

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0199**

Lance Arnold Kingbird, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 13, 2021
Affirmed
Halbrooks, Judge***

Beltrami County District Court
File No. 04-CR-14-3347

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

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

David L. Hanson, Beltrami County Attorney, David P. Frank, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant Lance Arnold Kingbird challenges the district court's denial of his second petition for postconviction relief. We affirm.

FACTS

A jury found Kingbird guilty of three counts of first-degree criminal sexual conduct based on allegations that he assaulted a minor relative in three separate incidents. The district court entered judgment of conviction on all three offenses and sentenced Kingbird to 360 months in prison. Kingbird appealed, and we stayed the direct appeal to allow Kingbird to pursue postconviction relief. *State v. Kingbird*, No. A15-2001, 2018 WL 1997342, at *2 (Minn. App. Apr. 30, 2018) (*Kingbird I*), *rev. denied* (Minn. July 17, 2018).

In his first petition for postconviction relief, Kingbird claimed ineffective assistance of counsel, contending that his attorneys failed to call certain witnesses and failed to present certain evidence in his defense. *Id.* The postconviction court held a hearing, at which Kingbird testified regarding what the proposed witnesses would have said had they testified and what the evidence would have shown had it been offered. *Id.* He called his defense attorneys to testify, but they declined to disclose confidential communications. *Id.* Kingbird presented no evidence to corroborate his own testimony. *Id.*

The district court denied Kingbird's first postconviction petition. *Id.* We reinstated Kingbird's direct appeal, inviting him to address issues raised and decided in the proceedings relating to his postconviction petition as well as his conviction and sentencing. *Id.*; *State v. Kingbird*, No. A15-2001 (Minn. App. Aug. 22, 2017) (order). Kingbird argued

that the district court abused its discretion by admitting the victim's recorded statement to a forensic interviewer. *Kingbird I*, at *2. He also challenged the district court's denial of his postconviction claims regarding ineffective assistance of trial counsel. *Id.* at *4. We affirmed, and the supreme court denied review. *Id.* at *6.

Kingbird subsequently brought a second petition for postconviction relief, asserting (1) improper sentence; (2) ineffective assistance of trial counsel; (3) ineffective assistance of appellate counsel; (4) biased jury and insufficient probable cause for arrest and search; (5) *Brady* and *Giglio* violations; and (6) newly discovered evidence. The district court denied Kingbird's request for an evidentiary hearing, determining that he failed to present facts warranting one. And the district court denied relief, determining that Kingbird's second petition for postconviction relief was untimely and that all claims were procedurally barred under Minn. Stat. § 590.01 (2020) and *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), lacked merit, or both. Kingbird appeals.¹

DECISION

Appellate courts review a district court's summary denial of a petition for postconviction relief for abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). Legal issues are reviewed de novo, while review of factual issues is limited

¹ Kingbird challenges the district court's determination that his second postconviction petition was untimely. Because we resolve the appeal on other grounds, we decline to reach this issue. We note, however, that a postconviction petition is time-barred under Minn. Stat. § 590.01, subd. 4(a) (2020), 90 days after the court's decision on direct appeal. *Berkovitz v. State*, 826 N.W.2d 203, 207 (Minn. 2013).

to whether sufficient evidence in the record sustains the district court's findings. *Mataakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015).

1. The district court properly determined that Kingbird did not receive multiple sentences for crimes committed during a single behavioral incident.

Kingbird argues that the district court erred in rejecting his postconviction claim of improper sentencing. A challenge to a sentence may be filed in a petition for postconviction relief pursuant to Minn. Stat. § 590.01, subd. 1(1). *Washington v. State*, 845 N.W.2d 205, 210 (Minn. App. 2014). “[A]n offender may challenge his sentence either by filing a petition for postconviction relief under chapter 590 of the Minnesota Statutes or by filing a motion to correct sentence pursuant to rule 27.03, subdivision 9.” *Id.* A motion to correct a sentence under Minnesota Rule of Criminal Procedure 27.03, subd. 9, is not subject to the limitations on postconviction petitions found in Minn. Stat. § 590.04 (2020). *State v. Amundson*, 828 N.W.2d 747, 751-52 (Minn. App. 2013).

