

*This opinion is nonprecedential except as provided by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
A23-1798**

Duke Ogeto Maroko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 29, 2024
Affirmed
Cochran, Judge**

Scott County District Court
File No. 70-CR-20-6185

Duke Ogeto Maroko, Bayport, Minnesota (pro se appellant)

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

Ronald Hovevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Considered and decided by Larson, Presiding Judge; Cochran, Judge; and Smith,
John, Judge.*

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant challenges the postconviction court's summary denial of his petition for postconviction relief. He argues that the postconviction court erred by determining that his claim of prosecutorial misconduct is procedurally barred under *State v. Knaffla*, 243 N.W.2d 737 (1976), and by concluding that his claims of ineffective assistance of trial counsel lack merit. We affirm.

FACTS

This is the second appeal arising from appellant Duke Ogeto Maroko's convictions of first-degree assault and stalking. Respondent State of Minnesota charged Maroko with several offenses after a physical altercation left a woman with cuts on her face and hand. In the complaint, the state alleged that Maroko assaulted the victim with a knife in the doorway of her apartment. Before trial, the state amended the complaint, adding charges of attempted second-degree intentional murder, first-degree assault, and stalking. The state's evidence at trial included testimony from the victim, neighbors, and responding officers. The state also introduced a surveillance video portraying part of the hallway outside the victim's apartment. Maroko testified in his own defense. The jury found Maroko guilty of first-degree assault and stalking only, and the district court imposed concurrent prison sentences of 206 months for first-degree assault and 23 months for stalking.¹

¹ A more complete recitation of the facts is found in *State v. Maroko*, No. A21-1238, 2022 WL 3349246, at *1 (Minn. App. Aug. 15, 2022), *rev. denied* (Minn. Oct. 26, 2022).

In his first appeal, Maroko challenged the sufficiency of the evidence and contended that the district court denied him his right to a speedy trial. In a supplemental pro se brief, he also argued that (1) the district court erred by instructing the jury that it could not review a transcript of the victim's testimony, (2) the prosecutor engaged in misconduct by introducing an edited version of the surveillance-video recording into evidence, and (3) his trial attorney provided him with ineffective assistance of counsel. *Maroko*, 2022 WL 3349246, at *1. We affirmed Maroko's convictions while preserving his right to assert his ineffective-assistance-of-counsel claim in a postconviction proceeding. *Id.* at *8.

Maroko subsequently filed a petition for postconviction relief, asserting that he received ineffective assistance of trial counsel and that the prosecutor committed misconduct. To support his claim of ineffective assistance of counsel, Maroko alleged counsel failed to: (1) communicate and work with Maroko, which led to counsel failing to investigate evidence contained on Maroko's cellphone; (2) investigate the prosecutor's withholding of an unedited surveillance video; (3) object to the prosecutor's offering of an edited surveillance video into evidence; (4) object to a supplemental jury instruction regarding whether the jury could review the victim's trial testimony; and (5) impeach the victim with her inconsistent statements. Regarding his prosecutorial-misconduct argument, Maroko asserted that the prosecutor engaged in misconduct when he "intentionally edited and cut video surveillance of the crime scene so it [would] fit [the prosecutor's] theory."

The postconviction court determined that Maroko's prosecutorial misconduct claim was already raised on direct appeal and thereby barred pursuant to Minnesota Statutes

section 590.01, subdivision 1 (2022), and *Knaffla*, 243 N.W.2d 737. The postconviction court further determined that the ineffective-assistance-of-counsel claims alleged in the petition “fail[ed] to meet the threshold . . . found in *Strickland v. Washington*, 466 U.S. 668 (1984).” The postconviction court therefore denied Maroko’s postconviction petition without holding an evidentiary hearing.

Maroko appeals.

DECISION

A person convicted of a crime may seek postconviction relief by filing a petition alleging that the conviction “violated the person’s rights under the Constitution or laws of the United States or of the state.” Minn. Stat. § 590.01, subd. 1(1). The postconviction court must hold an evidentiary hearing on the petition “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2022). When determining whether the petitioner is entitled to an evidentiary hearing, the postconviction court is required to consider the facts alleged in the petition as true and construe them in the light most favorable to the petitioner. *Andersen v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018). “[T]he burden is on a petitioner to show facts entitling the petitioner to relief.” *Allwine v. State*, 994 N.W.2d 528, 541 (Minn. 2023). We review the summary denial of a postconviction petition for an abuse of discretion, reviewing the postconviction court’s factual findings for clear error and its legal conclusions de novo. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012).

Maroko argues that the postconviction court abused its discretion by denying his petition without holding an evidentiary hearing. Maroko asserts that the postconviction

court erred as a matter of law by determining that his prosecutorial-misconduct claim is procedurally barred and that his ineffective-assistance-of-counsel claim fails to meet the requisite legal standard. We address Maroko’s arguments in turn.

