STATE OF MINNESOTA

IN SUPREME COURT

A19-0686

Ramsey County | Anderson, J.
Took no part, Gildea, C.J.

Ryan David Petersen,

Appellant,

vs.

Filed: December 26, 2019
Office of Appellate Courts

State of Minnesota,

Respondent.

Ryan David Petersen, Oak Park Heights, Minnesota, pro se appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

The district court did not abuse its discretion by denying appellant's claim of ineffective assistance of appellate counsel on the merits.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

ANDERSON, Justice.

Appellant Ryan David Petersen was convicted of the first-degree premeditated murder of Chase Passauer. On direct appeal, we affirmed his conviction. *State v. Petersen*, 910 N.W.2d 1 (Minn. 2018). Petersen then sought postconviction relief, asserting a claim of ineffective assistance of appellate counsel. The district court denied his petition without a hearing. Because we conclude that Petersen's claim fails on the merits, we affirm the district court.

FACTS

The murder of Chase Passauer arose from a dispute between Petersen and his criminal defense attorney.[1] On the day of the murder, Petersen exchanged a series of text messages with his attorney concerning a parking ticket. When the attorney informed Petersen that he was unable to talk by phone because he was preparing for court, and he would not handle Petersen's parking ticket, Petersen fired the attorney and demanded a refund of the $7,000 retainer he had previously paid. Petersen told his girlfriend that he intended to get his money back from, and shoot, the attorney. Petersen then drove five miles to the attorney's office and, with a hidden .40-caliber semiautomatic handgun in his waistband, entered the building, ascended the stairs, and entered the law office through unlocked doors.

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[1] The facts of this opinion are taken from our opinion in Petersen's direct appeal. *See Petersen*, 910 N.W.2d at 4–5. In this postconviction appeal, the facts are undisputed.

Petersen confronted Passauer, a law clerk who was seated at the reception desk in the law office, demanding to know where the attorney was located. Angry that Passauer did not know where the attorney was, Petersen shot Passauer in the chest five times. As Petersen left the office, he shot Passauer three more times through a glass window separating the reception area from the entryway. Petersen fled, leaving Passauer to die from the eight gunshot wounds to his chest.

The State charged Petersen by complaint with second-degree intentional murder. Just before his second court appearance,[2] Petersen informed the State that he intended to enter a straight plea to the charge of second-degree intentional murder. The State filed an amended complaint charging Petersen with first-degree premeditated murder, second-degree intentional murder, and possession of a firearm by an ineligible person. The State also informed the district court that a grand jury proceeding would be convened to consider the first-degree murder charge.

Petersen still attempted to plead guilty to the second-degree murder charge, but the district court did not accept his plea. Five days later, a grand jury indicted Petersen on all three charges. The district court denied Petersen's motion to dismiss the grand jury indictment.

After a bench trial, the district court found Petersen guilty of all three charges. The district court sentenced Petersen to life in prison without the possibility of release for first-

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[2] The parties disagree as to whether this was a second-appearance hearing, *see* Minn. R. Crim. P. 8, or an omnibus hearing, *see* Minn. R. Crim. P. 11.

degree premeditated murder and a concurrent 60-month sentence for possession of a firearm by an ineligible person; it did not sentence Petersen on the second-degree intentional murder count.

Petersen filed a direct appeal. *See Petersen*, 910 N.W.2d 1. We determined that (1) the district court did not abuse its discretion by declining to accept Petersen's guilty plea to second-degree intentional murder, and (2) sufficient evidence supported the district court's finding of premeditation. *Id.* at 6, 8. Accordingly, we affirmed Petersen's convictions. *Id.* at 9.

Petersen filed a petition for postconviction relief. He argued that his conviction for first-degree premeditated murder must be set aside and that, based on a claim of ineffective assistance of appellate counsel, he should receive a new sentencing hearing for his conviction of possession of a firearm by an ineligible person. The district court denied Petersen's petition without a hearing, and Peterson now appeals.

