STATE OF MINNESOTA

IN SUPREME COURT

A22-1378

Washington County — McKeig, J.

Stephen Carl Allwine,

Appellant,

vs.

Filed: July 19, 2023
Office of Appellate Courts

State of Minnesota,

Respondent.

Stephen Carl Allwine, Bayport, Minnesota, pro se.

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

Kevin Magnuson, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota, for respondent.

S Y L L A B U S

1. None of appellant's ineffective assistance of appellate counsel claims satisfy the requirements articulated in *Strickland v. Washington*, 466 U.S. 668 (1984).

2. The district court did not abuse its discretion by denying appellant's postconviction motion to compel discovery.

3. The district court did not abuse its discretion by denying appellant's postconviction motion for a hearing on alleged juror misconduct.

4. The district court did not abuse its discretion by dismissing appellant's postconviction petition without an evidentiary hearing.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

McKEIG, Justice.

In 2018, appellant Stephen Carl Allwine was convicted of first-degree premediated murder, Minn. Stat. § 609.185(a)(1) (2022), and sentenced to life in prison. We affirmed his conviction on direct appeal as well as his denial for postconviction relief. *State v. Allwine (Allwine I)*, 963 N.W.2d 178 (Minn. 2021). In this appeal, Allwine challenges the district court's denial of his second petition for postconviction relief. Allwine presents several arguments, including numerous claims of ineffective assistance of appellate counsel, that the district court abused its discretion in denying a motion to compel discovery and a motion for a hearing on juror misconduct, and that the district court abused its discretion in denying an evidentiary hearing on his second postconviction petition. We affirm.

FACTS

In January 2018, a jury found appellant Stephen Carl Allwine guilty of first-degree premeditated murder, *see* Minn. Stat. § 609.185(a)(1), for the death of his wife, Amy Allwine, in November 2016. A more detailed discussion of the facts surrounding Amy's

death, as well as Allwine's arrest, trial, and conviction, can be found in *Allwine I*, 963 N.W.2d at 182–85. We recite only the facts pertinent to this appeal below.

In February 2016, a person using the online screen name "dogdayGod" sent a message to Besa Mafia, a forum that advertises contract killers, seeking to hire someone to kill Allwine's wife, Amy. DogdayGod sent the message over the "Dark Web," which is a part of the Internet that is only accessible through a specialized browser called The Onion Router, or "TOR." Evidence at trial showed that the TOR browser was installed on Allwine's computer. An investigator also testified that Allwine installed apps on his phone, which could be used to access the TOR browser.

After contacting Besa Mafia, dogdayGod sent a second message asking if it would be possible to kill Amy while she was on a business trip in Moline, Illinois. Five minutes before this message was sent, the user of a laptop with the username "S Allwine" searched for Moline, Illinois. DogdayGod later provided Besa Mafia with the route Amy would be taking, the address of Amy's hotel, a description of Amy and her vehicle, and a photograph of Amy. The day prior to this message, the user of a laptop with the username "S Allwine" accessed Amy's Facebook account and browsed her photographs.

To pay Besa Mafia for killing Amy, dogdayGod used an online digital currency known as "Bitcoin." DogdayGod sent a unique 34-character code to Besa Mafia on March 22, 2016. The State's expert, Mark Lanterman, later found that the "S Allwine" laptop contained the same unique 34-character alphanumeric code used for Bitcoin as the code that dogdayGod sent to Besa Mafia on March 22, 2016.

In May 2016, law enforcement notified Amy and Allwine that someone attempted to hire an assassin to kill her. They asked her for the names of any individuals who may wish to harm her. Amy provided a list of names, but there was no evidence of the dogdayGod account on the devices of any of the individuals Amy listed.

On November 13, 2016, Allwine was working from his basement office at home. At noon, he went upstairs to have lunch with Amy and their son. Shortly after noon, Amy told Allwine that she was feeling dizzy, lightheaded, had a dry mouth, and went to lie down in her bed. Allwine went back downstairs to continue working, but records showed that his last employment action was at 12:51 p.m. that day. Around 1:00 p.m., Amy's father arrived at the Allwine residence to finish a home project for the family. Allwine told Amy's father that she was in the bedroom and not feeling well. Amy's father left the Allwine residence around 2:00 p.m., but Allwine called him minutes later and asked him to take their son so Allwine could take Amy to a clinic. Allwine told Amy's father that he would pick up their son that evening around 5:30 p.m. Amy's father returned to the Allwine residence, picked up his grandson, and left, leaving Allwine and Amy alone in the home.

Three hours later, at approximately 5:00 p.m., Allwine called Amy's father to notify him that he was running late because he needed to stop at a gas station. Allwine arrived at 5:30 p.m. and told Amy's father that Amy decided not to go to the clinic. Allwine and his son stopped for dinner and then arrived home around 6:52 p.m. Upon arrival, the son entered the home and discovered Amy's body. Allwine called 911 at approximately 7:00

p.m. and told the emergency dispatcher: "I think my wife shot herself. There's blood all over."

Cottage Grove police officers responded to Allwine's 911 call. Officers noticed that the evidence at the scene seemed inconsistent with a suicide.[1] Shortly after, investigators and scientists from the Minnesota Bureau of Criminal Apprehension ("BCA") arrived at the Allwine residence to analyze the crime scene. After their analysis, BCA forensics experts and the medical examiner concluded that Amy's position on the floor and blood patterns on her face were inconsistent with a suicide. Gunshot residue was also found on Allwine's hand.

