STATE OF MINNESOTA

IN SUPREME COURT

A20-1221

Itasca County District Court — Thissen, J.

Joseph Christen Thoresen,

Appellant,

vs.

Filed: October 13, 2021
Office of Appellate Courts

State of Minnesota,

Respondent.

Joseph Christen Thoresen, Stillwater, Minnesota, pro se.

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

Matti R. Adam, Itasca County Attorney, Rachel A. Everson, Assistant Itasca County Attorney, Grand Rapids, Minnesota, for respondent.

S Y L L A B U S

1. The district court did not abuse its discretion by denying appellant's claims asserting violations of *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Appellant's claim that the grand jury indictment was insufficient and overly confusing is barred under the *Knaffla* rule.

3. Appellant's claims that the district court committed plain error by failing to stop the prosecutor from allegedly misstating the evidence and by telling the jury what to believe during closing argument are barred under the *Knaffla* rule.

4. Appellant's claim of judicial estoppel is barred under the *Knaffla* rule.

5. Appellant's claim that the prosecutor committed prosecutorial misconduct is barred under the *Knaffla* rule.

6. Appellant did not meet his burden to show ineffective assistance of trial or appellate counsel.

7. Appellant's claim that the evidence presented at the jury trial was insufficient to support his conviction is barred under the *Knaffla* rule and he is not entitled to additional testing of blood samples under Minn. Stat. § 590.01, subd.1a(a) (2020).

8. Appellant's claims that the search warrants were deficient and that he was interrogated in violation of his rights as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), are barred under the *Knaffla* rule.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

THISSEN, Justice.

In 2017, appellant Joseph Thoresen was convicted of first-degree premeditated murder. After we affirmed his first-degree murder conviction on appeal, Thoresen sought postconviction relief on several grounds. The district court denied his motion and requests

without a hearing. Because we conclude that the district court did not abuse its discretion by summarily denying Thoresen's claims for postconviction relief, we affirm.

FACTS

The relevant facts are recounted in *State v. Thoresen*, 921 N.W.2d 547 (Minn. 2019). On June 21, 2016, David Haiman was killed on a trail in Itasca County. Following a police investigation, a grand jury indicted Thoresen on four offenses, including first-degree premeditated murder, first-degree murder while committing kidnapping, second-degree intentional murder, and second-degree murder while committing assault. Each count encompassed one theory of principal liability as well as one theory of accomplice liability. A jury found Thoresen guilty of first-degree premeditated murder as a principal and as an aider and abettor. The district court entered a conviction on principal liability and sentenced Thoresen to life in prison without the possibility of release.

Thoresen appealed his conviction to our court. He first argued that the testimony of his accomplice, Kayleene Greniger, was not sufficiently corroborated to support his first-degree premeditated murder conviction. *Id.* at 551. Thoresen also argued that the district court abused its discretion by denying his request to instruct the jury about the credibility of drug users or witnesses who could later be charged as accessories after the fact. *Id.* at 553.

We rejected both arguments. On the first issue, we determined that Greniger's testimony was corroborated by four witnesses. *Id.* at 552. We further determined that there was independent evidence of Thoresen's guilt beyond Greniger's testimony and, therefore, her testimony was sufficiently corroborated to sustain Thoresen's conviction. *Id.* On the

second issue, we held that the district court did not abuse its discretion by denying Thoresen's proposed jury instructions because the jury heard that the witnesses used mind-altering substances that affected their memory and perception. *Id.* at 554. Additionally, we noted that the district court had instructed the jury to consider each witness's ability to remember and relate to facts as well as whether he or she had an interest in the outcome of the case. *Id.*

In November 2019, Thoresen moved for additional blood and DNA testing under Minn. Stat. § 590.01, subd. 1a (2020). Thoresen claimed that investigators did not test 94 percent of the evidence collected from his apartment. The district court denied Thoresen's motion because the test was available at the time of his jury trial and he did not raise the issue prior to jury trial or during his direct appeal. *See* Minn. Stat. § 590.01, subd. 1a(a)(2). The district court further stated that additional testing that proved a lack of Haiman's blood in the apartment would not establish his actual innocence, noting that Haiman was not killed in Thoresen's apartment.

