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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1481**

State of Minnesota,
Respondent,

vs.

Daniel Alexander Albert,
Appellant.

**Filed August 31, 2026
Affirmed
Bentley, Judge**

Hennepin County District Court
File No. 27-CR-23-13348

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

Mary F. Moriarty, Hennepin County Attorney, Nicholas G. Kimball, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Elizabeth C. Royal, Elizabeth Royal Law Office, St. Paul, Minnesota (for appellant)

Considered and decided by Bentley, Presiding Judge; Ross, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

After a jury trial, appellant was convicted of two counts of first-degree criminal sexual conduct. Following a stay of this appeal for postconviction proceedings, appellant

challenges the convictions based on alleged trial errors and argues that the district court abused its discretion in denying postconviction relief. We affirm in each respect.

FACTS

The following facts derive from the testimony and evidence received at trial as well as Albert's postconviction petition and supporting documents.

Charges

In 2022, nine-year-old M.L.G. confided in a cousin that appellant Daniel Alexander Albert had sexually touched her. The cousin told her mom, who then told one of M.L.G.'s guardians, and the conduct was eventually reported to the police. During a forensic interview, M.L.G. stated that her aunt lived with Albert across the street from her grandmother's home and she would sometimes visit her aunt's place while she was staying with her grandmother. M.L.G. told the interviewer that she "got raped" by "Dan Albert" during the visits. She described one incident as occurring around Thanksgiving that year but stated that it happened more than one time. Identifying the place on her body where Albert touched her, M.L.G. circled the vaginal area and buttocks on a diagram. When the interviewer asked whether the touching was "on the outside of [her] body or the inside of [her] body," M.L.G. whispered, "Inside."

Respondent State of Minnesota charged Albert with two counts of first-degree criminal sexual conduct involving penetration or contact with an individual under 14 years

of age where the actor is more than 36 months older, in violation of Minn. Stat. § 609.342, subd. 1a(e) (2022).¹

Trial and Sentencing

Albert proceeded to a jury trial and was represented by appointed counsel. Before trial, the state filed a motion in limine seeking to admit M.L.G.’s forensic interview into evidence. The state also filed a notice of intent to offer expert testimony from the forensic interviewer and a motion to allow the presence of a support person for M.L.G. while she testified. Albert did not oppose those motions or object to the admission of this evidence.

During trial, the jury heard testimony from M.L.G., the forensic interviewer, M.L.G.’s therapist, and several family members. Albert also testified in his own defense.

M.L.G. had difficulty testifying to the details of Albert’s conduct, referring to it initially as “[w]hat Dan did.” She testified that it happened more than once and started when she was around seven years old.

When the state asked more about “what Dan did,” the following exchange took place:

Q: What Dan did, did you ever feel anything on your body?

A: I don’t want to talk about it.

....

Q: All right. When you talked to the lady at the police station, did you talk about what Dan did?

A: Yeah.

¹ The state also charged Albert with first-degree criminal sexual conduct involving penetration of an individual under 16 years of age where there is a significant relationship and multiple acts, in violation of Minn. Stat. § 609.342, subd. 1a(h)(iii) (2022). That count was dismissed before trial.

Q: Okay. And what Dan did, would there be anything that you would hear when that was happening, like hear with your ears ever?

A: No.

Q: How about anything that you would see?

A: I don't know.

....

Q: What Dan did, did you feel any touches on your body?

A: Yeah.

....

Q: . . . can you tell me where on your body?

A: I don't want to answer.

When given the option, M.L.G. agreed to circle where he touched her on a diagram of a body, and she circled the vaginal area on the diagram. M.L.G. indicated that Albert used his hand when asked, "[W]hat would touch that part?" The state continued:

Q: . . . When his hand would touch that part, would it be over your clothes or under your clothes or something else?

A: I don't want to say.

Q: You don't want to say? Okay. And when his hand would touch that part, would it be on the outside of that part or the inside of that part or something else?

A: I don't know.

....

Q: . . . How did that feel on your body?

A: Uncomfortable.

Q: Would your clothes ever move or be off, or would they be on or something else?

A: I don't know.

Q: . . . did that happen on one day or more than one day?

A: More than one day.

Q: Okay. And do you remember the last time that it happened?

A: No.