On November 14, 2016, a medical examination was performed on Amy's body. The medical examiner discovered a nontherapeutic amount of scopolamine in Amy's system.[2] Based on the level of scopolamine in Amy's system, the medical examiner agreed that Amy died at 3:15 p.m. or earlier that day. The medical examiner also agreed that the evidence was inconsistent with suicide; rather, the evidence was consistent with homicide.

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[1] Cottage Grove Sergeant Patrick Nickle testified that the position of the handgun, which was on Amy's non-dominant left arm despite being shot on the right side of her head, and Amy's pants being unbuttoned and unzipped were unusual for a suicide.

[2] Scopolamine is a prescription drug that is commonly used to treat motion sickness. Scopolamine can cause a person to experience blurred vision, a dry mouth and throat, confusion, hallucinations, dilated pupils, flushing of the skin, drowsiness, and insomnia. In May 2016, dogdayGod inquired on a website called Dream Market Forum about the drug scopolamine. The medical examiner testified that Amy never had a prescription for scopolamine.

Following an investigation, Allwine was indicted by a grand jury on the charge of first-degree premeditated murder. The case proceeded to trial, and on January 31, 2018, the jury found Allwine guilty. On February 2, 2018, Allwine was sentenced to life imprisonment without the possibility of release.

Allwine subsequently filed a direct appeal, then filed a motion to stay his direct appeal to bring a petition for postconviction relief. We granted that motion. *State v. Allwine*, A18-0846, Order at 1–2 (Minn. filed Apr. 2, 2019). Before the district court, Allwine filed a petition for postconviction relief and moved for funds for a digital forensics expert. The district court denied Allwine's motion for funds because he did not establish indigency. The district court also denied Allwine's postconviction petition.

We thereafter affirmed both Allwine's conviction and the denial of postconviction relief. *Allwine I*, 963 N.W.2d at 182. Following this denial, Allwine filed another postconviction petition claiming ineffective assistance of appellate counsel; raising a claim of jury misconduct; and requesting an evidentiary hearing on claims alleged in the petition. Allwine also filed a motion to compel discovery. The postconviction court summarily denied the postconviction petition and denied the motion to compel discovery. Allwine now appeals.

ANALYSIS

We review a summary denial of a postconviction petition for an abuse of discretion. *Griffin v. State*, 961 N.W.2d 773, 776 (Minn. 2021). An abuse of discretion is "based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (citation omitted) (internal quotation marks omitted). We review the district court's factual findings

for clear error and its legal conclusions de novo. *Eason v. State*, 950 N.W.2d 258, 264 (Minn. 2020). In reviewing the summary denial, we view the facts alleged in the light most favorable to the petitioner. *Griffin,* 961 N.W.2d at 776. "[A] hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to grant the requested relief." *Id.* (citation omitted) (internal quotation marks omitted).

Allwine raises several arguments that he claims entitle him to relief. First, he argues that his appellate counsel was ineffective on multiple grounds. Second, he claims that the postconviction court abused its discretion in denying his motion to compel discovery. Third, he contends the district court abused its discretion in denying his motion for a *Schwartz* hearing to investigate alleged juror misconduct.[3] Finally, he argues that the district court abused its discretion in denying an evidentiary hearing on his postconviction petition. We consider each of these arguments in turn.

I.

We first address whether Allwine's appellate counsel was ineffective. An evidentiary hearing on an ineffective assistance of counsel claim is only required when a petitioner alleges facts that "affirmatively show that his attorney's representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (citation omitted)

[3] A *Schwartz* hearing is the name given to the procedure by which "a trial court may investigate alleged juror misconduct by summoning a juror for questioning about the alleged misconduct in the presence of counsel for both parties." *Martin v. State*, 969 N.W.2d 361, 363 n.1 (Minn. 2022) (citing *Schwartz v. Minneapolis Suburban Bus Co*., 104 N.W.2d 301, 303 (1960)).

(internal quotation marks omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a party is required to show that (1) counsel's performance fell below an "objective standard of reasonableness," and (2) a reasonable probability exists that the outcome would have been different but for counsel's errors. 466 U.S. at 688, 694. An attorney's performance falls below an objective standard of reasonableness when they fail to exercise the skills and diligence of a reasonably competent attorney under the circumstances. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). Appellate counsel does not fall below an objective standard of reasonableness by not raising a claim on appeal if counsel could have legitimately concluded that it would not prevail. *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007). To succeed on an ineffective assistance of counsel claim, a petitioner must identify a specific claim appellate counsel unreasonably failed to raise. *Jackson v. State*, 817 N.W.2d 717, 724 (Minn. 2012).

The fact that this ineffective assistance of counsel claim is raised in Allwine's second postconviction petition does not preclude us from considering the claim. It is our rule under *Knaffla* that once a direct appeal has been taken, all claims raised in that appeal, known at the time of appeal, or that should have been known at the time of appeal will not be considered in a subsequent petition for postconviction relief. *Leake*, 737 N.W.2d at 535 (citing *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976)). Therefore, as Allwine filed a direct appeal and previous postconviction appeal, generally any claims that he has already raised, that he knew of at the time of the appeal, or that he should have known of at the time of appeal, are barred under *Knaffla*. But "[c]laims of ineffective assistance of appellate counsel on direct appeal are not barred by the *Knaffla* rule in a first postconviction

appeal" because they could not have been brought earlier. *Leake*, 737 N.W.2d at 536. Although Allwine filed a previous postconviction petition, it was consolidated with his direct appeal, meaning he has effectively only had one appeal since his conviction. Therefore, he could not have raised his ineffective assistance of appellate counsel claim earlier, and we will consider his claims on their merits. *See id.*

A.

