STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1523

State of Minnesota,
Respondent,

vs.

Aaron Joseph Shea,
Appellant.

Filed September 9, 2024
Affirmed in part, reversed in part, and remanded
Schmidt, Judge

Mille Lacs County District Court
File No. 48-CR-21-1378

Keith Ellison, Attorney General, Peter Magnuson, Zuri Balmakund, Assistant Attorneys General, St. Paul, Minnesota; and

Erica Madore, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Ede, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

In this direct appeal from the judgment of conviction for third-degree burglary and felony theft, appellant Aaron Joseph Shea argues (1) the district court plainly erred by admitting forensic reports in violation of his state and federal constitutional rights to confront the witnesses against him, and erred by admitting the reports as they constituted

hearsay, (2) the district court plainly erred in admitting hearsay statements of the complainant, (3) the district court plainly erred by not, sua sponte, striking the state's closing argument when the prosecutor allegedly shifted the burden of proof, (4) he received ineffective assistance of counsel due to his attorney's failure to object to these errors, and (5) the cumulative effect of the errors denied him a fair trial. Appellant also argues (6) that his counsel was ineffective regarding a restitution challenge. We affirm Shea's convictions, reverse the restitution order, and remand to the district court for further restitution proceedings.

FACTS

In July 2018, P.W. arrived at his property after having been away for two days and noticed that an iron cat near his pole barn had been moved. He checked the barn door, which was locked, but observed that one of the windows had been broken by a rock. Upon inspecting the interior of the barn, P.W. noticed several items were missing.

P.W. contacted the Mille Lacs County Sherriff's Office. A deputy arrived, noticed the broken window, and saw some blood under the broken window inside the barn. The deputy took samples of the blood and sent them to be analyzed by the Bureau of Criminal Apprehension (BCA).

L.A., a BCA forensic scientist, tested the samples. The blood samples did not match any known offenders in the BCA database. The results of those tests were reviewed by B.K., another BCA forensic scientist. Approximately one year later, the BCA database alerted that a potential match had been found for the blood sample when Shea's DNA was added to the database due to a separate charge.

A deputy conducted a buccal swab on Shea pursuant to a search warrant and that swab was sent to the BCA for comparison. The same BCA forensic scientist, L.A., analyzed the DNA from Shea's buccal swab and determined it matched the DNA from the blood sample found in P.W.'s barn. As with the prior blood sample, B.K.—the second BCA forensic scientist—reviewed L.A.'s test results and analysis.

P.W. did not know Shea or give him permission to enter the barn. P.W. compiled a list of the missing items and their retail value. P.W. valued all the missing items at $7,452.

Respondent State of Minnesota charged Shea with third-degree burglary and felony theft. Shea waived his right to a jury and the case proceeded to a bench trial.

P.W. testified about discovering the broken window on the barn and testified about the list of missing items and their values. The district court received the list of missing items into evidence without objection.

Regarding the process of extracting DNA profiles from samples, B.K. testified that scientists "put the sample into a robot, and it gives us a DNA profile which we can then interpret." B.K. then testified that she reviewed L.A.'s reports. The prosecutor then moved to admit L.A.'s initial report related to the blood found in the barn, into evidence. Shea did not object. After the district court received the exhibit into evidence, the prosecutor elicited testimony from B.K. regarding L.A.'s initial report.

The prosecutor moved to admit L.A.'s second report, which noted the potential match between Shea and the sample from P.W.'s barn. Shea did not object. After the district court received the second report into evidence, B.K. testified about the report and stated that a known sample from Shea was received by the BCA and tested by L.A.

The prosecutor then moved to admit L.A.'s third report into evidence. After the district court received the report into evidence, again without objection, B.K. testified that she reviewed L.A.'s work and agreed with the report's determination that the DNA sample from P.W.'s barn matched the sample provided by Shea.

The prosecutor then moved to admit an exhibit that reflected the DNA profile generated from the blood by the window in P.W.'s barn. Shea did not object and the district court received the exhibit into evidence. The state also moved to admit an exhibit into evidence, without objection, that reflected the DNA profile developed from the known sample from Shea. Then the following exchange between the prosecutor and B.K. occurred related to the two exhibits:

> Q. Looking at these documents together, it does look like there is certainly a visual similarity. Is there any type of program or any application that does matching and confirmation for you or is it just a visual match?
>
> A. It is a visual match done by the interpreting scientist and then the tech reviewer, myself, will confirm that match.
>
> Q. And in your opinion as the technical reviewer with the BCA, is this a match?
>
> A. Yes, this was determined to be a match.

