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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0757**

State of Minnesota,
Respondent,

vs.

Marcel Dylan Zephier,
Appellant.

**Filed January 31, 2022
Affirmed; motion denied
Johnson, Judge**

Redwood County District Court
File No. 64-CR-19-501

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

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin Butler, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Johnson, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Redwood County jury found Marcel Dylan Zephier guilty of two counts of first-
degree criminal sexual conduct based on evidence that he sexually abused a nine-year-old

girl. We conclude that the district court did not err by admitting into evidence a video-recording and transcript of a forensic interview of the complainant or by admitting into evidence expert testimony concerning delayed reporting by victims of sexual abuse. We also conclude that Zephier is not entitled to a new trial on the grounds of prosecutorial misconduct. We further conclude that the post-conviction court did not err by denying, without an evidentiary hearing, Zephier's claim that his trial attorney provided him with ineffective assistance of counsel. Therefore, we affirm.

FACTS

In April 2019, 17-year-old B.H. confided to a staff member of a girls' group home that, when she was nine years old, she was sexually abused by Zephier. The group home reported the information to an officer of the Lower Sioux Indian Reservation Police Department, who arranged for a forensic interview of B.H. During the interview, B.H. stated that, on the day in question, she went to her uncle's home. Zephier answered the door and told her that her cousins were in a back room. As she and Zephier walked toward the back room, Zephier pulled her into his bedroom. B.H. told the interviewer that she was afraid and screamed but that no one was present to hear her. She said that Zephier pushed her onto his bed and tried to remove her pants but that she kicked and began to cry. Zephier became frustrated and hit her, swore at her, and told her to stop crying. She stopped kicking but continued to scream and cry. B.H. stated that Zephier inserted his penis into her vagina. When he had finished penetrating her, he forced her to touch his penis with her hands and then told her to get out. During the interview, B.H. stated that Zephier had done similar things to her cousin and to her sister. She stated that the incident involving her sister had

not previously been reported but that the incident involving her cousin had been the subject of a court proceeding. A police officer later interviewed Zephier, who denied the accusations.

In June 2019, the state charged Zephier with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a), (h)(i) (2010). In December 2019, the state filed a motion *in limine* to establish the admissibility of expert testimony concerning delayed reporting by sexual assault victims, *Spreigl* evidence of Zephier's sexual assaults of two other young female cousins, a video-recording and transcript of the forensic interview of B.H., and Zephier's prior charge of domestic assault by strangulation. After a hearing, the district court granted the state's motion with respect to the expert testimony and the *Spreigl* evidence, denied the motion with respect to Zephier's prior charge, and deferred its ruling with respect to the video-recording and transcript of the forensic interview. The district court stated that it would rule on the admissibility of the forensic interview after B.H. testified at trial.

The case was tried over two days in early January 2020. B.H. was the state's first witness. Her trial testimony was very similar to the statements she had made during the forensic interview. Zephier's trial attorney did not cross-examine her. The state called seven other witnesses, including a group-home staff member, B.H.'s father, and a Lower Sioux Indian Reservation police officer. B.H.'s sister testified that Zephier sexually assaulted her when she was eight or nine years old. The forensic interviewer testified and laid a foundation for the video-recording and transcript of B.H.'s forensic interview. The district court admitted the video-recording and transcript of the forensic interview after

finding that B.H.'s credibility had been challenged. The prosecutor played for the jury an excerpt of the forensic interview in which B.H. described the sexual assault by Zephier. A law-enforcement officer testified that Zephier previously had sexually assaulted a then-11-year-old cousin, which resulted in a conviction of fifth-degree criminal sexual conduct. The state's final witness was Erica Staab-Abscher, who testified as an expert concerning the prevalence of delayed reporting among victims of sexual assault. Zephier did not testify and did not present any other evidence.

The jury found Zephier guilty of both charges. The district court sentenced him to 144 months of imprisonment. Zephier timely filed a notice of appeal. He later moved this court for a stay and a remand so that he could file a petition for post-conviction relief, and this court granted the motion. In November 2020, he petitioned for post-conviction relief and alleged that his trial attorney provided him with ineffective assistance of counsel. In May 2021, the post-conviction court denied his petition without an evidentiary hearing. This court later dissolved the stay and reinstated the appeal.

DECISION

I. Admissibility of Forensic Interview

Zephier argues that the district court erred by admitting into evidence the video-recording and transcript of the forensic interview of B.H. He argues that the evidence should have been excluded on the ground that it is inadmissible hearsay.

