STATE OF MINNESOTA

IN SUPREME COURT

A19-0593

Ramsey County | Chutich, J.

Neal Curtis Zumberge,

Appellant,

vs.

Filed: December 26, 2019
Office of Appellate Courts

State of Minnesota,

Respondent.

Neal Curtis Zumberge, Stillwater, Minnesota, pro se.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant Ramsey County Attorney, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

1. The district court did not abuse its discretion when, without holding a hearing, the court denied the claims raised in the postconviction petition because, even when the alleged facts are viewed in a light most favorable to appellant, the claims are procedurally barred by *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976).

2. Although the district court did not address the claim of ineffective assistance of appellate counsel that was raised in appellant's memorandum, a remand is not required because no additional fact finding is necessary and the alleged facts, even when viewed in a light most favorable to appellant, conclusively show that appellant is entitled to no relief on this claim.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

CHUTICH, Justice.

Appellant Neal Curtis Zumberge was convicted of murder and attempted murder. After we affirmed his convictions on direct appeal, he filed a petition for postconviction relief, alleging that the judge, prosecutor, and defense counsel committed reversible errors during his jury trial. In his supporting memorandum, he alleged an additional claim of ineffective assistance of appellate counsel. The district court summarily denied the petition without addressing the claim of ineffective assistance of appellate counsel. Viewing the alleged facts in a light most favorable to Zumberge, we conclude that the claims raised in the petition are procedurally barred by *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). We also conclude that the failure to address the claim of ineffective assistance of appellate counsel does not require a remand because no additional fact finding is necessary, and because the alleged facts, even when viewed in a light most favorable to Zumberge, conclusively show that he is entitled to no relief. We therefore affirm.

FACTS

A Ramsey County grand jury indicted Zumberge for first-degree premeditated murder, Minn. Stat. § 609.185(a)(1) (2018), and second-degree murder, Minn. Stat. § 609.19, subd. 1 (2018), based on the fatal shooting of his neighbor, Todd Stevens.[1] The grand jury also indicted him for attempted first-degree premeditated murder and attempted second-degree murder concerning the nonfatal shooting of Stevens's girlfriend, Jennifer Cleven. Minn. Stat. § 609.17 (2018); *see* Minn. Stat. §§ 609.185(a)(1), 609.19, subd. 1. Zumberge pleaded not guilty and demanded a jury trial.

A number of pre-trial motions were filed. The prosecutor notified the court at a hearing on a motion in limine that it had provided *Spreigl* notice of the State's intent to introduce evidence of a harassment restraining order that Cleven had obtained against Zumberge. The State also intended to introduce evidence that Zumberge had been cited for violation of the restraining order, although that citation was ultimately dismissed by the district court. At the motion hearing, Zumberge's counsel said that the citation would be "taken care of quite swiftly and cleanly on cross-examination" because the citation had, in fact, been dismissed. Ultimately, the court admitted the evidence because it was "relevant to the whole relationship of the parties."

Before Zumberge's trial, his wife, Paula Zumberge, was acquitted of charges against her in a separate trial arising out of the shooting of Stevens. In response, the district court issued an order stating that "[a]ny evidence pertaining to the acquittal of [Paula Zumberge]

---

[1] A description of the underlying facts may be found in our opinion in Zumberge's direct appeal. *See State v. Zumberge*, 888 N.W.2d 688 (Minn. 2017).

is strictly prohibited." Counsel for each party were to inform their witnesses therefore "not to either mention or allude to" the acquittal during the trial.

Zumberge's jury trial lasted seven days. Towards the end of the trial, Cleven testified at length. In particular, she testified about what she had heard at the time of the murder. Counsel for Zumberge elicited testimony about gunshots and asked what Cleven heard when the gun was fired:

> Counsel: What did you hear?
>
> Cleven: (No response.)
>
> Counsel: What do you remember hearing?
>
> Cleven: I heard gunshots going off and I heard somebody in the background saying, "Shoot 'em; keep shooting," egging somebody on to do it. It was a—just two or three or four short words.

Cleven continued, describing the moment more, and eventually saying, "But I do remember her telling—egging him on: 'Shoot, shoot, keep shooting' or 'Shoot 'em; shoot 'em.' " As Cleven testified, counsel for Zumberge said "[a]ll right" and "[o]kay" in between Cleven's statements, and then eventually, "[l]et's move on to another topic."

