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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2021**

Reginald Oranz Calhoun, Petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 22, 2019
Affirmed
Peterson, Judge***

Hennepin County District Court
File No. 27-CR-15-15651

Reginald Calhoun, Moose Lake, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, John Patrick Monnens, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Peterson,
Judge.

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

UNPUBLISHED OPINION

PETERSON, Judge

In this pro se appeal, appellant challenges the denial of his postconviction petition for relief from his criminal sexual conduct conviction. We affirm.

FACTS

Appellant Reginald Oranz Calhoun was found guilty by a jury and convicted on three counts of criminal sexual conduct. The district court sentenced him to 90 months in prison and a lifetime term of conditional release. Calhoun's attorney filed a direct appeal, arguing that the district court erred by denying two *Batson*¹ challenges, allowing the state to present impeachment evidence and rebuttal evidence, entering convictions on all three counts, and imposing a lifetime term of conditional release. Calhoun submitted a supplemental pro se brief in which he asserted claims of ineffective assistance of trial counsel, unfair trial management, insufficient evidence, newly discovered evidence, and prosecutorial misconduct. This court found that the district court erred in entering convictions on all three counts and imposing a lifetime term of conditional release,² but found no merit in Calhoun's remaining arguments and deemed his pro se arguments waived because he failed to adequately brief the issues. *State v. Calhoun*, No. A16-0598, 2017 WL 877300 (Minn. App. Mar. 6, 2017), *review denied* (Minn. May 16, 2017).

¹ See *Batson v. Kentucky*, 476 U.S. 79, 96-100, 106 S. Ct. 1712, 1723-25 (1986) (holding that party may challenge an opposing party's use of peremptory challenges during jury selection that appear to strike jurors based on their race).

² Upon remand by this court, the district court resentenced Calhoun to 90 months in prison without the lifetime conditional-release requirement.

Calhoun then filed a pro se postconviction petition that raised many of the same issues that were raised in his direct appeal and also asserted a claim of ineffective assistance of appellate counsel. The postconviction court denied relief, finding that all of Calhoun's claims, except his ineffective-assistance-of-appellate-counsel claim, are barred and that there is no merit to his claim of ineffective assistance of appellate counsel. This appeal follows.

D E C I S I O N

This court reviews the summary denial of postconviction relief for abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). “Under this standard of review, a matter will not be reversed unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). We review issues of law de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

I. Barred claims

Calhoun argues that the postconviction court erred by determining that all of his claims, except his ineffective-assistance-of-appellate-counsel claim, are barred. We disagree.

Once a direct appeal has been taken, “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*, 243 N.W.2d 737, 741 (Minn. 1976). In his postconviction petition, Calhoun raised claims of prosecutorial misconduct, improper admission of

prejudicial impeachment evidence, poor trial management by the district court, ineffective assistance of trial counsel, newly discovered evidence, and ineffective assistance of appellate counsel. All of these claims, except the ineffective-assistance-of-appellate-counsel claim were raised in Calhoun's direct appeal and, even if they had not been raised in his direct appeal, the claims are based on events that occurred during trial and were known and could have been raised in his direct appeal. Because the claims were known at the time of the direct appeal, the postconviction court did not err when it concluded that the claims are barred under *Knaffla*.

II. Ineffective assistance of appellate counsel

Calhoun argues that all of the issues that he raised in his postconviction petition stemmed from ineffective assistance of appellate counsel. Calhoun asserts that his appellate counsel was ineffective in three ways: (1) counsel did not allow Calhoun to request a stay of his direct appeal so that he could seek a postconviction hearing to establish a complete record for his direct appeal; (2) counsel told Calhoun to file a supplemental pro se appellate brief but then did not provide the basic information Calhoun needed to prepare an acceptable brief; and (3) counsel declined to address several non-frivolous issues that Calhoun suggested should be addressed in his direct appeal.

An ineffective-assistance-of-appellate-counsel claim is not subject to the *Knaffla* bar "when it cannot be said that the defendant knew or had a basis to know about the claim at the time of the direct appeal." *Reed*, 793 N.W.2d at 732. It cannot be said that Calhoun had a basis to know at the time of his direct appeal that his counsel's assistance in the appeal was ineffective. But, to establish a claim of ineffective assistance of appellate

counsel, Calhoun must show “that counsel’s representation fell below an objective standard of reasonableness,” and “that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). “A court may address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other.” *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). “In Minnesota, the standard for attorney competence is representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). There is a strong presumption that “counsel’s performance fell within a wide range of reasonable assistance.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

1 and 2. *Failing to request a stay of direct appeal and assist in preparing a supplemental pro se brief*

Even if we assume that appellate counsel’s refusal to allow Calhoun to request a stay of his direct appeal and failure to provide the information that Calhoun needed to prepare an acceptable supplemental brief fell below an objective standard of reasonableness, we conclude that Calhoun failed to establish that counsel’s actions constituted ineffective assistance because he has not shown that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of his direct appeal would have been different. Calhoun does not identify any facts that he could have

established to complete the record for his direct appeal or any arguments that he could have made in his supplemental brief that would have changed the results of his direct appeal.

