

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0067**

Troy Dunlap, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 25, 2008
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-CR-00-107809

Troy Anthony Dunlap, OID #207294, Prairie Correctional Facility, P.O. Box 500, Appleton, MN 56208 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from denial of his third petition for postconviction relief from convictions of first- and third-degree criminal sexual conduct, pro se appellant Troy Dunlap challenges the district court's determination that his claims are barred by *Knaffla*. Appellant argues that he should receive a new trial because (1) his trial counsel was ineffective; and (2) the district court erred by not instructing the jury on lesser-included offenses. We affirm.

DECISION

A postconviction petition allows the petitioner to seek relief from the district court if “the conviction obtained or the sentence or other disposition made violated the person’s rights under the Constitution or laws of the United States or of the state.” Minn. Stat. § 590.01, subd. 1 (2006).

But if a petitioner knew or should have known of the claimed violation at the time of direct appeal, the courts generally do not consider the claim when raised in a subsequent petition for postconviction relief. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). “Similarly, a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief.” *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006). Exceptions to these rules are made for claims that present novel legal issues or if the interests of justice require review. *Id.*

On appeal, this court reviews the denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I.

This is appellant's second appeal to this court and third petition for postconviction relief from his convictions of first- and third-degree criminal sexual conduct. Appellant argues that his trial counsel was ineffective. Appellant did not raise this claim on direct appeal. But he did raise it in his second petition for postconviction relief, wherein the district court denied relief and appellant failed to appeal the decision.

An ineffective-assistance-of-counsel claim is barred under *Knaffla* if the claim can be decided on the basis of the trial record and the briefs. *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006). Here, appellant does not raise any facts or issues outside of the trial record. And this is a claim appellant knew or should have known of on his direct appeal. Thus, appellant's claim is barred under *Knaffla*. Furthermore, claims made in previous postconviction proceedings are barred and appellant brought this same claim in his second petition for postconviction relief. *See Spears*, 725 N.W.2d at 700. Therefore, we conclude that the district court did not abuse its discretion in denying appellant postconviction relief.

Moreover, even if we were to address the merits of appellant's claim, the claim fails. To prevail in a claim for ineffective assistance of counsel, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). Here, appellant claims that a single contradictory comment by his trial counsel prejudiced his right to a fair trial. At trial, evidence of appellant’s guilt was considerable, including DNA evidence linking him to the crime. Appellant has not shown that but for his counsel’s comment, the result of the proceeding would have been different. Thus, we conclude that even if it is not barred by *Knaffla*, appellant’s claim fails.

II.

Appellant argues that the district court erred by not instructing the jury on lesser-included offenses. At trial, appellant did not request such an instruction. Appellant argues that Minn. Stat. § 609.02 (2006) required the district court to give the jury such an instruction. But the statute appellant relies on is inapposite – it contains definitions for interpreting the criminal code and does not reference lesser-included offenses.

In addition, this claim is one appellant knew or should have known of both at the time of his direct appeal, and at the time of his two previous petitions for postconviction relief. Consequently, it is barred by *Knaffla*. See *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007) (holding appellant’s challenge to jury instructions is barred by *Knaffla* because claim was known or should have been known after trial). Moreover, “when a defendant fails to request a lesser-included offense instruction warranted by the evidence, the defendant impliedly waives his or her right to receive the instruction.” *State v. Dahlen*, 695 N.W.2d 588, 597-98 (Minn. 2005). Thus, without determining whether the

evidence warranted the instruction, we conclude that appellant waived any right he may have had to receive the instruction by failing to request it at trial. Therefore, the district court did not abuse its discretion in denying appellant's claim.

Affirmed.