more than two years before he filed his second petition for postconviction relief in March 2011. Respondent's argument has substantial merit regarding the hearsay, vouching, and insufficiency-of-evidence issues. But that argument is fatally flawed regarding appellant's ineffective-assistance-of-counsel claim.

"[A] claim under [the "interests of justice" exception] arises on the date of an event that establishes a right to relief in the interests of justice." *Id.* Because appellant's claims of hearsay, vouching, and insufficiency of evidence arose no later than appellant's July 25, 2008 sentencing, which is more than two years before he filed his second petition, appellant is time-barred from invoking the "interests of justice" exception with respect to those claims.

However, appellant's second petition also alleges that "he was denied his right to the effective assistance of counsel by the failure of [his] appointed attorney to timely file a postconviction petition." Because appellant's counsel could have filed a timely postconviction petition as late as July 26, 2010, appellant's claim of ineffective assistance of counsel arose no earlier than that date. Appellant was not time-barred from invoking an exception to his late filing of that claim in his March 2011 second postconviction petition. Thus, the postconviction court abused its discretion by failing to determine whether his ineffective-assistance-of-counsel claim—though filed after the primary postconviction-petition deadline that expired two years after his sentencing—should nonetheless be heard under the "interests of justice" exception. Because the relevant facts are not in dispute, and because appellant has requested review and respondent has raised no objection, we address that question here rather than remand.

B.

The application of "interests of justice" relief is limited to "exceptional situations." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). In *Gassler*, the Minnesota Supreme Court recognized a non-exclusive list of factors to be considered when determining

whether exceptional circumstances exist that warrant application of the "interests of justice" exception. *Id.* at 586-87. Those factors include: (1) the substantive merit of the petitioner's claim, (2) the absence of deliberate or inexcusable failure on the part of the petitioner to raise the issue on direct appeal, (3) the degree to which fault for the alleged error lies with the petitioner or the party defending the alleged error, (4) whether fundamental fairness must be addressed, and (5) whether the integrity of judicial proceedings is implicated. *Id.* The *Gassler* court also observed that "under certain circumstances the *reversal* of a conviction may seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 587 (emphasis in original).

Appellant's ineffective-assistance-of-counsel claim has substantive merit. Appellant could not have raised this issue in a direct appeal because the claim arose after the time for a direct appeal had expired. Appellant is also not at fault for his counsel's failure to timely file his petition for postconviction relief; indeed, the record reflects that appellant contacted the State Public Defender's Office within six months after he was sentenced, his first petition for postconviction relief was not filed until more than eighteen months later, and his counsel took full responsibility for the untimeliness of that petition. In addition, appellant's complete deprivation of a substantive review of his convictions, when such deprivation was indisputably caused by the error of counsel, is a circumstance that we believe implicates fundamental fairness and the integrity of the judicial proceedings.

Because appellant has demonstrated that his claim is not frivolous and it is in the interests of justice to remedy appellant's complete deprivation of postconviction review,

we conclude that appellant's ineffective-assistance-of-counsel claim satisfies the "interests of justice" exception. As noted earlier, the postconviction court failed to address the merits of appellant's ineffective-assistance-of-counsel claim and the relevant facts are not in dispute. Therefore, we review this claim de novo. *See State v. Edwards*, 736 N.W.2d 334, 338 (Minn. App. 2007) (observing that this court review claims of ineffective assistance of counsel de novo), *review denied* (Minn. Sept. 26, 2007).

II.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that "'counsel's representation fell below an objective standard of reasonableness'" and (2) the existence of "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). The defendant has the burden of proof on both prongs, *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007), and cannot succeed if the showing on either prong is insufficient. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987); *see also Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. We review claims of ineffective assistance of counsel de novo. *Edwards*, 736 N.W.2d at 338.

The United States Supreme Court has held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 1035 (2000). "Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to

the defendant's wishes." *Id.*; *accord Miles v. Sheriff*, 266 Va. 110, 581 S.E.2d 191, 194 (2003) (finding that, by ignoring defendant's explicit instruction to file an appeal, defense counsel's behavior constituted deficient performance under *Flores-Ortega* and *Strickland*). Here, appellant obtained postconviction counsel on January 27, 2009, but appellant's counsel did not file his first petition for postconviction relief until July 28, 2010—two days after the time for filing a petition had expired. Appellant's counsel commendably took full responsibility for this error, filing two letters in the district court explaining that she "had made a two-day calendaring error" and that "the two-day delay in filing the petition was entirely a mistake on the part of counsel, not petitioner himself." This, like the failure to file a notice of appeal in *Flores-Ortega*, cannot be considered a strategic decision. Thus, appellant has demonstrated that his counsel's representation fell below an objective standard of reasonableness.