When asked specifically about the day around Thanksgiving, M.L.G. said she did not remember if it happened that day. She agreed that it was easier to remember when she was “talking to the lady at the police station” because it was “a lot closer to the time.” She confirmed that she gave truthful answers during that conversation.

The state offered the video recording of the forensic interview into evidence through the testimony of the forensic interviewer and provided the jury with a transcript of the interview. Albert did not object, and the district court admitted them. The video was played to the jury.

The jury found Albert guilty of both counts of first-degree criminal sexual conduct.

At sentencing, Albert moved for a downward dispositional departure on the basis that he is “particularly amenable to probation.” The court found, after “read[ing] through the presentence report, the psychosexual evaluation, and . . . [sitting] through the trial,” that Albert was not particularly amenable to probation and denied the motion. The district court noted its concerns about whether Albert would engage in treatment and whether his failure to take accountability would affect his success in treatment.

The district court convicted Albert on both counts and sentenced him to 180 months’ imprisonment on count one and 144 months’ imprisonment on count two, to be served concurrently.

Albert retained private counsel and filed a direct appeal with a corresponding brief. The appeal was then stayed to permit Albert to seek postconviction relief in the district court.

Postconviction

In his petition for postconviction relief, Albert argued that he received ineffective assistance of counsel and that his right to counsel of his choice had been violated. Regarding ineffective assistance of counsel, Albert argued that on multiple occasions his trial attorneys “failed to make proper objections, file motions, and elicit available evidence favorable to [him].” In support of those arguments, Albert relied on a report from a clinical psychologist analyzing the weaknesses of the forensic interview in this case and opining that Albert’s counsel should have offered their own expert testimony dissecting the interview and discussing the amount of weight to give M.L.G.’s allegations. He also relied on an affidavit of a private investigator who provided “an outline and recommendations” of things “that should have been investigated” by Albert’s attorneys.

With respect to the right to counsel of choice, Albert argued that his right was violated because his trial attorneys advised him not to talk to anybody about his pending charges, including family. Albert understood that to mean that he could not talk to family about hiring a private attorney. To support the argument that this advice violated his right to counsel of his choice, Albert relied on his own affidavit and an affidavit from his brother asserting that, if Albert had been able to talk with his family, they would have provided financial resources to pay for an attorney.

Albert also moved for the district court to order the state to pay “reasonable expert witness fees” under Minnesota Statutes section 563.01, subdivision 4 (2024).

The district court denied Albert’s petition without an evidentiary hearing. On the ineffective-assistance-of-counsel issue, the district court identified that “trial strategy

is . . . generally the province of the attorney.” It noted that Albert “listed multiple instances where [he] believed the defense performed poorly but failed to explain how that performance fell below the standard of reasonableness.” The district court determined that Albert’s “position is primarily that he disagrees with the attorneys’ choices.” The court also stated that Albert failed to allege how the claimed errors affected the outcome of the case and therefore did not demonstrate prejudice. Addressing the counsel-of-choice argument, the district court noted that Albert “provided no information that he was unsatisfied with the [appointed counsel] or that he was denied any attempts to actually hire his own attorney.”

In a separate order, the district court denied Albert’s motion for expert-witness fees.

We dissolved the stay of the appeal.

DECISION

We begin by considering the arguments made in Albert’s principal brief filed before his appeal was stayed for postconviction proceedings. Then, we reach Albert’s challenge to the district court’s summary denial of his postconviction petition. Finally, we address Albert’s appeal of the order denying expert-witness fees.

I. Direct-Appeal Claims

Albert argues in his direct appeal that the district court made numerous errors at trial and sentencing that call for various forms of relief. First, he asserts that he is entitled to a new trial because the district court plainly erred by admitting the forensic interview and because the prosecutor committed misconduct amounting to plain error by vouching for M.L.G.’s credibility in her closing argument. Second, he argues that his convictions must

be reversed because the evidence presented was insufficient to prove penetration, one of the elements of the crimes for which he was found guilty. Third, he seeks resentencing on the basis that the district court abused its discretion by denying his motion for a dispositional departure. We address these issues in turn.

