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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0622**

Vollie Andre Brown, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 21, 2020
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-16-6660

Vollie A. Brown Jr., Rush City, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Vollie Brown Jr. appeals from the district court's summary denial of his petition for postconviction relief. The district court rejected most of Brown's claims as lacking legal and factual support and as *Knaffla*-barred, and it rejected his newly-discovered-evidence

and ineffective-assistance-of-appellate-counsel claims on their merits. We affirm because the district court did not abuse its discretion by determining that Brown is not entitled to postconviction relief.

FACTS

The state charged Vollie Brown in April 2016 with first-degree assault, second-degree assault, and felony domestic assault, alleging that Brown stabbed his cousin in their grandmother's home. A jury found him guilty on all three counts, and the district court sentenced him to 135 months in prison.

Brown directly appealed his convictions. *State v. Brown*, No. A17-0859, 2018 WL 1997587, at *2 (Minn. App. Apr. 30, 2018), *review denied* (Minn. July 17, 2018). His appellate counsel argued that Brown was entitled to a new trial because the district court failed to give a limiting instruction on the proper use of relationship evidence. *Id.* Brown filed a pro se supplemental brief, in which he argued that the evidence of his guilt was insufficient and that the prosecutor engaged in misconduct. *Id.* at *2 n.1. We affirmed the convictions. *Id.* at *3. We determined that the district court's failure to give the jury a limiting instruction regarding relationship evidence was error that was plain, but that the error did not affect Brown's substantial rights because the remaining jury instructions were proper and there was overwhelming evidence of his guilt. *Id.* We addressed Brown's supplemental brief in a footnote, deeming his arguments waived because they were not supported by citation to the record or any legal authority. *Id.* at *2 n.1.

Brown filed a petition for postconviction relief in December 2018. The petition raised numerous grounds for relief, including actual innocence, ineffective assistance of

appellate counsel, insufficiency of the evidence, prosecutorial misconduct, failure to give the jury a cautionary instruction on relationship evidence, newly discovered evidence, improper use of character evidence, failure to properly instruct the jury, and various due-process violations. The district court denied the petition without an evidentiary hearing. It determined that all but two of Brown's claims were without legal or factual basis and were procedurally barred under *Knaffla*. The district court rejected the two remaining claims—newly discovered evidence and ineffective assistance of appellate counsel—because the petition did not allege facts supporting the elements of the claims. Brown appeals.

D E C I S I O N

Brown challenges the district court's denial of his petition for postconviction relief. We review the denial of a postconviction petition for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review legal issues de novo. *Id.* We will not reverse unless the postconviction court acted in an arbitrary or capricious manner, based its decision on an erroneous interpretation of the law, or made factual findings that were clearly erroneous. *Id.* We see no abuse of discretion here.

The district court correctly concluded that all but two of Brown's allegations are *Knaffla*-barred. A postconviction petitioner is procedurally barred from raising any claims that he did raise or could have raised on direct appeal. *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). Most of Brown's arguments were either raised on direct appeal or could have been raised at that time. Brown's appellate counsel on direct appeal raised the issue of the district court's failure to give the jury a cautionary instruction regarding relationship

evidence, and Brown’s supplemental brief raised the issues of insufficiency of the evidence and prosecutorial misconduct; we addressed all these arguments and rejected them. *Brown*, 2018 WL 1997587, at *2 n.1, *3. Most of Brown’s remaining claims were known or should have been known at the time of direct appeal and could have been brought then.

Only two claims in Brown’s petition would not have been available at the time of his direct appeal—newly discovered evidence and ineffective assistance of appellate counsel. The district court rejected Brown’s newly-discovered-evidence claim because the allegations in the petition were insufficient. A defendant can obtain a new trial based on newly discovered evidence only if he meets four elements, showing that (1) the evidence was not known to the defense at the time of the trial, (2) the defense could not have discovered the evidence through due diligence before the trial, (3) the evidence is “not cumulative, impeaching, or doubtful,” and (4) it would likely result in acquittal or a more favorable result. *State v. Mosley*, 895 N.W.2d 585, 590 (Minn. 2017). The district court properly concluded that Brown’s petition does not allege facts that could satisfy these elements.

The newly discovered evidence alleged in Brown’s petition is that an eyewitness, Brown’s girlfriend at the time of the offense, would provide “completely different [t]estimony” that would “resolve prior history of [the victim’s] reputation for violence” and call into question Brown’s convictions. The girlfriend did not testify at the trial, and Brown attributes her absence to her relocating out of state out of fear of harm from the victim and his family. The allegations in Brown’s petition do not satisfy three of the elements for newly discovered evidence. The first two elements are not satisfied because

Brown knew of the evidence at the time of trial. Because Brown was in a romantic relationship with his girlfriend and she was present during the altercation, he was necessarily aware of the potential testimony he now says she can provide. Brown also did not satisfy the third element, because he has provided no affidavit by his girlfriend or other showing to indicate what supposedly exculpatory testimony she might provide. Brown's petition on its face fails the test for newly discovered evidence, the district court did not abuse its discretion by rejecting the argument.

The district court likewise properly rejected Brown's ineffective-assistance-of-appellate-counsel argument. To show ineffective assistance of appellate counsel, a defendant must satisfy the two-element test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984): his attorney's representation must have fallen below an objective standard of reasonableness, and there must be a reasonable probability that, but for the attorney's errors, the outcome of the proceeding would have been different. *Nissalke v. State*, 861 N.W.2d 88, 93–94 (Minn. 2015). Brown's argument did not satisfy either element.

The basis of Brown's argument in his petition is that his appellate counsel failed to raise a number of arguments on appeal, including due-process violations and actual innocence. An appellate attorney "is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail." *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). Brown's appellate counsel raised only one issue on appeal—the district court's failure to issue a limiting instruction on relationship evidence. Brown lists other arguments that he insists appellate counsel should have raised but fails

to provide any factual support for the proposed arguments. He fails to establish that it was objectively unreasonable for his counsel to have reasoned that only one argument had merit. Brown contends that his appellate counsel's failure to raise the arguments resulted from inattention or neglect, rather than strategy. But he offers only conclusory assertions. And he fails to demonstrate that his direct appeal would have ended favorably had his appellate counsel raised the arguments. The representation of Brown's appellate counsel was not objectively unreasonable.

Brown insists that his petition deserved an evidentiary hearing. An evidentiary hearing is unnecessary if the petition and record conclusively show that the petitioner is not entitled to the relief requested. Minn. Stat. § 590.04, subd. 1 (2018); *Francis v. State*, 781 N.W.2d 892, 896 (Minn. 2010). A hearing was unnecessary to address Brown's *Knaffla*-barred arguments. A hearing was also unnecessary to address the merits of his newly-discovered-evidence argument or ineffective-assistance-of-appellate-counsel argument. Because the petition and record conclusively show that Brown is not entitled to relief, the district court properly denied the petition without an evidentiary hearing.

Affirmed.