Generally, an appellant asserting ineffective assistance of counsel must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Fields*, 733 N.W.2d at 468 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). But the *Flores-Ortega* Court held that the defendant was entitled to a new appeal without demonstrating that his appeal would likely have had merit because "the adversary process itself [was] presumptively unreliable" due to the appellant being entirely deprived of an appeal. *Flores-Ortega*, 528 U.S. at 483, 120 S. Ct. at 1038 ("Put simply, we cannot accord any 'presumption of reliability' to judicial proceedings that never took place." (citation omitted)) (quotation

omitted). Thus, under the circumstances presented here, appellant is not required to show prejudice to prevail on his claim of ineffective assistance of counsel.

We acknowledge that the *Flores-Ortega* Court required the defendant to demonstrate a reasonable probability that, but for his counsel's errors, he would have timely appealed. *Id.* at 484, 120 S. Ct. at 1038. In *Flores-Ortega*, unlike the case before us, defense counsel failed to even ask the defendant whether he wanted to appeal. *Id.* Here, the uncontroverted record demonstrates that both appellant and his counsel intended to file a timely petition for postconviction relief. Accordingly, even if we were to require the limited showing of prejudice required in *Flores-Ortega*, appellant has met that burden here.

Accordingly, we conclude that appellant is entitled to a full review of the claims raised in his first postconviction petition because he was entirely denied postconviction review due to his counsel's ineffective assistance. *See id.* at 484-85, 120 S. Ct. at 1039 (holding that defendant is entitled to new appeal when counsel's ineffective assistance deprives defendant of appeal).

III.

Appellant requests this court's review of the claims he raised in his first postconviction petition—that certain police testimony allegedly constitutes hearsay and vouching, and that the evidence presented at trial is allegedly insufficient to support appellant's conviction of child endangerment. We acknowledge that the postconviction court did not reach the merits of these claims. But we observe that the relevant facts are not in dispute, appellant expressly requested review of these claims without an

evidentiary hearing in his first postconviction petition, and neither party has objected to the resolution of these claims in this appeal. Accordingly, because these claims can be resolved on the record before us, we address them de novo.[4]

A.

Appellant argues that the district court erroneously admitted in evidence police testimony describing the conversations between the CIs and appellant as being "consistent with" controlled-substance transactions. Appellant contends that this testimony constituted prejudicial hearsay. We defer to the district court's evidentiary rulings, which are not overturned absent a clear abuse of discretion. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989).

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). And "statement" is defined as "an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion." Minn. R. Evid. 801(a). Officer Grosso testified that, during several of the controlled buys, he heard conversations between the CIs and appellant that were consistent with controlled-substance transactions. And Deputy Dammen testified that he

[4] Appellant also challenges the constitutionality of Minn. Stat. § 590.01, subd. 4(a), arguing that he is guaranteed one substantive review of his conviction under the Minnesota Constitution. The postconviction court did not address this issue. Because we reach the merits of appellant's claims on alternative grounds, we need not address appellant's constitutional challenge. We note, however, that the Minnesota Supreme Court presently is reviewing two cases involving this constitutional issue. *See Miller v. State*, No. A09-2047, 2010 WL 2813501 (Minn. App. July 20, 2010), *review granted* (Minn. Sept. 29, 2010); *Sanchez v. State*, No. A09-2195, 2010 WL 2813535 (Minn. App. July 20, 2010), *review granted* (Minn. Sept. 29, 2010).

heard W.S. and a male "discussing a narcotics transaction." Neither Officer Grosso's nor Deputy Dammen's testimony contains "statements," as defined by the rules of evidence. The police testimony does not contain specific assertions made by any party; rather, it describes the recorded conversations based on the witnesses' law-enforcement experience. Moreover, the police testimony does not assert the truth of any particular proposition, but rather it describes verbal and nonverbal conduct. Because the challenged portions of the police testimony do not contain statements made by appellant or the CIs, the police testimony is not hearsay.

