STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2340

State of Minnesota,
Respondent,

vs.

Jesse Ray Loberg,
Appellant.

Filed March 17, 2009
Affirmed
Hudson, Judge

Wright County District Court
File No. 86-KX-03-003800

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Thomas N. Kelly, Wright County Attorney, Wright County Government Center, Ten Second Street Northwest, Buffalo, Minnesota 55313 (for respondent)

Bryan R. Battina, Elizabeth A. Mikesell, Michael H. Frasier, Bock & Battina, LLP, 333 Washington Avenue North, Suite 336, Minneapolis, Minnesota 55401 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

HUDSON , Judge

On appeal from a conviction of first-degree criminal sexual conduct, appellant argues that (1) the district court violated his right to a speedy trial, (2) several evidentiary

and procedural errors warrant a new trial, (3) the prosecutor committed misconduct during closing arguments, and (4) he was denied effective assistance of counsel. We affirm.

FACTS

On November 18, 2003, appellant Jesse Ray Loberg was charged by complaint with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a), (h)(iii) (2002). The charges stemmed from acts committed against M.T., a minor child. In a separate complaint, appellant was charged with an additional count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a), for acts committed against C.T., also a minor child. The complaints were subsequently amended to add two counts of second-degree criminal sexual conduct in regard to M.T., and one count of second-degree criminal sexual conduct in regard to C.T.

At appellant's first appearance on December 18, 2003, he did not make a demand for a speedy trial; at a later hearing, appellant waived his speedy-trial right. After several continuances, appellant pleaded not guilty to the charges. A jury trial was scheduled for June 6, 2005, but appellant and the state agreed to a 90-day continuance. Another continuance was ordered on September 12, 2005.

On September 28, 2005, appellant moved the district court to conduct an in camera review of confidential social-service and therapist records from the victims' therapy sessions to determine whether the records contained information that would assist in appellant's defense. The therapy records were not made available to the district court

at the time of appellant's motion, and the district court did not immediately rule on the motion.

Appellant's trial was rescheduled for October 24, 2005, but appellant failed to appear and another continuance was issued. After several pretrial hearings, an additional hearing was held on August 1, 2006, regarding the victims' therapy records, during which appellant limited the scope of his request. The district court finally received the victims' therapy records on September 20, 2006, and approximately one month later, the court disclosed 11 of the 543 records to appellant – ten pertaining to C.T. and one pertaining to M.T. The district court found that the remaining records would not aid appellant in his defense.

After several more hearings, appellant's trial began on April 23, 2007. Both victims testified at trial. M.T. identified appellant as the person who sexually abused her, but C.T. was unable to identify appellant at trial. On cross-examination, appellant questioned both victims about the number of people they spoke to regarding the abuse. He further questioned C.T. about the accuracy of a prior statement in which C.T. alleged that the abuse happened a hundred times. He also specifically asked M.T. whether her father told her what to say to her therapist.

At a break in the testimony, the bailiff told the district court that the jurors could hear the sidebar conversations between the judge and the attorneys. The district court stated that it wanted to hold any remaining sidebars outside of the courtroom, but appellant's counsel objected, expressing concern that the jurors would begin talking

about the case if the judge and attorneys left the courtroom to hold sidebars. The district court decided to simply limit discussions on objections.

The state sought to introduce the victims' videotaped CornerHouse interviews through Jennifer Droneck-Fink—the child-protection worker who interviewed the victims regarding the allegations of sexual abuse.[1] Appellant objected to the admission of the videos, but said that if the videos were admitted, he wanted the videos to be played in their entirety because some of the statements on the videos fit within his theory of the case. The district court admitted the videos under Minn. Stat. § 595.02, subd. 3 (2006).

The videos were played at the close of Droneck-Fink's direct examination. The video of M.T.'s interview was played first, followed by a 15-minute recess, after which C.T.'s interview was played. The state then finished its direct examination of Droneck-Fink. During cross-examination, Droneck-Fink acknowledged that a child could be intentionally or unintentionally manipulated by a caretaker into thinking he or she has been sexually abused. She also admitted that she never asked if the victims' father told them what to say during the interviews.

Appellant did not call any witnesses. During closing arguments, appellant argued that the evidence showed that someone had influenced the victims' allegations and that the victims' father had the opportunity and motive to influence them. Appellant also argued that there was no evidence corroborating the allegations. During deliberations, the jury asked the district court if it could review the video of M.T.'s interview. The

[1] CornerHouse is a child-abuse training and evaluation center whose stated mission is to assess suspected child sexual abuse, to coordinate forensic interview services, and to provide training for other professionals.

district court allowed the jury to review the video once in its entirety, in the courtroom, and in the presence of counsel.

