

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

Stephen Carl Allwine,

Petitioner,

vs.

State of Minnesota,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING PETITION FOR
POSTCONVICTION RELIEF**

Court File No: 82-CR-17-242

This matter came on Petitioner's Petition for Postconviction Relief before Douglas B. Meslow, on March 11, 2022. Petitioner is self-represented. Respondent is represented by Nicholas A. Hydukovich, Assistant Washington County Attorney.

NOW THEREFORE, having considered all the facts and circumstances surrounding this matter and the pleadings filed in connection with this Petition, this Court makes the following:

FINDINGS OF FACT

1. On November 13, 2016, Amy Allwine ("Amy") died of a gunshot wound to the head. On January 18, 2017, Petitioner Stephen Carl Allwine ("Allwine") was charged with Second Degree Murder-Intentional. On March 24, 2017, Allwine was indicted on First Degree Murder-Premeditated. The jury convicted Allwine of First Degree Murder – Premeditated following a trial that lasted from January 12, 2018, through January 31, 2018.
2. On February 2, 2018, Allwine was sentenced to life imprisonment for the crime of Murder in the First Degree - Premeditated in violation of Minn. Stat. §609.185(a)(1) for the murder of Amy.
3. On May 31, 2018, Allwine filed an appeal with the Minnesota Supreme Court.
4. On April 2, 2019, the Minnesota Supreme Court granted Allwine's motion to stay his appeal to allow him to file a Petition for Postconviction Relief in district court.
5. On August 1, 2019, Allwine filed a First Petition for Postconviction Relief. Allwine did not file a memorandum of law with the First Petition.

6. On September 9, 2019, the Court issued an Order requiring Allwine to file and serve his memorandum of law by December 19, 2019, and the State to file its response by January 15, 2020 (“Briefing Order”).

7. On March 2, 2020, Allwine filed a “Second” Petition for Postconviction Relief (which was essentially an Amended Petition for Postconviction Relief) and a memorandum of law.

8. On June 12, 2020, Allwine filed his response to the State’s brief. Allwine also filed a letter requesting to keep the record open to obtain documentation from Allwine’s trial counsel and information from Allwine’s hired experts. On June 16, 2020, the State filed a letter opposing Allwine’s request to keep the record open. The Court kept the record open until June 22, 2020, when a phone conference was held with the attorneys to discuss Allwine’s request to keep the record open. The Court denied the request to continue keep the record open during the phone conference. Thus, the record closed on June 22, 2020.

9. On September 21, 2020, the Court issued Findings of Fact, Conclusions of Law and Order denying Allwine’s Petition for Postconviction Relief (“Postconviction Order”).

10. Allwine’s appellate counsel filed (3) motions for reconsideration, all of which were denied.

11. The Minnesota Supreme Court reinstated Allwine’s appeal and he also appealed this Court’s Postconviction Order. The Supreme Court affirmed Allwine’s conviction and this Court’s Postconviction Order. *State v. Allwine*, 963 N.W.2d 178 (Minn. 2021).

The following evidence was introduced at trial:

12. Allwine and Amy were married in 1998. (12T. p. 32).¹ Allwine was a member of the United Church of Christ and an elder in the church. (12T. pp. 42-44).

13. Allwine had three extramarital affairs. (12T. pp. 182-84, 196, 198-99; 13T. 43-44, 118-33).

¹ The transcripts are filed in 16 volumes for hearing dates from March 24, 2017, through January 31, 2018, which is the date of the first appearance following the indictment through the last day of trial. The transcripts are labeled by Roman numerals. Transcript Volume #16 from January 31, 2018, the last date of trial, is incorrectly labeled Volume VII. For ease of reading and because two of the filed transcripts from two different trial days are labeled as Volume VII, this Order will refer to the transcripts by numbers rather than Roman numerals.