Thoresen then timely moved for postconviction relief, seeking to vacate his conviction. He asserted that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); the grand jury indictment was insufficient and overly confusing; the district court committed plain error by failing to stop the prosecutor from allegedly misstating the evidence and telling the jury what to believe during closing argument; the State's theory of the case was barred by the doctrine of judicial estoppel; the prosecutor engaged in misconduct; his trial and direct appeal lawyers provided ineffective assistance of counsel; the evidence was insufficient to convict him; the search warrants

issued in his case were deficient; and he was interrogated in violation of his rights as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court denied Thoresen's petition for postconviction relief without an evidentiary hearing. Thoresen appealed.

ANALYSIS

We review a postconviction court's decision to summarily deny a petition for postconviction relief for an abuse of discretion. *See Campbell v. State*, 916 N.W.2d 502, 506 (Minn. 2018). An abuse of discretion occurs when the postconviction court "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). In determining whether the district court abused its discretion, we review the district court's factual determinations for clear error and its legal conclusions de novo. *Eason v. State*, 950 N.W.2d 258, 264 (Minn. 2020).

A defendant who is convicted of a crime is permitted to seek postconviction relief to vacate and set aside the judgment, grant a new trial, or make other dispositions as may be appropriate when claiming that (1) the conviction was obtained in violation of the person's rights under the Minnesota Constitution or the United States Constitution, or (2) when "scientific evidence not available at trial . . . establishes the petitioner's actual innocence." Minn. Stat. § 590.01, subd. 1 (2020).

The postconviction court must hold an evidentiary hearing to resolve factual disputes that are material to determining the legal issues raised in the postconviction petition when those factual disputes were not resolved in the proceedings resulting in a conviction. *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). "The showing required

for an evidentiary hearing is lower than that required for a new trial." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of granting the hearing. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002).

But the factual dispute must be material. A postconviction court may dismiss a petition for postconviction relief without holding an evidentiary hearing "unless [the] petitioner alleges facts which, if proven, would entitle [the] petitioner to the requested relief." *Hanley v. State*, 534 N.W.2d 277, 278 (Minn. 1995). A petitioner's allegations "must be more than argumentative assertions without factual support." *Opsahl v. State*, 677 N.W. 414, 423 (Minn. 2004) (citation omitted) (internal quotation marks omitted).

A postconviction court also may "summarily deny a claim that is procedurally barred by the *Knaffla* rule." *Pearson v. State*, 891 N.W.2d 590, 597 (Minn. 2017). "The *Knaffla* rule provides that when a petition for postconviction relief follows a direct appeal of a conviction, all claims raised in the direct appeal and all claims of which the defendant knew or should have known at the time of the direct appeal are procedurally barred." *Hooper v. State* (*Hooper I)*, 838 N.W.2d 775, 787 (Minn. 2013) (citation omitted) (internal quotation marks omitted).

When a claim was not previously raised, there are exceptions to the *Knaffla* bar. A postconviction court may consider such a claim when the claim is so novel that it can be said that its legal basis was not reasonably available to counsel at the time of the direct appeal. *See King*, 649 N.W.2d at 156–57. A postconviction court also may consider such a claim otherwise barred by *Knaffla* "in the interests of justice." *Id*. The interests-of-justice

exception applies only when the claim has "substantive merit" and the petitioner "did not deliberately and inexcusably fail to raise the [claim]" in his previous appeals. *Hooper v. State* (*Hooper II*), 888 N.W.2d 138, 143 (Minn. 2016) (citation omitted) (internal quotation marks omitted).

I.

Thoresen asserts that the State withheld favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). According to Thoresen, the State withheld the interviews of Robert Dewey, John Peck, and Donna Stram until after his direct appeal. Thoresen also asserts that the State withheld 770 Facebook posts. Thoresen argues that the interviews and Facebook posts are both favorable and material to his case.