Appellant was acquitted on all charges pertaining to C.T., but he was convicted of one count of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct in regard to M.T. The two second-degree convictions were subsequently vacated under the doctrine of merger. This appeal follows.

D E C I S I O N

I

Appellant first argues that the district court violated his right to a speedy trial. A speedy-trial challenge presents a constitutional question subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Minnesota Constitution." *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). The supreme court has set forth four factors to consider when determining if the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); *see also State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977) (adopting the *Barker* inquiry).

A. Length of delay

Length of delay functions as a "triggering mechanism" in the speedy-trial analysis in that until some delay is evident, "the other factors need not be considered." *State v.*

Jones, 392 N.W.2d 224, 235 (Minn. 1986). In Minnesota, a delay of over 60 days from the date a defendant demands a speedy trial is presumptively prejudicial such that it will trigger consideration of the remaining *Barker* factors. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Here, appellant did not demand a speedy trial, so the length of delay is measured from the date of appellant's arrest until the beginning of appellant's trial. *See Cham*, 680 N.W.2d. at 125 ("We measure the length of delay from the time when the police arrest the defendant."). Because more than three years elapsed between appellant's arrest and trial, consideration of the remaining *Barker* factors is appropriate.

B. Reason for delay

"The responsibility for an overburdened judicial system cannot . . . rest with the defendant." *Jones*, 392 N.W.2d at 235. However, "when the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

Appellant argues that the vast majority of the delay here is attributable to the district court, which raises a presumption of prejudice. We disagree. The district court's notes from each of the pretrial hearings indicate that many of the continuances are attributable to appellant, which creates a presumption against prejudice. *See State v. DeRosier*, 695 N.W.2d. at 109 (finding no speedy-trial violation when the delay was "occasioned by defense motions for a change of venue, continuances, and . . . [the defendant] never moved for a speedy trial"). For example, the record establishes that the continuances issued on April 9, May 7, May 21, and August 27, 2004, were all requested by appellant. Notes from the hearings on February 6, April 9, and July 16, 2004, further

indicate that appellant waived any time requirements for his trial. Additionally, appellant agreed to a continuance on July 6, 2005.

Because much of the delay in this case is attributable to appellant, this factor weighs against appellant's claim. At best, this factor is neutral, given that the source of some of the delay is unidentifiable and is therefore presumed attributable to the district court. *See Jones*, 392 N.W.2d at 235 ("The responsibility for an overburdened judicial system cannot . . . rest with the defendant").

C. Defendant's assertion of his right to a speedy trial

Appellant concedes that he made no formal demand for a speedy trial and acknowledges that he waived his speedy-trial right. Appellant argues, however, that he waived his right only to accommodate the scheduling of his omnibus hearing, and he asserts that his waiver should only be applied to his omnibus hearing. But after appellant first waived his speedy-trial right on February 6, 2004, he again waived any time requirements on April 9 and July 16, 2004. Appellant's failure to request a speedy trial, waiver of his right to a speedy trial, and subsequent waivers of any time requirements all weigh against appellant's speedy-trial claim.

D. Prejudice to the defendant

"The final prong of the *Barker* test is to determine whether [a defendant] suffered prejudice as a result of the delays." *State v. Windish*, 590 N.W.2d 311, 318 (Minn. 1999). In considering prejudice to a defendant, the supreme court has considered three interests protected by the right to a speedy trial: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility

that the defense will be impaired." *Id*. (citing *Barker*, 407 U.S. at 532, 92 S. Ct. at 2182). The defendant does not have to prove prejudice; it can be "suggested by likely harm to a defendant's case." *Id.*

In a footnote, appellant briefly argues that even though he was not incarcerated, the delay in his trial was prejudicial because he was kept "under the thumb of the law," was not free to leave the state, and was not allowed to conduct business of his "own free will." But appellant cites no authority for the proposition that a defendant who is not incarcerated and is merely awaiting trial under normal travel restrictions suffers prejudice by a delay in trial caused, in part, by his own actions. *Cf. State v. Griffin*, 760 N.W.2d 336, 338–39, 341 (Minn. App. 2009) (holding that an eight-month delay in trial prejudiced the defendant who, although not incarcerated, was required to be available for trial within two hours' notice for the first six months of the delay, which impinged upon her liberty and prevented her from returning home to Chicago, Illinois). Also in a footnote, appellant alleges that the long delay "weighed heavily" on his mind. The record does not reflect any particularized evidence of appellant's anxiety or concern beyond that usual to a defendant in a criminal proceeding.

