

*This opinion is nonprecedential except as provided by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
A21-0207**

Scott Marlin Morey, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 9, 2021
Affirmed
Ross, Judge**

Clearwater County District Court
File No. 15-CR-14-522

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

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

Kathryn A. Lorsbach, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Scott Morey guilty of sexually abusing his minor sons in 2016. Morey challenged his conviction in a petition for postconviction relief, contending that the prosecutor engaged in misconduct and that he received ineffective assistance of counsel during trial. The district court rejected his ineffective-assistance claim on the merits and his prosecutorial-misconduct claim as *Knaffla*-barred. Because Morey cannot establish that

any alleged ineffective assistance prejudiced him, and because *Knaffla* bars his prosecutorial-misconduct claim, we affirm.

FACTS

A jury found Scott Morey guilty of 13 counts of felony criminal sexual conduct involving two of his minor sons in 2016. A third son, E.M., also accused Morey of sexually abusing him, but because he killed himself before trial, related charges were not included in the complaint. Morey appealed his conviction and his sentence, which we affirmed in 2017. *State v. Morey*, No. A16-1364, 2017 WL 3222747, at *3–6 (Minn. App. July 31, 2017), *review denied* (Minn. Oct. 17, 2017). Morey petitioned for postconviction relief in 2019, contending, among other things, that his trial counsel provided him with ineffective assistance and that the prosecutor engaged in misconduct. The district court conducted a hearing at which Morey represented himself, testified, and called as witnesses his trial counsel John Leunig, the trial prosecutor Richard Mollin, and his wife.

Morey contended that Leunig failed to investigate his claims and refused to call crucial witnesses including a man whom we will call Smith for privacy concerns, who would have supposedly testified that he overheard the boys admitting that they had fabricated their allegations. Leunig, whom the district court found credible, stated that his trial strategy included minimizing the witness list to avoid potential adverse testimony and highlighting the lack of eyewitnesses and physical evidence. Leunig also testified that Morey participated favorably in Leunig’s decision about witness selection.

Morey also contended that Mollin engaged in prosecutorial misconduct by failing to disclose E.M.'s having purportedly confessed to fabricating his allegations. But Mollin, whom the district court found credible, denied having heard about the alleged confession.

The district court concluded that Morey's ineffective-assistance-of-counsel claim failed because it implicated only the attorney's trial strategy. It determined that *Knaffla* barred Morey's claim of prosecutorial misconduct because he had witnessed the alleged misconduct at trial and stated before trial that Mollin refused to disclose material information.

Morey appeals.

DECISION

Morey challenges the district court's decision denying his postconviction petition. He argues that the district court improperly denied his ineffective-assistance-of-counsel claim and that *Knaffla* does not bar his postconviction prosecutorial-misconduct claims. Both arguments fail.

I

Morey argues that the district court improperly denied his ineffective-assistance-of-counsel claim. We review the denial of postconviction relief for an abuse of discretion, considering legal issues de novo and reviewing factual findings for clear error. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). We therefore review Morey's ineffective-assistance-of-counsel claim, a legal issue, de novo. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). The Sixth Amendment right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687,

104 S. Ct. 2052, 2064 (1984). Morey could prevail on the claim only if he established that his attorney's representation was objectively unreasonable and that a reasonable probability exists that his attorney's poor performance prejudiced his defense. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Because Morey did not establish prejudice, the claim fails.

Morey contends that Leunig acted unreasonably by not calling Smith as a witness. The claim fails on the merits because Morey shows no prejudice from the alleged deficient representation. Leunig's decision about trial tactics, including which evidence to present and which defenses to raise, is a matter of attorney discretion. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). And "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91, 104 S. Ct. at 2066. Leunig said that he decided not to investigate Smith so as to minimize potential adverse testimony. But there is an important difference between failing to investigate a potential exculpatory witness and deciding not to call that witness after investigation. *See State v. Nicks*, 831 N.W.2d 493, 507 (Minn. 2013). And it would be difficult in a purely he-said-versus-he-said case to hold reasonable a defense attorney's decision not to investigate the assertion that a witness overheard the alleged victims admit to fabricating their allegations of abuse.