A. Arguments for a New Trial

1. Forensic Interview

Albert did not object to the admission of the forensic interview at trial, so the standard of review on appeal is plain error. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Under the plain-error standard, Albert must establish (1) an error; (2) that was plain; and (3) that affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “An error is plain if it was clear or obvious.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). If all three prongs are met, an appellate court must then “assess whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings.” *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016) (quotation omitted).

Albert asserts that the admission of the forensic interview was error because it was hearsay and the district court did not decide, on the record, whether an exception applied to the general rule that hearsay is inadmissible. The state argues that the district court did not err because, had Albert objected, there were multiple hearsay exceptions they would have asserted, including the recorded-recollection exception under Minnesota Rule of Evidence 803(5), the “catchall” exception under Minnesota Rule of Evidence 807, or a statutory provision that makes “[a]n out-of-court statement made by a child under the age

of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration” admissible when certain conditions are met, under Minn. Stat. § 595.02, subd. 3 (2024). Albert disputes the applicability of these exceptions and maintains that the district court had an obligation to explain the exception that it applied.²

These arguments illustrate the importance of an objection at trial to the admission of hearsay evidence. The Minnesota Supreme Court has recognized the difficulty in reviewing hearsay issues under the plain-error standard and underscored that hearsay objections are “particularly important to the creation of a record of the trial court’s decision-making process.” *Manthey*, 711 N.W.2d at 504; *see also State v. Stone*, 982 N.W.2d 500, 512 (Minn. App. 2022) (stating that “[t]he supreme court has indicated a hesitancy to deem the admission of hearsay plain error”), *aff’d on other grounds*, 995 N.W.2d 617 (Minn. 2023). Because Albert did not object to the admission of the forensic interview as hearsay, we have no record on which we can assess the district court’s decision-making process. Even assuming without deciding that the district court erred in admitting the forensic interview, we cannot say, based on the record before, us that any such error was “clear or obvious,” *Strommen*, 648 N.W.2d at 688 (quotations omitted), in light of the numerous potential exceptions that may have applied if the issues had been developed in the district court, *see Manthey*, 711 N.W.2d at 504.

² With respect to the exception in Minnesota Statutes section 595.02, subdivision 3, Albert focuses on the fact that the court did not conduct a hearing outside the presence of the jury on the reliability of the statement, as would have been required if the state had relied on that provision.

Albert also does not refer us to caselaw that requires a district court to sua sponte conduct a hearing and make findings about the applicability of hearsay exceptions in the absence of an objection, and we are aware of none. To the contrary, in *State v. Burns*, the supreme court concluded that the district court's failure to hold a hearing under section 595.02, subdivision 3, "does not justify granting the defendant a new trial" when "defendant did not request such a hearing or object to the lack of one." 394 N.W.2d 495, 496-98 (Minn. 1986). In *State v. Alvarez*, we concluded in the context of the admissibility of statements by co-conspirators under Minnesota Rule of Evidence 801(d)(2)(E) that "[n]o Minnesota caselaw directly requires the district court to state in writing or on the record its finding that the requisite showings have been made." 820 N.W.2d 601, 620 (Minn. App. 2012), *aff'd sub nom. State v. Castillo-Alvarez*, 836 N.W.2d 527 (Minn. 2013). And in *State v. DeRosier*, applying the "catchall exception," the supreme court has noted that the district court should make findings on the enumerated requirements "on the record unless there is a waiver, explicitly or by silence, or the basis of the ruling is obvious." 695 N.W.2d 97, 105 (Minn. 2005) (quotation omitted). These cases further lead us to conclude that the district court did not plainly err in declining to make findings or conclusions of law on the record regarding the admission of hearsay evidence absent an objection.

Because Albert has not established plain error in the admission of the forensic interview, we do not reach the other factors of the plain-error test. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

2. Prosecutorial Misconduct

Albert separately argues that he should be afforded a new trial because the prosecutor committed misconduct in her closing argument. Specifically, Albert asserts that the state improperly vouched for M.L.G.'s credibility at two points in the closing argument. First, when referring to M.L.G.'s testimony, the prosecutor stated:

[T]he reality is that that is the best evidence you're ever going to get in a case like this. Kids don't talk about this stuff right away. [He] [d]idn't . . . leave her with injuries. He didn't do it in front of anybody. It happens in secret, and that's the way kids keep it. Sometimes forever. That is the best evidence you will get in a case like this. Hearing from [M.L.G.] what happened to her body, what she felt, what she experienced.