I. The postconviction court did not abuse its discretion by summarily denying Maroko’s postconviction claim for prosecutorial misconduct.

A postconviction court may summarily deny a petition for postconviction relief “when the issues raised in it have previously been decided by the court of appeals . . . in the same case.” Minn. Stat. § 590.04, subd. 3 (2022). Similarly, all claims “known but not raised” on direct appeal “will not be considered upon a subsequent petition for postconviction relief.” *Knaffla*, 243 N.W.2d at 741.

On direct appeal, Maroko argued that the prosecutor committed misconduct by “introducing into evidence an edited surveillance video-recording.” *Maroko*, 2022 WL 3349246, at *7. In our opinion, we noted that “the complete, unedited [video recording] is not in the district court record.” Accordingly, we concluded it was not possible to determine whether the recording that was introduced into evidence prejudiced Maroko’s substantial rights. *Id.* We did not expressly reject Maroko’s argument, nor did we assign fault to Maroko for the insufficient record. *See id.*

In his postconviction petition, Maroko argued that the prosecutor engaged in misconduct when he “intentionally edited and cut video surveillance of the crime scene so it will fit his theory.” The postconviction court determined that Maroko’s prosecutorial-misconduct claim is *Knaffla*-barred because Maroko raised the issue of prosecutorial misconduct on direct appeal and we “determined the record provided by [Maroko] was

insufficient.” Maroko contends that his prosecutorial-misconduct claim is not *Knaffla*-barred because we were unable to address the merits of his claim on direct appeal.²

Maroko’s argument is well taken, but nonetheless we conclude that the postconviction court did not abuse its discretion by denying Maroko a hearing relating to the alleged prosecutorial misconduct. In the ineffective-assistance-of-counsel context, claims are generally not *Knaffla*-barred when the claim requires more fact-finding by the district court. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). Maroko argues a similar standard should be applied with respect to his prosecutorial-misconduct claim and therefore he should be afforded a postconviction hearing to “offer proof of the complete video,” even though he raised the issue of prosecutorial misconduct on direct appeal. Assuming without deciding that his prosecutorial-misconduct claim is not *Knaffla*-barred, we conclude that the postconviction court did not abuse its discretion in denying Maroko a hearing on his prosecutorial-misconduct argument because the allegations in the postconviction petition “conclusively show that [Maroko] is entitled to no relief.” Minn. Stat. § 590.04, subd. 1.

The allegations in Maroko’s postconviction petition were that (1) the prosecutor introduced a surveillance recording into evidence at the trial; (2) the prosecutor “edited and

² Maroko also argues that his prosecutorial-misconduct claim is not procedurally barred because his appellate counsel did not include the argument in his principal brief on direct appeal, despite Maroko’s request that counsel raise the issue. We are not persuaded. Maroko cites no authority in support of his assertion that these circumstances create an exception to the *Knaffla* procedural bar. Instead, Maroko is attempting to assert an ineffective-assistance-of-appellate-counsel claim, which he did not raise in his postconviction petition and is therefore forfeited on appeal. See *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (“It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief.” (quotations omitted)).

cut parts of the video out, which left only the parts that favored the state’s case”; and (3) the unedited version shows that Maroko lived in the apartment, never “left the apartment or forced his way back in,” and “was not trying to kill [the victim].”

Even accepting the allegations as true and construing them in the light most favorable to Maroko, Maroko cites no legal authority in support of his argument that the prosecution’s introduction of only the favorable portions of the video at trial constitutes prosecutorial misconduct. Nor are we aware of any authority supporting this argument. Moreover, Maroko acknowledges that he reviewed the “original surveillance video” before trial. Therefore, Maroko’s attorney could have introduced the remainder of the video or the video in its entirety if the attorney believed the video as a whole would have been helpful to Maroko’s defense. On this record, we discern no prosecutorial misconduct. Because Maroko provides no legal support for his argument and has failed to demonstrate any misconduct, the postconviction court did not abuse its discretion in summarily denying Maroko’s prosecutorial-misconduct claim even if the claim is not *Knaffla*-barred. Minn. Stat. § 590.04, subd. 1.

II. The postconviction court did not abuse its discretion by summarily denying Maroko’s postconviction claim for ineffective assistance of counsel.

Criminal defendants have a constitutional right to the assistance of counsel for their defense. U.S. Const. amend. VI; Minn. Const. art. I, § 6. That constitutional right includes “the right to *effective* assistance of counsel.” *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019) (emphasis added).

“[T]o receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in [*Strickland*].” *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (quotation omitted). Under *Strickland*, a defendant must prove that (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) “there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* (citing *Strickland*, 466 U.S. at 687-96). There is a strong presumption that counsel’s performance was reasonable. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). And we typically will not review matters of trial strategy, which “lie within the discretion of trial counsel and will not be second-guessed by appellate courts.” *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). If an appellant cannot meet one of the *Strickland* prongs, the claim fails, and we need not address the other prong. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020). Lastly,

when we review a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, we will consider the court’s factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court’s decision or conclude that the court abused its discretion because postconviction relief is warranted.

