STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2064

State of Minnesota,
Respondent,

vs.

Jeremy James Fountaine,
Appellant.

Filed August 20, 2012
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-10-4235

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Connolly, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

CONNOLLY, Judge

Appellant challenges his convictions of criminal sexual conduct in the first degree, criminal sexual conduct in the third degree, and assault in the fifth degree, arguing that he is entitled to a new trial because the district court abused its discretion by failing to appoint substitute counsel and that appellant was prejudiced by the ineffective assistance of counsel. Because we see no abuse of discretion and no prejudice to appellant, we affirm.

FACTS

On May 14, 2010, appellant Jeremy James Fountaine was charged with criminal sexual conduct in the third degree following a reported incident of sexual assault. A public defender was appointed to represent him. After receiving additional medical reports on the victim, the state amended the complaint to add a charge of criminal sexual conduct in the first degree for injuries suffered during the sexual assault.

On July 26, 2010, appellant submitted an undated handwritten letter requesting substitute counsel to the trial court judge. The deputy court administrator returned the letter to appellant, explaining that the information in the letter could not be referred to the judge for consideration because appellant had not proceeded through the proper channels when submitting the request and stating that *ex parte* contact with a judge about a case

was prohibited under Canon Number 3 (A)(7) of the Minnesota Code of Judicial Conduct.[1]

On September 17, 2010, appellant submitted a request form to the judge stating that he would "like to if possible file for a public defender to guid (sic) my case" because appellant did not think his current attorney was "doing his job." The judge wrote back on September 21, 2010, stating the court does not appoint particular attorneys; attorneys are assigned by the public defender's office.

When the trial began on December 28, 2010, appellant again expressed dissatisfaction with his appointed counsel, stating for the record:

> I have. . . discussed with my attorney an offer that I had offered the prosecution of a plea to a fourth degree without the sexual penetration. And I have also discussed with my attorney that I am not being represented fairly, that he thinks I'm guilty, that he is working against me, and I've put in my best effort to acquire new counsel. I do not have the money for a private attorney . . . so I'm stuck with. . . what I have, and I just wanted to put it on the record that I don't feel I'm being treated fairly.

The district court noted that appellant had made a record that he was unhappy with counsel and could not afford to hire a private attorney and that the practice of the local public defender's office was to not substitute appointed counsel.

The jury found appellant guilty of criminal sexual conduct in the first degree, criminal sexual conduct in the third degree, and assault in the fifth degree. He challenges his convictions, arguing that the district court abused its discretion in denying his request

[1] Minn. Code of Judicial Conduct, Canon 3A(7) (1996) was abrogated by Minn. Code of Judicial Conduct, Canon 2.9 (2009).

for a different attorney and that he was prejudiced by the ineffective assistance of counsel.

D E C I S I O N

I. Substitution of Counsel

The decision to grant a request for substitute counsel lies within the district court's discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). On review, this court considers whether the district court abused its discretion. *See id*. at 465.

An indigent defendant has a constitutional right to the effective assistance of counsel at every stage of the criminal process. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel "includes a fair opportunity to secure an attorney of choice, but an indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). An indigent defendant must accept any capable attorney, unless the defendant's request for substitute counsel is reasonable and justified by "exceptional circumstances." *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970).

Exceptional circumstances are generally "those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Exceptional circumstances do not include general dissatisfaction or disagreement with the appointed attorney's representation, or personal tension between the attorney and client. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *Worthy*, 583 N.W.2d at 279. Only when a defendant raises "serious allegations of inadequate representation" may a district court deem it necessary to conduct a searching inquiry into

the request for substitute counsel. *Clark*, 722 N.W.2d at 464. A defendant has the burden of showing the existence of exceptional circumstances. *See Worthy*, 583 N.W.2d at 279.

Appellant argues that he requested substitute counsel on three separate occasions – in his undated handwritten letter, in his request form on September 17, and in his statement for the record on December 28 – and that the district court abused its discretion by denying the requests based on the "practice" of the public defender's office without examining appellant's specific complaints. But appellant offers no support for the implication that the number of times substitute counsel is requested is relevant to the district court's decision to grant or deny the request.