Second, when recounting the forensic interview footage and discussing the penetration element of the offenses, the prosecutor stated:

And she says, "Inside."
"Did any part of his hand, um, was that touching on the outside of your body or the inside of your body?"
And she whispers, "Inside."
"Can you show me where the touch went inside your body?"
And she puts a second circle around the genital area on the front of her body. That's penetration.

Because Albert did not object to these statements at trial, we apply the modified plain-error standard of review. *Peltier*, 874 N.W.2d at 803. Under that test, the appellant must first demonstrate "that the prosecutor's conduct constitutes an error that is plain." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the appellant makes that showing, the burden then shifts to the state to demonstrate that the misconduct did not affect the appellant's substantial rights. *Id.*

“A prosecutor may not personally endorse the credibility of witnesses.” *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). A statement constitutes impermissible vouching “when the government implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). But the state can argue that certain witnesses were or were not credible. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). It also “has the right to analyze and explain the evidence, and to argue all proper inferences to be drawn from the evidence.” *State v. Mems*, 708 N.W.2d 526, 532 (Minn. 2006). “When evaluating alleged vouching, a court will look at the closing argument as a whole.” *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (quotation omitted).

Albert argues that the first statement he identified about the “best evidence” was improper vouching because it invoked a pattern from child sexual-abuse cases generally, which he alleges placed greater pressure on the jury to believe M.L.G. But this argument is undermined when we look at the closing argument as a whole and the context in which the statement was made. *See id.* The prosecutor stated multiple times before and after the “best evidence” statement that, *if* the jury believes M.L.G.’s statements, then that is enough to find him guilty. The prosecutor did not usurp the jury’s role in determining witness credibility. Instead, she repeatedly reminded the jury that it was their decision whether to believe M.L.G. Considering the closing as a whole, we cannot conclude that the district court plainly erred in allowing that aspect of the closing argument.

Regarding the second challenged portion of the state’s closing, Albert argues the statement, “That’s penetration,” amounted to the state “vouching for the child witness’s understanding that inside meant penetration.” But the state is permitted to analyze and explain the evidence and to argue that the jury should draw proper inferences. *Mems*, 708 N.W.2d at 532. We are not persuaded that the statement here fell so far outside the bounds of permissible advocacy that the district court plainly erred in allowing it. Again, because Albert has not established a plain error, he is not entitled to relief. *See State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021) (“[A] negative answer to any one of the three parts of the plain error doctrine may end our analysis and a defendant’s quest for relief.”).

B. Argument for Reversal for Insufficient Evidence

Albert argues that his convictions must be reversed because there is insufficient evidence to prove a violation of Minnesota Statutes section 609.342, subdivision 1a(e), beyond a reasonable doubt. The statute provides:

A person who engages in penetration with anyone under 18 years of age or sexual contact with a person under 14 years of age . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 14 years of age and the actor is more than 36 months older than the complainant.

Minn. Stat. § 609.342, subd. 1a(e). Albert challenges the sufficiency of the evidence only on the element of penetration. He argues that M.L.G.’s response of “inside,” when asked during the forensic interview whether the “touching [was] on the outside of [her] body or the inside of [her] body,” was insufficient to prove penetration beyond a reasonable doubt. He maintains that, to M.L.G., “inside” could have meant something other than penetration.

When analyzing a sufficiency-of-the-evidence claim, the “relevant standard of review depends on whether the factfinder . . . reached its conclusion of law based on direct or circumstantial evidence.” *State v. Petersen*, 910 N.W.2d 1, 6 (Minn. 2018). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* (quotation omitted).

In “reviewing the sufficiency of direct evidence, [appellate courts] painstakingly review the record to determine whether that evidence, viewed in the light most favorable to the verdict, was sufficient to permit the jurors to reach the verdict that they did.” *State v. Segura*, 2 N.W.3d 142, 155 (Minn. 2024) (quotation omitted). In contrast, when circumstantial evidence was used to prove an element of a crime, “we apply a two-step test to assess the sufficiency of the evidence on those elements.” *State v. Firkus*, 31 N.W.3d 468, 478 (Minn. 2026).