The next day, based on this testimony, counsel for Zumberge moved the court to reverse its prior ruling forbidding the introduction of any evidence concerning the acquittal of Paula Zumberge. Zumberge's counsel also asked the court to give a cautionary instruction to "disregard Jennifer Cleven's statement that Paula Zumberge said, 'Shoot, shoot' during the time—between shots." The court denied each request.

Evidence admitted at trial included a surveillance video taken from a camera mounted on the home of Cleven and Stevens at the time of the murder. The camera

captured much of their front yard and the Zumberges' home across the street. The district court admitted the video as Exhibit 86.

Review of the video suggests that it depicts the following: a car pulling into Cleven's driveway (which the prosecutor said was Cleven's car); Paula Zumberge standing in her front yard; Cleven briefly appearing as she walks in her front yard; Zumberge appearing around the corner of his house on the right-hand side before an altercation between Cleven and Paula Zumberge seems to begin; and Zumberge appearing, disappearing, and reappearing around the time of the shooting.

The surveillance video served as the introduction to the closing argument of the prosecutor. As she started her closing argument, she played the video. While it was playing, the prosecutor described Zumberge as the man: "at the side of his house with his loaded shotgun, peeking, waiting, looking"; "looking for an opportunity"; and "waiting for [Stevens] to come out of the house . . . so he could fire those fatal shots."

The jury found Zumberge guilty as charged, and the district court imposed a sentence of life without the possibility of release. On direct appeal, Zumberge argued that the district court erred in excluding evidence relevant to his fear of Stevens, denying his request for a third-degree murder instruction, and denying his motion to dismiss the charge of first-degree murder. *State v. Zumberge*, 888 N.W.2d 688, 692 (Minn. 2017).

Zumberge also filed a pro se supplemental brief, claiming that the district court did not allow admission of character evidence that would have proved his state of mind.[2]

---

[2] In his brief, Zumberge did not argue that the district court admitted inadmissible evidence of his citation of a violation of a harassment restraining order that was dismissed.

Zumberge was convicted in 2015, and we affirmed his conviction on direct appeal in January 2017. In our opinion, we described the ongoing feud that Zumberge had with Stevens. *Zumberge*, 888 N.W.2d at 692. The feud had lasted for years over issues related to the feeding of deer in Stevens's yard. *Id.* We concluded that "[t]he State had a very strong case that . . . Zumberge . . . act[ed] . . . with premeditation and intent to kill." *Id.* at 697.

Zumberge timely petitioned the district court for postconviction relief in December 2018, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and judicial error. He raised a claim of ineffective assistance of *appellate* counsel in the memorandum accompanying his postconviction petition for relief.[3] The district court denied the petition without an evidentiary hearing, finding that all claims were barred by the rule stated in *Knaffla*, 243 N.W.2d at 741. This appeal followed.

ANALYSIS

On appeal, Zumberge argues that the district court abused its discretion when it summarily denied the claims that he raised in his postconviction petition.[4] He also

---

He also did not contend that the district court permitted improper testimony or that it allowed an inappropriate closing argument from the prosecutor. Nor did Zumberge argue any claims of ineffective assistance of counsel—trial or appellate.

[3] This claim appeared on page 109 of the 123-page memorandum accompanying Zumberge's petition for postconviction relief.

[4] Zumberge also moved to strike a statement from the State's brief that said that he "did not request a hearing on his petition." We deferred our decision on this motion to the merits. *Zumberge v. State*, No. A19-0593, Order at 2 (Minn. filed Sept. 5, 2019). Contrary to the State's assertion, Zumberge did request a hearing in his postconviction petition and

contends that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel. The State acknowledges that the district court failed to address the claim of ineffective assistance of appellate counsel that was raised in the supporting memorandum.[5] Nevertheless, the State argues that a remand is not required because no additional fact finding is necessary and the alleged facts conclusively show that Zumberge is entitled to no relief on the claim of ineffective assistance of appellate counsel.