Hearsay evidence is defined as an out-of-court statement that is offered to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Hearsay evidence generally is inadmissible as

substantive evidence. Minn. R. Evid. 802; *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). But some out-of-court statements are not considered hearsay. Minn. R. Evid. 801(d). For example, a prior statement by a witness that is consistent with the witness's trial testimony is considered non-hearsay and, thus, is not inadmissible on hearsay grounds. Minn. R. Evid. 801(d)(1)(B). The applicable rule provides: "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness" *Id.* The purpose of rule 801(d)(1)(B) is to allow a party "to enhance the credibility of a witness and as substantive evidence if the court determines the statements would be helpful in evaluating credibility." *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (quoting 11 Peter N. Thompson, *Minnesota Practice – Evidence* § 801.01 at 439 (3d ed. 2001)). That purpose is not served, however, unless the credibility of the witness has been challenged. *See id.*; *State v. Fields*, 679 N.W.2d 341, 347-48 (Minn. 2004); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). We apply an abuse-of-discretion standard of review to a district court's ruling on a hearsay objection. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019).

Zephier contends that B.H.'s credibility was not challenged before the district court admitted the prior consistent statement. The district court expressly stated that B.H.'s credibility had been challenged, "particularly" by Zephier's emphasis on the evidence that she had delayed reporting the incident. In its subsequent post-conviction order, the court reiterated that B.H.'s credibility was challenged in Zephier's opening statement and in his

trial attorney's questioning of other witnesses. The post-conviction court likely was referring to Zephier's trial attorney's comment in his opening statement that "[t]here are disagreements about what happened, if anything happened." In cross-examining other witnesses, Zephier's trial attorney sometimes asked questions that appear designed to cast doubt on the truthfulness of B.H.'s accusations. Zephier contends that the comment in the opening statement is too general to constitute a credibility challenge for the purposes of rule 801(d)(1)(B). He also contends that, before the district court's ruling, his trial attorney had not raised the issue of B.H.'s delayed report with any witness.

The applicable caselaw indicates that the credibility challenge required by *Nunn* and subsequent opinions need not be direct or explicit. The circumstances of *State v. Bakken*, 604 N.W.2d 106 (Minn. App. 2000), *rev. denied* (Minn. Feb. 24, 2000), are very similar to this case. The appellant was convicted of criminal sexual conduct toward a 13-year-old child, whose interview by a police officer was recorded and later introduced into evidence under rule 801(d)(1)(B). *Id.* at 108. On appeal, this court noted that the child's credibility had been challenged because the child "was the only witness to present firsthand evidence against Bakken" and, for that reason, the child's credibility "was central to the case." *Id.* at 109.

In this case, it was similarly obvious—if not more so—that the parties' evidence and arguments were focused on whether B.H.'s testimony was credible. Before trial, the state sought leave to call an expert witness to testify about B.H.'s delay in reporting the incident, for the purpose of showing that the delayed report did not diminish B.H.'s credibility. At the hearing on that motion, the prosecutor confirmed that B.H. intended to

testify. Zephier's trial attorney asserted various objections at the pre-trial hearing to the introduction of the forensic interview, but he did *not* argue at that time that B.H.'s credibility would *not* be challenged. Zephier's trial attorney raised the issue of B.H.'s credibility in his opening statement by alluding to a disagreement about "what happened" or whether "anything happened." *Cf. State v. Grecinger*, 569 N.W.2d 189, 193-94 (Minn. 1997) (holding that, for purposes of rule 608(a), state's witness's character for truthfulness was attacked in defendant's opening statement). That Zephier's trial attorney did not cross-examine B.H. does not mean that there was no challenge to her credibility; Zephier had already challenged her credibility and had other means of doing so later in the trial.¹ Given all of these circumstances, the district court did not abuse its discretion by ruling that B.H.'s credibility was being challenged.

Thus, the district court did not err by admitting into evidence the video-recording and transcript of the forensic interview of B.H.

II. Expert Testimony

Zephier also argues that the district court erred by admitting expert testimony concerning delayed reporting by victims of sexual abuse.

"[E]xpert testimony is only admissible under Minn. R. Evid. 702 if the proponent shows that the testimony passes a four-part test: (1) The witness must qualify as an expert; (2) the expert's opinion must have foundational reliability; (3) the expert testimony must

¹In closing argument, Zephier's trial attorney challenged B.H.'s credibility in a more direct manner. Of course, the closing argument was made after the forensic interview was admitted. But the closing argument confirms the circumstances that were apparent at the time of the district court's ruling.

be helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard.” *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). This court applies an abuse-of-discretion standard of review to a ruling on the admissibility of expert testimony. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016).