The district court accepted written closing arguments. In the state's closing, the prosecutor made multiple assertions that elements of the offenses were "not in dispute," and that Shea did not present any "evidence to the contrary." The prosecutor then argued that the possible alternative theories that Shea might raise—such as that he entered the barn, cut himself, and left without taking any property—were "not reasonable doubt."

In Shea's written closing arguments, submitted one day after the state's written closing arguments, Shea did not object to the state's closing argument. Shea also conceded that all the exhibits accepted at trial were entered into evidence without objection. In the written rebuttal closing argument, the prosecutor argued that Shea's assertions in his closing argument were "fanciful and capricious doubts."

In the findings of fact, conclusions of law, and order for judgment, the district court found that the DNA match between Shea's buccal swab and the blood in P.W.'s barn meant that Shea had been inside the barn without lawful reason. The court also recognized that Shea's entry into the barn coincided with "the theft of the various tools, fishing equipment, and hunting equipment," and that those items have "never been recovered."

With respect to the burglary charge, the district court found that Shea entered the barn without P.W.'s consent, that the circumstances demonstrate Shea's intent to steal, and that Shea stole various items totaling $7,452. These facts were found by the district court to have been proven beyond a reasonable doubt.

Regarding the theft charge, the district court found that "[t]he items listed in exhibit 1 . . . were the property of [P.W.]." The court also found that Shea intentionally took those items knowing he had no right to take them, that P.W. did not consent to Shea taking those items, and that Shea intended to permanently deprive P.W. of the possession of those items. The total value of those items, as previously found by the district court, exceeded $5,000. These facts were found by the district court to have been proven beyond a reasonable doubt.

The district court then found Shea guilty of third-degree burglary and felony theft. The district court sentenced Shea to 15 months in prison for the burglary charge, stayed the sentence for five years, and placed Shea on supervised probation. The district court also required Shea to pay $7,452 in restitution. On the theft charge, the district court sentenced Shea to 12 months and one day in prison, stayed for one year.

Shea filed a motion to challenge the restitution order, arguing that P.W. did not make a sufficient showing of the items stolen and their cost, and asserting that Shea did not have the ability to pay. Shea's counsel, however, did not file the required affidavit. Because there was no timely affidavit filed, the district court dismissed the motion.

Shea appeals.

DECISION

I. Even if the district court's admission of L.A.'s reports and B.K.'s testimony regarding those reports constituted plain error, any possible plain error did not affect the fairness and integrity of the judicial proceedings.

On appeal, Shea challenges the admission of the DNA reports and the testimony related to those reports, contending the evidence violated his constitutional rights and constituted hearsay. Shea's trial counsel, however, did not object to the admission of L.A.'s reports or B.K.'s testimony regarding those reports.

Failing to object to the admission of evidence before the district court generally forfeits the ability to challenge the evidence on appeal. *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996). However, an appellate court may consider an otherwise forfeited issue under the plain error standard if the appellant establishes (1) an error, (2) that is plain, and (3) the error affects the defendant's substantial rights.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, the court must then decide whether it should address the issue to "ensure fairness and the integrity of the judicial proceedings." *Id.* Only after all these factors are satisfied may an appellate court exercise its discretion to correct an unobjected-to error. *Id.* If an appellate court concludes that any requirement of the plain-error test is not satisfied, the court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

This plain-error analysis also applies to unobjected-to alleged violations of a defendant's constitutional rights to confront witnesses. *State v. Noor*, 907 N.W.2d 646, 649-50 (Minn. App. 2018), *rev. denied* (Minn. Apr. 25, 2018). Accordingly, Shea's arguments of Confrontation Clause and hearsay violations related to the admission of L.A.'s reports and B.K.'s testimony are addressed under the same plain-error analysis.

Assuming, without deciding, that the first three plain-error factors are met, we conclude that any error did not affect the fairness and integrity of the judicial proceedings. "Our analysis of the fairness, integrity, or public reputation of judicial proceedings does not focus on whether the alleged error affected the outcome resulting in harm to the defendant in the particular case." *Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022). Instead, "we ask whether failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial." *Id.* We may exercise the "limited discretionary power to grant relief based on an unobjected-to error" only when failing to correct the plain error would "have an impact beyond the current case by causing the public to seriously question the fairness and integrity of our judicial system." *Id.*

As noted, Shea did not object to the admission of L.A.'s reports, or to any of B.K.'s testimony related to those reports. Had Shea objected or moved to exclude that evidence, the state likely could have remedied any Confrontation Clause or hearsay concerns by having L.A. testify. Given the issues created by Shea's failure to object, and the easy remedy to cure the now-asserted errors, we conclude that a new trial is unnecessary to ensure the fairness and integrity of the judicial proceedings.

