STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1363

State of Minnesota,
Respondent,

vs.

Richard Dean Paquin, II,
Appellant.

Filed October 5, 2010
Affirmed in part, reversed in part, and remanded
Worke, Judge

Steele County District Court
File No. 74-CR-07-1765

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Daniel A. McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

WORKE, Judge

Appellant challenges his criminal-sexual-conduct convictions, arguing that (1) he is entitled to a new trial because the state deliberately and inexcusably failed to disclose

the complete account of an interview with a key witness; (2) his attorney was ineffective because he questioned appellant about a petty-misdemeanor offense when the state did not intend to use this evidence to impeach appellant; and (3) his sentence was impermissible because it was based on the sentencing guidelines at the time of sentencing rather than at the time of the offense. We affirm appellant's convictions, but reverse and remand for resentencing.

FACTS

In June 2007, appellant Richard Dean Paquin, II, was charged with first- and third-degree criminal sexual conduct for acts committed against his girlfriend's brother, K.L., from April 2001 through July 2003. At trial, K.L. testified that when he was ten years old he started visiting his sister, D.L., and appellant, who is ten years older than K.L. During one visit, appellant talked K.L. into watching a pornographic movie with him. Appellant blew marijuana smoke into K.L.'s face and then masturbated in front of K.L. During another visit, appellant showed K.L. pornographic magazines, blew marijuana smoke into K.L.'s face, and asked if he could touch K.L.'s penis.

K.L. eventually smoked marijuana with appellant. After smoking marijuana, K.L. and appellant would view pornographic material, and appellant would masturbate and ask K.L. to masturbate with him. Appellant would then "play with [K.L.'s] penis" with his hands, and if K.L. felt high enough he would touch appellant's penis. When K.L. was eleven years old, the touching expanded to oral sex. K.L. testified that by the time he was 16 years old, there had been 20 to 30 instances of sexual contact between appellant and him and that the last incident occurred in early 2007. Appellant testified that he had

very little contact with K.L. until 2006. Appellant admitted that he and K.L. smoked marijuana together a couple of times, but denied showing K.L. pornographic material and engaging in sexual contact with K.L.

The county attorney's victim-witness coordinator, T.D., testified that she took notes during an interview with D.L. T.D. testified that D.L. stated during the interview that "[appellant] told her not to go into his top drawer[,] [but] [s]he went into his top drawer, and she found his pornography." This testimony contradicted D.L.'s statements that she bought the pornography and that there was no place in the apartment she shared with appellant where appellant forbade her to go. On cross-examination, T.D. stated that her notes on this subject were not included in the summary provided to the defense. The district court found "a discovery violation." In determining a remedy, the district court considered a continuance, but determined that additional investigation was not necessary. The court considered appellant's attorney's request for a mistrial, but stated that while the error was obvious, it was not so prejudicial to warrant a mistrial. The district court concluded that "the prejudice, although concerning, . . . c[ould] be cured by a curative instruction or by re-calling [D.L.]" The court instructed the jury: "You are to disregard the testimony of [T.D.] as it relates to any alleged statement by [D.L.] that [appellant] instructed her not to go into [his] top dresser drawer."

Appellant testified at trial that he had been convicted of giving false information to a police officer. On cross-examination, the prosecutor sought to question appellant about the circumstances under which the false information was given. The prosecutor stated that after he gave notice of his intent to question appellant about the conviction, he

realized that it was a petty-misdemeanor conviction, which is not considered a crime. Appellant's attorney stated that he received the state's notice, and considered attempting to prevent the introduction of the evidence at trial, but researched the issue and determined that the evidence was admissible as a crime of dishonesty. Appellant's attorney stated, however, that he did not believe that the prosecutor could use the evidence as character evidence. The district court denied the prosecutor's request to question appellant about the circumstances of the offense, ruling that the probative value was outweighed by the potential prejudice to appellant.

In July 2008, the jury found appellant guilty as charged. On August 1, appellant moved for a new trial, in part, because of the state's failure to disclose T.D.'s notes. The district court denied appellant's motion, ruling that the curative instruction was the appropriate remedy. The court found that the state should have provided the defense with its notes, but chose not to in order to "'save a little something' for possible impeachment at trial. This is a trial by surprise tactic that is discouraged by the open discovery rules." The district court concluded, however, that the "nondisclosure [] was not so serious and prejudicial that [appellant's] right to a fair trial was denied." The court based this conclusion on

> an affidavit of [the jury] foreperson . . . . submitted to show 'whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror[.]' From the [] affidavit, it appears that the jury did not engage in any improper deliberations in violation of court orders.[1]

[1] The state included the affidavit as an exhibit with its submission in opposition to appellant's new-trial motion. The district court accepted the affidavit under Minn. R.