Allwine first alleges that appellate counsel failed to raise a claim that the district court abused its discretion in denying his motion for acquittal.[4] But even viewing this allegation in a light most favorable to Allwine, he is conclusively entitled to no relief for following reasons.

The test for granting a motion for acquittal is whether "the evidence is sufficient to present a fact question for the jury's determination." *State v. Slaughter*, 691 N.W.2d 70,

[4] Allwine argues that the conclusion that he killed Amy rests on ten circumstances: (1) that he drugged Amy with scopolamine; (2) that the time of death was between 1:30 and 3:30 p.m.; (3) that the gunshot residue on Allwine's hand indicated that he fired the gun; (4) that Allwine moved Amy to her final location; (5) that Allwine cleaned up the scene; (6) that his laptop contained a deleted note containing Besa Mafia's Bitcoin number; (7) that Allwine used TOR to access the Dark Web, purchase drugs, and communicate with Besa Mafia; (8) that Allwine sent anonymous e-mails to Amy; (9) that Allwine killed his wife to avoid a divorce; and (10) that no one else wanted to harm Amy. He then claims that if the State failed to prove any of the listed circumstances, the judge should have granted the motion for acquittal. But this is not the correct standard. For a first-degree premeditated murder case, the question is ultimately whether Allwine "cause[d] the death of a human being with premeditation and with intent to effect the death of the person or of another." Minn. Stat. § 609.185(a)(1). This is what the State had to prove—not the ten circumstances raised by Allwine. Further, Allwine's attempts to undermine the persuasiveness of the ten circumstances relate to the weight of the evidence, which is not considered in a motion for acquittal. *See State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005).

74–75 (Minn. 2005). To make this determination, we view all the evidence presented and draw any inferences in favor of the State. *Id.* at 75. "[I]f the evidence is insufficient to sustain a conviction" on any of the charges, the district court should grant the motion for a judgment of acquittal as to those charges. Minn. R. Crim. P. 26.03, subd. 18(1)(a). A district court may only deny the motion when the evidence is sufficient to present a factual question for the jury. *State v. Thomas*, 891 N.W.2d 612, 617 n.7 (Minn. 2017). In determining whether to grant the motion, the district court does not consider the weight and credibility of the evidence. *Slaughter*, 691 N.W.2d at 75.

Viewing the evidence in the light most favorable to the State, as we must, the evidence demonstrates that Allwine was home between 6 a.m. and 5 p.m. on the day Amy was killed. Shortly after noon, Amy told Allwine that she was not feeling well and that she was going to go rest. From 12:51 p.m. onward, Allwine's employer recorded no work activity for him. Allwine told Amy's father he would take Amy to a clinic, but never did. After this, Amy was killed by a gunshot to the head. The gun was found in her left hand, even though she was right-handed. Gunshot residue was found on Allwine. Law enforcement officers and the medical examiner concluded that the crime scene evidence was inconsistent with a suicide, and later learned that a nontherapeutic amount of the drug scopolamine was found in Amy's system. Amy did not have a prescription for scopolamine. DogdayGod, an Internet profile that had previously been searching for a contract killer to kill Amy, had been looking for scopolamine through the Dark Web. Other previous messages sent by dogdayGod included details that matched up within minutes of searches performed on the laptop of "S Allwine." Based on the amount of scopolamine in

Amy's system, the medical examiner agreed that Amy died at 3:15 p.m. or earlier. Between 2:00 p.m. and 6:52 p.m., the only person other than Amy identified in the Allwine residence was Allwine himself.

These facts all lead to the conclusion that Allwine, deliberately and premeditatedly, killed Amy. Based on this record, Allwine's appellate counsel "could have legitimately concluded" that an argument that the district court abused its discretion when it denied Allwine's motion for an acquittal would not have prevailed on appeal. Because appellate counsel does not have a duty to include all possible claims on direct appeal, but rather was permitted to argue only the most meritorious claims, *Schneider*, 725 N.W.2d at 523, Allwine is conclusively entitled to no relief even when we view his allegation in a light most favorable to him.

B.

Allwine next alleges that appellate counsel, while handling the pre-appeal proceedings regarding the first postconviction petition, unreasonably failed to show that his *trial* counsel was ineffective because of *appellate* counsel's failure to timely submit to the postconviction court evidence to support the claim. But even viewing this allegation in the light most favorable to Allwine, he is conclusively entitled to no relief for following reasons.

Allwine claims his *trial* counsel was ineffective because trial counsel ignored and did not put into evidence a crime scene log showing that the investigator arrived after 11:30 p.m. (which Allwine suggests would have put Amy's time of death within his alibi window) and failed to challenge the medical examiner's time of death conclusions and the

State's digital forensic expert with his own experts. To support those ineffective assistance of trial counsel claims, appellate counsel, in the first postconviction proceeding, attempted to introduce (1) the crime scene log, (2) a report from Dr. Jonathan Arden that opined Amy possibly died within Allwine's alibi window, and (3) an affidavit from John Carney that there was a reasonable doubt that Allwine was dogdayGod. But because appellate counsel failed to submit this evidence before the record closed, Allwine claims appellate counsel was ineffective. We evaluate this claim under the two-prong *Strickland* test described above. 466 U.S. at 688, 694.