Our conclusion is consistent with prior cases in which this court assumed that the first three plain-error prongs were met regarding the admission of certain evidence but concluded that the error did not seriously affect the fairness, integrity, or reputation of the judicial proceedings because the state could have addressed the hearsay challenge by having the relevant witness testify if the defendant had properly objected. *See, e.g.*, *State v. Modtland*, 970 N.W.2d 711, 723-24 (Minn. App. 2022), *rev. granted* (Minn. Apr. 27, 2022) *and ord. granting rev. vacated* (Minn. Mar. 14, 2023). In *Modtland*, we declined to grant a new trial because "it would be seriously *unfair* to grant relief to appellant on this issue" given "the problems created by appellant's failure to object at trial[.]" *Id.* at 724 (emphasis in original).

Recent United States Supreme Court precedent does not alter our conclusion. *See Smith v. Arizona*, 144 S. Ct. 1785 (2024).[1] In *Smith*, the Supreme Court analyzed whether a district court violated the Confrontation Clause by admitting an expert's testimony that restated the factual notes and reports of a non-testifying lab analyst (Rast) regarding her

[1] We requested the parties to submit supplemental briefing to address *Smith* because the United States Supreme Court decided the case after the briefs in this appeal were submitted.

testing of numerous substances. *Id.* at 1791, 1795. A different analyst (Longoni), with no prior connection to the case, reviewed Rast's notes and report. At trial, Longoni testified about the general practices and policies, as well as the scientific method utilized in testing the substances. *Id.* at 1795-96. Longoni then offered an "independent opinion" about the identity of the substances in question, which mirrored the opinion Rast had reached. *Id.*

The Supreme Court recognized that the defendant had "no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work." *Id.* at 1799. In other words, the Confrontation Clause problem arose because the factual assertions contained in Rast's notes and reports formed the entire basis of Longoni's opinion. *Id.* at 1798-99. Without Rast's testimony, the defendant was unable to challenge the veracity of the factual assertions underlying Longoni's opinions. *Id.*

The Supreme Court detailed the Confrontation Clause problems:

> Rast's statements thus came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All those opinions were predicated on the truth of Rast's factual statements. Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

Id. at 1799-1800. The Supreme Court concluded that the defendant's inability to cross-examine the testing analyst violated the defendant's constitutional rights under the Confrontation Clause. *Id.* at 1800.

We conclude that the material circumstances in this case differ from the circumstances in *Smith*. Most importantly, B.K. did not rely on the same kind of materials as Longoni did in *Smith*. Unlike Longoni, B.K. was directly involved with this case as she participated as the technical reviewer in finalizing the BCA's conclusions by independently reviewing the machine-generated DNA profiles. Also, unlike Longoni, B.K.'s testimony was not reliant upon—or simply replicating—the notes or reports of a different analyst.

Here, unlike the expert's testimony in *Smith*, B.K.'s testimony was premised upon a machine-generated DNA profile. Raw data generated by a machine is not an out-of-court statement offered for the truth of the matter asserted such that Confrontation Clause or hearsay concerns would be triggered. *See State v. Ziegler*, 855 N.W.2d 551, 555-56 (Minn. App. 2014) (concluding that machine-generated "statements" are exempt from the purview of the Confrontation Clause). Evidence and testimony that interprets the data becomes the concern of a defendant's constitutional rights under the Confrontation Clause.

Here, B.K. reviewed the machine-generated profiles in exhibits 11 and 12. She then testified, as the BCA's technical reviewer of the data, that the two samples were a match. This testimony, unlike in *Smith*, does not reflect B.K. providing L.A.'s opinion as if it was her own. Instead, B.K. provided her independent opinion, as the technical reviewer, based solely on the machine-generated DNA profiles.

Moreover, B.K. did not rely on L.A.'s report for the source or chain of custody of exhibits 11 and 12. Instead, B.K. relied on her own personal knowledge of the BCA's chain-of-custody protocols, which the United States Supreme Court in *Smith* concluded was permissible. *Smith*, 144 S. Ct. at 1800 ("Because Longoni worked in the same lab as Rast, he could testify from personal knowledge about how that lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody."). Accordingly, B.K.'s testimony that the machine-generated DNA profiles in exhibits 11 and 12 were a match does not present the same Confrontation Clause concerns as were present in *Smith*.