Kingbird argues that it is possible that the jury found him guilty of multiple offenses arising from a single behavioral incident, and it was therefore improper to sentence him on more than one count. *See* Minn. Stat. § 609.035, subd. 1 (2012) (prohibiting multiple sentences for crimes committed during a single behavioral incident). Two factors are considered to determine whether multiple offenses were committed during a single behavioral incident: “whether the offenses occurred at substantially the same time and place” and “whether the conduct was motivated by an effort to obtain a single criminal objective.” *State v. Barthman*, 938 N.W.2d 257, 265-66 (Minn. 2020) (quotations omitted). Here, the jury was presented with three guilty and three not-guilty verdict forms that bore

distinct headers for each of three alleged incidents: “Alleged Incident on the Mattress,” “Alleged Incident on the Couch,” and “Alleged Incident in the Woods.” Although the verdict form did not specify dates for the incidents, the district court correctly concluded that Kingbird was convicted of offenses that occurred in three different locations, and Kingbird does not argue that the victim’s testimony was inconsistent with respect to the locations of the offenses. The jury found Kingbird guilty of each offense. The district court did not err in rejecting Kingbird’s claim of improper sentencing on the merits.

2. The district court did not err in determining that many of Kingbird’s postconviction claims are *Knaffla*-barred.

Kingbird argues that the district court erred in determining that his claims of ineffective assistance of trial counsel, *Brady* and *Giglio* violations, and certain other claims are barred by the rule of *State v. Knaffla*.

Claims asserted in a second postconviction petition are *Knaffla*-barred “if they could have been raised on direct appeal or in a previous postconviction petition.” *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). And under Minn. Stat. § 590.04, subd. 3, a postconviction court may summarily deny a successive petition for postconviction relief if the petitioner raises claims that are similar in substance to previous claims. *Perry v. State*, 595 N.W.2d 197, 200 (Minn. 1999). Nevertheless, a claim is not *Knaffla*-barred if (1) “the defendant presents a novel legal issue” or (2) “the interests-of-justice require the court to consider the claim.” *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011). The interests-of-justice exception requires that the claim have merit and be “asserted without deliberate or inexcusable delay.” *Id.* (quotation omitted).

Ineffective assistance of trial counsel

Kingbird contends that his trial attorneys were ineffective because they failed to offer certain evidence at trial; conducted an inadequate investigation; failed to object to inadmissible evidence; failed to object to a late amendment of the complaint; failed to adequately prepare witnesses; and failed to object to the discharge of the first jury. All of Kingbird's ineffective-assistance-of-trial-counsel claims were either raised or could have been raised in his first appeal. Therefore, the district court did not err in determining that Kingbird's ineffective-assistance-of-trial-counsel claims are *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741.

***Brady and Giglio* claims**

Kingbird contends that the district court erred when it held that his claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) are *Knaffla*-barred. Kingbird argues that the state failed to make several disclosures required by both *Brady* and Minn. R. Crim. P. 9.01 and that respondent State of Minnesota withheld various pieces of evidence in addition to the results of an investigation into a prior allegation by the victim. With respect to *Brady* disclosures, Kingbird cites transcripts from pretrial hearings at which Kingbird's attorneys requested more information. Kingbird raised the same issues in his first appeal to this court, and we observed, "Kingbird asserts that the prosecutor impermissibly failed to disclose exculpatory evidence, but he supports the assertion with examples of evidence known to Kingbird and not proffered by his attorneys." *Kingbird I*, at *6 n.1. With respect to *Giglio*, Kingbird's exact argument is

unclear, but it appears to depend on purportedly conflicting pretrial statements and the relevance of certain testimony, both of which were known at the time of trial.

Kingbird does not raise any new claims, nor does he claim any newly discovered evidence regarding his *Brady* or *Giglio* claims. Therefore, the district court did not err in determining that these claims are *Knaffla*-barred.

Other claims

Kingbird makes a passing argument that his claims relating to prosecutorial misconduct, speedy trial and fair jury, and lack of probable cause to arrest should have been allowed to proceed under the interests-of-justice exception to the *Knaffla* bar. As noted above, the interests-of-justice exception requires that the claim have merit and be “asserted without deliberate or inexcusable delay.” *Buckingham*, 799 N.W.2d at 231 (quotation omitted). To the extent these claims, which relate to pretrial and pretrial proceedings, are raised for the first time in this appeal, we are not persuaded that they are asserted without inexcusable delay.

3. The district court did not err in denying Kingbird’s claims of newly discovered evidence without an evidentiary hearing.

To receive an evidentiary hearing on a timely postconviction claim of newly discovered evidence, the petitioner must allege facts, that if proven, would satisfy the four-prong *Rainer* test.² *Bobo v. State*, 820 N.W.2d 511, 517 (Minn. 2012) (citing *Rainer*

² As noted above, the district court concluded that Kingbird’s second postconviction petition was untimely, and Kingbird challenges that conclusion on appeal. Because we decline to reach the timeliness issue, we presume, for purposes of analyzing Kingbird’s argument about entitlement to an evidentiary hearing, that the petition was timely.

v. State, 566 N.W.2d 692 (Minn. 1997)). The test requires proof that the newly discovered evidence (1) was not known to defendant or counsel at the time of trial; (2) could not have been discovered before trial through the exercise of due diligence; (3) is not cumulative, impeaching, or doubtful; and (4) would “probably produce an acquittal or a more favorable result.” *Id.* at 518 (quotation omitted).