Assuming without deciding that Allwine's appellate counsel's representation fell below an objective standard of reasonableness for failing to submit the crime scene log, report, and affidavit on time,[5] we consider whether viewing Allwine's allegation in a light most favorable to him, there is a reasonable probability that the outcome of Allwine's first postconviction appeal would have been different had the documents been properly submitted. To determine whether the timely submission of these documents would have resulted in a different outcome, we must consider the argument that these documents were attempting to support: that appellant's *trial* counsel was ineffective for failing to call expert witnesses to combat the State's expert witnesses and for failing to use the crime scene log

[5] We assume this point without deciding because we do not know why the report, affidavit, and crime scene log were not timely submitted. If the first prong of *Strickland* was dispositive, an evidentiary hearing would be needed to determine why the evidence was not submitted by the court's deadline. But because the ineffective assistance claim fails on the second prong of *Strickland*, an evidentiary hearing is unnecessary.

to challenge the medical examiner's testimony regarding time of death. This claim we also evaluate under the two-prong *Strickland* test. *Id.*

First, we consider whether Allwine's trial counsel's performance fell below an objective standard of reasonableness by failing to call expert witnesses or introduce the crime scene log. Allwine's experts may have come to different conclusions regarding the evidence in this case than the State's experts. But choosing which witnesses to call, including expert witnesses, is considered trial strategy. *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010). Furthermore, we have cautioned against second-guessing decisions of trial counsel in hindsight simply because of an unfavorable result to a defendant. *See State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003) ("[I]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (citation omitted) (internal quotation marks omitted)). Here, Allwine's counsel chose to pursue a non-technical, eyewitness defense. It is difficult to say that trial counsel's strategy was unreasonable, even though it was not successful.

But ultimately, we conclude that even viewing Allwine's allegation in the light most favorable to him, there is no reasonable probability that the outcome of the case would have been different. The report and affidavit merely call into question the certainty of the State's experts' findings; they do not affirmatively prove that Amy was killed during Allwine's alibi window or that Allwine was not dogdayGod. This, coupled with the other overwhelming evidence in this case (as detailed above and in *Allwine I*) would not lead to

a reasonable probability that the outcome of the trial would have been different. Accordingly, the claim fails the second *Strickland* prong. *See* 466 U.S. at 694.

Allwine's allegations regarding the crime scene log are similarly unavailing. The medical examiner was adamant at trial that the time of death was sometime in the afternoon of November 13, 2016, and agreed that a time of death of 3:00 to 3:15 p.m. was possible. Allwine points out that the medical examiner stated at trial that Amy died 4 to 6 hours prior to the investigator's arrival. The investigator arrived after 11:30 p.m., which would put the "4 to 6" hours squarely within Allwine's alibi window. Allwine claims that the crime scene log would have therefore shown that Amy was killed while he was not home.

This argument rests upon a mischaracterization of the medical examiner's testimony. The medical examiner testified that it takes 4 to 6 hours before a body feels "cool to the touch." Therefore, if the investigator arrived at 11:30 p.m., Amy would have died *at least* 4 to 6 hours prior to that time. This testimony suggests that the latest Amy could have died was 7:00 p.m., but it does not provide a limit on the earliest Amy could have died. It certainly does not show that Amy was killed during Allwine's alibi window. Furthermore, that was only part of the medical examiner's testimony regarding Amy's time of death. Based on the level of scopolamine in Amy's system, the medical examiner concluded that Amy died in the afternoon and agreed that a time of death of 3:15 p.m. was possible. The fact that the crime scene log would not have proven Amy was killed during a period when Allwine had an alibi, coupled with the testimony calculating the time of death based on scopolamine ingestion and the other overwhelming evidence in this case, does not demonstrate a reasonable probability that the outcome of the trial would have been

different had the log been included. The crime scene log's timely inclusion in the record would not have shown ineffective assistance of trial counsel, and the claim therefore fails to satisfy the second prong of *Strickland*. *See* 466 U.S. at 694.

For these reasons, even when Allwine's allegations are viewed in the light most favorable to him, the postconviction court did not abuse its discretion in deciding that the failure of appellate counsel to timely submit the report, affidavit, and crime scene log did not constitute ineffective assistance of appellate counsel.

C.

Allwine also raises other allegations that his appellate counsel unreasonably did not challenge a number of ways in which Allwine's *trial* counsel was ineffective, including trial counsel purportedly mishandling the cross-examinations of Detective Terry Raymond and the medical examiner; not completing a full discovery of divorce in Allwine's church, the United Church of God; and destroying his trial strategy during closing argument by misrepresenting the arrival time of an investigator, thereby putting the time of Amy's death outside Allwine's alibi window.[6] But even viewing these allegations in the light most

[6] Allwine also raises trial counsel's failure to impeach Mark Lanterman, the lack of a full investigation into Amy's mental and physical state, and the failure to interview the medical examiner, investigator, and anyone from Allwine's workplace as other examples of ineffective assistance of trial counsel. For these issues, Allwine either did not raise them in his second postconviction petition, or his analysis of the issue in his brief is entirely conclusory. Such arguments are forfeited before us. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (noting that issues that are not raised in a petition for postconviction relief cannot be raised on appeal); *State v. Rossberg*, 851 N.W.2d 609, 619–20 (Minn. 2014) (holding that challenges consisting of "factual assertions with no support in the record and conclusory declarations detached from any legal reasoning" are forfeited). Though Allwine raises generally that his trial counsel was ineffective, he is responsible for

favorable to Allwine, he is conclusively entitled to no relief for the reasons explained below.