A person convicted of a crime who claims that the conviction violated the person's constitutional or statutory rights is entitled to file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2018). "Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief," a district court must hold an evidentiary hearing. Minn. Stat. § 590.04, subd. 1 (2018). "An evidentiary hearing provides the postconviction court the means for evaluating the credibility of a witness." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012) (citing *Wilson v. State*, 726 N.W.2d 103, 107 (Minn. 2007)). But a district court "need not hold an evidentiary hearing when the petitioner alleges facts that, if true, are legally insufficient to entitle him to the requested relief." *Id.* (citing *Spann v. State*, 740 N.W.2d 570, 572 (Minn. 2007)).

With these legal principles in mind, we consider each of Zumberge's claims in turn.

---

on page 120 of his supporting memorandum. Accordingly, we grant his motion to strike the erroneous statement from the State's brief.

[5] The State also acknowledges that it, too, did not notice Zumberge's claim of ineffective assistance of appellate counsel. But because we are to "liberally construe" postconviction petitions and "look to the substance thereof and waive any irregularities or defects in form[,]" Minn. Stat. § 590.03 (2018), we take each of Zumberge's claims as presented in his memorandum accompanying his petition.

I.

Zumberge argues that the district court abused its discretion when it summarily denied the claims he raised in his postconviction petition. We disagree.

We review a district court decision to deny a postconviction petition for an abuse of discretion. *Erickson v. State*, 842 N.W.2d 314, 318 (Minn. 2014). A district court abuses its discretion when it has "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). A district court "does not abuse its discretion when it summarily denies a petition that is procedurally barred by the *Knaffla* rule." *Jackson v. State*, 919 N.W.2d 470, 473 (Minn. 2018) (citing *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015)).

Under the *Knaffla* rule, " 'all claims known but not raised' at the time of direct appeal are barred from consideration in any subsequent petitions for postconviction relief." *Cooper v. State*, 745 N.W.2d 188, 190–91 (Minn. 2008) (quoting *Knaffla*, 243 N.W.2d at 741). The *Knaffla* rule also "includes all claims that the appellant should have known of at the time of appeal." *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004) (citing *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002)). For claims that were not raised on direct appeal, two exceptions to the *Knaffla* rule exist: (1) a novel legal issue is presented that was unavailable at the time of the direct appeal; or (2) the interests of justice require review. *Brocks v. State*, 753 N.W.2d 672, 674–75 (Minn. 2008).

The district court determined that all of the claims raised in Zumberge's postconviction petition "were either known or should have been known at the time of his

direct appeal." The court also determined that neither of the exceptions to the *Knaffla* rule applies. For the reasons that follow, these determinations were not an abuse of discretion.

Viewing the alleged facts in a light most favorable to Zumberge, we conclude that each of the claims raised in the postconviction petition relate to alleged pre-trial or trial errors that were known or should have been known at the time of his direct appeal.[6] First, Zumberge contends that evidence of a citation for violation of a restraining order that Cleven had against him was inadmissible because it was *Spreigl* evidence. *See State v. Spreigl*, 139 N.W.2d 167, 173 (Minn. 1965). Even though the citation was ultimately dismissed, the district court admitted this evidence in a pre-trial order as relationship evidence. Given that this decision occurred *before* trial, Zumberge therefore knew or should have known about this claim on direct appeal.

Second, Zumberge alleges that Cleven's testimony at trial was improper because it violated the district court order issued before trial stating that evidence of Paula Zumberge's acquittal was improper. As with his first claim, this claim also involves matters that were decided before and during the trial. Zumberge's second claim is also barred by *Knaffla*.

---

[6] In his memorandum, Zumberge categorizes these errors as "structural errors." But structural errors are "defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards because the entire conduct of the trial from beginning to end is obviously affected." *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011) (alteration omitted) (citation omitted) (internal quotation marks omitted). "There is a fundamental difference between structural error and trial error." *Id.* The claims Zumberge alleges do not amount to structural errors, and we therefore do not address them as structural.

Zumberge's final claim is procedurally barred as well. He takes issue with the prosecutor's closing argument, asserting that it was a surprise argument that unfairly raised a theory of premeditation not previously raised at trial. Because this closing argument occurred at trial, it is also barred by *Knaffla*.

Moreover, neither of the *Knaffla* exceptions applies here. Zumberge does not present any novel legal issues in his appeal. And because he raises issues that he inexcusably failed to raise at trial and on appeal, the interests of justice do not require review of his claims here. Accordingly, the district court did not abuse its discretion when it summarily denied the claims that were raised in the postconviction petition because, even when the alleged facts are viewed in a light most favorable to Zumberge, the claims are procedurally barred by the *Knaffla* rule.