3. *Declining to address issues in Calhoun's direct appeal*

Calhoun argues that his appellate counsel provided ineffective assistance by failing to raise several issues that he suggested should have been raised in his direct appeal.³ “[A]ppellate counsel is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail.” *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009).

a. *Prosecutorial misconduct*

Calhoun contends that, during the presentation of evidence and closing argument, the prosecutor misstated evidence by incorrectly identifying the street intersection where Calhoun met the sexual-assault victim. Calhoun also contends that the prosecutor misled the jury by continuously conflating two different street intersections while questioning witnesses.

“A prosecutor engages in prosecutorial misconduct when the prosecutor violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state’s case law.” *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotations omitted). “It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.” *State v.*

³ The issues that Calhoun contends that appellate counsel should have raised in his direct appeal are the issues that Calhoun raised in his pro se supplemental brief.

Bobo, 770 N.W.2d 129, 142 (Minn. 2009) (quotation omitted). When reviewing closing arguments for possible prosecutorial misconduct, this court considers “the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotations omitted).

The victim testified that she was walking west along Lake Street when she encountered Calhoun at Elliot Avenue, behind Chicago Lake Liquors, and Calhoun led her to a residence on Elliot Avenue. The prosecutor asked the victim, “How did [Calhoun] get you from the corner of Chicago and Lake to the residence?” The prosecutor also described an exhibit admitted during trial as a picture of the corner of Chicago and Elliot. Finally, the prosecutor stated during closing argument that the victim met Calhoun while “she was walking down Chicago and Lake.”

Chicago Avenue runs parallel to Elliot Avenue and is one block west of Elliot Avenue; the avenues do not intersect. Both avenues intersect Lake Street. Calhoun argues that the prosecutor’s misstatements about the streets and intersection were material to key elements and confused the jury.

While the prosecutor’s statements regarding the intersection where the victim met Calhoun were incorrect and inconsistent, Calhoun does not cite any evidence that suggests that the prosecutor intentionally misstated the evidence or misled the jury. More importantly, when determining whether misconduct occurred, this court looks at whether the prosecutor’s acts “have the effect of materially undermining the fairness of a trial.” *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). There is no evidence that suggests

that the prosecutor's misstatements about the names of streets and intersections undermined the fairness of the trial. The district court instructed the jury that "arguments or other remarks of an attorney are not evidence." Also, during the victim's testimony at trial, the district court admitted an aerial map as exhibit number 1, and the victim testified that the exhibit depicted the area where she was assaulted. The victim then pointed to the exhibit while she testified about the assault, indicating where she was at various points during the assault. Because the prosecutor did not commit misconduct and the victim's testimony supports the jury's verdicts, appellate counsel's failure to raise prosecutorial misconduct as an issue in Calhoun's direct appeal was not ineffective assistance. See *Williams*, 764 N.W.2d at 31.

b. Ineffective assistance of trial counsel⁴

Appellate counsel is "not obligated to raise ineffective-assistance-of-trial-counsel claims that appellate counsel could have legitimately concluded would not prevail." *Reed*, 793 N.W.2d at 736. "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective-assistance-of-trial-counsel claim, the appellant must first show that trial counsel was ineffective." *Fields*, 733 N.W.2d. at 468. Thus, to succeed on this issue, Calhoun must show that his trial counsel's "representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of [his trial] would

⁴ Calhoun had two trial attorneys, one represented him during pretrial matters and the other represented him during the jury trial. The term "trial counsel" may refer to either attorney.

have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068).

Calhoun asserts three claims of ineffective assistance of trial counsel: (1) trial counsel assured him that photographs of the victim’s injuries would not be admitted into evidence but failed to make a motion to exclude the photographs; (2) trial counsel failed to obtain cellphone records; and (3) trial counsel failed to object to prosecutorial misconduct.

(i) *Motion to exclude photographic evidence*

The day after the assault, the victim was hospitalized due to injuries that were not related to the assault. At the hospital, a police officer asked the victim about the assault and took photographs of bruises on her arms, which were admitted into evidence at trial. The victim testified that, following the assault, she had bruises on her arms from where Calhoun grabbed her, and the photographs corroborated this testimony. Counsel clarified that the photographs depicted the victim’s arms following the sexual assault.

At trial, Calhoun’s attorney objected to the admission of the photographs, arguing that they were “overly prejudicial in that [they] reference[] a hospital visit that was unrelated.” The district court overruled the objection and admitted the evidence. Calhoun’s attorney made the necessary objection, and there is no evidence that her actions were deficient.

(ii) *Failing to obtain cellphone records*

The victim testified that her cellphone was ringing repeatedly when Calhoun was sitting with her. She stated that Calhoun took her phone, answered the call, and said “Leave her alone.” A good friend of the victim testified that she and the victim had planned to

meet on Chicago Avenue on the night of the assault. The friend testified that she “called [the victim] and nothing, nothing. Then I called her again and a man answered and said, ‘leave my friend alone,’ and hung the phone up. So I kept calling back; nothing, nothing.”

