STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1915

State of Minnesota,
Respondent,

vs.

Justin Lee Niesen,
Appellant.

Filed January 21, 2025
Affirmed
Reilly, Judge[*]

Kanabec County District Court
File No. 33-CR-22-160

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Barbara McFadden, Kanabec County Attorney, Steven C. Cundy, Assistant County Attorney, Mora, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Reilly, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this direct appeal from the judgment of conviction for first-degree burglary and giving a peace officer a false name, appellant argues that he received ineffective assistance of counsel because his attorney failed to (1) raise an involuntary-intoxication defense on his behalf and request a corresponding jury instruction; and (2) object to an erroneous jury instruction that did not specify or define the predicate offense the state was required to prove for a burglary. We affirm.

FACTS

One morning in June 2022, a woman was awoken from her living room couch by her dog trying to play with someone she did not recognize. The stranger, later identified as appellant Justin Lee Niesen, was smiling at her as she laid on her living room couch. Niesen had put on the woman's work t-shirt and her husband's winter neck gaiter. The woman screamed at Niesen, asking why he was in her house and telling him to get out. Niesen said, "No big deal. Wrong house." The woman called for her husband, and, when he came, Niesen fled to the basement. The woman then called 911.

The husband grabbed a shotgun from a locked gun case and followed Niesen to the basement. Niesen "looked like he was trying to grab some things" and "was putting his shoes on." The husband pointed the shotgun at Niesen and commanded him to walk. Then, with Niesen at gunpoint, the husband walked Niesen around to the front of the house and through the driveway onto the main road.

A deputy encountered Niesen walking on a road near the residence and recognized him as one of the Niesen brothers. Niesen identified himself as his twin brother, James. Squad car footage shows Niesen telling the deputy that he "took an Ativan and got confused," and that he was coming from a party and going to the bar where he worked. The deputy drove Niesen back to the victims' house, where the couple confirmed that Niesen was the intruder they saw inside their home. Niesen then said that he was hallucinating because he took an Ativan. The officer asked Niesen where he got the shirt, and Niesen said he did not know. Niesen also told the officer he needed to go to the hospital because he "[could] barely hold [his] head up." Niesen nodded off sporadically.

After the deputy left the home, the woman checked the basement for missing items. She found muddy socks and a debit card belonging to Niesen's mother on the floor and an empty pill bottle underneath a bed. And on a nightstand, the woman found a pocketable pile of small items, including her belongings that used to be in a drawer and some items that belonged to Niesen. A clothes basket was tipped over, "like it had been gone through." There were no signs of forced entry. The husband believed that Niesen may have entered through a basement door.

Meanwhile, the deputy took Niesen to the hospital, where the deputy noticed identifying markings that matched Justin Niesen but not James Niesen. Neisen responded when the deputy referred to him as "Justin." Niesen was promptly released to the deputy for transport to the county jail.

The state charged Niesen with one count of first-degree burglary of an occupied dwelling, Minn. Stat. § 609.582, subd. 1(a) (2020), one count of second-degree burglary of

a dwelling, Minn. Stat. § 609.582, subd. 2(a)(1) (2020), and one count of false identification to a peace officer, Minn. Stat. § 609.506, subd. 2 (2020). At the start of the first day of Niesen's jury trial, while discussing pretrial motions, the prosecutor said:

> [T]his appears to be a case of voluntary intoxication, which is not a defense, unless it's a specific intent crime, which I don't believe would be appropriate for counsel to bring up, as is diminished capacity, Your Honor. Neither of those would be lawful defenses. I don't think those would be appropriate.

The district court noted that defense counsel did not raise any affirmative defenses. Defense counsel agreed that he was not raising a diminished-capacity defense and that he "would agree that voluntary intoxication in this case [did] not appear to be a valid legal defense."

During closing argument, defense counsel said that Niesen did not intend to commit theft and that Niesen had no opportunity to return the t-shirt and gaiter while held at gunpoint; Niesen had not intended to steal the pile of belongings in the basement. The state argued that it was reasonable to infer that Niesen had an intent to steal when he put on clothes that were not his and gathered the pile of belongings, which included a wedding ring, that also were not his.

The jury found Niesen guilty of all counts. The district court convicted Niesen of all three counts but sentenced him only on the first-degree burglary and the false-name counts, for 57 months' and 90 days' incarceration respectively.

Niesen appeals.

DECISION

Niesen claims that he received ineffective assistance of counsel because of his attorney's alleged misunderstanding of an affirmative defense and failure to object to the

jury instructions for the burglary offenses. An ineffective-assistance-of-counsel claim involves a mixed question of law and fact, which an appellate court reviews de novo. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

When a defendant asserts that counsel was ineffective, this court evaluates the claim according to the two-prong *Strickland* test. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 688, 687 (1984)). Under the *Strickland* test, a defendant must "show that (1) counsel's performance 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." *Pearson v. State*, 891 N.W.2d 590, 598 (Minn. 2017). Reviewing courts "may analyze the *Strickland* requirements in either order and may dispose of a claim on one prong without considering the other." *Tichich v. State*, 4 N.W.3d 114, 122 (Minn. 2024) (quotation omitted).

For the first prong, "[t]he objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). "[T]here is a strong presumption that counsel's performance was reasonable." *Andersen*, 830 N.W.2d at 10.

An attorney's mistake of law can sometimes constitute an objectively unreasonable performance. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under

Strickland."); *State v. Ellis-Strong*, 899 N.W.2d 531, 539 (Minn. App. 2017) ("An attorney's 'mistake of law' because of a failure to look up a statute may amount to an objectively unreasonable performance." (discussing *Hinton*, 571 U.S. at 274-75)). But "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

I. Voluntary Intoxication Defense

When a defendant is charged with a crime requiring proof that they intended to cause a particular result, "the fact of [voluntary] intoxication may be taken into consideration in determining such intent." *State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (quoting Minn. Stat. § 609.075 (2012)). In other words, a defendant charged with a specific-intent crime may argue that they did not form the required intent because of their voluntary intoxication.