Kingbird appears to rely on the following as newly discovered evidence: an “affidavit” from a neighbor about a conversation she overheard between the victim and the victim’s mother; “transcripts of recordings he made of a conversation with [the victim’s mother]”; screenshots from his cellphone from October 17, 2014; and county health and human services records. The district court determined that this evidence did not meet the standard for an evidentiary hearing because there was no showing of due diligence, the evidence was intended for impeachment purposes and cumulative, and a much of it (including the substance of the neighbor’s unsworn statement) was available to Kingbird before trial. We agree.

In his first appeal Kingbird argued that his attorney should have called as a witness the neighbor, who would have testified about a conversation she overheard between the victim and her mother. *Kingbird I*, at *4. In this appeal, he argues that the neighbor’s “affidavit” relating the same or similar content is newly discovered evidence. The substance of the neighbor’s statement, which the district court correctly observed was not made under oath, is not new evidence. With respect to the other “newly discovered evidence,” Kingbird makes no specific argument in this appeal. We nevertheless note that evidence is not “newly discovered” when the petitioner was present when the underlying

events occurred. *Onyelobi v. State*, ___ N.W.2d ___, ___, 2021 WL 5227111, at *3 (Minn. Nov. 10, 2021). Based on our review of the proposed evidence, the district court did not err in concluding that Kingbird failed to satisfy the test to obtain an evidentiary hearing.

4. The district court did not err when it denied Kingbird’s ineffective-assistance-of-appellate-counsel claim.

Kingbird’s claims of ineffective assistance of appellate counsel are not *Knaffla*-barred because they could not have been brought in his first appeal. *Thoresen v. State*, 965 N.W.2d 295, 310 (Minn. 2021). “To establish ineffective assistance of appellate counsel a petitioner must demonstrate that appellate counsel’s performance was objectively unreasonable, and that the unreasonable performance prejudiced him.” *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004). If the ineffective-assistance-of-appellate-counsel claim is contingent on trial counsel’s ineffectiveness, then the appellant must initially prove trial counsel was ineffective. *Id.*

“Appellate counsel does not have a duty to raise all possible issues, and may choose to present only the most meritorious claims on appeal.” *Morrow v. State*, 886 N.W.2d 204, 206 (Minn. 2016). Additionally, there is a strong presumption that appellate counsel’s judgment about which issues to raise “falls within the wide range of reasonable professional assistance.” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted).

Kingbird argues that *appellate counsel* should have argued that *trial counsel* should have argued that evidence relating to a sexually transmitted infection was admissible and “a strong indication of innocence.” In Kingbird’s first appeal, we rejected the argument

that trial counsel's decision not to offer this evidence was unreasonable, concluding that decisions on the evidence to present at trial "are strategic and generally not subject to review." *Kingbird I*, at *5-6. Because Kingbird cannot show that his trial counsel were ineffective in this respect, his claim that appellate counsel's performance fell below an objective standard of reasonableness also fails. *McDonough*, 675 N.W.2d at 56. Further, Kingbird does not show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 688, 694 (1984).

Kingbird also argues ineffective assistance of appellate counsel based on conduct that "includes, but isn't limited to, failing to raise issues related to *Brady* and *Giglio* violations, failure to conduct an adequate investigation, and including subpoenaing and presenting testimony at the postconviction hearing." An assertion of error in a brief that is not supported by argument or authority is waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *rev. denied* (Minn. Aug. 5, 1997). Perceiving no obvious error, we decline to reach these arguments.

Therefore, the district court did not err in denying Kingbird's ineffective-assistance-of-appellate-counsel claim on the merits.

5. The arguments in Kingbird's pro se supplemental brief do not warrant relief.

In his pro se supplemental brief, Kingbird raises arguments regarding ineffective assistance of counsel, evidentiary errors, and *Brady* and *Giglio* violations. As in his earlier appeal, many of the issues are addressed in his primary brief or are attempts to recast earlier arguments. *Kingbird I*, at *6. Others are *Knaffla*-barred because they were, or could have

been, raised in the first appeal or postconviction petition. *See Perry*, 731 N.W.2d at 146. As in *Kingbird I*, we conclude after careful review that none of the assignments of error, individually or cumulatively, establishes grounds to reverse Kingbird's convictions. *Kingbird I*, at *6.

Affirmed.