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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0380**

Pao Choua Xiong, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 27, 2021
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CR-17-1995

Pao Choua Xiong, Faribault, Minnesota (pro se appellant)

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

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant seeks review of the district court's order denying his petition for postconviction relief from his 2017 conviction of first-degree criminal sexual conduct. Appellant argues (1) the district court erred by summarily denying his petition as

procedurally barred, and (2) he is entitled to relief based on the ineffective assistance of trial and appellate counsel. Appellant also challenges the district court's denial of an evidentiary hearing. We affirm.

FACTS

In 2017, the state charged appellant Pao Choua Xiong with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2016), alleging he sexually assaulted his eight-year-old child (daughter).

N.L. (mother) called police in March 2017 to report daughter was crying and bleeding from her vagina. Police transported daughter to Children's Hospital in St. Paul and daughter told a nurse practitioner that Xiong came into the bathroom, lifted her onto the counter, and "raped me, he tried to rape me."

Daughter was first seen in the emergency department by Dr. Henry Ortega, who referred daughter to the Midwest Children's Resource Center (MCRC) for an evaluation. Later that day, an MCRC nurse and Dr. Mark Hudson examined daughter. Dr. Hudson testified he found "a small rupture" to the entrance of daughter's vagina, which bled upon manipulation. Dr. Hudson later testified daughter's injury was "consistent" with her described assault. In July 2017, a jury found Xiong guilty of first-degree criminal sexual conduct. The district court sentenced Xiong to 156 months in prison.

Xiong appealed, arguing he was entitled to a new trial or resentencing. This court affirmed Xiong's conviction, holding (1) "the district court did not abuse its discretion by denying appellant's motion for a mistrial after having failed to administer an oath before [daughter] testified, where [daughter] was sworn and verified her earlier testimony"; and

(2) “[t]he district court erroneously admitted testimony of [Xiong’s] drug and alcohol use” as general relationship evidence, “but the error was harmless.” *State v. Pao Choua Xiong*, No. A17-1976, 2018 WL 6165491, at *2–3 (Minn. App. Nov. 26, 2018). On the sentencing issue, however, we reversed and remanded, concluding “[t]he district court abused its discretion” by sentencing Xiong using a criminal-history point for a Wisconsin felony conviction without determining whether the offense would qualify as a felony in Minnesota. *Id.* at *5–6. During the remand, Xiong withdrew his request for resentencing because the state “satisfied its burden to prove his out-of-state criminal history points.”

On November 16, 2020, Xiong petitioned for postconviction relief, seeking an evidentiary hearing and a new trial under Minn. Stat. § 590.04, subd. 1 (2020). Xiong argued he is entitled to a new trial based on evidentiary issues before and during trial, claiming the state did not disclose relevant information about the medical exams and interviews of daughter before trial and the probable-cause statement in the complaint “was hearsay.”¹ Xiong also argued he is entitled to a new trial because his trial counsel’s

¹ Xiong’s petition also argued the evidence was insufficient to sustain his conviction and asserted his “actual innocence,” both of which the district court rejected as procedurally barred. Xiong’s brief to this court mentions sufficiency of the evidence once or twice but Xiong cites no legal authority or present an argument about why he is entitled to relief on this ground. Xiong’s brief states “ACTUAL INNOCENCE” on the cover, along with mentioning “actual innocence” a few times in the argument section. But we cannot discern a cogent issue separate from those discussed below. Xiong’s brief quotes federal caselaw on “actual innocence” in the context of a habeas petition, but Xiong’s brief does not cite any relevant Minnesota legal authority on this issue, nor does he articulate why he is entitled to relief on this ground. Because he does not present a cogent argument or cite relevant legal authority, we consider neither sufficiency of the evidence or Xiong’s actual innocence. *See Scruggs v. State*, 484 N.W.2d 21, 25 n.1 (Minn.1992) (holding when defendant’s appellate brief does not raise issues previously stated in a petition for postconviction relief, those issues are considered waived); *see also McKenzie v. State*,

representation “fell below the objective standard of reasonableness,” prejudiced his defense, and therefore deprived him of his constitutional right to effective assistance of counsel. Xiong identified his trial counsel’s failure to investigate and cross-examine witnesses about evidence, specifically, bloody underwear recovered from the crime scene, the medical examinations of daughter, and DNA evidence taken from daughter.