Ineffective assistance of counsel claims based on trial strategy generally are not reviewable by courts. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Trial strategy includes the extent of trial counsel's investigation. *Id.* It also includes which witnesses to call and what information to present to a jury. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Allwine takes issue with the fact that his trial counsel did not ask Detective Raymond whether Allwine could have been waiting by his computer despite the computer recording no activity after 12:51 p.m. on November 13, 2016. It is true that this testimony was not elicited, despite the information being in Detective Raymond's notes. But, as the State points out, choosing not to cross-examine on this point also prevented Detective Raymond from stating that Allwine could have been nowhere near his computer given the lack of activity, which would not have helped Allwine's case. Ultimately, the decision to not risk eliciting potentially incriminating information falls within trial strategy and does not demonstrate ineffective assistance of trial counsel. *See Jones*, 392 N.W.2d at 236 (stating that trial strategy includes what evidence to present to the jury).

Similarly, Allwine claims that his trial counsel was ineffective for eliciting harmful time-of-death testimony from the medical examiner. Allwine cites *United States v.*

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pointing to specific examples as to why counsel was ineffective. *Jackson*, 817 N.W.2d at 724. By making conclusory arguments and raising different claims to us than he did to the postconviction court, he has failed to do so. These claims are therefore forfeited.

Villalpando, 259 F.3d 934 (8th Cir. 2001), for the proposition that eliciting damaging testimony from a prosecution witness can demonstrate ineffective assistance of trial counsel.

In *Villalpando*, defense counsel improperly elicited prejudicial character evidence that their client had ordered a murder unrelated to the drug and firearm offenses with which he was charged. *Id.* at 937. The district court in that case found that the cross-examination had "absolutely no strategic value," and presenting this evidence to the jury "was inherently unsound and unreasonable under prevailing professional norms." *Id.* (internal quotation marks omitted). The cases cited in *Villalpando* also relate to otherwise inadmissible evidence that was only admitted but for defense counsel's error. *Id.* at 939 (citing *Crotts v. Smith*, 73 F.3d 861, 864, 866 (9th Cir. 1996) (holding trial counsel was ineffective for failing to object to unfairly prejudicial testimony that the defendant had told third parties he was wanted for "killing a cop"); *Ward v. United States*, 995 F.2d 1317, 1318–19 (6th Cir. 1993) (concluding that trial counsel was ineffective for opening the door to evidence of defendant's character and propensity to make pipe bombs during cross-examination). Similarly, in our own case involving a defendant's challenge to evidence elicited during cross-examination, we found that testimony regarding a defendant's refusal to talk to officers was both prejudicial and inadmissible. *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979).

Those are not the circumstances here. In this case, trial counsel first established the medical examiner's estimated time of death, then proceeded to undermine that testimony through further cross-examination. None of this evidence was improper or unfairly

prejudicial, and we cannot say under our highly deferential standard of review that trial counsel's cross-examination strategy fell outside of a "wide range of professionally competent assistance." *Rhodes*, 657 N.W.2d at 844 (quoting *Strickland*, 466 U.S. at 690).

Allwine further claims that an investigation by his trial counsel showing other elders in the United Church of God were divorced would have undercut his alleged motive to murder Amy. This claim also fails. In a postconviction proceeding, the burden is on a petitioner to show facts entitling the petitioner to relief. *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). Allwine has not done so. Allwine faults his trial counsel for simply not introducing divorce decrees of elders in his church. But merely introducing divorce decrees does nothing to undercut any part of the State's case. Moreover, for motive purposes, it does not matter if the elders in his church were divorced unless Allwine knew about the divorces at the time of the murder, a fact that he does not allege. Choosing to not pursue this issue was not error on the part of the trial counsel.

Finally, as previously addressed, the crime scene log is not as damaging as Allwine suggests. There is no reasonable probability that had the log been introduced, the result would have been different. *See Strickland*, 466 U.S. at 694. Furthermore, trial counsel did argue that the time of death proposed by the medical examiner was wrong, but he did so using a witness instead of the crime scene log. Looking back on the trial and asking whether using the crime scene log would have been more effective evidence is the exact type of second-guessing that we should avoid. *See Rhodes*, 657 N.W.2d at 844.

Because none of Allwine's allegations, even when viewed in the light most favorable to him, demonstrate ineffective assistance of trial counsel, appellate counsel did

not render ineffective assistance of counsel by choosing not to raise them in the first postconviction proceeding.

D.

Allwine next claims that appellate counsel should have raised the State's alleged withholding of material evidence favorable to Allwine in violation of its *Brady* obligations. But even when this allegation is viewed in a light most favorable to Allwine, he is conclusively entitled to no relief.