Calhoun argues that “[t]he phone call is central to this case, because it was a window into the moments [the victim] and [he] were alone, and it speaks to if [the victim] was in danger.” He contends that his trial counsel should have tried to obtain records for the victim’s cellphone because the phone records would show whether this call happened.

The record shows that trial counsel’s defense strategy was to show that sexual contact with the victim was consensual. Phone records that showed that there was no call would have undermined the victim’s and her friend’s credibility, and phone records that showed that there was a call would have enhanced their credibility, but, in either case, the phone records would not have shown that the victim consented to sexual contact. Whether to obtain the phone records to challenge the victim’s and her friend’s credibility was a matter of trial strategy for trial counsel to decide. “[M]atters of trial strategy, including which witnesses to call, what defenses to raise at trial, and specifically how to proceed at trial, will not be reviewed later by [a court] as long as the trial strategy was reasonable.” *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). In light of the limited probative potential of the phone records, deciding not to obtain the records was a reasonable trial strategy that did not constitute ineffective assistance.

(iii) Failing to object to prosecutorial misconduct

Calhoun argues that his trial counsel failed to object to numerous instances of prosecutorial misconduct and actually endorsed the prosecutor’s misstatement of the

evidence when trial counsel referred to “the corner of Chicago and Elliot.” But, as analyzed above, the prosecutor did not commit misconduct, and trial counsel did not need to object. *See Bobo*, 770 N.W.2d at 138 (concluding that appellant did not satisfy first prong of *Strickland* because counsel’s failure “to make an objection that would not succeed is not professionally unreasonable”). And, like the prosecutor’s incorrect references to the streets in the area where the assault occurred, trial counsel’s incorrect reference to an intersection that does not exist was not evidence and could not have confused the jury about the evidence presented at trial. Thus, there is not a reasonable probability that trial counsel’s misstatement affected the outcome of Calhoun’s trial.

In sum, for each of his claims that trial counsel was ineffective, Calhoun failed to show either that his trial counsel’s representation fell below an objective standard of reasonableness or that there is a reasonable probability that, but for trial counsel’s unprofessional errors, the result of his trial would have been different. Because Calhoun did not receive ineffective assistance of trial counsel, appellate counsel did not need to raise an ineffective-assistance claim in Calhoun’s direct appeal. *See Williams*, 764 N.W.2d at 31.

(iv) *Prejudicial impeachment evidence*

Calhoun argues that the trial court failed to instruct the jury on *Spreigl* evidence and that his appellate counsel should have raised this issue in his direct appeal. *See State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965) (explaining that evidence of a previous crime, wrongdoing or act, commonly known as *Spreigl* evidence, is generally inadmissible unless certain conditions are met). The postconviction court found that evidence of Calhoun’s

past crimes was properly admitted and that the district court made rulings consistent with *Spreigl*. However, it appears that the evidence that Calhoun takes issue with was admitted as impeachment evidence under Minn. R. Evid. 609, not as *Spreigl* evidence.

When Calhoun testified at trial, the state sought to introduce evidence of his prior felony convictions for impeachment purposes. The district court conducted a *Jones* analysis⁵ and concluded that it would allow the state to impeach Calhoun with two of his four prior convictions. In Calhoun’s direct appeal, this court held that the district court did not abuse its discretion by admitting evidence of two of Calhoun’s prior felony convictions as impeachment evidence. *State v. Calhoun*, 2017 WL 877300 at *5. This evidence does not implicate *Spreigl*, and appellate counsel did not provide ineffective assistance by failing to raise this issue in Calhoun’s direct appeal.

III. Denial of evidentiary hearing concerning newly discovered evidence

Calhoun argues that the postconviction court erred by not conducting an evidentiary hearing regarding a newly discovered witness. An evidentiary hearing must be granted when a petitioner alleges “facts that would, if proved by a fair preponderance of the evidence, entitle him to relief.” *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002).

A new trial may be granted upon newly discovered evidence if a defendant shows:

- (1) that the evidence was not known to the defendant or his/her counsel at the time of trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and

⁵ See *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978) (discussing factors for district courts to consider when exercising discretion to admit evidence of a defendant’s prior crimes for impeachment purposes).

(4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). Calhoun appears to argue that the identity of the newly discovered witness was not known at the time of his direct appeal and this issue is now ripe for review because the witness has been identified as “Major Brooks.” Thus, he contends, a new trial is necessary under *Rainer*.

The postconviction court found that the identity of the potential witness was known at the time of trial. Calhoun asserts that Major Brooks was present the day of the assault and could testify to events surrounding the assault. Calhoun even argues that Major Brooks was mentioned on several occasions during the trial. Thus, the identity of the witness was known to Calhoun and his counsel at the time of trial, and his testimony, which could have been discovered before trial, is not newly discovered evidence.

Affirmed.