As such, the district court's admission of the unobjected-to testimony and reports does not present circumstances that require this court to order a new trial to ensure fairness and integrity in the judicial proceedings.

II. Any possible plain error in admitting the list of items created by P.W. did not affect the fairness and integrity of the judicial proceedings.

Shea argues the district court erred by not, sua sponte, excluding the list of stolen items that P.W. made. Shea did not object to this exhibit. As such, we review Shea's argument under the plain error standard. *Griller*, 583 N.W.2d at 740. Shea contends the district court plainly erred by admitting the exhibit as it constitutes inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is generally inadmissible. Minn. R. Evid. 802.

The supreme court has held that because of the "complexity and subtlety" of the hearsay rule and its exceptions, raising a timely objection is particularly important as, without an objection, the opposing party is "not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

Shea's failure to object did not provide the state with an opportunity to establish that the statements were admissible under one of the exceptions to the hearsay rule. *Id.* The state could have, for example, had P.W. offer testimony about each item on the list that he determined was missing, how he learned the item was missing, and how he valued the missing item. Such testimony would have cured any hearsay concern, had an objection been raised. Without an objection, the state was not required to pursue alternative means of entering the contents of the list into evidence. Thus, assuming without deciding that the first three plain-error factors are met regarding the now-challenged exhibit, we conclude that any error did not affect the fairness and integrity of the judicial proceedings.

III. The prosecutor's closing argument did not significantly affect the verdict.

The district court had the parties submit written closing arguments, staggering the dates for the submissions. Shea now argues the prosecutor committed prosecutorial misconduct in closing arguments, but he did not object.

When appellant failed to object to alleged prosecutorial misconduct, this court applies a modified plain-error test. *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). Under this test, the appellant bears the burden to show both that the prosecutor committed error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). We

consider "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). If appellant establishes plain error, the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights, *i.e.*, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotations omitted). If the state fails to meet that burden, we determine whether reversal is required to uphold the fairness and integrity of judicial proceedings. *Id.*

Shea argues that the prosecutor committed misconduct by shifting the burden of proof in closing arguments. Comments that misstate or dilute the state's burden of proof are "highly improper and constitute[] prosecutorial misconduct." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). A prosecutor shifts the burden of proof "when they imply that a defendant has the burden of proving his innocence." *Id.* (quotation omitted). "A prosecutor's description of the evidence as 'uncontradicted' may be viewed by the jury as a reference to the defendant's silence when the defendant is the only person that could be expected to challenge the government's evidence." *State v. Streeter*, 377 N.W.2d 498, 501 (Minn. App. 1985). Prosecutors have been repeatedly warned that such statements are improper. *Id.*

Assuming without deciding that the prosecutor committed plain error in closing arguments, we conclude that any error did not have a significant effect on the verdict. The prosecutor's language in closing arguments was incidental to the substance of the argument as a whole. *See, e.g.*, *State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985)

(concluding that two references to "uncontroverted" evidence did not result in prejudice). In addition, the prosecutor's use of the words "uncontradicted" or "undisputed" does not amount to prejudicial misconduct when the usage would not suggest that the defendant had any obligation to present evidence or call witnesses. *See State v. DeVere*, 261 N.W.2d 604, 606 (Minn. 1977) (providing that, while prosecutor should not have said "uncontradicted," the word did "necessarily suggested to the jury that defendant had an obligation to call witnesses"). The prosecutor's comment about the lack of evidence supporting a defense theory also does not constitute improper burden-shifting. *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) ("[A] prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden." (quotation omitted)).

Finally, the fact that this was a bench trial also supports our conclusion that any misconduct in closing arguments did not affect the verdict because the district court understood that the state bears the burden of proof beyond a reasonable doubt and clearly applied that burden in its findings of fact, conclusions of law, and order for judgment. *See, e.g.*, *State v. Galven-Tirado*, No. A21-0486, 2022 WL 898021, at *7 (Minn. App. Mar. 28, 2022) (holding that alleged prosecutorial misconduct did not affect defendant's substantial rights in part because "this case was tried to the court, not a jury, which reduces the risk of prejudice"), *rev. denied* (Minn. May 31, 2022).[2] Accordingly, there is no reasonable likelihood that the absence of any presumed error in the prosecutor's closing argument would have had a significant effect on the verdict rendered by the district court.