Albert argues that this court should apply the circumstantial-evidence test because there is an inference required to determine that M.L.G.’s answer of “inside” meant penetration. In contrast, the state asserts that the direct-evidence standard applies. We find the state’s argument more persuasive.

The supreme court emphasized in a case involving a minor that “proof of penetration need not be in any particular form of words.” *State v. Steinbrink*, 297 N.W.2d 291, 292 (Minn. 1980). M.L.G.’s statements about the nature of the touching she experienced is

evidence “based on personal knowledge or observation.” *Harris*, 895 N.W.2d at 599 (quotation omitted). And even though M.L.G. did not use the word, “penetration,” we disagree with Albert that an inference is required to conclude that M.L.G. was describing penetration when she was asked in the forensic interview whether the touching was “on the outside of [her] body or the inside of [her] body” and answered, “Inside.” M.L.G. further indicated that penetration occurred when she was asked, “Can you show me where the touch *went inside* your body?” and she circled the vaginal area on the provided diagram. (Emphasis added.)

The state’s presentation of M.L.G.’s testimony and statements amounts to evidence that, if true, would prove the element of penetration through “personal knowledge or observation” and “without inference or presumption.” Thus, we apply the direct-evidence test to Albert’s sufficiency-of-the-evidence challenge. *Id.* (quotation omitted). Albert does not argue that the evidence is insufficient under the direct-evidence test. In our review, we conclude it is sufficient. Viewed “in the light most favorable to the verdict,” *Segura*, 2 N.W.3d at 155 (quotation omitted), M.L.G.’s testimony and her statements in the forensic interview that were admitted into evidence were sufficient to permit the jurors to find that Albert’s touching involved penetration. The evidence is therefore sufficient to sustain the conviction.

C. Sentencing Challenge

Next, Albert alleges that the district court abused its discretion by declining to grant his motion for a dispositional departure at sentencing. “A sentencing court must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and

compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). A dispositional departure from the presumptive sentence “places the offender in a different setting” than what the guidelines provide, such as sentencing a defendant to probation rather than imprisonment. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

When deciding whether to grant a dispositional departure, district courts typically focus on the “characteristics of the defendant.” *Id.* A dispositional departure to a probationary sentence may be justified based on the defendant’s “particular amenability” to probation. *Soto*, 855 N.W.2d at 308 (emphasis omitted) (quotation omitted). To evaluate particular amenability to probation, district courts apply the factors listed in *State v. Trog*, which include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” 323 N.W.2d 28, 31 (Minn. 1982).

“But the mere fact that a mitigating factor is present in a particular case does ‘not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.’” *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). A district court need not discuss every *Trog* factor before imposing a presumptive sentence. *Id.* at 254. And “[a]lthough the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

On review, appellate courts “afford the trial court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *Soto*, 855 N.W.2d at 307-08 (quotation omitted). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). So long as “the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination,” the reviewing court should not interfere with the district court’s exercise of discretion in imposing a sentence. *Van Ruler*, 378 N.W.2d at 80-81. Only in “a rare case” will an appellate court reverse the district court’s decision to impose a presumptive guidelines sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Albert argues that the district court abused its discretion by denying his motion for a downward dispositional departure because “the district court did not properly evaluate the factors at issue which should have given rise to a determination that he was particularly amenable to probation.” He cites *Trog* factors in his favor, including his lack of a prior criminal record, his cooperation with the proceedings, and his support from friends and family. Albert also contends that the psychosexual evaluation’s finding that he is a “low risk” for reoffending supports a dispositional departure.

Before imposing a guidelines sentence at the sentencing hearing, the district court noted that it had read both the presentence investigation and the psychosexual evaluation. Based on those documents and its observations at trial, the district court concluded that Albert is not particularly amenable to probation. The district court explained that, in

reading through the psychosexual evaluation, it had the sense that Albert is “somebody who doesn’t want to engage . . . and will simply not be involved in programming.” The district court also noted that Albert had failed to take accountability for his actions, which can impact amenability to treatment. The district court’s observations are consistent with information in the record, and its explanation reflects that it carefully evaluated the information presented. *Van Ruler*, 378 N.W.2d at 80-81. Even if some *Trog* factors weighed in his favor, the district court was not obligated to depart or to make findings on every *Trog* factor. *Pegel*, 795 N.W.2d at 253-54.

The district court did not abuse its discretion by declining to grant a dispositional departure.