14. In May 2016, the FBI learned that a person was attempting to hire a hitman to kill Amy through the Besa Mafia website on the Dark Web.² (15T. p. 34, Ex. 124). A person with the screen name dogdayGod sent the following message to Besa Mafia:

I am looking to hire you for a hit, but what is the recommended way to convert cash to bitcoin anonymously. If I pull \$5000 out for a hit, after the hit I assume that the police would see that draw and wonder where it went, so even if the bitcoins are not traceable, that missing money would raise suspicion? Is there a way to make it look like I am buying something and end up with bitcoins so that the money looks like it is going to something tangible and not cash to pay for a hit?

15. On May 31, 2016, FBI Special Agent Asher Silkey and a Cottage Grove police detective met with Amy to notify her of the hit attempt. (2T. p. 73). DogdayGod sent messages to the Besa Mafia regarding a March 19, 2016, business trip that Amy was taking to Moline, Illinois.³ DogdayGod provided the address of the hotel where Amy was staying, a physical description of her, a description of her vehicle, and a picture of Amy. (Ex. 125, 127).

16. On July 31, 2016, Amy called Special Agent Silkey to report that on July 24, 2016, and July 31, 2016, she received anonymous emails telling her to commit suicide and threatening to harm her family members if she did not commit suicide. (2T. pp. 76-77, 79; Ex. 83, 84). The July 24, 2016, email contained details such as her parents' address and the color of shirt that her son was wearing the Friday before the email was sent. (Ex. 84).

17. Police recovered email messages on one of Allwine's email accounts that were exchanged with a person named Ryan Seidel regarding purchasing Bitcoin. (14T. pp. 143-44). On March 4, 2016, Ryan Seidel met a man who he could not identify at a Wendy's restaurant in Minneapolis. (14T. pp. 144-45, 147-48). The man paid \$6,000.00 for Bitcoin. (14T, pp. 143, 145, 156). Allwine had a dinner date that night with Michelle Woodard, a woman with whom he was having an affair. (T14. pp. 120, 129). Allwine texted Ms. Woodard and told her that he would be late because he had met a man at a fast-food restaurant to "exchange" Bitcoin and he locked his keys in his truck. (T.14. p. 129).

² Besa Mafia is a "store" on the Dark Web that advertises itself as a forum to hire a hitman.

³ The FBI was provided this information in May 2016 from a confidential source who obtained it through a hack of the Besa Mafia website. Thus, the emails were sent prior to May 2016.

Allwine's cell phone records indicate that he called his insurance company for lockout assistance at a Wendy's in Minneapolis on March 4, 2016. (T.14. p. 81).

18. On March 7, 2016, Allwine reported to the Cottage Grove Police Department that he was scammed of \$6,000.00 in Bitcoin from a man named Mark while trying to purchase computer, lab gear, and study material. (12T. 187-88). Police found no emails on any of Allwine's accounts with a man named Mark to purchase training supplies. (12T. pp. 206-07).

19. On the day that Amy was killed, Allwine reported to police that Amy told him around 12:15-12:30 p.m. that she was feeling dizzy and lightheaded and went to lie down in her bed. (Ex. B at p. 4 – transcript of Allwine's November 15, 2016, interview with police).

20. Amy's father was at the Allwine residence the day that Amy died from approximately 1:00 – 2:00 p.m. to finish installing a dog door in the home. (12T. pp. 38-39). Allwine called Amy's father shortly after 2:00 p.m., just after he left the home, and asked him to pick up the Allwines' son, Joseph, so he could take Amy to the clinic. (12T. p. 39). Allwine told Amy's father that he would pick up Joseph at 5:30 p.m. (*Id.*)

21. Amy never went to the clinic. (Ex. B pp. 5-6). Allwine told police that he checked on Amy later in the afternoon and then went back downstairs and finished work. (Ex. B pp. 5-6). The records from Allwine's employer show his last actions on November 13, 2016, were at 12:51 p.m. (12T. p. 165).