Zephier first contends that the district court should not have qualified the state’s expert witness, Staab-Abscher, as an expert witness. A witness may be qualified as an expert “by knowledge, skill, experience, training, or education.” Minn. R. Evid. 702. “The competency of an expert witness to provide [an expert] opinion depends upon both the degree of the witness’s scientific knowledge and the extent of the witness’s practical experience with the subject of the offered opinion.” *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998). Minnesota courts typically have been “liberal” in qualifying experts by virtue of their experience. *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990).

In a pre-trial ruling, the district court granted the state’s request to admit expert testimony on “the nature of counterintuitive victim behaviors and delayed reporting.” At trial, Zephier’s trial attorney objected during the direct examination of Staab-Abscher to a lack of foundation and was allowed to conduct a *voir dire* examination. The district court then ruled that Staab-Abscher was qualified to give expert testimony concerning “counterintuitive victim behavior with a specific focus on delayed reporting.” In its subsequent order denying post-conviction relief, the court stated that Staab-Abscher has a bachelor’s degree in social work and women’s studies, had 20 years of experience working

with victims of domestic violence and sexual assault, had conducted over 500 hours of training on domestic and sexual assaults, and had testified as an expert in previous criminal trials.

Zephier contends on appeal that Staab-Abscher should not have been qualified as an expert because her employment has been primarily administrative in nature, she has not conducted research on victims of sexual assault, she does not have an advanced degree, her publications are not focused on delayed reporting of sexual assault victims, and her work has not focused specifically on juveniles. The record reflects, however, that Staab-Abscher, through her work, has had “direct contact” with victims of domestic violence and sexual assault. Staab-Abscher testified to her professional experience in working with victims of sexual assault who delayed reporting, and she testified that she was trained to recognize the behaviors of victims who delay reporting. In light of Staab-Abscher’s experience, the district court did not abuse its discretion in finding that she was qualified to give expert testimony concerning the tendency of sexual-assault victims to delay their reports of sexual assaults. *See Poppler v. Wright Hennepin Coop. Elec. Ass’n*, 834 N.W.2d 527, 538-40 (Minn. App. 2013) (affirming qualification of electrician as expert on effects of stray voltage on dairy cattle), *aff’d on other grounds*, 845 N.W.2d 168 (Minn. 2014).

Zephier also contends that the state did not lay an adequate foundation for Staab-Abscher’s expert opinion. Zephier does not develop this argument by explaining the foundation that is necessary or otherwise explaining why the foundation is inadequate. Zephier complains that the state did not make a proper pre-trial disclosure of the bases of Staab-Abscher’s expert opinion. But that is a discovery issue, for which Zephier does not

seek relief on appeal. Given the argument presented, we have no reason to conclude that the district court abused its discretion in ruling that the state laid a foundation for Staab-Absher's expert opinion.

Thus, the district court did not err by admitting Staab-Absher's expert testimony.

III. Claims of Prosecutorial Misconduct

Zephier argues that the prosecutor engaged in misconduct on three occasions.

The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 611 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001). Consequently, prosecutorial misconduct may deny the defendant his right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

There is no dispute in this case that Zephier did not object to the conduct that he challenges on appeal. Accordingly, we apply the "modified plain-error test." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant initially must establish that there is an error and that the error is plain. *Ramey*, 721 N.W.2d at 302. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If there is a plain error, the burden shifts to the state, which must show that the plain error 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." *Id.* (quotation omitted). "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses

whether it should address the error to ensure fairness and the integrity of the judicial proceedings.’” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).²

Zephier first argues that the prosecutor engaged in misconduct during *voir dire* by asking all prospective jurors the following question: “After a person is raped, what kind of emotions do you think may be running through their mind?” Zephier contends that the prosecutor improperly asked jurors to put themselves in B.H.’s shoes and encouraged the jury to make decisions based on sympathy rather than facts. Zephier cites *State v. Bradford*, 618 N.W.2d 782 (Minn. 2000), and *Rairdon v. State*, 557 N.W.2d 318 (Minn. 1996), respectively, in support of these arguments. But in each of those opinions, the supreme court did not find that the same type of prosecutorial misconduct alleged in this case had occurred, and the conduct in those cases was more serious than in this case. *See Bradford*, 618 N.W.2d at 799-800; *Rairdon*, 557 N.W.2d at 322-24. Because the prosecutor’s conduct did not plainly contravene a law, rule, or standard of conduct, the prosecutor did not plainly engage in misconduct. *See Ramey*, 721 N.W.2d at 302.