Appellant contends that the district court's response to his statements at trial clearly establishes that the district court knew appellant had requested substitute counsel. But general dissatisfaction or disagreement with an appointed attorney's representation does not constitute a "serious allegation[] of inadequate representation" that would necessitate a searching inquiry into any implied request for substitute counsel. *See Clark*, 722 N.W.2d at 464; *Worthy*, 583 N.W.2d at 279.

In any event, appellant did not actually make three separate requests for substitute counsel; he made only one. His undated handwritten letter was returned to him, and in his statement for the record on the day of trial, he simply voiced his displeasure with his appointed attorney; he did not request another attorney.

Moreover, a district court is required to conduct a hearing on a request for substitute counsel only if the defendant establishes sufficient facts to put the court on

notice of serious allegations of inadequate representation. *Clark*, 722 N.W.2d at 464. Appellant's request form failed to raise any facts sufficient to put the court on notice of serious allegations of inadequate representation. Therefore, appellant cannot show that the trial court abused its discretion in denying his request for substitute counsel.

II. Ineffective Assistance of Counsel

Appellant argues that he received ineffective assistance of counsel that prejudiced him, entitling him to a new trial. Appellant contends that his appointed counsel was ineffective in jury selection, in conceding appellant's guilt on elements of the charged and uncharged offenses, and in introducing inadmissible character evidence against appellant.

To prevail on a claim of ineffective assistance of counsel, appellant "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). An attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would demonstrate under the circumstances. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). A strong presumption exists that counsel's performance falls within the wide range of reasonable

professional assistance. *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002). This court may address the *Strickland* prongs in any order and may dispose of a claim of ineffective assistance of counsel if one prong is determinative. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

A. Jury Selection

Appellant argues that his counsel failed to challenge for cause a juror who strongly exhibited a bias in favor of police credibility. But the juror in question was eventually dismissed through the exercise of a peremptory challenge, so any error in failing to strike the juror for cause was harmless and did not prejudice appellant. Appellant's claim that his counsel failed to object to improper voir dire by the prosecutor also fails on the merits. A review of trial counsel's performance with regard to ineffective assistance of counsel does not include reviewing attacks on trial strategy, such as failing to object to alleged errors. *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006).

B. Concession of Guilt

Appellant argues that his counsel conceded his guilt without his consent. The decision to admit guilt is the defendant's. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001). If counsel admits a defendant's guilt without the defendant's consent, counsel's performance is deficient, and prejudice is presumed; the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission. *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). However, even if counsel admits guilt without the defendant's permission, no error will be found if the defendant acquiesced in the strategy. *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992) (concluding that

defendant acquiesced in counsel's admission of guilt because counsel used the same strategy throughout trial and the defendant never objected); *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991) (concluding that defendant acquiesced in the admission because counsel used the same strategy from beginning to end of trial and defendant admitted that he understood the tactic, but did not object to it).

It is clear from the record that counsel's primary defense strategy throughout trial was persuading the jury that, while appellant wanted to engage in sexual intercourse with the victim, there was no sexual penetration, a necessary element for a conviction of either criminal sexual conduct in the first degree or criminal sexual conduct in the third degree. Appellant argues that his counsel improperly conceded his guilt in the opening statement. But appellant, on direct examination, echoed any concession made in counsel's opening statement. Moreover, appellant never objected to counsel's admissions; appellant acquiesced in counsel's request to include jury instructions for the lesser offense of assault in the fifth degree if the jury was persuaded that there was no sexual penetration; and appellant acknowledged for the record that, if the jury instructions for the lesser offense were included, there was a strong likelihood he would be convicted of that offense. Thus, appellant explicitly consented to counsel's defense strategy, which was reasonable under the circumstances.

C. Character Evidence

Character evidence may not be offered "for the purpose of proving action in conformity therewith. . . ." Minn. R. Evid. 404. The character evidence elicited by counsel or volunteered by appellant was not offered for this purpose; it was intended to

provide context to appellant's testimony. Appellant knowingly waived his right to remain silent and instead chose to testify at trial, a strategy he had discussed beforehand with his appointed counsel. An appellate court, which, unlike counsel, has the benefit of hindsight, should not review such trial strategies. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Therefore, appellant has failed to show that counsel's performance fell below an objective standard of reasonableness, or that any prejudice resulted from the alleged deficiencies.

Affirmed.