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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0536**

Robert Sam Raisch, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 17, 2018
Affirmed
Smith, Tracy M., Judge**

Pine County District Court
File No. 58-CR-15-321

Robert Sam Raisch, Jr., Bayport, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this pro se appeal from an order denying postconviction relief, appellant raises various issues regarding his trial and appellate counsel's performance. Because appellant has not shown that his trial or appellate attorneys were ineffective, we affirm.

FACTS

In 2015, appellant Robert Raisch was charged with several crimes following the discovery of human remains after a trailer fire. During the subsequent ten-day trial, the jury heard testimony from numerous witnesses, including A.L. and E.N., who had been with Raisch at the trailer and who both testified for the state, and Raisch, who testified on his own behalf. The jury found Raisch guilty of second-degree intentional murder, second-degree felony murder, and first-degree assault.

In his direct appeal, Raisch challenged his convictions, arguing that the district court abused its discretion by admitting evidence of his prior bad acts, denying his mistrial motion, and declining to instruct the jury on accomplice testimony with respect to A.L., in addition to a number of other claims in his pro se supplemental brief. *State v. Raisch*, No. A16-0586, 2017 WL 1134403, at *1 (Minn. App. Mar. 27, 2017), *review denied* (Minn. May 30, 2017). This court affirmed the district court in all respects.

In early 2018, Raisch filed a pro se petition for postconviction relief. He argued that his convictions should be vacated on the grounds that his trial counsel was ineffective, and that appellate counsel was ineffective for failing to argue that trial counsel was ineffective and for failing to raise other claims. The postconviction court denied Raisch's request for relief without a hearing.

Raisch appeals.

DECISION

An appellate court reviews the “denial of a postconviction petition, including the denial of relief without an evidentiary hearing, for an abuse of discretion.” *State v. Nicks*,

831 N.W.2d 493, 503 (Minn. 2013). A defendant may challenge his conviction through a postconviction petition when direct appellate relief is not available. Minn. Stat. § 590.01, subd. 1 (2016). However, “where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). But, because they cannot be raised on direct appeal, ineffective-assistance-of-appellate-counsel claims are not barred by *Knaffla*. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

An ineffective-assistance-of-counsel claim presents a mixed question of law and fact subject to de novo review. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). “To prove ineffective assistance of counsel, a defendant must show that (1) his attorney’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel’s errors.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

Raisch argues his appellate counsel was ineffective, in part, for failing to raise, on his direct appeal, alleged errors made by his trial attorney. “When an ineffective assistance of appellate counsel claim is based on appellate counsel’s failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective.” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

We address in turn each of Raisch’s four arguments as to why his appellate counsel was ineffective.

Conceding guilt

Raisch argues that his appellate counsel failed to raise on direct appeal the argument that trial counsel conceded guilt during closing argument. “When counsel for the defendant admits a defendant’s guilt without the defendant’s consent, the counsel’s performance is deficient and prejudice is presumed.” *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010).

In evaluating whether defense counsel made an improper concession, we first perform a de novo review of the record to see if counsel in fact conceded the defendant’s guilt and, if so, we must proceed to the second prong of the inquiry and determine whether the defendant acquiesced in that concession.

Id. at 318.

A review of the record shows that trial counsel did not concede guilt. Raisch claims that, while his counsel, throughout the trial, employed the theory of the case that Raisch “had nothing to do with the crimes he was charged with and that A.L. & E.N. were the perpetrators,” during closing argument, his attorney “abandoned this strategy . . . for the absurd argument that defendant thought he had killed [the] victim during the assault so there could be no intent to kill with fire.” We consider the attorney’s statements in the context of the entire record. *See Prtine*, 784 N.W.2d at 318. When read as a whole, the transcript makes clear that, rather than admitting guilt, Raisch’s attorney was simply arguing that the state had not met its burden on the specific-intent element of second-degree murder, even if the jury chose to believe the state’s witnesses. Accordingly, it was not an

abuse of discretion for the postconviction court to conclude Raisch's claim that his trial counsel conceded guilt lacked merit and could not serve as a basis for postconviction relief.

Accomplice jury instruction

Raisch next argues that his appellate counsel failed to competently argue on appeal that trial counsel was ineffective in seeking to procure an accomplice jury instruction because trial counsel (1) did not effectively introduce evidence that would have shown A.L. to be an accomplice, (2) did not effectively cross-examine A.L., and (3) failed to interview or call another witness.

We note that appellate counsel raised the issue of the district court's refusal to give an accomplice instruction regarding A.L. in Raisch's direct appeal and this court rejected that argument. *Raisch*, 2017 WL 1134403 at *6. Raisch now argues that appellate counsel was nevertheless ineffective in not arguing that trial counsel was ineffective because trial counsel failed to sufficiently establish the factual predicate that A.L. was an accomplice in order to entitle him to an instruction.

Any decision by appellate counsel not to make this argument about trial counsel was well founded, since it would have constituted a challenge to trial strategy, and such strategic decisions are not subject to review for ineffective-assistance-of-counsel claims. "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Thus, Raisch's complaints about trial strategy cannot serve as the basis for an ineffective-assistance-of-counsel claim.

Fingerprint evidence

Raisch also argues that his appellate counsel failed to raise the argument that trial counsel was ineffective by failing to sufficiently present facts concerning forensic evidence of his fingerprint on A.L.'s truck and other facts that, according to Raisch, would have undermined A.L.'s testimony at trial.

This, again, is a challenge to trial strategy. “Trial counsel’s performance is presumed to be reasonable.” *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). And this court will “not generally review a claim for ineffective assistance of counsel based on trial strategy.” *State v. Robertson*, 884 N.W.2d 864, 877 (Minn. 2016). Trial strategy includes “the extent of counsel’s investigation and the selection of evidence presented to the jury.” *Vang*, 847 N.W.2d at 267. The evidence Raisch’s attorney chose to present at trial and question witnesses about is a matter of trial strategy, and as discussed in the prior section, is not a matter this court will second guess on appeal.

Sufficiency of evidence

Finally, Raisch argues that his appellate counsel failed to raise the argument that the evidence presented at trial was insufficient to support his convictions. It is well established that appellate counsel “need not raise all possible claims on direct appeal.” *Leake*, 737 N.W.2d at 536. “[A] claim need not be raised if appellate counsel could have legitimately concluded that it would not prevail.” *Id.* (quotations omitted).

On direct appeal, appellate counsel did not challenge the sufficiency of the evidence but Raisch raised the claim in his supplemental brief. We rejected the claim. *See Raisch*, 2017 WL 1134403, at *6. Our rejection demonstrates that appellate counsel exercised

sound judgment within her prerogative. *See Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007) (explaining that appellate counsel is “permitted to argue only the most meritorious claims”). It further demonstrates that Raisch suffered no prejudice. *See Roby v. State*, 547 N.W.2d 354, 356-57 (Minn. 1996) (noting that a defendant must be prejudiced by appellate counsel’s failure to raise a claim). Raisch asserts that our rejection of the sufficiency-of-the-evidence argument demonstrates that his appellate counsel was ineffective in not pursuing and briefing it, but he provides no basis for claiming ineffective assistance of appellate counsel other than his disagreement with the merits of the decision.

In sum, Raisch’s arguments of ineffective assistance of appellate counsel fail either because he fails to establish that his trial counsel was ineffective, *see Fields*, 733 N.W.2d at 468, or because he challenges strategic decisions of his appellate counsel, *see Leake*, 737 N.W.2d at 536. The postconviction court did not abuse its discretion in summarily denying Raisch’s petition for postconviction relief.

Affirmed.