Under *Brady*, suppression by the State of material evidence favorable to the defendant violates the constitutional guarantee of due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Three elements must be met to succeed on the claim of a *Brady* violation: "(1) the evidence must be favorable to the defendant as either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material." *Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018). Evidence is material under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (internal quotation marks omitted). Materiality must be more than speculative. *State v. Hathaway*, 379 N.W.2d 498, 507 (Minn. 1985). "Because a *Brady* materiality analysis involves a mixed issue of fact and law, we review a [postconviction] court's materiality determination de novo." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

The alleged *Brady* violations identified by Allwine include failing to disclose (1) the investigator's notes; (2) results of the "Hemo Trace" test on the washcloth allegedly used to clean Amy's blood; (3) BCA crime scene photos allegedly omitted from disclosure; (4) additional e-mails between dogdayGod and Besa Mafia, allegedly in the possession of the FBI, that included another Bitcoin address and stated that malware had been placed on dogdayGod's computer; (5) Lanterman's records of his prior expert testimony; (6) the surveillance video at the SuperAmerica gas station that Allwine allegedly visited the day of the murder; and (7) surveillance video that showed Allwine's neighbor mowing his lawn the day of the murder, despite claims by the State that the neighbor, who testified to seeing Amy alive in the late afternoon of November 13, 2016, was confused about the date and time he saw Amy alive.[7] Allwine claims that "[b]ecause Appellate counsel didn't do their discovery surrounding these issues, their performance fails the *Strickland* prong."

The contents of the investigator's notes, the results of the "Hemo Trace" test, and the allegedly omitted crime scene photos are all too speculative to satisfy the materiality requirement of *Brady*. *See Hathaway*, 379 N.W.2d at 507. Allwine offers no evidence as to what they contain, or if they even exist. Therefore, Allwine has not established that they are material.

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[7] Allwine also challenges in this appeal the alleged failure of the State to disclose the crime scene log. There is no evidence that the log was suppressed, but assuming the allegations are true, as we must in a postconviction petition, *Griffin*, 961 N.W.2d at 776, it is potentially impeaching material regarding time of death. But because Allwine did not raise the suppression of the crime scene log in his postconviction petition, his claim is forfeited. *Schleicher*, 718 N.W.2d at 445.

Allwine also does not sufficiently support the claim that the failure to disclose the allegedly suppressed e-mails in the FBI's possession is a *Brady* violation. To show a Brady violation, Allwine had to demonstrate that the evidence purportedly in the FBI's possession was "suppressed by the prosecution." *See Campbell*, 916 N.W.2d at 510. *Brady* requires that the prosecution learn of favorable evidence known to others acting on the prosecution's behalf in the case, including the police. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995). But we have never held that a county prosecutor is responsible under Brady to know of information held by the FBI as a matter of law. *Cf State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995) (holding that the non-disclosure of files held by the federal Bureau of Alcohol, Tobacco and Firearms (BATF) did not amount to a discovery violation by the State because "[t]he BATF, as a federal agency, does not 'report' to the Hennepin County prosecutor's office . . . ."). Allwine makes a bare assertion that the FBI is a state actor, but fails to provide any facts or authority to explain how the FBI was acting on behalf of Washington County in this case. *See Kyles*, 514 U.S. at 437. Allwine's failure to explain why any evidence held by the FBI should be imputed to the prosecution in this case under *Brady* falls short of his burden to set forth facts and legal support that entitle him to the relief requested. *State v. Ali*, 855 N.W.2d 235, 260 n.24 (Minn. 2014).

Similarly, Allwine does not explain how the State would have possession of the information on Lanterman that he sought for impeachment purposes. Additionally, a SuperAmerica video that does not show Allwine at the time when he supposedly was there is at best neutral, at worst incriminating, but certainly not exculpatory. And the information presented by the surveillance video of the neighbor was also disclosed to Allwine in

writing, and Allwine provides no reason why the written description of the video insufficient.

All of these claims are meritless, but even to the extent they may have some merit, our analysis suggests that appellate counsel could have legitimately concluded that we would have ruled against them. *Schneider*, 725 N.W.2d at 523. Consequently, even when these allegations are viewed in a light most favorable to Allwine, he is conclusively entitled to no relief.

E.

Allwine further alleges that the prosecution committed various acts of misconduct, that he raised these errors to his appellate counsel, and that appellate counsel's decision to instead "pursue their meritless issues" in the first appeal was "ineffective on their part." Allwine raises several instances of the prosecution allegedly eliciting false testimony: the medical examiner testifying that the investigator arrived at the crime scene at 7:00 p.m. when the crime scene log shows him arriving after 11:30 p.m.; Lanterman tracing a Bitcoin address to a deleted note on Allwine's iPhone, even though Allwine had no Bitcoin wallet on his iPhone but had one on his Samsung Galaxy phone; and asking whether the medical examiner would agree to a time of death of 3:15 p.m. Allwine also provides a number of alleged misstatements the prosecutor made to the jury, which included that Allwine was violent, that someone wearing socks was the source of prints during the clean-up of the murder, that a witness who saw Amy after the supposed time of death was mistaken, that Allwine was looking for a divorce, that Allwine called a woman he had an affair with after Amy's death, that Amy was incapacitated by drugs administered by Allwine, and that

Allwine accessed the Dark Web in early 2016. In the closing argument, the prosecutor also allegedly presented facts not in evidence about Amy's life insurance policy, someone cleaning the carpet in the master bedroom after Amy's death, and a note being deleted from Allwine's iPhone. Finally, Allwine claims the prosecutor made improper comments by stating "the defense wants to park your common sense."[8]

Allwine did not object to prosecutorial misconduct during trial, which means that had appellate counsel raised them in the first appeal, they would have been subject to plain error analysis. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Allwine, therefore, cannot prevail on his ineffective assistance of appellate counsel claim if his appellate counsel could have legitimately concluded this plain error argument would not prevail. *See Schneider*, 725 N.W.2d at 523.