Nicks, 831 N.W.2d at 503-04.

The postconviction court rejected Maroko’s claims of ineffective assistance of counsel without holding an evidentiary hearing, determining that Maroko’s allegations either related to trial counsel’s unreviewable strategy or otherwise failed to satisfy

Strickland. On appeal, Maroko challenges the postconviction court's determination regarding two allegations raised in the petition: the failure to impeach and the failure to investigate alleged prosecutorial misconduct. Maroko also raises new, additional claims of ineffective assistance of counsel. As follows, none of Maroko's arguments warrant relief.

Impeachment

In his postconviction petition, Maroko claimed that his counsel failed to "impeach a key witness"—the victim. Maroko asserted his counsel "should have aggressively sought to impeach [the victim's] testimony" because the victim gave "[m]ultiple and different statements to the detectives about the events before, during and after the incident." Those statements allegedly related to why Maroko and the victim were arguing and how the victim was cut by the knife during the assault. The district court determined that trial counsel's decision regarding impeachment of the victim was a matter of trial strategy, and therefore beyond review.

"What evidence to present to the jury, including which defense to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of a trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn.1999). We have held that the alleged "failure to conduct cross-examination in a certain manner" concerns trial strategy and does not demonstrate ineffective assistance of counsel. *State v. Irwin*, 379 N.W.2d 110, 115 (Minn. App. 1985), *rev. denied* (Minn. Jan. 23, 1986). And the supreme court has noted that failing to impeach adverse witnesses "arguably falls within

trial strategy and therefore is not reviewable.” *Andersen*, 830 N.W.2d at 13. Thus, even if Maroko’s allegations about the victim’s inconsistent statements are true, the district court did not err in determining that trial counsel’s method of impeachment amounts to unreviewable trial strategy for the purposes of an ineffective-assistance-of-counsel claim.

Regardless, even if Maroko had shown that trial counsel’s failure to confront the victim is reviewable under *Strickland* and we assume counsel’s performance fell below *Strickland*’s objective-standard-of-reasonableness prong, Maroko fails to demonstrate that there is a reasonable probability that, but for counsel’s failure to ask the victim about the allegedly inconsistent statements, Maroko would have been acquitted. *See Nicks*, 831 N.W.2d at 504. In his postconviction petition, Maroko suggested that the inconsistencies would have been probative of the victim’s credibility. But Maroko did not show that the alleged inconsistencies were anything more than minor discrepancies between the victim’s various accounts of the events precipitating the first-degree assault. Moreover, the state’s case was strong and did not rely solely on the victim’s testimony; it also relied on the testimony of two neighbors and surveillance footage. Thus, we conclude that Maroko’s petition does not satisfy *Strickland*’s second prong. The postconviction court therefore did not abuse its discretion by summarily denying Maroko’s claim for ineffective assistance of counsel regarding impeachment of the victim.

Prosecutorial Misconduct

Maroko also asserts that his counsel was ineffective because of his failure to object to or investigate the prosecutor’s alleged misconduct relating to the surveillance video. Having already concluded that Maroko has failed to demonstrate prosecutorial misconduct,

we further conclude that Marko was not prejudiced by his counsel's alleged failure to investigate or object to the introduction of the edited video. Therefore, Maroko cannot satisfy *Strickland*'s second prong, and this claim fails. *See Peltier*, 946 N.W.2d at 372. The postconviction court did not abuse its discretion by summarily rejecting Maroko's ineffective-assistance-of-counsel claim premised on a failure to investigate or object to alleged prosecutorial misconduct.

New Allegations of Ineffectiveness

Finally, Maroko argues for the first time on appeal that his counsel was ineffective because counsel (1) failed to call certain potential defense witnesses, (2) failed to raise a probable-cause challenge to the amended complaint, (3) improperly responded to the prosecutor's assertion that Maroko's testimony was not credible, (4) failed to object to or correct the prosecutor during closing argument, and (5) failed to file various sentencing motions. Maroko did not raise these claims of ineffective assistance of counsel in his petition for postconviction relief. Therefore, the arguments related to these claims are forfeited and we decline to address them on appeal. *See Schleicher*, 718 N.W.2d at 445.

In sum, the postconviction court did not err in determining that Maroko's claims of ineffective assistance of counsel raised in his postconviction petition either concerned unreviewable trial strategy or failed to satisfy *Strickland*. None of Maroko's arguments on appeal convince us otherwise. Accordingly, the postconviction court did not abuse its discretion by summarily denying Maroko's postconviction petition.

Affirmed.