Appellant's primary claim is that the passage of time strengthened the state's case, thereby prejudicing his defense. But in order to establish that he was prejudiced by a delay in trial, appellant is required to show a direct harm to his defense, such as the inability to locate witnesses, the unwillingness of witnesses to testify, or the inability of witnesses to recall important events. *See Jones*, 392 N.W.2d at 235–36 (finding no prejudice from delay where there was no evidence that the witnesses at trial were unable

to recall essential facts, no witnesses were called by the defendant, and the defendant did not contend that any witnesses had died during the delay). Appellant does not argue, nor does the record reflect, that appellant suffered any such direct harm to his defense.

Appellant also argues that the delay allowed the therapy sessions to distort the victims' memories and gave the victims time to learn how to "sound credible while testifying six years after the alleged events." These arguments are no more than mere conjecture, and appellant fails to cite any authority to support a claim that a defendant is prejudiced when delay affects the memory and credibility of the state's witnesses. Therefore, appellant cannot establish that he was prejudiced by the delay, and the absence of prejudice weighs against appellant's speedy-trial claim.

Our review of the *Barker* factors thus indicates that the district court did not violate appellant's right to a speedy trial.

II

Next, appellant raises several evidentiary and procedural challenges. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id.*

A. Sidebar conversations

Appellant first argues that he was prejudiced by the jury's ability to hear some of the sidebar conversations. But at trial, appellant made no objection upon learning of the jury's ability to hear the sidebars, made no claim of prejudice, and requested no relief.

The failure to object to error at trial generally constitutes waiver of a challenge to that error on appeal, allowing reversal only if the error is plain and affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant offers no argument as to how he was prejudiced, other than to say that the jury's ability to hear some of the sidebars "could have nothing but a prejudicial effect." But the record does not reflect exactly what prejudice appellant may have suffered. Contrary to appellant's claim, the record does not establish that the jurors heard "every word spoken in the sidebars." Accordingly, while there were several sidebar discussions the jury could have overheard, the record does not indicate exactly what information or comments to which the jury was privy. Furthermore, appellant does not argue, and the record does not suggest, that any of the jurors improperly considered the sidebars.

Because appellant alleges no real prejudice and because the record is unclear as to what prejudice may have resulted from the jury's ability to hear some of the sidebars, appellant cannot establish that his substantial rights were affected. Thus, he is not entitled to relief.

B. The victims' therapy records

Next, appellant avers that the district court abused its discretion by only disclosing 11 of the confidential documents from the victims' therapy sessions. The district court followed the correct procedure in reviewing the documents in camera and then disclosing those documents that it found helpful to appellant's defense. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) ("The in camera approach strikes a fairer balance

between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense"). We review the district court's decision to limit the disclosure of confidential records for an abuse of discretion. *State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008.)

The district court reviewed the therapy records for any information that would be helpful to appellant in preparing his defense, negating his guilt, or preparing for cross-examination. After independently reviewing the victims' therapy records, we agree with the district court that the overwhelming majority of the records are private counseling notes that are not helpful to appellant.[2] As a result, the district court did not abuse its discretion by limiting the disclosure of the victims' therapy records.

C. The video interviews

Additionally, appellant contends that the district court abused its discretion by admitting the CornerHouse videos of the victims' interviews. The district court admitted the videos under Minn. Stat. § 595.02, subd. 3 (2006), which provides, in relevant part, that an out-of-court statement made by a child under the age of ten is admissible if the district court finds, among other requirements, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability. But the district court did not make the required reliability

[2] Although the district court sealed the victims' therapy records pursuant to Minn. R. Crim. P. 9.03, the nondisclosed portions of the records were not included with the district court file we initially received from Wright County. At oral arguments on January 7, 2009, we informed the parties that we had not yet received all of the therapy records and inquired into the records' whereabouts. Neither party had any information regarding the location of the records. We subsequently received the records from Wright County on January 13, 2009.

findings. We agree with appellant that it was an abuse of discretion for the district court to admit the videos without making the required reliability determination.

But we cannot say that appellant was prejudiced by the district court's failure to make the required findings because the record indicates that there were sufficient indicia of reliability to support the admission of the videos. Droneck-Fink, the child-protection worker who conducted the interviews, testified about her training and experience and about the protocol that CornerHouse interviewers use when interviewing abuse victims. She was thus subject to cross-examination, and was in fact cross-examined, about her reliability and the reliability of CornerHouse protocol. Further, both victims testified at trial and were subject to cross-examination about the statements they made in the videos.