[2] We cite this nonprecedential opinion, and others, for their persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

IV. Shea did not receive ineffective assistance of counsel during his trial.

Shea argues that he received ineffective assistance of counsel because his trial counsel failed to object to the admission of the evidence previously addressed in this opinion. Shea also contends that his trial counsel "reinforced" the prosecutor's inappropriate burden shifting in the defense's written closing arguments. Shea argues he should receive a new trial due to his counsel's ineffective representation. We disagree.

Criminal defendants have a right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). "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). An appellate court can address an ineffective-assistance-of-counsel 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).

Here, the record is not sufficiently developed to determine whether Shea's attorney provided ineffective assistance. On this record, nothing establishes why Shea's attorney did not raise timely objections. A developed record may reveal that Shea's attorney had strategic reasons for not raising objections, which we would not review on appeal. *See State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014) ("Generally, we will not review an ineffective-assistance-of-counsel claim that is based on trial strategy."). Any analysis of the decisions that Shea's attorney made would be speculation. Accordingly, we decline to consider this issue due to the undeveloped record.

V. A new trial is not required based upon the alleged cumulative errors.

Shea argues that he should be granted a new trial based upon the cumulative effects of all the alleged errors. An appellant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998); *see also State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006). When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the state's case. *State v. Williams*, 908 N.W.2d 362, 366 (Minn. 2018) (quotations omitted).

Having thoroughly reviewed the record, we conclude that any alleged errors, taken collectively, did not have the effect of denying Shea a fair trial.

VI. Shea's counsel was ineffective regarding his restitution hearing.

Shea argues that he received ineffective assistance of counsel when his counsel failed to timely file an affidavit in support of his motion challenging restitution. Shea has the burden of showing (1) that his "attorney's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. King*, 990 N.W.2d 406, 417 (Minn. 2023) (quotations omitted).

Victims of a crime have a right to seek restitution against the convicted offender. Minn. Stat. § 611A.04, subd. 1 (2022). A defendant may challenge a restitution order, but he must do so by requesting a hearing in writing within thirty days of receiving notification of the restitution amount or thirty days from sentencing, whichever is later. Minn. Stat. § 611A.045, subd. 3(b) (2022). To properly challenge an order awarding restitution, the

defendant must file a sworn affidavit at least five business days before the restitution hearing "setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims." Minn. Stat. § 611A.045, subd. 3(a) (2022).

After our independent review of the record, we conclude that Shea's counsel's representation fell below an objective standard of reasonableness. The transcript reveals that the attorney filed a motion to challenge the restitution order but failed to file the required affidavit due to an apparent problem with the attorney's calendaring system. Because there was no timely affidavit filed, the district court dismissed the motion. Accordingly, Shea's counsel's oversight in failing to timely file and serve the affidavit resulted in a procedural bar to Shea's ability to challenge the restitution order. As such, the attorney's failure to file the affidavit by the required deadline amounts to conduct falling below an objective standard of reasonableness. *See Jones v. State*, No. A20-1297, 2021 WL 1604344, at *3-4 (Minn. App. Apr. 26, 2021) (reversing and remanding for an evidentiary hearing because counsel's "oversight in failing to timely serve and file the affidavit resulted in a procedural bar to challenge the restitution order" and the attorney's "failure to act within the deadline . . . amounts to conduct falling below an objective standard of reasonableness").

There is also a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *King*, 990 N.W.2d at 417 (quotations omitted). For example, Shea challenged the restitution order under the assertion that P.W. did not make a sufficient showing of the items stolen and their cost.

Had the affidavit been timely filed, the state would have been required to bear the burden of demonstrating the amount of loss sustained by P.W. as a result of the offense, and to show the appropriateness of the restitution. *See* Minn. Stat. § 611A.045, subd. 3(a). We cannot speculate whether the state could have satisfied that burden, but we agree with Shea that there is a "reasonable probability that . . . the result of the proceeding would have been different." *King*, 990 N.W.2d at 417 (quotations omitted).

Since this claim of ineffective assistance of counsel can be decided based on the trial court record, Shea's appellate counsel appropriately raised the ineffective assistance issue on direct appeal. *See Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004) (holding that an ineffective assistance of trial counsel claim is procedurally barred when raised in a postconviction petition if the claim could have been decided on the basis of the trial court record). Because Shea's counsel's representation fell below an objective standard of reasonableness, and because there is a reasonable probability that the result of the restitution hearing would have been different had counsel timely filed the required affidavit, we reverse and remand with instructions for the district court to issue an order establishing a reasonable timeline for Shea to file a motion to challenge the restitution decision along with the required accompanying affidavit. If any such motion and affidavit are filed, we order the district court to hold a hearing on the motion challenging restitution.

Affirmed in part, reversed in part, and remanded.