ANALYSIS

A person convicted of a crime may petition for postconviction relief under Minn. Stat. § 590.01, subd. 1 (2018). A district court is required to hold an evidentiary hearing and make findings of fact and conclusions of law "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2018). We review a district court's denial of a postconviction petition for an abuse of discretion, and we review any embedded issues of law de novo. *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). An abuse of discretion occurs when the district court has "exercised its discretion in an arbitrary or capricious

manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* at 729.

To prevail on his claim of ineffective assistance of appellate counsel, Petersen must show that (1) his appellate counsel's representation on direct appeal "fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694; *see also Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). Courts "may analyze the *Strickland* requirements in either order and may dispose of a claim on one prong without considering the other." *Lussier v. State*, 853 N.W.2d 149, 154 (Minn. 2014). In addition, when determining whether an attorney's performance fell below an objective standard of reasonableness, courts do not second-guess the decision of appellate counsel not to raise a claim that "counsel could have legitimately concluded would not prevail." *Reed*, 793 N.W.2d at 733 (citation omitted) (internal quotation marks omitted).

On appeal, Petersen raises four claims of error in the district court's summary dismissal of his postconviction petition. We consider each claim in turn.

A.

Petersen first argues that the district court erred by determining that his appellate counsel was not ineffective for failing to argue that his convictions for first-degree murder and second-degree murder violated Minn. Stat. §§ 609.04 and 609.035 (2018).

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. In other

words, "the State may not convict a person for both a crime and its lesser-included offense." *State v. Johnson*, 773 N.W.2d 81, 89 (Minn. 2009); *see also State v. Wipper*, 512 N.W.2d 92, 94 (Minn. 1994) (explaining that the defendant could not be convicted of both first-degree murder and second-degree murder for the same conduct). "We have long recognized that the 'conviction' prohibited by [Minn. Stat. § 609.04] is not a guilty verdict, but is rather a formal adjudication of guilt." *Pierson v. State*, 715 N.W.2d 923, 925 (Minn. 2006) (citation omitted) (internal quotation marks omitted). "[A] conviction occurs only after the district court judge accepts, records, and adjudicates" a finding of guilt. *Id.* Accordingly, the procedure a district court should follow when a defendant is convicted of a charged offense and a lesser-included offense is "to adjudicate formally and impose sentence on one count only." *State v. Martinez*, 725 N.W.2d 733, 739 (Minn. 2007) (citation omitted) (internal quotation marks omitted).

Although similar to section 609.04, section 609.035 focuses on the issue of sentences, as opposed to conviction. It states:

> Except [for subdivisions and sections that do not apply to this case], if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.

Minn. Stat. § 609.035, subd. 1. "Section 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include

punishment for all offenses."[3] *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (citation omitted) (internal quotations marks omitted). The purpose of section 609.035 is "to limit punishment to a single sentence where a single behavioral incident result[s] in the violation of more than one criminal statute." *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995) (citation omitted) (internal quotation marks omitted). "Multiple punishment refers not to multiple convictions but multiple sentences." *Id.* (citation omitted) (internal quotation marks omitted). When a defendant is found guilty of both first-degree and second-degree murder, no violation of section 609.035 occurs when "the district court convict[s] him of first-degree murder and sentence[s] him on that count" only. *Rhodes v. State*, 735 N.W.2d 315, 320 n.7 (Minn. 2007).

In this case, the district court acknowledged that the sentencing order arising from the court trial erroneously states that Petersen was "convicted" of second-degree intentional murder. More specifically, the district court acknowledged that "the sentencing order dated October 7, 2016 contains a clerical error in indicating [that Petersen] was convicted of" second-degree intentional murder; thus, the court directed that the order "be corrected to reflect [that Petersen] was found guilty by the court but no conviction was entered by the court." The district court also observed that no punishment was imposed for the second-

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[3] There are exceptions to the prohibition in section 609.035 on multiple sentences for a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). For example, multiple sentences are allowed when a defendant commits a firearm offense as part of the same behavioral incident with another crime. *See State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

degree murder offense.[4] In other words, the district court acknowledged the need to correct a clerical error in the sentencing order and concluded that there was no section 609.035 violation because no punishment was imposed for the second-degree murder offense.