The State violates the constitutional guarantees of due process when, whether intentionally or unintentionally, it suppresses "material evidence favorable to the defendant." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (citing *Brady*, 373 U.S. at 87). There are three elements of a *Brady* violation:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
> (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
> (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Id.; *see also Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Because the materiality analysis under the third prong "involves a mixed issue of fact and law, we review a district court's materiality determination de novo." *Walen*, 777 N.W.2d at 216. "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different." *Zornes v. State*, 903 N.W.2d 411, 418 (Minn. 2017) (citation omitted) (internal quotation marks omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id.* (citation omitted) (internal quotation marks omitted).

Robert Dewey Interview

Robert Dewey is the father of Jodee Dewey, a witness for the prosecution. He owns the land that, before the murder, Thoresen traveled to with Kayleene Greniger and Haiman. During his interview, Robert Dewey stated that he was not at the residence on the day in question, that he did not have a basket on the back of his four-wheeler, and that he had two baseball bats in the garage, one painted black and one painted white. Thoresen additionally claim that Robert Dewey suggested that any baseball bat he may have was a little slugger. Robert Dewey stated that he did not believe any of the bats were missing.

Thoresen claims that Robert Dewey's statement contradicts the trial testimony of Kayleene Greniger. Kayleene Greniger testified that it was at the Dewey residence on a four-wheeler ride that Thoresen told her that they were going to kill Haiman. Kayleene Greniger also testified that she saw a wooden baseball bat on the back of a four-wheeler and later "saw the baseball bat in the car next to the machete." *Thoresen*, 921 N.W.2d at 549–50.

The postconviction court concluded that, assuming Robert Dewey's interview was withheld and it could have been used to impeach Kayleene Greniger, Thoresen was still conclusively entitled to no relief because the interview was not material. The court reached

this conclusion because Thoresen was unable to show that Robert Dewey's interview would have led to a different verdict.

We agree with the postconviction court that the allegedly suppressed evidence was not material. We assume, as the district court did, that Thoresen meets the suppression prong of *Brady*. Thoresen also meets the favorability prong of *Brady* because the evidence could have been used to impeach Kayleene Greniger's testimony.

But Thoresen's argument fails on the materiality prong. There is not a reasonable probability that, had Thoresen been in possession of Robert Dewey's interview, the outcome of the jury trial would have been different. The origin of the bat would not outweigh the evidence that Thoresen hit Haiman in the head with a bat. The evidence at the jury trial included testimony about Haiman's autopsy showing that he was struck in the head with a blunt object, Kayleene Greniger's testimony that she saw Thoresen strike Haiman in the head twice with a bat, and Thoresen's own statement to Tristan Corwin that he struck a kid in the head twice with a bat. *See Thoresen*, 921 N.W.2d at 550, 552. The withheld interview was not material because there is not a reasonable probability that the outcome of the jury trial would have been different had Thorsen had the interview before trial. Therefore, the postconviction court did not abuse its discretion by finding that the failure to disclose Robert Dewey's interview did not violate *Brady*.

John Peck Interview

John Peck gave a statement to investigators about Tristan Corwin. John Peck said about Tristan Corwin, "But any, anyway, um, ah he's been trying to fight all this stuff in court ah about what he didn't do and what he did do and that he had a bat, that was his bat.

I guess somebody hit the guy in the head or something or?" Thoresen asserts that Peck's statement implicates Tristan Corwin in Haiman's murder. He argues that the statement shows that the bat was never in Thoresen's hands and that the bat never came from the Dewey residence.

The postconviction court found that Thoresen failed to show how this evidence was favorable or material. The court stated that John Peck's interview was "vague, general, and full of conjecture" and could not show that Tristan Corwin murdered Haiman. The court also stated that the origin of the bat is largely immaterial.

We agree with the postconviction court. Again, we assume that Thoresen meets the suppression prong of *Brady*. But Thoresen has failed to show how John Peck's interview is favorable or material.

Evidence is favorable when it is exculpatory or could be used for impeachment purposes. *Walen*, 777 N.W.2d at 216. Thoresen's assertion that John Peck's vague and speculative statement is exculpatory and shows that Tristan Corwin murdered Haiman is without merit. Even if Tristan Corwin was the owner of the baseball bat, John Peck's statement does not implicate Tristan Corwin in the murder. John Peck stated that "somebody hit the guy in the head or something." He did not say who did so. Although Tristan Corwin may have been the owner of the bat, this fact does not make him the one who used it to kill Haiman, and thus Thoresen's argument that John Peck's interview is exculpatory (and so favorable) fails. Further, there is no reasonable probability that the result of the proceeding would have been different had Thoresen possessed John Peck's

statement before trial. Substantial evidence, including Kayleene Grainger's testimony, supports the jury's conclusion that Thoresen hit Haiman in the head with the bat.