At sentencing, the court stated that for a first-degree criminal-sexual-conduct conviction, the minimum sentence was 144 months in prison. The court further stated that while the case presented a "potential presumptive consecutive issue," the court was "going to exercise discretion [and] . . . . impose a concurrent sentence." The court sentenced appellant on the first-degree criminal-sexual-conduct conviction to 173 months in prison. On the third-degree criminal-sexual-conduct conviction, the district court sentenced appellant to 60 months in prison. The district court stated that it was the court's intent that the sentences run "concurrent and not consecutive," concluding that the sentence was "proportional" and "fair." This appeal follows.

D E C I S I O N

Discovery Violation

Appellant first argues that the district court abused its discretion by refusing to grant him a new trial based on the state's failure to disclose a complete account of an interview with D.L. We must first consider whether a discovery violation occurred. "Whether a discovery violation occurred presents a question of law, which we review de novo." *State v. Colbert*, 716 N.W.2d 647, 654 (Minn. 2006).

Evid. 606(b). Rule 606(b) provides that while a juror may not testify as to any matter occurring during the jury's deliberations, to the effect of anything upon a juror's mind, or emotions influencing a juror in reaching a verdict, a juror may provide an affidavit as to "whether extraneous prejudicial information was improperly brought to the jury's attention." The affidavit here indicates that the jury did not discuss information that the district court ordered the jury to disregard and that the jury did not base its verdict on information that the district court ordered the jury to disregard. The affidavit falls under the exception to rule 606(b).

A prosecutor must disclose any "written or recorded statements," "written summaries of oral statements," and "the substance of oral statements" that are known to the prosecutor and relevant to the case. Minn. R. Crim. P. 9.01, subd. 1(2).

> The prosecutor's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office.

Id., subd. 1a(1).

The district court found that a discovery violation occurred because the state failed to disclose T.D.'s notes taken during an interview with D.L. Because T.D. was the prosecutor's victim-witness coordinator, she participated in the investigation. And her notes were relevant to the case because the prosecutor used the information in the notes for impeachment purposes. T.D. testified that during the interview, D.L. stated that appellant told her not to go into his top drawer, but she did and found pornography. The statement contradicted D.L.'s statement regarding who purchased the pornography and whether she had access to all areas of the apartment she shared with appellant. The prosecutor was obligated to disclose T.D.'s notes; thus, the district court did not err in finding that this was a discovery violation.

When a discovery violation has occurred, the district court is particularly suited to determine the appropriate remedy for the violation and has discretion in deciding *whether* to impose sanctions. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Absent a clear abuse of discretion, this court will not overturn the district court's ruling. *Id.* In

determining a remedy, the district court should consider the reason disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying any prejudice with a continuance, and any other relevant factors. *Id.* "A new trial is warranted when the [] discovery violation[] viewed in the light of the whole record, appear[s] to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *State v. Miller*, 754 N.W.2d 686, 705 (Minn. 2008) (quotation omitted). A new trial should not be ordered if there is no reasonable probability that the outcome would have been different if the evidence had been disclosed. *State v. Freeman*, 531 N.W.2d 190, 198 (Minn. 1995).

The district court did not abuse its discretion in fashioning a remedy for the discovery violation. Appellant first requested a mistrial based on the discovery violation, which the district court denied after concluding that the extent of the prejudice did not warrant a mistrial. The court considered a continuance, but determined that additional investigation was not necessary. The court concluded that any prejudice could be rectified with a curative instruction, and instructed the jury to disregard T.D.'s testimony as it related to any alleged statement by D.L. that appellant instructed her not to go into his dresser drawer.

Appellant then requested a new trial, which the district court denied after concluding that, although the failure to disclose the interview notes was inexcusable, it "was not so serious and prejudicial that [appellant's] right to a fair trial was denied." While the district court relied on an affidavit from the jury foreperson that "the jury did not engage in any improper deliberations in violation of court orders," the affidavit was

most likely unnecessary to assure the court that the jury followed its instructions because a jury is presumed to follow a district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

Appellant asserts, however, that the state must face some sort of consequence because the violation was deliberate. Appellant cites to *State v. Kaiser*, in which the supreme court exercised its supervisory power over the district court and ordered a new trial because of a discovery violation. 486 N.W.2d 384, 387 (Minn. 1992). But, as the state points out, this supervisory power over the district court is reserved to the supreme court; thus, we are without power to order a new trial without a showing of prejudice. *See State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995) (stating that as "an intermediate appellate court, we decline to exercise supervisory powers reserved to this state's supreme court"), *review denied* (Minn. Sept. 20, 1995).

