STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0404

State of Minnesota,
Respondent,

vs.

Derek Leake,
Appellant.

Filed April 14, 2025
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-22-9531

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

Mary F. Moriarty, Hennepin County Attorney, Matthew D. Hough, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Bond, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his conviction of second-degree intentional murder, arguing that trial counsel was ineffective for failing to object to the prosecutor's repeated use of the word "murder" while questioning a state witness. We affirm.

FACTS

Around 2:00 a.m. on April 24, 2022, appellant Derek Leake had an altercation with R.C. on a bus in Minneapolis, resulting in Leake fatally stabbing R.C. in the neck. Leake was charged with second-degree intentional murder and second-degree unintentional murder while committing a felony. At trial, the state presented the testimony of 13 witnesses and numerous exhibits, including surveillance footage from the bus where the altercation took place. Leake asserted a self-defense claim. The jury found Leake guilty on both charges. The district court convicted him of second-degree intentional murder and sentenced him to 360 months in prison.

Leake appealed and then obtained a stay to pursue postconviction relief. In his postconviction petition, Leake asserted, in relevant part, that trial counsel provided ineffective assistance by failing to object when the prosecutor "repeatedly" described R.C.'s death as "murder" while questioning a homicide investigator. The district court conducted an evidentiary hearing.

At the hearing, trial counsel was asked about five instances in which the prosecutor used the term "murder" when questioning the homicide investigator:

- "When you reviewed the bus video from April 24th, Bus 1572 where this murder took place, did the suspect, Mr. Leake, have anything with him on that date?"

- "Did you also learn from [a probation agent] that up until right around—or I should say just after the time of this murder, he had been having regular contact with Mr. Leake?"

- "Was Derek Leake ultimately located and arrested for the murder of [R.C.]?"

- "In addition to getting video from Bus 1572 where this murder occurred, did you also as part of the identification process—well, let me ask you this before I get into this other video. Was this a—we're kind of summing this up; right? But was this a lengthy process, and did it require a lot of legwork to identify that person in Bus 1572?"

- "And that's the bus [shown in a slide] that the murder actually occurred on; is that also correct?"

Trial counsel agreed that he did not object to any of these questions. He explained that, in his experience trying "[w]ell over two hundred" criminal cases, it is best to "move on" rather than objecting in most instances because it avoids highlighting the matter and builds credibility and goodwill with the jury, which accrues to the defendant's benefit "when it comes to deliberations." Trial counsel also said that he did not "at any point" during the trial think that the state was describing R.C.'s death as murder "in order to convince the jury that that's what happened." Rather, he believed that in each instance the prosecutor used the word "murder" to describe other aspects of the evidence, not Leake's conduct or the "legal classification" of Leake's conduct.

Leake also testified at the postconviction hearing. He acknowledged that he was not concerned by the prosecutor's use of the word "murder" during the trial because, at that time, he was unfamiliar with the distinction between homicide and murder.

The district court denied postconviction relief, reasoning that (1) trial counsel's decision not to object was strategic and not subject to review for competence; and (2) the failure to object was not objectively unreasonable because the use of the term "murder" was not "unfairly emphasized" but used simply as "a marker for certain events," and the average person sees "no meaningful distinction" between murder and homicide.

After Leake moved to reinstate the appeal, we dissolved the stay. The parties subsequently briefed the ineffective-assistance-of-counsel claim.

DECISION

To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) "counsel'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." *Tichich v. State*, 4 N.W.3d 114, 122 (Minn. 2024) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Either prong may be dispositive. *Id.* We review a district court's application of *Strickland* de novo. *Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017). We address Leake's challenge to the district court's application of each prong in turn.

Performance

Under the first *Strickland* prong, counsel's performance is objectively reasonable if counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Davis v. State*, 15 N.W.3d 635, 644 (Minn. 2025) (quotation omitted). In assessing counsel's performance, we recognize that "[l]egal representation is an art, not a science." *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn.

2003); *see Strickland*, 466 U.S. at 693 (stating "an act or omission that is unprofessional in one case may be sound or even brilliant in another"). And we presume that counsel's representation was reasonable. *Davis*, 15 N.W.3d at 644.

Leake argues that it was objectively unreasonable for trial counsel not to object to the prosecutor's use of the word "murder." This argument is unavailing. Decisions about objections are matters of trial strategy, which we generally will not review for competence. *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017); *see also State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013) (stating that courts "give trial counsel wide latitude to determine the best strategy for the client"). Leake points to certain cases in which appellate courts have reviewed the depth or breadth of counsel's investigation, but he identifies none that abandon the well-established principle that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (quoting *Strickland*, 466 U.S. at 690-91). Particularly where, as here, there is no claim of inadequate investigation and counsel articulated a strategic decision not to object, we will not second-guess that decision.