Typically, to prove the existence of plain error, Allwine would have to show (1) error, (2) that is plain, and (3) affects his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But in prosecutorial misconduct claims, the third prong places the burden on the prosecutor to prove a lack of prejudice to the defendant's substantial rights.

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[8] Allwine claims that his Confrontation Clause rights were violated by (1) Detective Raymond's testimony about Allwine's work on the day of Amy's death based on a report generated by Allwine's employer and (2) the fact that Allwine was required to pay to receive the computer images generated by a third party from an examination of Allwine's devices. Allwine's claim regarding Detective Raymond's testimony as to his workflow on the day of the murder was not raised in his second postconviction petition and is therefore forfeited. *See Schleicher*, 718 N.W.2d at 445. Allwine also fails to explain why not being able to afford the fees charged to examine evidence held by a third party is a violation of the Confrontation Clause. The Confrontation Clause generally prohibits the admission of testimonial statements of witnesses who do not appear at trial. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The third party in question testified at trial, and Allwine was therefore not denied his right to confront any statements made by him.

Ramey, 721 N.W.2d at 302. The burden is still on the defendant, though, to show prongs one and two, which is usually accomplished by showing that the error "contravenes case law, a rule, or a standard of conduct." *Id.* To show prosecutorial misconduct for offering false testimony, the facts alleged must show, for example, that the State "deliberately offered perjured testimony or violated the rules of discovery." *Carridine v. State*, 867 N.W.2d 488, 496 (Minn. 2015). In assessing prosecutorial misconduct, we also consider the amount of objectionable conduct, whether the prosecutor emphasized or dwelled on it, and the strength of the evidence against a defendant. *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007).

Here, no evidence shows that the State intentionally violated "case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Most of the statements at issue in the prosecutor's closing argument are reasonable inferences from the record, even if there was no direct testimony or conflicting testimony stating as such (for example, although there was no direct testimony that Amy was incapacitated by drugs administered by Allwine, or that Allwine accessed the Dark Web in early 2016, those statements are reasonable inferences from the record).

But there were some passing statements involving evidence that was not elicited at trial (for example, information about Amy's life insurance policy, that someone cleaned the carpet in the master bedroom after Amy's death, and that a note was deleted from Allwine's iPhone). These facts were not heavily emphasized or dwelled upon, and the other evidence against Allwine, particularly the digital forensic evidence, was very strong. *See Allwine I*, 963 N.W.2d at 187–88. Therefore, even if these statements were error, the

State has met its burden to show that the statements did not affect Allwine's substantial rights. *Wren*, 738 N.W.2d at 394. Because we find Allwine's prosecutorial misconduct claim unavailing, appellate counsel could have legitimately concluded this argument would not prevail. *Schneider*, 725 N.W.2d at 523. Allwine's appellate counsel was therefore not ineffective in declining to raising these issues. Consequently, even when these allegations are viewed in a light most favorable to Allwine, he is conclusively entitled to no relief.

F.

Allwine additionally alleges that appellate counsel was ineffective for failing to raise a claim that the district court abused its discretion in allowing *Spreigl* evidence.[9] He argues that the district court improperly admitted the *Spreigl* evidence of his prior affairs. Specifically, he reasons that the State failed to give adequate notice that it would be seeking to admit the evidence. He observes that the *Spreigl* notice must be given at or before the omnibus hearing, but notice was not provided to him until months later.

The argument Allwine makes now on appeal, however, is not the same claim he made before the district court in his second postconviction petition. Below, Allwine did not claim that the State did not follow the correct procedure for providing notice of an intent to rely on *Spreigl* evidence. He simply claimed that the *Spreigl* evidence was

[9] "*Spreigl* evidence is evidence of a defendant's prior crimes, wrongs, or acts, which would otherwise be inadmissible, but which the state can seek to have admitted for the limited purpose of showing motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003).

improper character evidence.[10] But even if we assume without deciding that Allwine sufficiently raised a procedural objection to the admission of *Spreigl* evidence in his second postconviction petition, Allwine's claim still fails even when viewed in the light most favorable to him.

The requirements for notice are not nearly as rigid as Allwine suggests. The text of the rule governing the timing for a *Spreigl* notice reads:

> In felony and gross misdemeanor cases, the notice must be given at or before the Omnibus Hearing under Rule 11, or as soon after that hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor.

Minn. R. Crim. P. 7.02, subd. 4(a). The rule itself contemplates that notice may be given after the omnibus hearing if the prosecutor did not know about the other crime, wrong, act, or specific instance of conduct at the time of the omnibus hearing. In a postconviction proceeding, the burden is on Allwine to allege facts that would entitle him to relief. *Turnage*, 729 N.W.2d at 599. Allwine clearly alleges that the notice was not given by the omnibus hearing, but he does not address when the prosecutor became aware of the evidence. Without asserting that the prosecutor knew of the affairs at the time of the omnibus hearing, Allwine failed to carry his burden of proof on the *Spreigl*-related claim, and his ineffective assistance claim thus fails.[11]

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[10] Allwine does not press this argument before us; he now only argues that the State failed to give adequate *Spreigl* notice.