Donna Stram Interview

Thoresen argues that the prosecution withheld the interview of Donna Stram. He asserts that Donna Stram's interview contradicts the testimony of Kayleene Greniger's brother, Jeff Greniger. Donna Stram told investigators that she was sitting in her car the early morning of June 21, 2016 (the day of the murder), and saw two young gentlemen get into a baby blue four-door vehicle at around 2:30 a.m. Donna Stram identified the two men and told investigators that neither of the people she saw were Kayleene Greniger or Thoresen.[1]

Once again, we assume that Thoresen meets the suppression prong of *Brady*. Further, while Thoresen fails to identify how this evidence would be used to impeach Jeff Greniger, if we follow the lead of the district court and assume that Jeff Greniger was one of the men identified, we could reasonably conclude that Donna Stram's statement could be used to contradict Jeff Greniger's testimony regarding when he traveled to and from the apartment on the night before the murder. Accordingly, we can foresee how the interview could have been favorable as impeachment evidence.

But even if we accept that argument, Donna Stram's statement is immaterial as there is no reasonable probability that the result of the proceeding would have been different.

[1] The identities of the men Donna Stram saw are not in the record and were not shared with Thoresen.

Impeaching Jeff Greniger's credibility regarding his timeline would not negate the substantial evidence that Thoresen killed Haiman. Jeff Greniger was not present at the time of the murder. His testimony at the jury trial focused on events before the murder: that Thoresen beat up Haiman in the apartment and that Haiman was tied up and bleeding on the floor. The testimony was corroborated by DNA evidence of blood in the apartment and Jodee Dewey's testimony that Haiman was injured there. Because Donna Stram's statement was not material, the district court did not abuse its discretion by concluding that the failure to disclose Donna Stram's interview did not violate *Brady*.

Facebook Posts

Thoresen argues that the prosecution withheld 770 Facebook posts. Thoresen claims that he has never seen the Facebook posts and knows of their existence only from an "item sheet" which, he asserts, shows that they were received by the investigators. Thoresen contends that the posts could have been useful to impeach Kayleene Greniger's testimony. After a thorough examination of the record, we conclude that Thoresen's *Brady* claim concerning the Facebook posts is barred by *Knaffla*.

The record shows that Thoresen knew that the State had the Facebook posts before both the jury trial and his direct appeal. The posts were seized pursuant to a July 2016 search warrant issued to Facebook, which was subsequently extended. The warrants, which expressly sought access to posts from the Facebook accounts of Thoresen, Kayleene Grainger, Tristan Corwin, and Haiman, were placed in evidence at a February 26, 2017 hearing. Further, before the jury trial, Thoresen knew enough about the posts to unsuccessfully challenge the seizure of the posts. The district court denied his motion to

suppress use of the posts at trial, expressly finding that Thoresen lacked standing to challenge seizure of the posts from the accounts of Kayleene Grainger, Tristan Corwin, and Haiman. This record evidence demonstrates that, at the time of his direct appeal, Thoresen should have known about the seizure of the Facebook posts and the fact that he did not have them. Because Thoresen failed to assert the State's failure to disclose the posts that he knew existed in his direct appeal, his claim is barred by *Knaffla*.

II.

Thoresen argues that the indictment filed against him was missing essential facts. He also notes that each offense in the indictment included a charge for both principal liability and accomplice liability. He asserts that including two separate offenses in each count was overly confusing to both the grand jury and to Thoresen. The Minnesota Rules of Criminal Procedure require that indictments contain "a written statement of the essential facts constituting the offense charged." Minn. R. Crim. P. 17.02, subd. 2. Little more than statutory language is necessary when "all that is essential to constitute the offense is stated fully and directly." *State v. Bias*, 419 N.W.2d 480, 486 (Minn. 1988). An indictment must "apprise[] the defendant of what he must be prepared to meet." *Id.* After a fair trial, a conviction "will stand unless there is actual proof that [the] defendant has in fact been misled as to the charge brought against him, to his prejudice." *Id.*

Thoresen's claims regarding the grand jury indictment are barred by *Knaffla*. Thoresen knew before his direct appeal what was included in the indictment and of the possibility that essential facts were excluded from it. He also knew before his direct appeal that the indictment included charges for both principal liability and accomplice liability.

