STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1146

Grant Jason Bresnahan, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 15, 2011
Affirmed; motion to strike granted
Stauber, Judge

Ramsey County District Court
File No. 62K407004320

Grant Jason Bresnahan, Moose Lake, Minnesota (pro se appellant)

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

John Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

STAUBER, Judge

In this pro se postconviction appeal seeking relief from his 2008 convictions of burglary and criminal sexual conduct, appellant argues (1) he was denied his right to effective assistance of trial and appellate counsel; (2) he was denied his right to a fair trial

by the introduction of evidence that was unfairly prejudicial and introduced in order to influence the jury to convict by illegitimate means; and (3) the postconviction court abused its discretion by denying his petition without an evidentiary hearing. We affirm.

FACTS

In December 2007, appellant Grant Bresnahan was charged with first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2006), and fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(c) (2006). The complaint states that appellant knocked on his female neighbor's door and forced his way into her apartment. Appellant then pinned her against a wall and licked her face. He also ripped open her robe and touched her genitals and breasts. Appellant eventually released the victim's hands and showed her that he had two knives. Appellant then made "lewd sexual suggestions" and asked her to come over to his house. The victim finally persuaded appellant to leave her apartment.

In March 2008, a jury convicted appellant of both charges. The district court sentenced appellant to consecutive prison sentences of 78 months for the burglary conviction and 24 months for the sexual-assault conviction. On appeal, this court affirmed appellant's convictions. *State v. Bresnahan*, A08-1273, 2009 WL 2997925 (Minn. App. Sept. 22, 2009), *review denied* (Minn. Nov. 24, 2009).

Appellant subsequently petitioned for postconviction relief. He claimed that he was (1) denied effective assistance of trial and appellate counsel; (2) denied his right to a fair trial by introduction of unfairly prejudicial evidence; and (3) entitled to an

evidentiary hearing on these issues. The postconviction court denied appellant's motion. This appeal followed.

The state subsequently moved to strike appellant's appendix and portions of his brief. By order dated October 8, 2010, consideration of the motion to strike was deferred to the panel.

D E C I S I O N

I.

We first address the state's motion to strike sections of appellant's brief and appendix on the ground that they concern matters outside the record. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. "[This] court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

The disputed sections indeed concern matters outside the record. Neither the affidavit of Theresa H. Bresnahan, dated May 26, 2010, nor the letter addressed to Interim Chief Appellate Public Defender Marie Wolf, dated March 3, 2010, were filed with the district court or during the postconviction proceeding. Consequently, neither is part of the record on appeal. We therefore grant the state's motion to strike the affidavit and letter, as well as all references to the affidavit and letter in appellant's brief. We do not consider these sections of appellant's brief and appendix in reaching our decision.

II.

Appellant claims that the trial record and facts produced in his brief support his ineffective assistance of trial and appellate counsel claims. "Because claims of ineffective assistance of counsel involve mixed questions of law and fact, our review of decisions by the postconviction court is de novo." *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "The defendant 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)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotations omitted). When considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). This court "generally will not review attacks on counsel's trial strategy." *Opsahl*, 677 N.W.2d at 421.

Appellant claims that his trial counsel failed to "do meaningful adversarial testing, failed to make arguments, failed to make any objections, failed to investigate, and entered into deals that materially aided the state in its prosecution." He further claims that his appellate counsel failed to raise meritorious claims on appeal. The postconviction court considered these claims and found them to be without merit. It found that appellant complained of his trial counsel's trial tactics, which are not subject to review. The postconviction court also found that appellant "failed to identify any areas in which

appellate counsel was ineffective . . . and there is no basis to consider, much less sustain, his claim."