²After briefing, the state moved to strike from Zephier’s reply brief an argument concerning the fourth requirement of the modified plain-error test. “The reply brief must be confined to new matter raised in the brief of the respondent.” Minn. R. Civ. App. P. 128.02, subd. 3. In his principal brief, Zephier discussed the first, second, and third requirements of the modified plain-error test but not the fourth. But Zephier’s argument was sufficient to put the state on notice that all requirements of the modified plain-error test might be relevant. The state referred to the fourth requirement in its responsive brief. Zephier did not thereafter make a new argument for reversal that had not been made in his principal brief or that was not in direct response to the state’s responsive brief. In any event, the issue is moot because we conclude below that Zephier cannot satisfy the first, second, and third requirements of the modified plain-error test with respect to any alleged instance of prosecutorial misconduct. Thus, the state’s motion to strike is denied.

Zephier next argues that the prosecutor engaged in misconduct in her opening statement by stating as follows:

Most nine-year-old girls play with Barbie dolls, love ponies, and want to be ballerinas. Most nine-year-old girls still believe there's a chance they'll become a princess someday. They are trusting spontaneous, carefree, and imaginative. . . . Late summer means school is just around the corner for most kids. Kiddos are excited to go back to school. They're excited to see friends and teachers. Start sports and show off their new clothing and their new school supplies.

Zephier contends that this statement was an attempt to inflame the passions and prejudices of the jury. Zephier cites *State v. Jackson*, 714 N.W.2d 681 (Minn. 2006), in support of this argument. But in that case, the supreme court did not find that the prosecutor engaged in misconduct, and the conduct in that case was more serious than the conduct in this case. *Id.* at 693-96. Again, because the prosecutor's conduct did not plainly contravene a law, rule, or standard of conduct, the prosecutor did not plainly engage in misconduct. *See Ramey*, 721 N.W.2d at 302.

Zephier last argues that the prosecutor engaged in misconduct in her closing argument by making the following statement:

I want you to take a moment to recall a sexual experience of your own. Now, imagine having to walk into a room full of strangers and retell those strangers about this encounter? Now, imagine that you were not a willing participant in that encounter, and you had to tell this story to this same group of strangers. Now, imagine when you are telling your story the person who raped you is sitting across from you. That was [B.H.'s] experience yesterday.

Zephier contends that the prosecutor made an argument that was not based on the evidence, asked jurors to put themselves in B.H.'s place, and encouraged jurors to render a verdict

based on sympathy. The state concedes that the prosecutor plainly engaged in misconduct. The state contends, however, that the prosecutorial misconduct did not affect Zephier's substantial rights. As noted above, the state bears the burden of showing that the prosecutorial 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 (quotation omitted).

The state charged Zephier with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.342, subd. 1(a), (h)(i). At trial, the parties were focused in a general way on whether Zephier engaged in the conduct that had been alleged. B.H. testified that Zephier did so. B.H.'s testimony was corroborated by the video-recording and transcript of the forensic interview. The state introduced evidence that Zephier engaged in similar criminal sexual conduct toward young female cousins on two prior occasions. Zephier's defense, as reflected in his attorney's closing argument, was that B.H. was not credible, particularly because of the nearly eight-year delay between the alleged incident and her report. In anticipation of that defense, the state elicited testimony from B.H. that she delayed reporting the alleged assault because Zephier threatened to hurt her or her family. In addition, the state introduced expert testimony that delayed reporting by victims of sexual assault is common. In light of this evidence, the state had a very strong case against Zephier. Accordingly, we conclude that the prosecutorial misconduct that is conceded by the state did not affect Zephier's substantial rights.

Zephier also argues, in the alternative, that even if none of the instances of alleged prosecutorial misconduct discussed above independently requires a new trial, their cumulative effect requires a new trial. “Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotation omitted). In other words, if an appellant establishes that a district court committed two or more procedural errors, none of which individually requires a new trial, the appellant nonetheless may be entitled to a new trial “if the errors, when taken cumulatively, had the effect of denying appellant a fair trial.” *Jackson*, 714 N.W.2d at 698 (quotation omitted). We have concluded, however, that there was only one instance of prosecutorial misconduct. Because there is only one error, not multiple errors, the cumulative-error doctrine does not apply.

Thus, Zephier is not entitled to reversal of his conviction and a new trial on the ground of prosecutorial misconduct.

IV. Assistance of Counsel

Zephier argues that the post-conviction court erred by denying his post-conviction petition without conducting an evidentiary hearing. In his petition, he alleged that he received ineffective assistance of counsel from his trial attorney for five reasons. On appeal, he continues to pursue his ineffectiveness claim with respect to only one alleged deficiency by his trial attorney: the attorney’s decision to not cross-examine B.H. Zephier asks this court to reverse and remand for an evidentiary hearing on that claim.