Even assuming that the police testimony comprised "statements," a statement otherwise considered hearsay is not hearsay if "the statement is offered against a party and is the party's own statement." Minn. R. Evid. 801(d)(2). Here, Officer Grosso and Deputy Dammen testified as to conversations they heard between appellant and two CIs. Because appellant is a party opponent, to the extent that the challenged police testimony described appellant's statements it does not constitute hearsay. *See* Minn. R. Evid. 801(d)(2); *State v. Mitjans*, 408 N.W.2d 824, 830 (Minn. 1987) (statements made by defendant to officer were admissible as admission by a party opponent). In addition, "[p]rior consistent statements are not considered hearsay if the declarant testifies at the trial and is subject to cross-examination about the statement, and the consistent statement is helpful to the trier of fact in evaluating the declarant's credibility as a witness." *State v. Stillday*, 646 N.W.2d 557, 563 (Minn. App. 2002) (quotation omitted) (holding that officer's testimony regarding what witness told her was admissible as prior consistent statement), *review denied* (Minn. Aug. 20, 2002); *accord* Minn. R. Evid. 801(d)(1)(B).

Here, the two CIs testified under oath as to their conversations and activities, their testimony was consistent with the police testimony describing the conversations between the CIs and appellant, and the CIs were subject to cross-examination. Thus, to the extent that the challenged police testimony described prior consistent statements made by the CIs, it does not constitute hearsay. Minn. R. Evid. 801(d)(1)(B); *Stillday*, 646 N.W.2d at 563.

Appellant also contends that this police testimony constitutes improper vouching. It is error for a district court to admit in evidence a witness's opinion as to the credibility of another witness's testimony. *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981). But the record before us does not contain testimony vouching for or against the credibility of another witness. Rather, the testimony of Officer Grosso and Deputy Dammen is merely corroborative of the CIs' testimony. Accordingly, this argument lacks merit.

In sum, the district court did not commit reversible error by receiving the testimony of Officer Grosso and Deputy Dammen describing conversations between appellant and the CIs. Accordingly, appellant is not entitled to relief on this ground.

B.

Appellant also asserts that the evidence presented at trial is insufficient to support his child-endangerment conviction. When considering a claim of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's

witnesses and disbelieved any evidence to the contrary." *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009) (quotation omitted). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

We apply a stricter standard if only circumstantial evidence was presented. "[W]hen a conviction is based solely on circumstantial evidence, that evidence must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. McArthur*, 730 N.W.2d 44, 49 (Minn. 2007) (quotation omitted). "However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (quotation omitted). A jury is in the best position to evaluate circumstantial evidence and its verdict is still entitled to due deference. *Webb*, 440 N.W.2d at 430.

"A parent, legal guardian, or caretaker who endangers [a] child's person or health by . . . knowingly causing or permitting the child to be present where any person is selling . . . or possessing a controlled substance . . . is guilty of child endangerment." Minn. Stat. § 609.378, subd. 1(b)(2) (2008). Under Minnesota law, a "caretaker" is "an individual who has responsibility for the care of a child as a result of a family relationship or who has assumed responsibility for all or a portion of the care of a child." Minn. Stat. § 609.376, subd. 3 (2008). The record establishes, and appellant does not contest, that children were present during at least two of the controlled buys of cocaine and when

police subsequently executed a warrant and recovered cocaine from appellant's residence.

Appellant contends, however, that evidence in the record is insufficient to prove that he was a "parent, legal guardian, or caretaker" of those children. We agree. The record reflects that appellant's girlfriend has at least two minor children, but it does not establish that appellant assumed any responsibility for those children. Rather, the children's mother was present when the children were present, and the record does not demonstrate that appellant supervised, cared for, interacted with, or otherwise provided for the children; indeed, Officer Grosso testified that the residential lease was not even in appellant's name. We are also unconvinced by the state's assertion, advanced for the first time during oral argument, that appellant is a "parent" of the children based solely on testimony that appellant is dating the children's mother.

Although the circumstantial evidence presented here is "consistent with the hypothesis that the accused is guilty" of child endangerment, it is not "inconsistent with any other rational hypothesis except that of guilt." *See McArthur*, 730 N.W.2d at 49.

Accordingly, because the evidence in the record before us does not support appellant's conviction of child endangerment, we reverse that conviction.[5]

Affirmed in part and reversed in part.

[5] We acknowledge that reversal of appellant's child-endangerment conviction will not affect his sentence because it runs concurrently with a lengthier sentence for his first-degree controlled-substance conviction. But we observe that, in addition to the general negative effect it has on appellant's criminal history, a child-endangerment conviction on appellant's record may lead to serious collateral consequences in the future. *See, e.g.*, Minn. Stat. §§ 260C.301, subd. 1(b)(6) (permitting termination of parental rights to a child if *any* child has experienced egregious harm in the parent's care); 260C.007, subds. 5 (defining "child abuse" to include a violation of the child-endangerment statute), 14(5) (defining "egregious harm" to include a violation of the child-endangerment statute) (2010).