On appeal, Petersen fails to acknowledge that the district court agreed that the clerical error in the sentencing order required correction for consistency with section 609.04. Instead, he contends that the *guilty verdicts* for both first-degree murder and second-degree murder violate sections 609.04 and 609.035. We disagree.

As a matter of law, the guilty verdicts for both first-degree murder and second-degree murder do not violate section 609.04 or section 609.035. A guilty verdict is not a conviction. *Pierson*, 715 N.W.2d at 925 (holding that "a conviction occurs only after the district court judge accepts, records, and adjudicates" a finding of guilt). And, in accordance with *Bookwalter*, 541 N.W.2d at 293, Petersen was not sentenced for second-degree murder. Instead, like the defendant in *Rhodes*, 735 N.W.2d at 320 n.7, Petersen was convicted of first-degree murder and sentenced on that count only. As explained in *Ferguson*, 808 N.W.2d at 589, sentencing Petersen on the first-degree murder count—the most serious offense—aligns with the purpose of section 609.035. Thus, appellate counsel's performance did *not* fall below an objective standard of reasonableness when she did not raise claims on direct appeal that the guilty verdicts violated sections 609.04 and 609.035.

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[4] The district court relied on the following statement in the transcript: "With regard to Count Two, murder in the second-degree with intent, I do find and adjudge you to be guilty of that offense and I'm sorry, what would be the guideline sentence on that? Well, I'm sorry. I'm not going to sentence you on that offense. I withdraw that."

B.

Petersen next argues that the district court erred by determining that his appellate counsel was not ineffective when counsel failed to argue that the charging document was defective.[5] Petersen's argument fails under both prongs of *Strickland*.

Under the first prong of *Strickland*, Petersen's argument fails because he has not shown that appellate counsel's failure to challenge the charging document fell below an objective level of reasonableness. 466 U.S. at 688. "An offense punishable by life imprisonment must be prosecuted by indictment. The prosecutor may initially proceed by a *complaint* after an arrest without a warrant or as the basis to issue an arrest warrant."[6] Minn. R. Crim. P. 17.01, subd. 1 (emphasis added). In addition, the purpose of a charging document is to "specify the charge and at the same time to prevent defendant from being charged twice with the same crime." *State v. Hall*, 176 N.W.2d 254, 260 (Minn. 1970) (stating that an information under which a defendant was charged is sufficient when "it adequately apprises the defendant of the charge on which he is being held and upon which he will be tried").

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[5] Petersen argues that the charging document was defective for several reasons. First, he argues that the State was not permitted by the rules to amend the complaint to charge first-degree murder. Second, Petersen argues that the district court inappropriately analyzed his claim of ineffective assistance of appellate counsel. Finally, Petersen argues that the grand jury indictment was faulty because the prosecution failed to convene a grand jury within 14 days of the Rule 8 hearing.

[6] The State may amend a complaint when "the evidence presented establishes probable cause to believe that the defendant has committed a different offense from that charged in the complaint, and the prosecutor intends to charge the defendant with that offense." Minn. R. Crim. P. 3.04, subd. 2(b).

Here, Petersen argues that a complaint can never charge first-degree murder. This is incorrect. Rule 17.01 explicitly states that the prosecution can "proceed by complaint" for a first-degree murder charge while awaiting a grand jury indictment. Minn. R. Crim. P. 17.01, subd. 1. Moreover, similar to the purpose of a charging document explained in *Hall*, the amended complaint here, as the district court explained, notified "the district court of the basis for a charge of first-degree murder and . . . served as a basis to hold [Petersen]." Based on the clear language of Rule 17.01, it was reasonable for appellate counsel to believe that Peterson's argument was not viable.