But the lack of any evidence of prejudice is so clear that, even if the attorney's decision not to investigate fell below the threshold of reasonable advocacy, Morey's claim fails. We "need not determine whether counsel's performance was deficient before

examining the prejudice suffered by the defendant If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. Prejudice may not be demonstrated through mere speculation, but must be established with evidence. *Gates v. State*, 398 N.W.2d 558, 563 (Minn. 1987). The record contains testimony from Morey’s wife that Smith sent her a message on Facebook informing her that the boys said they had falsified their allegations. Even if the district court had found Morey’s wife credible (it found that she was not), we would have no evidentiary basis on which to conclude that Morey has demonstrated prejudice. A party alleging counsel’s failure to present testimony of an exculpatory witness must show “that there is [such a witness], that he could have been located, that he would have testified, and that his testimony would have helped [the] defendant.” *Gates*, 398 N.W.2d at 563. The record contains no evidence that Smith even exists, let alone evidence that he could have been located, that he would have testified at trial, and that his testimony would have helped Morey’s defense. Morey did not call Smith to testify at the postconviction hearing, presented no documentation of the alleged Facebook messages, and offered no affidavit from Smith supporting the hearsay assertion that he had overheard the boys commenting about the truthfulness of their allegations. This is the sort of evidence that the district court might have considered, or that we might have considered on appeal, to assess potential prejudice in the failure to investigate.

Morey’s other arguments also fail. He contends that Leunig unreasonably decided not to retain a medical expert to examine the boys for evidence of anal rape because medical investigation would have established the absence of sexual abuse. This too is speculation.

And he contends that Leunig unreasonably failed to obtain testimony from E.M. after E.M. purportedly informed Morey's wife that he had fabricated his allegations. But E.M. killed himself before trial, and the prosecutor removed any charges relating to his allegations from the case. More importantly, the record offers no more reason to suggest that E.M. would have provided exculpatory evidence than it does to suggest that Smith would have. Morey has not shown prejudice under *Strickland*. We affirm on that ground.

II

Morey argues that *Knaffla* does not bar his postconviction prosecutorial-misconduct claims arising from Mollin's alleged suppression of or failure to disclose exculpatory evidence. *See State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). We review the district court's *Knaffla* decision for an abuse of discretion. *Quick v. State*, 692 N.W. 2d 438, 439 (Minn. 2005). Because Morey was aware of all of these issues before his direct appeal, *Knaffla* bars his prosecutorial-misconduct claims.

Morey contends that *Knaffla* does not apply because fact-finding incidental to trial was necessary to determine whether Mollin failed to disclose purportedly exculpatory evidence. An exception to the *Knaffla* bar exists for claims that cannot be determined from the district court record. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). But *Knaffla* bars a claim involving a prosecutor's purported failure to disclose exculpatory evidence known at the time of the direct appeal if the appellant has not discovered relevant evidence after the direct appeal. *Ferguson v. State*, 645 N.W.2d 437, 447 (Minn. 2002). Morey identifies no newly discovered evidence following his direct appeal.

Morey asserted at the postconviction hearing that his wife sent Mollin an email about E.M.'s allegedly confessing to fabricating allegations. This issue too was available to Morey before his direct appeal. And Mollin, whom the district court found credible, denied having been informed of the alleged confession.

Morey's other arguments are similarly unavailing. He alleged that Mollin withheld information about the boys' school-misconduct issues, but he cites no newly discovered information and the evidence indicates that he knew about these issues before his direct appeal. Also barred is his theory that Mollin failed to adequately investigate supposed prior false allegations by one of the boys; Morey certainly knew of this at trial because he says he informed both his counsel and Mollin about it. Finally, Morey asserted that Mollin instructed the boys' social workers to withhold information from him, but he also said that he learned about this during the child-protection hearing, which also occurred before his direct appeal. We are satisfied that *Knaffla* bars all of Morey's prosecutorial-misconduct arguments.

Affirmed.