This opinion is nonprecedential except as provided by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
A21-1664

Chris Marquis McMorris, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 28, 2022
Affirmed
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-16-21960

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Jonathan P. Schmidt, Assistant County Attorneys, Annika Johnson (certified student attorney), Minneapolis, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the summary denial of his petition for postconviction relief, arguing that the district court abused its discretion by determining that his claim of

ineffective assistance of trial counsel is procedurally barred and that his claims of ineffective assistance of trial and appellate counsel fail on the merits. He also argues that the district court should have ordered an evidentiary hearing based on newly discovered evidence. We affirm.

FACTS

On March 24, 2016, appellant Chris Marquis McMorris called 911 to report that his girlfriend's seven-month-old daughter (the child) was not breathing. McMorris performed cardiopulmonary resuscitation (CPR) until emergency services arrived and transported the child to the hospital, where the child was pronounced dead. The paramedics who transported the child to the hospital and hospital staff noticed bruising on the child, and an autopsy later revealed that the child had suffered multiple rib fractures and a lacerated liver. The cause of death was determined to be blunt force trauma to the abdomen, and the manner of death was determined to be homicide.

Respondent State of Minnesota charged McMorris with three counts of second-degree murder.[1] The case was tried to a jury in December 2017. At trial, the state presented evidence that McMorris initially believed that he was the child's biological father, but in February 2016—the month prior to the child's death—he learned that he was not. A copy of the paternity test was at the house, located by police, the day of the child's death. The

[1] The three charges all alleged that McMorris caused the death of the child while committing a felony but were based on different underlying felonies. Specifically, the charges were based on the underlying felonies of (1) neglect or endangerment of a child resulting in substantial bodily harm; (2) third-degree assault where the victim was under the age of four; and (3) third-degree assault resulting in substantial bodily harm.

child's mother testified that McMorris was hurt and upset by learning that he was not the father. The state theorized that, after McMorris learned that the child was not his biological child, he abused the child, ultimately causing her death.

The state presented evidence that staff at the child's childcare facility noticed a number of injuries on the child in March 2016. The director of the childcare facility documented the injuries and made a report to child-protective services on March 23—the day before the child's death. The director explained that she decided to make the report after observing "four new incidents in a row each day a new mark appeared" and not receiving a satisfactory explanation from the child's family. Prior to making the report to child-protective services, the staff wrote an injury report and gave it to McMorris, but he did not show the report to the child's mother.

The state's case included a video of the child from the evening before her death that showed her smiling, moving around freely in her walker, and playing. The state also presented testimony by the medical examiner who performed the autopsy, the chief of pediatric surgery at the University of Minnesota Masonic Children's Hospital, and a pediatrician who is board certified in child-abuse pediatrics from the same hospital. The medical examiner, who is board certified in forensic pathology, testified that the child "died of blunt force injuries to the abdomen" and that the manner of death was homicide. The child also suffered multiple rib fractures, which the medical examiner opined was strongly suggestive "of child abuse." The chief of pediatric surgery testified that the child suffered "a traumatic blow to the liver" and likely bled out "within one to two hours" of receiving the injury. Finally, the child-abuse medical expert testified that the liver injury occurred

"in close" proximity to the child's death. At the time McMorris called 911 to report that the child was not breathing, he had been alone with the child for approximately two and one-half hours.

A board-certified pathologist testified on behalf of McMorris. She testified that some of the child's rib fractures could have been caused by McMorris performing CPR, that the injury to the child's liver was "[v]ery, very small," "survivable," and did "not reflect a fatal assault-type pattern," and that other factors such as sickle cell and sudden infant death syndrome could have contributed to or caused the child's death. She ultimately opined that, based on the facts of the case, it "cannot be said to any degree of certainty that [the child] died from something that was done to her that morning." On cross-examination, the prosecutor sought to impeach the pathologist's credibility. The pathologist admitted that, during her testimony in at least one prior case, she "misstated" the number of forensic autopsies she had performed, and that people had written letters to her employers "as part of a direct attempt to attack [her] credentials." McMorris also called various character witnesses, testified in his own defense, and theorized that the child could have suffered the injuries while at the childcare facility.