The district court denied Xiong’s petition without an evidentiary hearing. The district court determined Xiong’s evidentiary and ineffective-assistance-of-counsel claims were procedurally barred. The district court also determined “[e]ven if the Court decided that [Xiong’s] ineffective assistance of counsel claims were not *Knaffla*-barred, they would nevertheless fail on the merits” because his claims are “mere allegations” and did not warrant an evidentiary hearing.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by denying Xiong’s petition for postconviction relief without a hearing.

Minnesota law permits “a person convicted of a crime” to petition for postconviction relief when they claim a conviction violated their constitutional or statutory rights, or because newly discovered evidence has established their innocence. Minn. Stat. § 590.01, subd. 1 (2020). After a convicted person files a postconviction petition, “an evidentiary hearing must be held ‘[u]nless the petition and the files and records of the

583 N.W.2d 744, 746 n.1 (Minn. 1998) (rejecting arguments not adequately briefed and considering the issue waived when appellant’s brief “allude[d] to” an issue but “fail[ed] to address them in the argument portion of his brief”).

proceeding conclusively show that the petitioner is entitled to no relief.” *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018) (quoting Minn. Stat. § 590.04, subd. 1). “The petition must allege more than argumentative assertions without factual support.” *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). “An evidentiary hearing is not required unless the petitioner alleges such facts which, if proved by a fair preponderance of the evidence, would entitle him or her to the requested relief.” *Id.* (internal quotations omitted).

An appellate court reviews “the denial of a petition for postconviction relief for an abuse of discretion.” *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A district court abuses its discretion in postconviction matters “when it has ‘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.’” *Id.* (quoting *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016)). “Legal issues are reviewed de novo,” but “review of factual issues is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *Id.* (internal citations and quotations omitted).

“[P]ost-conviction remedies exist to try fundamental issues that have not been tried before.” *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). This rule of law includes a procedural component, known as the “*Knaffla* bar.” When a postconviction petition is filed after a direct appeal is taken, (a) “all matters raised” during the direct appeal, and (b) “all claims known but not raised” during direct appeal “will not be considered upon a subsequent petition for postconviction relief.” *Id.*; see also Minn. Stat. § 590.01 subd. (1) (“A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or

sentence.”). “[A] postconviction court may summarily deny a claim that is . . . procedurally barred under *Knaffla*.” *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015)

Xiong argues the district court’s denial of his postconviction petition was an abuse of discretion for four reasons, which we discuss in turn.

A. Recanted and false-testimony claims

Xiong argues the district court erred by denying postconviction relief because Xiong “presented the Postconviction Court with many instances of recantation and perjured testimony from the state’s witnesses.” Xiong offers three examples. First, he contends mother made the “first false and misleading statement” and “committed perjury” because she said daughter was crying and bleeding after the assault. According to Xiong, mother was not present just after the assault; the only witness present, daughter’s older sister, testified daughter was not crying after the incident and older sister did not see blood on daughter. Second, Xiong claims Dr. Hudson “committed perjury with false and misleading statements” because in his medical report and police interviews Dr. Hudson stated he found a recent injury to daughter’s vaginal area; but at trial Dr. Hudson testified “there was no injury on the hymen itself.” Third, Xiong claims a St. Paul police investigator made “false and misleading statements” because she testified at trial that someone else wrote the complaint, which she signed. According to Xiong, the probable-cause statement was “hearsay based on hearsay with false and misleading information” that was not corroborated by any physical evidence or other witnesses. The state argues Xiong’s false-testimony claims are *Knaffla*-barred “because [Xiong] knew of them at the time of direct appeal and yet failed to raise them.”

We reject Xiong’s recanted or false-testimony claims for four reasons. First, Xiong has not properly presented a recanted-testimony claim, which usually rests on an affidavit or other evidence. *See, e.g., Wilson v. State*, 726 N.W.2d 103, 104–05, 107–08 (Minn. 2007) (granting postconviction hearing where jailhouse informant recanted in writing); *Opsahl v. State*, 677 N.W.2d 414, 423–24 (Minn. 2004) (granting postconviction hearing based on affidavits that show a witness had recanted). Xiong presented no affidavits or other evidence that any trial witness later recanted. Rather, Xiong claims one witness’s testimony contradicted either another witness’s testimony or statements in medical and police reports.