Niesen argues that his trial attorney mistakenly believed that a voluntary-intoxication defense was unavailable, and that such a belief was objectively unreasonable. The state argues that defense counsel made a strategic decision not to ask for a voluntary-intoxication instruction because Niesen would have had to testify, and he could have been impeached with two prior gross misdemeanors and a felony violation of a no-contact order.

Niesen relies on the trial record to support this claim. "Generally, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). But an appellate court may address the claim in a direct appeal if there is "no need for additional

facts to explain the attorney's decisions." *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997).

We conclude that the record is inadequate for our review. Although defense counsel agreed "that voluntary intoxication in this case does not appear to be a valid legal defense," he did not explain why he believed the defense was not valid here. Assuming, without deciding, that the burglary offenses were specific-intent crimes for which a voluntary-intoxication defense would be available, it is plausible that the belief could have been attributable to an objectively-reasonable mistake *or* to a strategic assessment. If defense counsel mistakenly believed that the defense was unavailable, the mistaken belief may have been objectively unreasonable. *See Hinton*, 571 U.S. at 274. But it is also plausible that defense counsel accurately assessed the law and decided against raising the defense. An attorney's reasoned decision to not raise a voluntary intoxication defense is a matter of trial strategy that appellate courts do not review. *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999). Without an explanation for why defense counsel did not raise a voluntary-intoxication defense, we cannot resolve Niesen's claim. Accordingly, we decline to consider the claim and preserve it for Niesen to raise in a postconviction proceeding, should he choose to do so.

II. Jury Instructions

Niesen also argues that it was objectively unreasonable for defense counsel not to object to the jury instructions on the burglary offenses. "A district court has considerable latitude when selecting the language of jury instructions." *State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015) (quotation omitted). But still, "jury instructions must fairly and

adequately explain the law and define the crime charged." *Id.* (quotation omitted). Jury instructions are erroneous if they "confuse, mislead, or materially misstate the law." *Id*. "An [attorney's] error based on a failure to notice a potentially erroneous jury instruction is not the kind of error that rises to the level of 'unreasonable error' for which [a reviewing] court typically grants a new trial." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012).

In this case, the district court instructed the jury that finding Niesen guilty of first-degree burglary required it to find that he (1) entered a dwelling; (2) without consent of the person in lawful possession of the dwelling; (3) while another person, other than an accomplice, was present; and (4) entered with an intent to commit a crime or committed a crime while in the dwelling. The instructions for the second-degree burglary count were similar except that they lacked the element regarding the presence of another person.

Niesen argues that defense counsel's failure to object to the instructions was unreasonable because they erroneously did not specify theft as the predicate crime for the burglary offenses and did not define the elements of theft. We are not persuaded.

To support his argument that the jury instructions needed to specify theft as the predicate offense, he relies on *State v. Hager*. 727 N.W.2d 668, 673 (Minn. App. 2007). In *Hager*, we determined that jury instructions for an aiding-an-offender offense were erroneous because they did not specify the crime that Hager was alleged to have aided. *Id.* But *Hager* is distinguishable. In *Hager*, "[t]he record [did] not clearly identify the crime or crimes [Hager] aided." *Id.* at 675. In fact, the state presented evidence that the offender committed four different criminal acts, but "the jury had the entire fact scenario to consider and was permitted to choose a crime that [Hager] may have aided." *Id.* But here, there is

no ambiguity. During opening statement, the prosecutor said that Niesen "committed a crime in that house by stealing" and that he intended "to steal the other items that he had gathered and put together in the basement." And in closing arguments, both parties suggested that the burglary charges turned on whether Niesen stole the shirt or gaiter or intended to steal the pile of belongings in the basement. Unlike in *Hager*, the record clearly identifies the predicate crimes as theft of the clothing and intent to commit theft of the gathered belongings. The court instructed the jury that it must find Niesen committed a crime in the building or entered with intent to commit a crime. Therefore, the jury instructions did not confuse or mislead the jury regarding the predicate crime for the burglary offenses.

As to Niesen's argument that the instructions needed to define the elements of theft, he relies on *State v. Charles*. 634 N.W.2d 425, 430-31 (Minn. App. 2001). But the supreme court has held that district courts need not instruct on the elements of theft when providing jury instructions on the offense of burglary. *Davis*, 864 N.W.2d at 176-79. In *Davis*, the court explained that "the failure to provide a definition of 'theft' or 'steal' to the jury did not mislead the jury or allow it to speculate over the meaning of the element[s]," and the district court did not err by omitting such a definition. *Id.* at 177. In reaching its conclusion, the *Davis* court cited an out-of-state case for the proposition that "theft is a term of . . . common understanding." *Id.* at 177, n.3 (citing *State v. Ng*, 750 P.2d 632, 639 (Wash. 1988)).

Similarly, we conclude that the district court's failure to define the elements of theft was not erroneous. "[D]etailed definitions of the elements to the crime need not be given

in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Id.* at 177. Because the district court here instructed the jury on each element of the burglary offense, the instructions were not erroneous. Accordingly, "it was not unreasonable for counsel to fail to object to proper jury instructions." *Gulbertson v. State*, 843 N.W.2d 240, 248 n.7 (Minn. 2014). Therefore, we do not need to consider whether counsel's performance affected the result. *See Tichich*, 4 N.W.3d at 122.

Affirmed.