The jury found McMorris guilty of second-degree murder and the district court sentenced McMorris to 360 months in prison, an upward durational departure. McMorris filed a direct appeal and was represented by the same counsel who represented him at trial. *State v. McMorris*, No. A18-0684, 2019 WL 1983489, at *1 (Minn. App. May 6, 2019). McMorris raised four claims on appeal, including that he received ineffective assistance of trial counsel because his counsel "failed to demand the name and findings of a forensic

pathologist who confirmed and agreed with his expert's findings and conclusions in his case." *Id.* at *2. This court rejected all four claims and affirmed the conviction.

In May 2021, McMorris petitioned for postconviction relief. He later filed an amended petition. McMorris argued that he was entitled to postconviction relief based on ineffective assistance of trial and appellate counsel. He submitted an expert report from Dr. Satish Chundru, a board certified forensic pathologist, in which Dr. Chundru responded to some of the state's evidence and opined that "the cause of death [of the child] . . . is debatable." McMorris argued that his trial counsel failed to "hire appropriately credentialed experts" such as Dr. Chundru, and that because he failed to do so he could not effectively cross-examine the state's witnesses or present a complete defense. McMorris also alleged that his counsel was ineffective because he failed to present an alternative-perpetrator defense suggesting that the child's mother or grandmother could have caused the child's death, did not object to the state's publication of autopsy photos, did not effectively present McMorris's testimony to the jury, and called witnesses that were unfavorable to the defense. He also alleged that he received ineffective assistance of appellate counsel because his appellate counsel was the same counsel that represented him at trial, which prevented McMorris from being able to meaningfully present his ineffective-assistance-of-trial-counsel claims on appeal.

The district court denied the petition for postconviction relief without a hearing.

DECISION

We review the denial of a petition for postconviction relief for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). An abuse of discretion

occurs when a district court's "decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). A district court may summarily deny a petition when the petition, files, and records conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2020). "A petitioner bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief." *Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013).

I. McMorris is not entitled to relief based on ineffective assistance of counsel.

McMorris argues that he is entitled to postconviction relief based on ineffective assistance of both trial and appellate counsel. To prevail on his ineffective-assistance-of-counsel claim, McMorris must demonstrate "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). An attorney provides reasonable assistance when he exercises "the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotations omitted). "[T]here is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

As an initial matter, however, we must deal with the question of whether our review of this issue is barred under *State v. Knaffla*, because it could have been raised on direct appeal. *See State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) (stating that when a direct

appeal has been taken all claims raised in that appeal and all claims known at the time of that appeal "will not be considered upon a subsequent petition for postconviction relief"). The district court determined that "all of [McMorris's] claims could have been raised in his direct appeal and are therefore barred by *Knaffla*." We disagree. McMorris could not have raised his claim of ineffective assistance of appellate counsel on direct appeal, and therefore that issue is not barred by *Knaffla*. This court has also held that, for purposes of *Knaffla*, when "trial and appellate counsel are the same . . . failure to raise claims of ineffective assistance of trial counsel is presumptively neither deliberate nor inexcusable and that, in fairness, further review should not be barred." *Jama v. State*, 756 N.W.2d 107, 112 (Minn. App. 2008). Here, McMorris was represented by the same counsel at trial and on appeal who raised an ineffective-assistance-of-counsel claim on direct appeal, but it was narrow in scope and not based on the errors alleged in the postconviction petition. It is therefore appropriate to review McMorris's claims on the merits.

When reviewing a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel, this court "will consider the [district] 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." *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

McMorris argues that he received ineffective assistance of appellate counsel because having the same counsel "at trial and on appeal prevented him from truly presenting his ineffective assistance of counsel claims on direct appeal." "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). Accordingly, both ineffective-assistance-of-counsel claims are predicated on McMorris's assertion that he received ineffective assistance of trial counsel.

McMorris argues that he received ineffective assistance of trial counsel because his counsel (1) "did not retain an appropriately credentialed expert to rebut" the testimony of the state's medical expert witnesses, (2) did not present alternative-perpetrator theories to the jury, (3) failed to object to the publication of highly prejudicial photographs of the autopsy of the child, (4) did not effectively present McMorris's testimony to the jury, and (5) presented witnesses that were harmful to McMorris's defense.

The district court determined that McMorris's claims lacked merit because "the particular instances of alleged ineffective assistance of his trial counsel all relate to trial strategy and are therefore not subject to review." McMorris challenges this determination and contends that "trial counsel's representation of McMorris was not merely the result of an error in trial strategy." But this argument is inconsistent with established caselaw.