Second, during district court proceedings, Xiong did not raise any claim about false testimony by mother or Dr. Hudson. While Xiong’s petition criticized the probable-cause statement as false, he did not allege the police investigator gave false testimony. “It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief.” *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005); *see also Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (determining an appellant’s claims raised for the first time on appeal are forfeited). Thus, we decline to decide these issues because Xiong forfeited them by raising the issues for the first time on appeal.

Third, Xiong’s false-testimony claims are *Knaffla*-barred. Xiong’s false-testimony claims rely on trial testimony and are thus based on inconsistencies known to Xiong at the time of his direct appeal. Thus, Xiong’s false-testimony claims are *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741.

Fourth, even if we were to review Xiong’s false-testimony claims on the merits, they would fail. Xiong contends we should review these claims under the three-part test applied to newly discovered evidence of false testimony. *See State v. Caldwell*, 322 N.W.2d 574, 584–85 (Minn. 1982) (adopting the *Larrison* test for postconviction petitions involving false testimony); *Larrison v. United States*, 24 F.2d 82, 87–88 (7th Cir. 1928) (providing a three-part test to determine whether a new trial should be granted because of false testimony).²

But Xiong has not produced newly discovered evidence of false testimony. Instead, as already mentioned, Xiong relies on trial testimony to identify inconsistencies and conflicts in witness testimony, medical reports received as exhibits, and the criminal complaint. As the supreme court has stated, “[t]his court has recognized that inconsistencies and conflicts in some particular area between one state witness and another does not constitute false testimony nor any basis for reversal.” *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983). Rather, inconsistencies are ““a sign of the fallibility of human perception—not proof that false testimony was given at trial,”” and “this is especially true when the testimony goes to the particulars of a traumatic and extremely stressful incident.” *Id.* (quoting *State v. Hanson*, 176 N.W.2d 607, 609 (Minn. 1970)).

² While the Seventh Circuit replaced the *Larrison* test with the four-part reasonable probability test, Minnesota continues to apply the *Larrison* test to false witness testimony. *See United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004) (replacing the *Larrison* test with the four-part “reasonable probability test”); *see also Andersen v. State*, 940 N.W.2d 172, 178 (Minn. 2020) (“We have adopted the *Larrison* test for determining whether to grant a new trial based on falsified or recanted witness testimony.”).

Thus, Xiong's recanted and false-testimony claims fail as a matter of law and the district court did not err by denying postconviction relief without a hearing.

B. Newly discovered evidence claims

Xiong argues the district court erred by denying postconviction relief on newly discovered evidence, claiming the state withheld evidence, and his trial counsel did not provide him with "his full Rule 9 Motion of Discovery until after his direct appeal." Specifically, Xiong argues the state withheld supplemental police reports, Dr. Ortega's medical reports, and MCRC's reports. Xiong contends these exhibits "are Newly discovered" even though they "were entered as evidence" or "testified to" at trial. The state argues this claim is *Knaffla*-barred because Xiong knew of the evidence at the time of direct appeal and "yet failed to raise" the issue during direct appeal.

In postconviction proceedings that seek a new trial based on newly discovered evidence, a petitioner must prove the evidence: "(1) was not known to the defendant or defense counsel at the time of the trial; (2) could not have been discovered through due diligence before trial; (3) is not cumulative, impeaching, or doubtful; and (4) would probably result in an acquittal or a more favorable result." *See State v. Mosely*, 895 N.W.2d 585, 590 (Minn. 2017) (citing *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). All four elements must be proven for a claim of newly discovered evidence to succeed. *Id.*

The district court determined Xiong's claims that the state withheld discovery and newly discovered evidence failed on the first element "because he readily admits his [trial] counsel knew about this evidence at the time of trial," and "[e]vidence is not 'newly-discovered' merely because a petitioner did not know about it at the time of trial."