We disagree with appellant and conclude that the postconviction court's findings are correct. Appellant attacks his trial counsel's strategies rather than his trial counsel's performance. This court cannot second-guess trial counsel's strategy decisions. These decisions—including the extent of trial counsel's investigations—are part of trial strategy and generally not subject to scrutiny on appeal. *See Opsahl*, 677 N.W.2d at 421. Likewise, we conclude that appellant's claim of ineffective assistance of appellate counsel is also without merit. Appellant asserts that since he has met his burden of showing ineffective assistance of trial counsel, appellate counsel had the duty to argue ineffective assistance of trial counsel in his prior appeal. However, appellant has not met his burden of showing ineffective assistance of trial counsel. Therefore, appellate counsel had no duty to raise that claim on appeal. If appellant believed his trial counsel was ineffective, he had the right to pursue that claim in a pro se supplemental brief in his prior appeal. *See Barnes v. State*, 768 N.W.2d 359, 361–62 (Minn. 2009).

Appellant fails to show that the representation by his trial and appellate counsel fell below an objective standard of reasonableness. The record supports appellant's guilt, and appellant has not shown a reasonable probability that the results of his trial or direct appeal would have been different. Accordingly, we conclude that the postconviction court did not err by finding that appellant was not denied his right to effective assistance of trial and appellate counsel.

III.

Appellant also argues that the postconviction court abused its discretion by denying appellant's claim that the district court erroneously admitted "other acts" evidence. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). If the district court errs by admitting evidence, this court determines "whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). "[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *Id.*

"Generally, evidence is admissible only if it is relevant." *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009) (quoting Minn. R. Evid. 402). Evidence of a defendant's other acts is not admissible to prove the defendant's character for committing crimes. Minn. R. Evid. 404(b). "Such evidence, often referred to as *Spreigl* evidence, may be admissible to show motive, intent, absence of mistake, identity, or a common scheme or plan." *Burrell*, 772 N.W.2d at 465. However, "other acts" evidence is admissible without regard to Minnesota Rule of Evidence 404(b) if excluding it "would present an incoherent or incomplete story of the charged crime." *State v. Hollins*, 765 N.W.2d 125, 132 (Minn. App. 2009).

Appellant appears to argue that the "vast majority" of evidence introduced by the state was extrinsic to the charged offenses and thus subject to exclusion under rule 404(b). Appellant states that only "two out of over sixty pages" of the state's case-in-chief was relevant to the charged offenses, while "[t]he other fifty-eight pages of the record" focused on events extrinsic to the charged offenses. Appellant argues that this "other acts" evidence "lure[d] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." For example, a portion of testimony from the state's case-in-chief addresses events following the burglary and sexual assault—the call to police, appellant's arrest, and police officers' search of appellant's house. Appellant argues that 404(b) excludes such evidence. We disagree.

None of the evidence that appellant refers to qualifies as *Spreigl* evidence under rule 404(b). The purpose of rule 404(b) is to exclude evidence of a defendant's other crimes or bad acts to prove the defendant's character for committing crimes. *See Burrell*, 772 N.W.2d at 465. But here, the state did not offer evidence of other acts to prove appellant's character for committing crimes. The evidence of events surrounding appellant's sexual assault and burglary offenses is necessary for the state to explain its complete story of the charged crimes. It is thus "inextricably intertwined with the evidence used to prove the crime charged" and "not subject to rule 404(b)." *See Hollins*, 765 N.W.2d at 131 (quoting *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir. 1983)). Accordingly, the postconviction court's decision was not an abuse of discretion.

IV.

Appellant finally argues that the postconviction court abused its discretion by denying appellant an evidentiary hearing. Postconviction courts must hold an evidentiary hearing "[u]nless the petition and the files and records of the proceedings conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). "Allegations in a postconviction petition must be more than argumentative assertions without factual support, and an evidentiary hearing is unnecessary if the [appellant] fails to allege facts that are sufficient to entitle him or her to the relief requested." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (citation and quotations omitted).

Because appellant's claims of ineffective assistance of trial and appellate counsel are without merit, we conclude that the postconviction court did not abuse its discretion by denying an evidentiary hearing on those issues. Similarly, appellant's claim that the postconviction court abused its discretion by allowing "other acts" evidence is without factual support. Because appellant's assertions are not sufficient to entitle him to his requested relief, an evidentiary hearing was unnecessary. Accordingly, the postconviction court did not abuse its discretion by denying appellant an evidentiary hearing.

Affirmed; motion to strike granted.