A post-conviction petition “shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired.” Minn. Stat. § 590.02, subd. 1(1) (2020). “[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.” Minn. Stat. § 590.04, subd. 3 (2020). A post-conviction court, in its discretion, “may receive evidence in the form of affidavit, deposition, or oral testimony.” *Id.* A district court may deny a petition for post-conviction relief without an evidentiary hearing if “the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” *Id.*, subd. 1. We apply an abuse-of-discretion standard of review to a post-conviction court’s decision to deny a post-conviction petition without an evidentiary hearing. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018).

The need for an evidentiary hearing depends on the substantive law underlying Zephier’s post-conviction claims. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. The existence of a right to counsel implies a “right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quotation omitted). To prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy two requirements:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

In this case, the post-conviction court considered only the first requirement of the two-part *Strickland* test: whether Zephier’s trial attorney’s performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. The objective standard is defined as “representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). The post-conviction court rejected Zephier’s ineffectiveness claim by referring to caselaw that states that courts “generally do not review ineffective assistance of counsel claims based on trial strategy.” *See Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010). The post-conviction court reasoned as follows:

Giving trial counsel’s decision-making the required deference, and avoiding the temptation [to] evaluate this issue through the lens of hindsight, trial counsel was faced with the difficult prospect of cross-examining the victim, a seventeen-year-old girl, who was emotional, crying during her testimony, and struggling to speak. Had counsel attempted to cross examine her, he risked the impression of attacking her and creating sympathy for her—which could have negatively affected Petitioner’s defense. Similarly, if questioned, the victim’s testimony would likely been very similar to testimony given on direct, giving the jury another opportunity to hear what trial counsel described as difficult and emotional testimony. Given these concerns, trial counsel had strategic reasons not to cross examine the victim. Courts do not review ineffective assistance of counsel claims that are based on these types of trial strategy decisions. Accordingly, Petitioner’s argument that trial counsel’s decision to not cross examine the victim does not rise to the level of ineffective assistance.

Zephier contends that the absence of any cross-examination of B.H. could not have been a strategic decision. He further contends that, without an evidentiary hearing, there is nothing in the record to support the post-conviction court's determination that his trial attorney did not cross-examine B.H. based on a deliberate, strategic decision. In essence, he contends that a court may not presume that a defendant's trial attorney had strategic reasons for not conducting a cross-examination of a state's witness.

In *Francis*, the appellant argued in a post-conviction proceeding that his trial attorney was ineffective because he was unprepared for trial, did not call alibi witnesses, and did not cross-examine the state's expert witness. 781 N.W.2d at 897. The supreme court reasoned, "There is 'a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance.'" *Id.* at 898 (quoting *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986)). The supreme court added, "We generally do not review ineffective assistance of counsel claims based on trial strategy." *Id.* The post-conviction court had denied the petition without conducting an evidentiary hearing, and the supreme court affirmed. *Id.* at 894, 897-98. Zephier's argument is inconsistent with the supreme court's opinion in *Francis*. Furthermore, the post-conviction court's reliance on the "strong presumption" stated in *Francis* was informed by the judge's experience of presiding over Zephier's trial and his observation and recollection of B.H.'s testimony.

Zephier contends further that the post-conviction court erred by not construing his petition in the most favorable light. The supreme court has stated, "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the

petition as true and construes them in the light most favorable to the petitioner.” *Andersen*, 913 N.W.2d at 422-23 (quotation omitted). But the supreme court also has stated, “An evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him to the relief requested.” *Francis*, 781 N.W.2d at 896. In this case, there is no allegation in Zephier’s post-conviction petition that his trial attorney did *not* have a strategic reason for not cross-examining B.H. The relevant part of the petition states simply that B.H. testified and that Zephier’s trial attorney “did not cross-examine her.” Another part of Zephier’s petition alleges in a conclusory way that his trial attorney was ineffective on the ground that he “failed to cross-examine the complaining witness.” But a court is not required to assume the truth of a pleading’s legal conclusions. *See Halva v. Minnesota State Colls. & Univs.*, 953 N.W.2d 496, 501 (Minn. 2021); *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

Thus, the post-conviction court did not err by denying Zephier’s post-conviction petition without an evidentiary hearing.

Affirmed; motion denied.

A handwritten signature in dark ink, appearing to read "Matthew E. Johnson". The signature is fluid and cursive, with the first name "Matthew" and last name "Johnson" clearly distinguishable.