This court generally does not review issues of trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Decisions such as which witnesses to call, what expert-witness testimony to present, and how to cross-examine the state's experts fall within the category of unreviewable trial strategy. *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010); *see also Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007) ("Decisions about which witnesses to call at trial and what information to present to the jury are questions of trial

strategy that lie within the discretion of trial counsel."). And the supreme court has explicitly determined that claims based on trial counsel's alleged failure to "elicit favorable testimony from a witness [and] retain necessary experts . . . are unreviewable trial strategy."[2] *Chavez-Nelson v. State*, 948 N.W.2d 665, 674 n.6 (Minn. 2020). The decision not to investigate and present an alternative-perpetrator defense similarly constitutes trial strategy. *Opsahl*, 677 N.W.2d at 421. Finally, "[d]ecisions about objections at trial are matters of trial strategy." *Leake*, 737 N.W.2d at 542.

On this record, the district court did not abuse its discretion in determining that McMorris's claims fail on the merits because they implicate unreviewable trial strategy. All five claims involve defense decisions that the Minnesota Supreme Court has explicitly held constitute trial strategy. Accordingly, McMorris's claims of ineffective assistance of trial counsel are without merit, and his claim of ineffective assistance of appellate counsel therefore fails as well.

II. The district court did not abuse its discretion by denying the petition for postconviction relief without holding an evidentiary hearing.

McMorris argues that the district court abused its discretion in denying his petition without an evidentiary hearing. He argues that "[t]he expert report of Dr. Chundru is newly discovered evidence that must be reviewed through an evidentiary hearing." The state responds that McMorris did not raise this issue below and it is therefore forfeited on appeal. We agree with the state.

[2] We note, in connection with McMorris's claim that his expert at trial lacked proper credentials, that the expert was a board-certified pathologist who had virtually the same credentials as McMorris's postconviction expert.

In *Azure v. State*, the supreme court noted that "[i]t is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted). In that case, the supreme court determined that the appellant had raised an issue for the first time on appeal, and that "[b]ecause [appellant] did not raise the claim in his postconviction petition and the postconviction court made no findings on the issue, we have no postconviction ruling to review" and the "claim has been waived for the purposes of this postconviction appeal." *Id.*

Here, McMorris's petition, amended petition, and legal memorandum reference Dr. Chundru's report, but do not specifically allege that the report constitutes newly discovered evidence. Rather, the filings discuss Dr. Chundru's report solely as it relates to McMorris's claims of ineffective assistance of counsel. There is no separate analysis regarding whether the report constitutes newly discovered evidence. Indeed, the phrase "newly discovered evidence" does not appear anywhere in the filings. McMorris also did not identify the appropriate legal test for determining whether a petitioner is entitled to relief based on newly discovered evidence—the four-part test established in *Rainer v. State*[3]—until his reply brief in this appeal from the denial of his petition. And, as provided

[3] To obtain a new trial based on newly discovered evidence, a petitioner must satisfy the four elements of the *Rainer* test: (1) "the evidence was not known to the defendant or [the defendant's] counsel at the time of the trial"; (2) the defendant could not have discovered the evidence before trial through due diligence; (3) "the evidence is not cumulative, impeaching, or doubtful"; and (4) the evidence would likely result in the defendant's acquittal or produce a more favorable result. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quoting *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)).

in Minn. R. Civ. App. P. 128.02, subd. 3, a reply brief "must be confined to new matter raised in the brief of the respondent." The district court therefore did not analyze or make findings related to the *Rainer* test, and as in *Azure* there is no decision for this court to review. The issue has thus been forfeited for purposes of this appeal. *Id.*

Additionally, as the state notes, a new opinion from a different expert witness generally does not entitle a petitioner to a new trial based on newly discovered evidence. In *State v. Blasus*, the supreme court analyzed a claim of newly discovered evidence and determined that the evidence was "merely a different opinion from a different expert" and that "[g]enerally expert testimony does not constitute newly discovered evidence." 445 N.W.2d 535, 543 (Minn. 1989). The supreme court further explained: "Nine medical experts gave testimony at appellant's trial; if the discovery of a tenth expert is new evidence warranting a new trial, no verdict would ever be final." *Id.* Here, too, a number of medical experts testified, and McMorris is merely offering the opinion of an additional medical expert. Accordingly, even if the issue were properly raised, it would fail on the merits.

Affirmed.