Moreover, even if we review the reasonableness of counsel's failure to object, Leake's ineffective-assistance claim still fails. Leake asserts that the prosecutor should not have used the word "murder" during questioning and, therefore, counsel should have objected. But whether it was improper for the prosecutor to use the word is different from whether trial counsel's failure to object to that usage was objectively unreasonable. The circumstances show that it was not unreasonable because the prosecutor did not use the word "murder" in a way that asked the jury to assume that the killing of R.C. was murder.

In one instance, the prosecutor used the word merely to describe the offense that Leake was arrested for—"the murder of [R.C.]." In every other instance, she used the word "murder" simply as a marker for R.C.'s killing to facilitate asking about other subjects, such as whether the video from the bus "where this murder took place" showed that Leake had anything on him, or what police learned about Leake's contact with his probation agent "just after the time of this murder." While it may have been more appropriate to use the word "homicide" rather than "murder," we agree with the district court that, for the jurors, there likely was "no meaningful distinction" between the two words. In fact, Leake himself acknowledged during the postconviction hearing that he saw no such distinction at the time of his trial. This record persuades us that trial counsel's reasoned decision not to object to the handful of times the prosecutor used the word "murder" to mark the event of R.C.'s killing was not objectively unreasonable.

Prejudice

As noted above, even if a defendant establishes that counsel's performance was objectively unreasonable, they are not entitled to relief unless they also show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Tichich*, 4 N.W.3d at 122 (quotation omitted). This means the defendant "must show that counsel's errors actually had an adverse effect." *Peltier v. State*, 946 N.W.2d 369, 373 (Minn. 2020) (quotation omitted). This prejudice analysis looks to "the totality of the evidence before the jury." *Pearson*, 891 N.W.2d at 600.

Leake contends the prosecutor's use of the word "murder" during questioning was prejudicial because he "had a viable self-defense claim." This argument fails for three reasons.

First, the conduct at issue was a small part of the trial record. Leake points to five instances of the prosecutor using the word "murder" while questioning one of the state's 13 witnesses. That amounts to a small fraction of the trial, during which the state presented four days of testimony. The record also confirms that, when questioning witnesses, the state much more commonly used the words "homicide" and "stabbing," which Leake does not dispute are factual and appropriate. On this record, the use of the word "murder" was limited, and its impact was presumably similarly limited.

Second, the district court's jury instructions likely mitigated the effect of the prosecutor's use of the term "murder." Both before trial and in final instructions, the court advised the jury that the attorneys' statements are not evidence. We presume the jury followed that instruction. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

Finally, the evidence against Leake was very strong. The state presented surveillance video from the bus, complete with audio, which shows the following sequence of events. Leake and R.C. were in a verbal altercation at the back of the bus. R.C. told Leake that he was going to "push" (according to the state) or "punch" (according to Leake) him in the face. As the altercation continued, Leake rummaged in his pockets and pulled out a knife, which he held in front of him near his waist. As the two men stood facing each other, R.C. either pushed or punched Leake once in the left shoulder, close to the neck. Leake leapt toward R.C. and stabbed him in the neck with the knife with enough force that

it looked to the driver at the front of the bus like Leake punched R.C. in the face. As blood spurted from R.C.'s neck, Leake grabbed his belongings and left the bus. R.C. died shortly thereafter.

Regardless of how the jury viewed the exchange between the two men up to the point of R.C. pushing or punching Leake, it is unlikely that the jury viewed R.C.'s actions as actually and reasonably causing Leake to fear death or great bodily harm, or viewed Leake stabbing R.C. forcefully in the neck as reasonably necessary for Leake to defend himself. *See State v. Baker*, 13 N.W.3d 401, 409 (Minn. 2024) (listing requirements for self-defense claim). Because that video evidence "completely undermined" Leake's self-defense claim, there is no reasonable likelihood that the handful of unobjected-to references to "murder" impacted the jury's verdict. *See Pearson*, 891 N.W.2d at 600 (concluding no prejudice from claimed ineffective assistance in trial counsel's failure to cross-examine a witness because of strength of other evidence).

On this record, there is no reasonable likelihood that, but for trial counsel's failure to object to the five instances of the prosecutor using the word "murder," the jury would have reached a different verdict.

Affirmed.