Under the second prong of *Strickland*, Petersen fails to show that, even if appellate counsel had argued on direct appeal that the charging document was defective, the outcome would have been different. Because Rule 17.01 allows a complaint to charge first-degree murder while a grand jury is convened, and because the timing requirement in Minn. R. Crim. P. 8.02 is not triggered until notice is given by the prosecution that it intends to convene a grand jury,[7] there is no basis for a claim that the charging document was defective. Moreover, the district court had the discretion to reject Petersen's plea. *See Petersen*, 910 N.W.2d at 6 (explaining that the district did not abuse its discretion by refusing to accept Petersen's guilty plea and noting that a defendant does not have an

[7] The State cites *State v. Vang* for the proposition that the timing requirement in Rule 8.02, subdivision 2, "is triggered only by the conditions of the first paragraph: a complaint charging a homicide and notification by the prosecuting attorney that the case will be presented to the grand jury, or the charging of an offense punishable by life imprisonment." 881 N.W.2d 551, 556 (Minn. 2016). Therefore, the timing requirement in Rule 8.02 was not triggered until Petersen's second appearance in court. And because the grand jury issued the indictment five days later, there was no violation of the timing requirement in Rule 8.02.

aboslute right to plead guilty). Therefore, Petersen has not shown a reasonable probability that the outcome would have been any different, as required by the second prong of *Strickland*. 466 U.S. at 694.

C.

Petersen also argues that his appellate counsel was ineffective by failing to assert that the amended complaint was a defective charging document. Had that argument been pursued, he asserts, the first-degree murder charge would have been dismissed, leaving only the second-degree murder charge, for which the district court would have been compelled to accept his plea. In support of this argument, Petersen relies on *State v. Linehan*, 150 N.W.2d 203 (Minn. 1967), which he contends holds that he has an absolute right to plead guilty to the second-degree murder charge.

To appropriately analyze Petersen's argument, the context of *Linehan* is important. In *Linehan*, the defendant was charged by indictment with first-degree murder, third-degree murder, and kidnapping. *Id.* at 205. The defendant attempted to plead guilty to the third-degree murder charge, but the district court rejected that plea. *Id.* Subsequently, the prosecution dismissed the indictment, charged only kidnapping, and the defendant was convicted. *Id.* On appeal, we stated that "[t]here is nothing in the grand jury's action showing an intent to vary the rule that the defendant has no absolute right to plead guilty to anything less than the entire indictment." *Id.* at 207. Petersen interprets this language to imply that if a defendant has no absolute right to plead to anything less than the entire complaint, then the defendant necessarily has an absolute right to plead to the entire complaint.

But *Linehan* does not create an absolute right to plead guilty. Petersen ignores contrary language in the *Linehan* opinion two paragraphs earlier that states: "It is clear to us that [Minn. Stat. §§ 630.11 and 630.30] contemplate not an absolute right on the part of a defendant to plead guilty, but a power on the part of the court, in its *discretion*, to allow him to do so in proper cases." *Id.* at 206 (emphasis added). In short, accepting a plea is within the district court's discretion. *See Petersen*, 910 N.W.2d at 6; *see also* Minn. R. Crim. P. 15.04, subd. 3(2) ("The judge *may* accept a plea agreement of the parties when the interest[s] of justice would be served." (emphasis added)).

Because appellate counsel reasonably could conclude that Peterson did not have an absolute right to plead guilty under *Linehan*, Petersen has failed to establish the first prong of *Strickland*.

D.

In addition, Petersen argues that the district court erred by failing to consider his arguments that appellate counsel was ineffective when counsel failed to assert a violation of Minn. Stat. § 611.02, and instead asserted three frivolous arguments on direct appeal.[8]

Petersen contends that his first-degree murder conviction violates Minn. Stat. § 611.02, arguing that this statute allows a conviction only on the second-degree murder count. We disagree.

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[8] Petersen does not explicitly assert that the district court abused its discretion by summarily denying his postconviction petition without discussing his section 611.02 argument. But in his brief he states, "[The district court] makes no mention whatsoever of 611.02" and the "court did not address this issue" in reference to Minn. Stat. § 611.02.

> Every defendant in a criminal action is presumed innocent until the contrary is proved and, in case of a reasonable doubt, is entitled to acquittal; and when an offense has been proved against the defendant, and there exists a reasonable doubt as to which of two or more degrees the defendant is guilty, the defendant shall be convicted only of the lowest.

Minn. Stat. § 611.02. The statute codifies the common-law burden-of-proof standard, proof beyond a reasonable doubt, for criminal prosecutions. It also codifies the proposition that when someone is charged with two or more degrees of an offense (i.e., first and second degree), and reasonable doubt exists as to the higher degree (i.e. first degree), the defendant can be convicted only of the lower degree (i.e. second degree).