Additionally, appellant does not allege that the jury's verdict was attributable to the erroneous admission of the videos. *See State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988) (noting that an evidentiary ruling is only prejudicial, and therefore reversible, "if there is a reasonable possibility the error complained of may have contributed to the conviction"); *see also State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (stating that in conducting the harmless-error analysis, the inquiry is whether the jury's verdict is "surely unattributable" to the error). As a result, appellant was not prejudiced by the district court's failure to make the required findings, and any error in the admission of the videos was harmless. *See* Minn. R. Crim. P. 31.01 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Appellant argues that if it was not reversible error for the district court to admit the videos, it was error to admit them without redacting certain portions of the videos. But at trial, appellant specifically requested that if the videos were admitted, they be played in their entirety because some of the statements on the videos fit within his theory of the case. Therefore, this claim is without merit.

Appellant further alleges that it was error for the district court to allow Droneck-Fink to give her opinion as to whether the victims had been sexually abused. But Droneck-Fink did not give her opinion about whether the victims had been abused. The transcript only indicates that at a sidebar, the prosecutor asked if he could inquire as to Droneck-Fink's opinion regarding whether the victims had been sexually abused. Ultimately, the prosecutor never made such an inquiry, and Droneck-Fink gave no such opinion.

D. Cross-examination of Droneck-Fink

Appellant claims that the district court erred by recessing after playing M.T.'s CornerHouse video without first allowing appellant to cross-examine Droneck-Fink. But appellant did not object to the timing of the recess at trial, and he provides no authority to support his claim. "An assignment of error based on mere assertion and not supported by any argument or authorit[y] . . . is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)). Because appellant cross-examined Droneck-Fink shortly after the second video was played for the jury,

prejudicial error is not obvious on mere inspection and we do not consider appellant's claim.

E. Playing M.T.'s interview video during deliberations

Appellant also contends that the district court abused its discretion by allowing the jury to watch the video of M.T.'s interview during deliberations. During deliberations, if the jury requests a review of testimony or evidence not taken to the jury room, the district court may grant the jury's request. Minn. R. Crim. P. 26.03, subd. 19(2)(1). If the district court chooses to grant the request, it has broad discretion to control the jury's review of the evidence to minimize prejudice. *State v. Wembley*, 728 N.W.2d 243, 245 n.1 (Minn. 2007) (citing *State v. Kraushaar*, 470 N.W.2d 509, 514–15 (Minn. 1991)).

In *Kraushaar*, the videotaped interview of the child victim was admitted into evidence, played for the jury, and sent into the jury room along with the other exhibits. 470 N.W.2d at 511. The supreme court concluded that while it would have been preferable for review of the videotape to have occurred in the courtroom under supervision, rather than in the jury room, any error was harmless because (1) the tape viewed in the jury room was no different from the tape that the jury would have seen in the courtroom; (2) replaying the tape merely allowed the jury to rehear what it had already heard; (3) the victim's testimony was positive, consistent, and corroborated by other evidence; and (4) it was extremely unlikely that the fact that the replaying of the tape prompted the jury to convict when it otherwise would not have done so. *Id*. at 516.

In *State v. Haynes*, 725 N.W.2d 524, 528–29 (Minn. 2007), the supreme court concluded that the district court did not abuse its discretion by replaying two tapes that

had been admitted into evidence "once in open court," because the district court followed the analysis set out in *Kraushaar* by allowing the jury to review the tapes in the courtroom and not in the jury room, thus minimizing any prejudice or misuse by the jury.

Here, the district court was within its discretion to allow the jury to view the video of M.T's interview, and by playing the video in its entirety, in open court, and in the presence of counsel, the district court followed the analysis set forth in *Kraushaar*. Therefore, the district court did not abuse its discretion by allowing the jury to watch M.T.'s CornerHouse interview during deliberations.

III

Appellant also argues that the prosecutor committed misconduct during closing argument by stating that the abuse happened hundreds of times, which, according to appellant, is not supported by the victims' testimony. It is misconduct for a prosecutor to intentionally misstate evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). But appellant did not object to the prosecutor's statement at trial. "Typically, a defendant is deemed to have waived the right to raise an issue concerning the prosecutor's final argument if the defendant fails to object or seek cautionary instructions." *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). "A defendant's failure to object to the prosecutor's statements implies that the comments were not prejudicial." *Id.*

"On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Appellant has the burden of showing that the prosecutor's conduct constituted an error

that was plain; the burden then shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.* at 300.

