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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1375**

Francisco Cleofus Mountain, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 30, 2018
Affirmed
Johnson, Judge**

Dakota County District Court
File No. 19HA-CR-13-1339

Francisco Cleofus Mountain, Bayport, Minnesota (*pro se* appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Kathryn M. Keena, Assistant Dakota
County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

In 2014, a Dakota County jury found Francisco Cleofus Mountain guilty of first-degree criminal sexual conduct. On direct appeal, this court affirmed his conviction and sentence, and the supreme court denied his petition for further review. In June 2017,

Mountain filed a *pro se* petition for postconviction relief in which he asserted five claims. The postconviction court denied the petition on the ground that each of the five claims is procedurally barred. We affirm.

FACTS

In April 2013, law-enforcement officers and paramedics responded to an emergency at a home in the city of Lakeville. Mountain and a woman were the only two persons at the home. The woman, who appeared to be intoxicated, was experiencing significant bleeding from her vagina. She was taken to an emergency room, where medical professionals found two long lacerations on the wall of her vagina and three tears on the outside of her vagina. She underwent surgery and received a blood transfusion. A nurse told a police officer that the woman's injuries could not have been caused by a penis or a finger but, rather, appeared to be caused by a sharp object. Medical professionals determined that the woman had an alcohol concentration of 0.31.

The state initially charged Mountain with making terroristic threats and domestic assault. The state later filed an amended complaint in which it charged Mountain with six offenses: (1) first-degree criminal sexual conduct with force or coercion, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2012); (2) first-degree criminal sexual conduct toward a person who is mentally impaired, mentally incapacitated, or physically helpless, in violation of Minn. Stat. § 609.342, subd. 1(e)(ii) (2012); (3) first-degree assault by inflicting great bodily harm, in violation of Minn. Stat. § 609.221, subd. 1 (2012); (4) making terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2012); (5) domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2012); and

(6) engaging in a pattern of stalking, in violation of Minn. Stat. § 609.749, subd. 5(a) (2012).

The case was tried to a jury on seven days in November 2013. The state called 18 witnesses; Mountain did not present any evidence. The jury found Mountain guilty on count 2 and not guilty on all other counts. The district court sentenced Mountain to 360 months of imprisonment. This court affirmed Mountain's conviction and sentence, and the supreme court denied Mountain's petition for further review. *See State v. Mountain*, No. A14-0871, 2015 WL 3822662 (Minn. App. June 22, 2015), *review denied* (Minn. Sept. 15, 2015).

In June 2017, Mountain filed a *pro se* petition for postconviction relief. He asserted the following five claims:

1. That the trial court erred in law to have rejected the contention that the circumstances proved could not include circumstances underlying charges for which petitioner was acquitted.

2. That the prosecutor committed reversible error in her opening and closing arguments by presenting evidence to the jury, which created inferences and innuendos that [the victim] was helpless that was not supported by facts.

3. That the trial court erred by allowing the erroneous admission of "prejudicial" evidence over petitioner's objection.

4. That the Court of Appeals erred by its use of an incorrect abuse of discretion standard of review upon an objected to error; rather than the correct harmless error beyond a reasonable doubt [impact] analysis.

5. That trial counsel's failure to render a specific objection under Minn. R. Evid. 403 to the court's erroneous

admission of prejudicial evidence without consideration that it's prejudice outweighed its probative value, counsel's error resulted in prejudice.

In July 2017, the district court denied the petition on the ground that all of Mountain's claims "were, or could have been raised, on appeal either with the Minnesota Court of Appeals or the Minnesota Supreme Court." Mountain appeals.

DECISION

Mountain argues that the district court erred by denying his postconviction petition on the ground that all five of his postconviction claims are procedurally barred. In general, this court applies an abuse-of-discretion standard of review to a postconviction court's denial of a postconviction petition. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015).

After an offender has had a direct appeal, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976); *see also* Minn. Stat. § 590.01, subd. 1 (2016). In this case, the postconviction court determined that all five of Mountain's claims are *Knaffla*-barred because they either were actually raised on direct appeal or could have been raised on direct appeal. In his *pro se* appellate brief, Mountain does not challenge the postconviction court's determination that his postconviction claims are procedurally barred by the *Knaffla* doctrine. Instead, Mountain addresses the merits of each claim. But the postconviction court did not deny his claims on the merits. Rather, the postconviction court denied his petition based on the determination that his claims are procedurally barred.

After reviewing the record, we agree with the postconviction court that all five of Mountain's postconviction claims are procedurally barred. Mountain's first claim, that the state's evidence was insufficient to support his conviction, was raised and decided on direct appeal. *Mountain*, 2015 WL 3822662, at *2-4. To the extent that Mountain makes a slightly different argument as to why the evidence was insufficient, his claim is barred because the theory could have been raised on direct appeal. *See Zornes v. State*, 903 N.W.2d 411, 420-21 (Minn. 2017).

Mountain's second claim, that the prosecutor engaged in prosecutorial misconduct in her opening statement and her closing argument, was not raised on direct appeal. The claim is procedurally barred because it was "known or should have been known at the time of a direct appeal." *See Cooper v. State*, 745 N.W.2d 188, 191 (Minn. 2008).

Mountain's third claim, that the district court erred by admitting inadmissible and prejudicial evidence during trial despite his trial attorney's objections, was raised and fully considered by this court on direct appeal. *Mountain*, 2015 WL 3822662, at *5-6.

Mountain's fourth claim, that this court applied an incorrect standard of review when considering his direct appeal, was not raised in Mountain's petition for review to the supreme court. The claim is procedurally barred because it was "known or should have been known" at the time he filed his petition for review. *See Cooper*, 745 N.W.2d at 191.

Mountain's fifth claim, that he received ineffective assistance from his trial attorney, was not raised on direct appeal. "If a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred." *Zornes*, 903 N.W.2d at 421 (quotation omitted). But if such a claim

“cannot be determined from the district court record and requires additional evidence” to determine whether the claim is meritorious, the claim is not *Knaffla*-barred. *Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009).

In this case, Mountain claims that his trial attorney was ineffective in not making a more specific objection to certain evidence that Mountain asserts was unduly prejudicial. It appears that Mountain is referring to exhibits consisting of photographs that depict the victim’s injuries. Mountain’s trial attorney did object to the admission of those exhibits. On direct appeal, Mountain’s appellate attorney argued that the district court erred by admitting the photographs, and this court affirmed. *Mountain*, 2015 WL 3822662, at *5-6. Mountain’s postconviction claim—that his trial attorney should have made a more specific objection—is a claim that could have been “determined on the basis of the trial record” and, thus, is *Knaffla*-barred because it was not raised on direct appeal. *Zornes*, 903 N.W.2d at 421.

The supreme court has recognized two exceptions to the *Knaffla* bar. A claim may not be procedurally barred (1) “if the claim involves an issue so novel that its legal basis was not reasonably available at the time of the direct appeal” or (2) if reviewing the claim would be in the interests of justice because it “has substantive merit and the petitioner did not deliberately and inexcusably fail to raise the issue.” *Swaney v. State*, 882 N.W.2d 207, 215 (Minn. 2016); *see also id.* at 215 n.4 (recognizing open question as to whether exceptions survive 2005 amendments to postconviction statute). We need not consider the exceptions because Mountain has not attempted to invoke either exception.

Thus, the postconviction court did not err by denying Mountain's postconviction petition on the ground that his postconviction claims are procedurally barred.

Affirmed.