Ineffective Assistance of Counsel

Appellant next argues that he received ineffective assistance of counsel because his attorney elicited testimony from appellant regarding a petty-misdemeanor conviction without considering that a petty misdemeanor is not a crime and failing to await a ruling on the admissibility of the evidence before eliciting the testimony.

To prove an ineffective-assistance-of-counsel claim, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S.

668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Trial counsel's failure to raise a particular issue is not considered ineffective assistance of counsel if the attorney could have legitimately concluded that he would not prevail on the claim. *Schneider v. State*, 725 N.W.2d 516, 522-23 (Minn. 2007). And a reviewing court generally defers to counsel's trial strategy because trial strategy is within the discretion of trial counsel. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

Appellant testified that he was convicted of giving false information to a police officer. The prosecutor stated that he had given notice of the state's intent to question appellant about the incident, but after filing notice, realized that a petty-misdemeanor offense is not a crime that would fall under the rule regarding crimes of dishonesty. Appellant's attorney was not ineffective for raising the conviction, however, because he stated that he researched the issue when he received the state's notice and considered attempting to prevent the introduction at trial, but determined that the evidence was admissible. It was not unreasonable for appellant's attorney to believe that the evidence of a petty-misdemeanor offense may be admissible under rule 609, because under the rule, evidence of a conviction is admissible if it "involved dishonesty or false statement, regardless of the punishment." Minn. R. Evid. 609(a)(2). Thus, appellant's attorney was not ineffective for failing to challenge the admission of the evidence because he believed that any motion to prevent the introduction of the evidence would be denied.

Additionally, appellant's attorney was not ineffective for raising the issue because it was raised as a matter of strategy. Appellant's attorney was under the understanding that the prosecutor intended to address the conviction; thus, by raising it on direct,

appellant's attorney limited the testimony to one sentence acknowledging the offense. Appellant asserts that his attorney was ineffective for failing to await a ruling on the admissibility before eliciting the testimony, but there was no motion before the court to rule. The motion before the court related to the testimony was the state's request to conduct further examination into the circumstances of the offense, which the district court denied after finding that the probative value of the evidence was outweighed by the potential prejudice to appellant. Appellant fails to show that his attorney's representation fell below an objective standard of reasonableness. Because appellant failed to show that his attorney's representation was unreasonable, the second *Strickland* factor need not be analyzed.

Sentence

Finally, appellant challenges his sentence. The state concedes that appellant's sentence was impermissibly based on the sentencing guidelines at the time of sentencing rather than the guidelines at the time of the offense. The parties disagree regarding the remedy.

We must first determine whether appellant's sentence is impermissible. The jury found appellant guilty of first- and third-degree criminal sexual conduct. Based on the offense dates between April 2001 and July 2003, the presumptive sentence for first-degree criminal sexual conduct was 144 months in prison. Minn. Stat. § 609.342, subd. 2(b) (2002). But the district court sentenced appellant to 173 months in prison based on the pre-sentence-investigation report (PSI) that recommended sentences based on the 2006 guidelines sentence. The PSI should have recommended a sentence based on the

guidelines that were in effect prior to 2006. After the offense dates, first-degree criminal sexual conduct became a level A offense with a presumptive sentence of 144 months in prison, but with a range of 144-173 months. *See* Minn. Sent. Guidelines IV (2006). Therefore, appellant's sentence is impermissible.

Appellant contends that we should impose the 144-month sentence, but the state argues that the sentence should be remanded to the district court because the court has discretion to impose consecutive sentences. Consecutive sentences are permissible when multiple offenses are committed against a single victim. Minn. Sent. Guidelines cmt. II.F.04 (2002). Thus, the district court had discretion to impose consecutive sentences.

The district court sentenced appellant to 173 months in prison for the first-degree criminal-sexual-conduct conviction and 60 months in prison for the third-degree criminal-sexual-conduct conviction. The district court, although acknowledging that the case presented a "potential presumptive consecutive issue," chose to "exercise discretion" in imposing concurrent sentences, stating that the sentence was "proportional" and "rational." On remand, the district court may be inclined to impose consecutive sentences in order to achieve this particular sentence. We, therefore, remand to the district court for resentencing.

Affirmed in part, reversed in part, and remanded.