Contrary to appellant's claim, the prosecutor did not assert that the abuse happened a hundred times; rather, he stated that the victims alleged that the abuse happened a hundred times, which is supported by C.T.'s testimony. A prosecutor is free to make legitimate arguments on the basis of all proper inferences from the evidence introduced. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996).

Moreover, any alleged misconduct committed by the prosecutor must be viewed against the overwhelming evidence of appellant's guilt. *Ives*, 568 N.W.2d at 714. Here, the victims testified against appellant, videos were played for the jury detailing the abuse, and several additional witnesses testified regarding the circumstances of the allegations. Thus, overwhelming evidence supports appellant's convictions, and any prosecutorial misconduct would not have influenced the verdict. Appellant therefore cannot show plain error. Appellant also argues that the prosecutor erred by telling the jury that appellant was chiefly responsible for the delay in trial, but, based on our review of the record, the prosecutor made no such comment during his opening statement or closing argument.

IV

Finally, appellant raises an ineffective-assistance-of-counsel claim. An appellant bears the burden of proof on an ineffective-assistance-of-counsel claim. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). To prove ineffective assistance of counsel, appellant must show that (1) his attorney's representation "fell below an objective standard of

reasonableness" and (2) "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)).

But appellant raises his ineffective-assistance-of-counsel claim for the first time on direct appeal. When an appellant raises an ineffective-assistance-of-counsel claim on direct appeal instead of in a postconviction proceeding, he faces a heavier burden because an appellate court "[does] not have the benefit of all the facts concerning why defense counsel did or did not do certain things." *State v. Zernechel*, 304 N.W.2d 365, 367 (Minn. 1981). Accordingly, an appellant claiming ineffective assistance of counsel on direct appeal must establish that nothing defense counsel could have said at a postconviction hearing would have justified the allegedly incompetent behaviors. *State v. Tienter*, 338 N.W.2d 43, 44 (Minn. 1983).

Appellant first claims that his counsel was ineffective for not demanding a speedy trial. But the record reflects that appellant's trial counsel requested multiple continuances in order to consult with experts regarding appellant's case. As a result, appellant cannot establish that nothing his trial counsel could have said at a postconviction hearing would have justified his decision to forgo a speedy-trial demand.

Next, appellant argues that his counsel was ineffective for not "forcing" the district court to rule on his motion to review the victims' therapy records sooner than it did. This claim is without merit. The record indicates that the therapy documents were not made available to the district court until nearly a full year after appellant moved the

court for review. The record does not establish why the documents were not provided to the district court earlier, and appellant does not argue that his trial counsel should have made the documents available earlier or had the means to do so. It is thus unclear how appellant's attorney could have "forced" the district court to review the documents any earlier.

Appellant also contends that his trial counsel should have challenged the district court's disclosure of the documents from the victims' therapy sessions. This claim is also without merit. Appellant's counsel made the record as to his request for the records, thereby preserving the issue for appeal; it is unclear how the failure to challenge the district court's ruling falls below an objective standard of reasonableness or how such a challenge would have made the proceedings any different.

Additionally, appellant alleges ineffective assistance of counsel based on his trial counsel's request that the CornerHouse interviews be played in their entirety if they were admitted into evidence. But appellant's trial counsel specifically stated that some of the statements on the tape fit within his theory of the case—namely, that someone was giving the victims information about appellant and thereby influencing their allegations against him. Accordingly, appellant cannot establish that nothing defense counsel would have said at a postconviction hearing would have justified the request.

Finally, appellant asserts that his trial counsel presented no defense to the charges. We disagree. In his opening statement, appellant's counsel stated that he expected the evidence would show that the victims' father had the opportunity to talk to the victims about the alleged abuse but that no one ever asked the victims if their father told them

what to say about the abuse. He cross-examined the witnesses consistent with the theory that the victims' allegations were influenced by their father, and he argued his theory of the case to the jury during closing arguments.

Appellant acknowledges that his trial counsel cross-examined the witnesses, but appellant argues that his counsel should have called additional witnesses, presented alternate theories of the case, and moved for a directed verdict once C.T. failed to identify appellant. These are attacks on trial counsel's strategy. "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel." *Jones*, 392 N.W.2d at 236. This court generally will not review attacks on counsel's trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

Accordingly, appellant cannot show that his trial counsel's representation fell below an objective standard of reasonableness or that the proceeding would have been different but for counsel's alleged errors. There was thus no violation of appellant's right to effective assistance of counsel.

Affirmed.