II.

We next consider the district court's failure to address Zumberge's claim of ineffective assistance of appellate counsel. In the past, we have remanded for further proceedings when a district court failed to address a claim and additional fact finding is necessary. *Dukes v. State*, 621 N.W.2d 246, 255 (Minn. 2001). For example, in *Dukes*, we remanded because the question was whether the defendant had consented to his counsel's admission of guilt, which required testimony from Dukes and counsel. 621 N.W.2d at 255.

Unlike the claim in *Dukes*, Zumberge's claim of ineffective assistance of appellate counsel does not require additional fact finding because Zumberge does not allege that he had any off-the-record discussions with appellate counsel that are material here. Instead,

he alleges that appellate counsel was ineffective on direct appeal when counsel failed to make the arguments that he raised in his postconviction petition. Consequently, a remand is not required here.

Having concluded that a remand is not necessary, we consider whether the alleged facts, when viewed in a light most favorable to Zumberge, conclusively show that he is entitled to no relief on the claim of ineffective assistance of appellate counsel.

Unlike the claims raised in the postconviction petition, Zumberge's claim of ineffective assistance of appellate counsel is not barred by the *Knaffla* rule because it could not have been raised in the direct appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (explaining that "[c]laims of ineffective assistance of appellate counsel on direct appeal are not barred by the *Knaffla* rule in a first postconviction appeal"). Nevertheless, Zumberge was required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two prongs of the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Dukes*, 621 N.W.2d at 252.

The first prong requires the petitioner to show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The second prong requires the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Each prong must be met for a petitioner to succeed. *See id.* at 687.

Appellate counsel does not have a "duty to raise all possible issues, and may choose to present only the most meritorious claims on appeal." *Zornes v. State*, 880 N.W.2d 363, 371 (Minn. 2016) (explaining also that "[a]ppellate counsel does not act unreasonably by

not raising issues that he or she could have legitimately concluded would not prevail"); *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008); *Leake*, 737 N.W.2d at 536; *Hummel v. State*, 617 N.W.2d 561, 566 (Minn. 2000). A defendant alleging a claim of ineffective assistance of appellate counsel must overcome the strong presumption that appellate counsel has exercised reasonable professional judgment in selecting the issues to raise on appeal. *Zornes*, 880 N.W.2d at 371.

Moreover, to show that appellate counsel was ineffective for failing to raise claims of ineffective assistance of *trial* counsel, the petitioner must show that trial counsel was also ineffective under the two-prong test of *Strickland*. *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). If a petitioner fails to show that trial counsel was ineffective, then the claim of ineffective assistance of appellate counsel also fails. *Id.* As with claims of ineffective assistance of appellate counsel, trial counsel's performance is also presumed reasonable, *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007), and we give particular deference to matters of trial strategy, *id.*, such as whether to object to evidence. *Leake*, 737 N.W.2d at 542.

Viewing the alleged facts in a light most favorable to Zumberge, we conclude that Zumberge failed to show that appellate counsel's representation fell below an objective standard of reasonableness.

A.

Zumberge first asserts that his trial counsel was ineffective by failing to object to the admission of evidence that a citation was issued to him for violating the restraining order that Cleven had against him. We disagree.

The State provided notice that it would seek to admit the evidence at trial. Trial counsel did not object to the evidence, declaring that he would easily make light of this citation by showing that it was eventually dismissed. The district court admitted the evidence, remarking that it was one example of the parties' relationship—one that was full of constant feuding between the neighbors.[7]

After reviewing the record, we conclude that trial counsel's failure to object was a matter of trial strategy, and therefore Zumberge's appellate counsel did not act unreasonably when she chose not to challenge that decision on appeal. *See Leake*, 737 N.W.2d at 536 ("Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts."). Consequently, even when the alleged facts are viewed in a light most favorable to Zumberge, appellate counsel's conduct did not fall below the objective standard of reasonableness concerning Zumberge's first claim.[8]

---

[7] We have previously observed that the relationship between Zumberge and his neighbors was central to this case. *Zumberge*, 888 N.W.2d at 692 (highlighting, for example, that "[o]ver a period of about two years, Zumberge's relationship with Stevens and Cleven deteriorated"). Although the district court recognized the importance of the relationship, it is unclear whether the district court believed that the evidence fell within the subset of evidence discussed in *State v. Boyce*, which is not subject to *Spreigl* notice. 170 N.W.2d 104, 115 (Minn. 1969) (discussing "evidence bearing directly on the history of the relationship existing between one accused of murder and the victim"). Because the State provided notice, no further discussion of this issue is required.