[11] Allwine also argues that appellate counsel was ineffective for raising meritless issues. But even assuming appellate counsel's arguments were meritless, to succeed on an ineffective assistance of counsel claim, Allwine must show a reasonable probability that

G.

Finally, Allwine claims that even if the errors alleged were independently insufficient to warrant reversal, the cumulative effects of the errors require a new trial. Allwine describes the errors as "obvious" and claims that appellate counsel's failure to raise the argument about their cumulative effects was ineffective assistance of appellate counsel.

As previously stated, in a postconviction proceeding, the burden is on a petitioner to show facts entitling them to relief. *Turnage*, 729 N.W.2d at 599. Cases when the cumulative effect of errors entitle a defendant to a new trial are "rare," and involve considering both "the egregiousness of the errors and the strength of the State's case." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). Here, the evidence against Allwine was strong, and any errors were not egregious. Therefore, Allwine has not demonstrated a reasonable probability that the result of the proceeding would have been different had his appellate counsel raised these arguments, and his argument therefore fails under the second prong of *Strickland*. *See* 466 U.S. at 694. Consequently, even when these allegations are viewed in a light most favorable to Allwine, he is conclusively entitled to no relief.

II.

Allwine next claims that the postconviction court abused its discretion in refusing to compel the State to produce allegedly withheld evidence in violation of *Brady v.*

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his case would have had a different result without the error. *See Strickland*, 466 U.S. at 694. Appellate counsel raising allegedly meritless issues does not mean that the result of Allwine's appeal would have been different had his counsel not raised the issues, and this claim therefore fails under the second prong of *Strickland*.

Maryland, 373 U.S. 83 (1963). He argues that he is not seeking new evidence, but instead looking for the evidence supposedly withheld by the State during trial.

Judges have "wide discretion" in issuing discovery orders, and those orders will not be disturbed "absent clear abuse of that discretion." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (citation omitted) (internal quotation marks omitted). Furthermore, *Knaffla* bars all claims raised in Allwine's previous appeal, known at the time of his appeal, or that should have been known at the time of his appeal, from being considered in a subsequent petition for postconviction relief. *See Leake*, 737 N.W.2d at 535 (citing *Knaffla*, 243 N.W.2d at 741).

Allwine himself acknowledges that the discovery request at issue was filed by his original trial counsel. Because the claims were known at the time of his direct appeal, they are *Knaffla*-barred and we cannot grant the relief he seeks on this basis.

III.

Allwine claims that the district court abused its discretion by denying a *Schwartz* hearing on alleged jury misconduct. According to Allwine, a juror told a third party that the jury could not decide whether Allwine pulled the trigger to kill Amy. The juror then told the third party that they "heard that Mr. Allwine just needed to be involved." Allwine therefore requested an evidentiary hearing to determine whether the juror received improper extraneous information.

In the context of a postconviction petition, a petitioner has the burden to set forth facts that entitle them to the relief requested. *Turnage*, 729 N.W.2d at 599 ("We have said that to carry this burden petitioners must do more than offer conclusory, argumentative

assertions, without factual support."); *see also Rainer v. State,* 566 N.W.2d 692, 695 (Minn. 1997) (holding that an anonymous letter was insufficient to entitle petitioner to an evidentiary hearing). A *Schwartz* hearing is not required until a defendant establishes a prima facie case of jury misconduct. *State v. Anderson*, 379 N.W.2d 70, 80 (Minn. 1985).

Here, Allwine has failed to meet his burden. First, no timeline is given for when this comment was raised. If the comment was raised before Allwine's direct appeal or first postconviction appeal, it is *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741. There is also no allegation as to the source of the alleged statement that "Mr. Allwine just needed to be involved." Additionally, the comment made is also not necessarily contrary to the jury instructions. The State had to prove whether Allwine "cause[d] the death of a human being with premeditation and with intent to effect the death of the person or of another." Minn. Stat. § 609.185(a)(1). Nowhere did the court say that Allwine had to be the one to pull the trigger of the gun, because "caus[ing] the death of a human being with premeditation" would have still been satisfied if Allwine had hypothetically hired a contract killer to kill Amy, and that person shot her. *See Allwine I*, 963 N.W.2d at 188 n.15 (explaining that aiding and abetting is *not* a separate offense, but rather is a theory of criminal liability). Because Allwine failed to meet his burden, the district court did not err when it denied his claim of juror misconduct. Consequently, even when these allegations are viewed in a light most favorable to Allwine, he is conclusively entitled to no relief.

IV.

Lastly, Allwine claims that the district court abused its discretion by not granting him a postconviction evidentiary hearing. But, as detailed above, none of the arguments

raised by Allwine would entitle him to relief, even if the facts he alleged were assumed to be true. When allegations in a postconviction petition, even when assumed to be true, are legally insufficient to entitle a petitioner to relief, denying the petition without a hearing is appropriate. *Rossberg v. State*, 932 N.W.2d 6, 9 (Minn. 2019). Therefore, the district court did not abuse its discretion in denying Allwine an evidentiary hearing.

CONCLUSION

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

Affirmed.