II. Postconviction Claims

Albert also challenges the district court’s decision to deny his petition for postconviction relief without an evidentiary hearing.

A district court may deny a petition for postconviction relief without an evidentiary hearing if a claim is procedurally barred or if the petitioner fails to allege facts that, if proved, “would entitle the petitioner to the requested relief.” *Thoresen v. State*, 965 N.W.2d 295, 303 (Minn. 2021) (quotation omitted). When determining whether the petitioner is entitled to an evidentiary hearing, the district 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).

Appellate courts review a district court's denial of a petition for postconviction relief for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). A district court abuses its discretion if it “exercise[s] its discretion in an arbitrary or capricious manner, base[s] its ruling on an erroneous view of the law, or [makes] clearly erroneous factual findings.” *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted). “Legal issues are reviewed de novo,” and factual issues are reviewed for whether the record evidence reasonably supports the findings. *Id.*

With that framing in mind, we turn to Albert's arguments. First, he argues that he received ineffective assistance of counsel. Second, he maintains that his right to counsel of his choice was violated. We address each issue in turn.

A. Ineffective Assistance of Counsel

The supreme court has held that, “[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” established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). The two prongs of the *Strickland* test are: (1) the defendant must prove that “counsel's representation fell below an objective standard of reasonableness” and (2) the defendant must prove there was a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 688, 694. While performing this analysis, there is a “strong presumption that counsel's performance was reasonable.” *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019) (quotation omitted).

In the context of a postconviction petition asserting a claim of ineffective assistance of counsel, appellate courts consider whether the district court's factual findings are sufficiently supported in the record. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013). The district court's factual findings should "not be disturbed unless they are clearly erroneous." *Id.* at 503. Appellate courts then "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." *Id.* at 504.

In his petition, Albert identified 11 alleged errors committed by his trial attorneys: (1) "[f]ailing to explain to Albert the meaning of instructions not to talk to anyone, depriving him of his Sixth Amendment right to paid counsel of his choice"; (2) failing to object to the admission into evidence of the forensic interview; (3) failure to object to certain statements; (4) "[f]ailing to notice that the trial judge neither made findings nor issued an order on the State's motion"; (5) "[f]ailing to interview the State's expert witnesses and prepare for their cross-examination"; (6) failing to subpoena therapy notes; (7) "[f]ailing to retain and call an expert witness on forensic examinations at trial"; (8) failing to subpoena digital devices; (9) "[f]ailing to file a response and objection to the State's Notice of Motion and Motion In Limine . . . , and failing to provide notice of intent to impeach" M.L.G.'s father; (10) failing to object to M.L.G.'s support person; and (11) failing to object to the state's vouching.

Albert's arguments do not warrant relief. Appellate courts "generally do not review ineffective assistance of counsel claims based on trial strategy." *Francis v. State*,

781 N.W.2d 892, 898 (Minn. 2010). Trial strategy includes “[w]hat evidence to present to the jury, what witnesses to call, and whether to object.” *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). The supreme court has emphasized that appellate courts should refrain from reviewing such decisions to afford trial counsel “the flexibility to represent a client to the fullest extent possible.” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (declining to review allegations that “counsel should have sought a change of venue, should have hired an investigator, and should have interviewed prospective witnesses” because “none of [those] contentions concern errors in professional performance but instead relate to trial strategy”).

Nearly all the conduct Albert alleges falls within the trial-strategy categories identified in *Bobo*—what evidence or witnesses to present to the jury and whether to object to those offered by the prosecution. 770 N.W.2d at 138.³ As a result, we generally would not review them. *See Francis*, 781 N.W.2d at 898.

Albert maintains, at least with respect to trial counsel’s decisions not to object to admission of the forensic interview and not to offer expert testimony about the inadequacies of the forensic interview, that they do not constitute legitimate trial strategy and, instead, reflect objectively unreasonable conduct. This position is not supported in the record. A written statement by one of his attorneys reveals that their strategy, in the event M.L.G. testified, was for the forensic interview to come in to “demonstrate[] that the investigation wasn’t performed properly, [M.L.G.’s] answers were the product of

³ Counsel’s advice to Albert not to speak with others about the details of his case does not amount to trial strategy but, as discussed further below, it was not objectively unreasonable.

suggestion and were significantly different than her trial testimony.” The cross-examination of the state’s witnesses was consistent with this strategy. Because the record reaffirms that the decision not to object to the forensic interview was part of the trial strategy, we decline to second-guess it. We also will not consider counsel’s decision not to call independent expert witnesses to establish that the investigation was not properly performed. *See Bobo*, 770 N.W.2d at 138; *Jones*, 392 N.W.2d at 236.