[8] As part of his first claim, Zumberge discusses two other incidents of prior bad conduct. The first incident involved an alleged assault by Zumberge of his son's ex-girlfriend. Zumberge was never arrested or charged. The second incident involved an alleged verbal assault of a water-meter man in Zumberge's neighborhood for which Zumberge also was never arrested or charged. No further discussion of these incidents is required because evidence of these incidents was never presented at trial.

B.

Next, Zumberge takes issue with Cleven's testimony about Paula Zumberge. He contends that Cleven's testimony violated the district court order prohibiting evidence of Paula Zumberge's acquittal, and that trial counsel was ineffective when counsel elicited testimony about the acquittal. In addressing this claim, we keep in mind the presumption that performance of trial counsel was reasonable and the deference we give to matters of trial strategy.

Here, trial counsel's objective in questioning Cleven was reasonable. He prefaced his questioning by saying, "There came a time when you heard loud noises, true? . . . Gunshots?" This inquiry did not attempt to elicit any testimony about Paula Zumberge's acquittal, but instead what Cleven heard when the gunshots were fired. Nor did Cleven's testimony appear to violate the order prohibiting evidence of the acquittal of Paula Zumberge.

Moreover, review of the transcript suggests that, once Cleven testified that Paula Zumberge had encouraged Zumberge to "shoot 'em," trial counsel was faced with a tactical decision of whether to mitigate the testimony or move on to another topic. Trial counsel did both: during the testimony, he moved on to another topic; the following day, he asked for a cautionary instruction regarding Cleven's testimony.

We conclude that the decision of trial counsel regarding the testimony of Cleven was a matter of trial strategy to which we give deference. Appellate counsel therefore need not have raised a claim of ineffective assistance of trial counsel; consequently, Zumberge's claim of ineffective assistance of appellate counsel concerning Cleven's testimony fails.

C.

Finally, Zumberge claims that the prosecutor's closing argument—which described Zumberge as coming around the side of the house and waiting for Stevens—was a "surprise" closing argument that presented a theory of "premeditation" that had not yet been introduced at trial. Reviewing the video, however, shows that the prosecutor's argument was based on a reasonable inference made from the video. *See State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

When viewed in a light most favorable to Zumberge, the video does not show that the prosecutor's closing argument regarding "premeditation" was unreasonable. The video depicts Zumberge peering around the corner and watching the altercation between the two women. Even if we assume that Zumberge came out of the house *after* he saw Stevens, as he contends, Zumberge's appearances around the corner of his house during the altercation lead to a reasonable inference of premeditation. As we said in Zumberge's direct appeal, "[t]he State had a very strong case that . . . Zumberge . . . act[ed] . . . with premeditation and intent to kill." *Zumberge*, 888 N.W.2d at 697.

Like the other decisions of trial counsel, declining to object to this closing argument was a matter of trial strategy entitled to deference, and appellate counsel need not have raised a claim of ineffective assistance of trial counsel on appeal. Zumberge's final claim also fails the first prong of *Strickland*.

In sum, when the facts alleged are viewed in a light most favorable to Zumberge, appellate counsel need not have raised any ineffective-assistance-of-trial-counsel claims because each of Zumberge's contentions relate to reasonable trial strategy. *See Leake*,

737 N.W.2d at 536. Accordingly, the facts alleged conclusively show that Zumberge is entitled to no relief on his claims of ineffective assistance of appellate counsel.[9]

CONCLUSION

For the foregoing reasons, we affirm the district court order denying Zumberge's petition for postconviction relief.

Affirmed.

---

[9] Zumberge must satisfy each prong of the *Strickland* test to succeed on a claim of ineffective assistance of appellate counsel. *Strickland*, 466 U.S. at 687. Because Zumberge failed to satisfy the first prong, we need not reach the issue of whether his claims satisfy the second prong.