Indeed, he made these arguments in the district court before his jury trial. The district court concluded that "[t]he grand jury instructions were not inaccurate or flawed in a manner that violates [Thoresen's] due process rights."

Even if we considered Thoresen's claims in the interests of justice, they fail on the merits. First, the indictment contained sufficient essential facts to notify Thoresen of the charges against him. S*ee Bias*, 419 N.W.2d at 486 (holding that similar language in a charging document satisfied the requirements for a written statement of the essential facts constituting the offense charged). This conclusion is evident because Thoresen filed a motion in the district court challenging the indictment; he also provided a defense throughout the jury trial, arguing that Kayleene Greniger was the one who murdered Haiman. Therefore, Thoresen has not met the burden of showing that the indictment was so deficient that he could not defend himself.

Thoresen's argument that the charges were overly confusing to him and to the grand jury similarly fails. Principal and accomplice liability can be included in the same count. Minn. R. Crim. P. 17.02, subd. 3 ("The indictment or complaint may allege in one count alternative theories of committing the offense or that the means by which the defendant committed the offense are unknown."). Additionally, the grand jury was given instructions regarding principal and accomplice liability for each count. Further, as noted above, Thoresen was not misled as to the charges against him and there is no evidence the grand jury did not understand the charges brought before them. Therefore, Thoresen is not entitled to relief on this ground.

III.

Thoresen also argues that the district court committed plain error when, despite the lack of an objection, it failed to stop the prosecutor during closing argument from allegedly misstating evidence and telling the jury what to believe. Under the plain-error test, an appellant must show "that there was (1) an error, (2) that is plain, and (3) the error must affect substantial rights." *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010). An error is plain when it is clear and obvious. *Id.* at 549. To establish that the error affected his or her substantial rights, an appellant must show that "the error was prejudicial and affected the outcome of the case." *Id.*

The postconviction court found that Thoresen's claims were barred by *Knaffla* and, even if not, the prosecutor's statements during closing arguments were neither inaccurate nor inappropriate and, therefore, did not prejudice Thoresen.

We agree. Thoresen was present at the jury trial and heard the presentation of the evidence. Even if we considered Thoresen's claim in the interests of justice, it fails on the merits. None of the prosecutor's statements highlighted by Thoresen were inaccurate. During closing argument, the prosecutor summarized evidence. Additionally, the court instructed the jury that closing arguments were not evidence. And as discussed earlier, the evidence against Thoresen was extensive. Thus, there is no plain error that affected Thoresen's rights and Thoresen is not entitled to relief on this ground.

IV.

Thoresen next argues that, because Kayleene Greniger's testimony before the grand jury was different then her testimony at the jury trial, the prosecution put forth inconsistent theories in violation of the doctrine of judicial estoppel. "The doctrine of judicial estoppel

has not been expressly recognized by this court." *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005). The doctrine of judicial estoppel generally requires that three conditions be met: (1) the party presenting the allegedly inconsistent theories must have prevailed in its original position, (2) there is a clear inconsistency between the original and subsequent position of the party, and (3) there must not be any distinct or different issues of fact in the proceedings. *Id.*

Before the grand jury, Kayleene Greniger testified that Thoresen cut off Haiman's head with the machete, but during the jury trial she testified that she was the one to decapitate Haiman. We need not decide whether to recognize the doctrine of judicial estoppel in this case. Thoresen's claim based on the doctrine (if we did recognize it) is barred by *Knaffla*. Thoresen had access to the grand jury testimony before his jury trial and knew or should have known of the inconsistencies as soon as Kayleene Greniger testified at the jury trial. Because Thoresen knew or should have known about his potential judicial estoppel claim at the time of his direct appeal, his judicial estoppel claim fails.