We agree with the district court. Xiong concedes witnesses testified about these medical and police reports and the reports were admitted as evidence during his trial. Xiong's claims therefore fail on the first element of the newly discovered evidence test. *See id.* We also conclude Xiong's newly discovered evidence claims were known and not raised in his direct appeal and are *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741. Thus, the district court did not abuse its discretion by summarily denying postconviction relief on Xiong's claims of newly discovered evidence.

C. Ineffective assistance of trial counsel

Xiong argues he is entitled to an evidentiary hearing on his ineffective-assistance-of-trial-counsel claims because his trial counsel's "representation fell below an objective standard of reasonableness," "the results of the proceedings and trial would have been different" without Xiong's trial counsel's poor representation, and his trial counsel's decisions cannot be reviewed based solely on the trial record.

The federal and state constitutions guarantee criminal defendants the right to effective assistance of counsel. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012); U.S. Const. amend. VI; Minn. Const. art 1, § 6. When this court reviews an ineffective-assistance-of-counsel claim, it uses the test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). *Strickland* requires an appellant to show that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (citing *Strickland*, 466 U.S. at 687). The appellate

court need not address both *Strickland* elements if one is dispositive. *Id.* Also, “there is a strong presumption that counsel’s performance was reasonable.” *Id.* (citation omitted). This court will not review an ineffective-assistance-of-counsel claim under *Strickland* when the claim is based on counsel’s trial strategy. *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020) (citing *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014)).

Xiong outlines three reasons his trial counsel provided ineffective assistance. First, Xiong claims his trial counsel was ineffective because Xiong “was not provided with his Rule 9 Motion of Discovery, or his transcripts of all the proceedings in his case.” Second, Xiong contends that “he was denied effective assistance of counsel” because his trial counsel failed to call Dr. Ortega as a witness even though he was the first physician to examine daughter and found ““no injuries or external lesions or (Blood)” on daughter. According to Xiong, Dr. Ortega’s testimony “would have rebutted” the testimony of Dr. Hudson and the MCRC nurse.

Third, Xiong claims his trial counsel’s investigation and trial tactics amounted to ineffective assistance, focusing on two examples. In the first example, police collected daughter’s clothing after the assault and the district court admitted a photo of daughter’s bloody underwear during trial. Xiong contends the outcome of his case would have been different if his trial counsel had “investigated” to whom the underwear belonged, conducted DNA tests on the underwear, produced the underwear at trial, and called daughter, mother, and older sister as rebuttal witnesses. In the second example, Xiong contends his trial counsel failed to “investigate” MCRC’s medical findings and failed to challenge or “investigate” the handling of the DNA evidence.

To be clear, Xiong’s claims about his trial attorney’s failure to “investigate” revolve around his belief that his attorney should have asked more or different questions *at trial* about the bloody underwear and the state’s DNA-collection processes, objected to admission of photos of the bloody underwear because the underwear itself could have been admitted, and should have tested the underwear for DNA.

The district court determined each of Xiong’s ineffective-assistance-of-trial-counsel claims were *Knaffla*-barred because they “can be decided on the basis of the district court record.” The district court’s analysis relies on an important distinction. “When 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.” *Sontoya v. State*, 829 N.W.2d 602, 604 (Minn. 2013).

Xiong’s claims are challenges to his trial counsel’s performance—the failure to ask specific questions at trial, the failure to call certain witnesses, the failure to offer evidence, or the failure to object to certain evidence. We agree with the district court that each of Xiong’s challenges was discernable on the trial court record. For example, the record reflects that Xiong’s legal counsel offered Dr. Ortega’s report as evidence at trial rather than call him as a witness because there was an issue with service of Dr. Ortega’s subpoena, so Dr. Ortega was not present during trial, despite the attorney’s best efforts. As a result, the reason Dr. Ortega was not called as a witness is discernable on the trial court record and does not require more fact-finding. Xiong’s ineffective-assistance-of-trial-counsel claims therefore should have been raised during the direct appeal. Similarly, Xiong’s claim challenging his attorney’s decision not to perform DNA-testing on daughter’s underwear

is discernable on the trial court record and does not require more fact-finding. Because Xiong’s criticisms of trial counsel’s performance were “known to” Xiong “at the time of his direct appeal,” we conclude the claims “are barred by [*Knaffla*].” *See Andersen*, 830 N.W.2d at 10; *Carridine v. State*, 867 N.W.2d 488, 493 (Minn. 2015) (determining appellant’s ineffective-assistance-of-trial-counsel claim was procedurally barred and “could have been raised on direct appeal because the claims are based on the trial record”).