Albert does not dispute that the other conduct he identifies falls within counsel’s trial strategy. Instead, he claims that, considering the alleged shortcomings together, we should conclude that counsel’s conduct was objectively unreasonable and constitutes ineffective assistance. Reviewing the record as a whole, we are not persuaded to deviate from our general practice of refraining to review trial strategy on appeal.

We conclude that Albert failed to meet his burden under the first *Strickland* prong to establish objectively unreasonable conduct, and we therefore do not reach the prejudice prong. *See Sanchez v. State*, 890 N.W.2d 716, 720 (Minn. 2017) (stating that appellate courts “need not analyze both elements of the *Strickland* test if one or the other is determinative”). Because Albert failed to allege facts establishing ineffective assistance of counsel, the district court did not abuse its discretion by denying his postconviction petition without an evidentiary hearing. *See Bobo*, 820 N.W.2d at 516 (stating that “[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*”).

B. Counsel of Choice

Albert argues that he was deprived of the right to counsel of his choice because his appointed counsel advised him not to talk to anyone about his case, and he interpreted this to mean he could not ask for help retaining private counsel.

“[A] defendant’s constitutional right to assistance of counsel includes a fair opportunity to secure counsel of his own choice.” *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005). But, as the district court noted, the right to counsel of choice does not include the right to *appointed* counsel of choice. *See State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (“[T]he right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his choice.”). The record supports the district court’s finding that Albert “provided no information that he was unsatisfied with the Public Defender’s Office or that he was denied any attempts to actually hire his own attorney.” It follows that the district court did not violate Albert’s right to counsel of choice. We construe his argument pertaining to his attorney’s conduct as an additional ineffective-assistance-of-counsel claim.

Considering the allegations in the petition and taking them as true, we cannot conclude that counsel’s advice was objectively unreasonable. There are complicated family dynamics in this case with numerous family members ultimately called to act as witnesses during the trial. It is not unreasonable that Albert’s attorney advised him to avoid complicating things further or potentially implicating himself by speaking with others. Moreover, Albert’s affidavit states that he was instructed not to “talk to anybody about [his] case or the charges,” which strikes us as distinct from speaking generally about his

attorney. While we must take as true that Albert understood counsel's advice to mean he could not ask for his family's help in paying for a private attorney, that understanding was not an objectively reasonable interpretation of his counsel's statements. Further, nothing in the record, nor in Albert's petition shows that Albert's counsel had reason to know about his misunderstanding, because there is nothing to suggest that Albert expressed discontent with his appointed counsel, inquired about obtaining different counsel, or asked for clarification on counsel's advice not to discuss his case. We therefore conclude that Albert has failed to allege facts showing that counsel was objectively unreasonable in giving the advice in question. *Strickland*, 466 U.S. at 688.

Additionally, Albert has also not established prejudice. He did not argue in his petition or supporting documents that, if he had obtained private counsel, there is a reasonable probability the outcome of his case would have been different. His ineffective-assistance-of-counsel claim therefore fails. *Id.* at 687. It follows that Albert failed to allege facts that would entitle him to relief and that an evidentiary hearing was unnecessary. *Thoresen*, 965 N.W.2d at 303-04. We see no basis to conclude that the district court abused its discretion because it did not misstate the law, nor did it act in an arbitrary and capricious manner. *Pearson*, 891 N.W.2d at 596.

III. Motion for Fees

As a final matter, Albert claims that the district court erred by denying his motion for expert fees related to his postconviction petition. We do not reach these arguments because his challenge to the district court's separate order denying his request for fees is beyond the scope of our review on this appeal. In our order dissolving the stay of Albert's

direct appeal, we directed that his briefing must be “limited to the issues that were raised and decided in the postconviction proceeding.” Albert’s motion for expert fees was independent of his postconviction petition and was resolved separately by the district court.

Affirmed.