V.

Thoresen contends that the prosecutor committed misconduct by not disclosing plea agreements presented by the State to Tristan Corwin and Jeff Greniger, knowingly presenting perjured testimony to the grand jury, and misstating evidence and using an improper theme throughout the jury trial. The postconviction court found that these claims were known or should have been known at the time of his direct appeal and thus were barred by *Knaffla*. The court also concluded that, were the claims not barred by *Knaffla*,

they did not rise to the level of prosecutorial misconduct and, as a whole, did not prejudice Thoresen.

We agree with the postconviction court that Thoresen's prosecutorial misconduct claims are barred by *Knaffla*.[2] By judicial order dated October 21, 2016, Thoresen had access to the grand jury transcript before his jury trial.[3] Accordingly, he was aware of the factual basis for his claim that the prosecutor allegedly presented perjured testimony to the grand jury at the time of his direct appeal. Similarly, Thoresen was present during the jury trial, heard the testimony of the various witnesses, and knew the prosecutor's themes and statements about the evidence. Thus, he knew the basis for a claim that the prosecutor misstated evidence and used improper themes at the time of his direct appeal. Finally, no *Knaffla* exception applies. Thoresen does not argue that an intervening decision created a

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[2] Thoresen provides no evidence that Tristan Corwin or Jeff Greniger received a plea deal. Because Thoresen does not point to anything that legitimately suggests that they received a deal in exchange for their testimony, we decline to address the issue.

[3] Thoresen argues that the prosecutor knowingly presented perjured testimony to the grand jury because Kayleene Greniger told the grand jury that Thoresen used the machete to decapitate Haiman but later, at the jury trial, admitted to being the one to decapitate Haiman with the machete. Thoresen presented no evidence to support his claim that the prosecutor knew Kayleene Greniger was committing perjury before the grand jury. The fact that Kayleene Greniger later changed her story does not mean the prosecutor knowingly elicited perjured testimony. Thoresen also claims that Jeff Greniger committed perjury before the grand jury because his story to the grand jury was inconsistent with what he told the police and at odds with the testimony of Jodee Dewey. Again, Thoresen makes conclusory allegations that a change in story, or inconsistency between the narratives of one witness and another, means the prosecutor knowingly elicited perjured testimony. That alone is insufficient as a matter of law to prove that the prosecutor presented perjured testimony.

novel legal issue, and he did not establish that an excuse existed for his failure to raise issues about which he knew. Therefore, his claims are barred.

VI.

Thoresen also contends that he is entitled to postconviction relief based on ineffective assistance of both trial counsel and appellate counsel. "Because claims of ineffective assistance of counsel involve mixed questions of law and fact, our review of decisions by the postconviction court is de novo." *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

To be entitled to an evidentiary hearing based on claims for ineffective assistance of counsel, "an appellant must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)." *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020) (internal quotation marks omitted). An appellant must "prove that [1] 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.' " *Id.* Counsel's performance is presumed reasonable. *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010). Generally, we will not review a claim of ineffective assistance of counsel when the attorney's conduct in question is based on trial strategy. *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014).

A.

Thoresen argues that he received ineffective assistance of trial counsel because his counsel failed to (1) file for a mistrial, (2) object to the introduction of prejudicial character evidence, (3) demand further testing, and (4) move for a change of venue. The postconviction court found that Thoresen's claims for ineffective assistance of trial counsel were barred by *Knaffla* and, even if not barred by *Knaffla*, they fail because he did not establish that the representation he received fell below an objective standard.

We agree that Thoresen's claims for ineffective assistance of trial counsel do not provide a basis for postconviction relief. Each of the errors identified by Thoresen are trial errors that either he knew or should have known at the time of his direct appeal. Further, except for the failure to demand further testing, the claims fail as a matter of law because Thoresen offers only conclusory assertions without detail, legal argument, explanation, or support. *See Crow v. State*, 923 N.W.2d 2, 10 (Minn. 2019) (stating that postconviction evidentiary hearing not required when claims "are based solely on conclusory, argumentative assertions without factual support" (citation omitted) (internal quotation marks omitted)). And Thoresen does not explain what potential information would have been gleaned from additional testing that would have resulted in a different outcome at trial. First, Haiman was not killed in Thoresen's apartment. Further, there was other testimony that Thoresen beat up Haiman in the apartment and that Haiman was tied up and bleeding on the floor. The testimony was corroborated by DNA evidence of blood in the apartment and Jodee Dewey's testimony that Haiman was injured there. Therefore, Thoresen's claims of ineffective assistance of trial counsel fail.