We considered, and rejected, a similar argument in *State v. Hallmark*, stating that "section 611.02 does not require a defendant found guilty of two crimes to be sentenced on the lesser of the two crimes." 927 N.W.2d 281, 306 (Minn. 2019).[9] In *Hallmark*, the defendant was found guilty of first-degree premeditated murder and second-degree

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Because we liberally construe postconviction petitions, we will address this issue. *See* Minn. Stat. § 590.03 (2018); *see also Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010).

[9] *Hallmark* is not cited by either party, but it is the most relevant case on this issue. Instead, Petersen dedicates a large portion of his brief to discussing the merits of *Morrow v. State*, 886 N.W.2d 204 (Minn. 2016). In *Morrow*, we held that the appellant's argument under Minn. Stat. § 611.02 was "misplaced because the jury verdicts demonstrate beyond a reasonable doubt that [defendant] was guilty of both charges." 886 N.W.2d at 207 n.3. In other words, when it is clear that a defendant is guilty beyond a reasonable doubt of the more serious offense, then there is no violation of section 611.02.

Petersen also cites *State v. Hernandez*, No. C8-00-1482, 2001 WL 641526 (Minn. App. June 12, 2001), in his brief to support his argument that section 611.02 requires a second-degree murder sentence here. But *Hernandez* involves a case in which the court of appeals held, based on the language of the jury instructions, that the jury's verdicts were legally inconsistent. *Id.* at *2. The instructions required the jury to find that the defendant "knew or believed" that the substance she was selling was cocaine for one charge, while simultaneously finding that the defendant "knew or believed" that the substance she was selling was amphetamine for a different charge. *Id.* at *1. That is not this case.

intentional murder. *Id.* at 287–88. On direct appeal, the defendant argued that the district court violated section 611.02 when it sentenced him based on the first-degree murder conviction "because the district court could have sentenced him on the second-degree murder conviction." *Id.* at 306. We explained that such an argument "misstates the nature of Minn. Stat. § 611.02" and we "declined to reduce a first-degree murder conviction supported by sufficient evidence to a second-degree murder conviction under [Minn. Stat. § 611.02]." *Id.*

Like the defendant in *Hallmark*, Petersen also misstates the meaning of section 611.02. Petersen argues that, because he was found guilty of both first-degree premeditated murder and second-degree intentional murder, "there is a doubt as to which of the two the [judge] intended to find [him] 'guilty' of." But verdicts finding Peterson guilty of both first-degree and second-degree murder do not, by definition, create "doubt" as to his guilt for either crime. Rather, Petersen is guilty of both crimes; he was convicted of, and sentenced for, first-degree premeditated murder and neither the conviction nor the sentence are prohibited by section 611.02. And on direct appeal, we concluded "that the only reasonable inference to be drawn from the totality of the evidence is that Petersen's murder of Passauer was a premeditated act." *Petersen*, 910 N.W.2d at 8. Thus, section 611.02 is inapplicable here because there is no doubt about Petersen's guilt of first-degree premeditated murder.[10]

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[10] Petersen also contends that appellate counsel was ineffective because three frivolous arguments were made on appeal: (1) there was insufficient evidence of premeditation; (2) transferred intent does not apply; and (3) the district court erred by not accepting his

In sum, the district court did not abuse its discretion in concluding that the petition, files, and records of the proceedings conclusively show that Petersen is entitled to no relief on his postconviction claim of ineffective assistance of appellate counsel. The district court therefore did not err by summarily dismissing that petition.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

GILDEA, C.J., took no part in the consideration or decision of this case.

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guilty plea on the ground that the second appearance was an Omnibus Hearing under Minn. R. Crim. P. 11. Petersen does not cite, nor have we found, any legal precedent supporting his claim that the assertion of unsuccessful arguments constitutes ineffective assistance of appellate counsel; he also does not allege that he was harmed by the assertion of these unsuccessful arguments. Thus, this argument fails under the second prong of *Strickland* because there is not "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.