Alternatively, the district court determined Xiong’s ineffective-assistance-of-trial-counsel claims would fail on the merits. *Andersen* guides our review of the merits. In *Andersen*, the appellant argued ineffective assistance of counsel, in part, because his trial counsel “failed to investigate the case, [and] did not call exculpatory witnesses or impeach adverse witnesses.” 830 N.W.2d at 13. The supreme court rejected these claims because the conduct at issue “falls within trial strategy and therefore is not reviewable.” *Id.* (citing *State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012)) (determining legal counsel’s decisions about the extent of investigation, which witnesses to call, and what questions to ask are typically matters of trial strategy that appellate courts will not review under *Strickland*).

The claims rejected in *Andersen* are like the claims raised by Xiong, who criticizes his trial counsel’s strategy about the extent of investigation, which witnesses to call, what questions to ask witnesses, whether to object to evidence, and whether to have evidence independently tested, such as DNA testing of the underwear. We conclude Xiong challenges matters of reasonable trial strategy. *See Carridine*, 867 N.W.2d at 494 (determining trial strategy includes determining which witnesses to call at trial);

Sanchez-Diaz v. State, 758 N.W.2d 843, 848 (Minn. 2008) (determining that selecting the evidence to present to the jury is trial strategy); *Andersen*, 830 N.W.2d at 10 (determining the extent of an attorney’s investigation is trial strategy); *Hodgson v. State*, 540 N.W.2d 515, 518 (Minn. 1995) (noting defense counsel’s decision not to investigate leads and not have evidence independently tested was trial strategy). Thus, we decline to review Xiong’s ineffective-assistance-of-trial-counsel claims under the *Strickland* test. *See Chavez-Nelson*, 948 N.W.2d at 665.

In sum, Xiong’s ineffective-assistance-of-trial-counsel claims were *Knaffla*-barred. But even if they were not, the claims are not appropriately reviewed under *Strickland* because Xiong’s claims rest on trial strategy. Thus, the district court did not err by summarily denying postconviction relief for ineffective assistance of trial counsel.

D. Ineffective assistance of appellate counsel

Xiong argues *Knaffla* “does not bar a claim of ineffective assistance of Appellate Counsel because the claim could not have been known until after direct appeal.” The state argues Xiong did not raise ineffective assistance of appellate counsel during district court proceedings, so he cannot raise the issue for the first time on appeal.

We first consider what conduct Xiong identified to support his claim for ineffective assistance of appellate counsel. Xiong’s opening brief does not describe his appellate counsel’s performance nor how it provided ineffective assistance, as required by the first step of the *Strickland* test. *Andersen*, 830 N.W.2d at 10. In his reply brief, Xiong argues his appellate counsel was ineffective for failing to inform him he could file a pro se supplemental brief, by not providing him with copies of transcripts and discovery from

district court proceedings, and for failing to raise an ineffective-assistance-of-trial-counsel claim in Xiong's direct appeal given the "unprofessional errors that were made by trial counsel."

Our review of Xiong's petition for postconviction relief confirms he did not identify or criticize appellate counsel's performance and therefore did not raise ineffective assistance of appellate counsel during district court proceedings. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure*, 700 N.W.2d at 447. In *Azure*, the defendant "did not even *raise* the claim of ineffective assistance of appellate counsel in his postconviction petition" and the supreme court held, "[b]ecause Azure did not raise the claim in his postconviction petition and the postconviction court made no findings on the issue, we have no postconviction ruling to review. Accordingly, we hold that Azure's ineffective assistance of appellate counsel claim has been waived for the purposes of this postconviction appeal." *Id.* Because Xiong did not raise ineffective assistance of appellate counsel during district court proceedings, Xiong forfeited the issue and we decline to consider it.

Affirmed.