B.

Thoresen's claims of ineffective assistance of appellate counsel are not barred by *Knaffla* because he could not have brought these claims at the time of his direct appeal. Appellate counsel, however, do not have a duty to include all possible claims on direct appeal and may choose to argue only the most meritorious claims. *See Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007). Further, we have said that "[w]hen an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985). We will not second-guess appellate counsel's decision not to raise a claim that "counsel could have legitimately concluded would not prevail." *Reed*, 793 N.W.2d at 733 (citation omitted) (internal quotation marks omitted).

Thoresen's argument regarding ineffective assistance of appellate counsel is brief and vague. Without elaborating, Thoresen asserts that there was "a breakdown of communication between the Appellate Counsel and Petitioner, upon which the Appellate Counsel fell below a reasonable standard and has hindered Mr. Thoresen's due process right to bring proper and legitimate legal issues forward in his Post Conviction Relief Petition." That assertion is not specific enough to support postconviction relief.

Thoresen also conclusorily mentions that his appellate counsel did not raise or spot issues relating to deficiencies in the search warrants, items that were not produced to the defense, and trial counsel's failure to hire independent expert witnesses to testify in court to dispute the evidence that was presented against him. But he does not identify what

experts trial counsel should have, but did not, hire or how they would have made a difference. We have reviewed the record and the district court's order rejecting Thoresen's claim that the search warrants were deficient and we find no error. Appellate counsel could have legitimately concluded that the argument would fail. And Thoresen does not identify the unproduced items that he now claims he knew about at the time of the direct appeal that appellate counsel should have challenged. Therefore, we conclude that, because Thoresen did not bear his burden to demonstrate by a preponderance of the evidence that appellate counsel's representation fell below a reasonable standard, he is not entitled to an evidentiary hearing.

VII.

Thoresen next contends that there is insufficient evidence against him to sustain his conviction. Thoresen first argues that there was no physical evidence linking him to the murder and no eyewitnesses except Kayleene Greniger. This claim is barred by *Knaffla*. Thoresen knew of these insufficiency-of-the-evidence claims at the time of his direct appeal. Indeed, Thoresen argued on direct appeal that Kayleene Greniger's testimony was insufficient and we held that Kayleene Greniger's testimony was sufficiently corroborated. *Thoresen*, 921 N.W.2d at 551–52.

Thoresen also argues that only 6 of the 78 swabs of blood collected from his apartment were tested. Consequently, he requests more testing to determine any other contributors and to determine whether the blood was human or animal. Thoresen's request for more testing is governed by Minn. Stat. § 590.01, subd. 1a(a), which states:

> A person convicted of a crime may make a motion for the performance of fingerprint or forensic DNA testing to demonstrate the person's actual innocence if: (1) the testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and (2) the evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

Thoresen does not satisfy these statutory requirements. He failed to demonstrate that the evidence was not subject to testing due to lack of technology or that the testing was not available as evidence at the time of the trial. Indeed, some samples *were* tested. Therefore, because Thoresen does not meet the statutory requirements necessary to require additional testing, this argument fails.

VIII.

Finally, Thoresen challenges the search warrants in his case and argues that he was subject to custodial interrogation without being read his rights in violation of *Miranda v. Arizona*, 384 U.S. 436, 439 (1966). Thoresen's claims are barred by *Knaffla*. He knew the basis for the claims at the time of direct appeal. In fact, Thoresen made these arguments to the district court before his trial. The court found that probable cause existed and supported the warrants. Additionally, the court found that part of Thoresen's statement was taken in violation of *Miranda* and that part of his statement was suppressed and not used during the trial. Therefore, Thoresen's claims regarding the alleged deficiencies in the search warrants and the alleged *Miranda* violations are clearly barred by *Knaffla*.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.