22. Amy was shot in the head at 3:15 p.m. or earlier on November 13, 2016. (16T. pp. 58-59).

23. Allwine called Amy's father around 5:00 p.m. and told him that he may be late picking up Joseph because he had to get gas. (12T. p. 40). Allwine arrived at the home of Amy's father to pick up Joseph at 5:30 p.m. (*Id.*). Allwine and Joseph went to Culver's for dinner and arrived home at 6:52 p.m. and found Amy dead. (12T. pp. 128-29, Ex. B at p. 6).

24. Officers found Amy in a bedroom, face up on the floor with a handgun in her left forearm. (11T. pp. 62, 75, 76). The Sergeant at the scene confirmed that Amy was right handed and testified that he had never known someone to commit suicide with a gun using their non-dominant hand. (11T. pp. 136-37).

25. Crime scene investigators opined that Amy had been moved because she was found face up, but the blood from her nose and mouth flowed left and the blood stain patterns near her head showed blood that had dripped from an elevated position above the floor. (11T.

pp. 198-200). Amy's blood was found on the wood floor outside the bedroom. (11T. pp. 207-08).

26. The BCA analyzed swabs taken from the trigger, slide, and pistol grip of the gun found next to Amy which contained mixtures of DNA from which Allwine and Amy could not be excluded, but which excluded over 99% of the world population. (14T. pp. 46-47). Allwine's hands were swabbed the night of the killing and gunshot residue was found on his right hand. (13T. pp. 14, 16-17).

27. Amy had an elevated level of Scopolamine in her system that she ingested orally. (13T. p. 37; 16T. p. 31). Scopolamine is a prescription drug used to treat motion sickness and Amy did not have a prescription for Scopolamine. (13T. pp. 28-29; 16T. pp. 30-31). Scopolamine can cause impaired thought, blurred vision, and slow movement. (13T. p. 38). DogdayGod made two posts on a website asking whether there was a seller of Scopolamine located in the Minneapolis area. (12T. pp. 204-06).

28. Police seized electronic devices from Allwine and his home and delivered (66) devices to Mark Lanterman, Chief Technology Officer of Computer Forensic Services, to analyze.⁴ (11T. p. 137; 14T p. 74; 15T pp. 4, 10).

29. A TOR browser is needed to access the Dark Web and Lanterman found a TOR browser installed on a MacBook obtained from Allwine's home with the user name "S Allwine." (15T. pp. 52 -53).

30. Lanterman found that a virtual private network was installed on the MacBook, which can be used to encrypt internet communications. (15T. pp. 52-53). On July 16, 2016, the MacBook user searched the term "Guerilla mail," which is a service that allows users to send anonymous emails. (15T. p. 54).

31. Lanterman found a note with the email address exqpliqv@sharklasers.com on an iPhone 6S named "S Allwine's iPhone," which Allwine gave to police the night of the murder. (11T. p. 64, 12T p. 122, 15T. p. 56). Sharklasers.com is a service that allows users to send anonymous emails. (15T. p. 56).

32. On February 16, 2016, dogdayGod sent an email to Besa Mafia stating that Amy would be traveling to Moline, Illinois in March 2016, which is a three-hour drive from Chicago, and asked for the price in Bitcoin for doing the hit and making it look like an

⁴ Allwine does I.T. work for two companies, which may explain the large number of devices located at the home.

accident. (15T. 38-39). Five minutes before dogdayGod sent the message to Besa Mafia, the user of the MacBook did a Google search for “Moline, IL” and clicked on a map showing the driving distance between Moline and Chicago. (15T. p. 39).

33. On March 5, 2016, dogdayGod sent a link of a photo of Amy to the Besa Mafia. (15T. p. 41). The photo link of Amy came from the website sallwine.net, but was not posted on that website until 45 minutes before dogdayGod sent the email to Besa Mafia. (15T. p. 44). The MacBook was used to browse photos on Amy’s Facebook account the day before the link to Amy’s photo was sent to Besa Mafia. (15T. p. 44).

34. The first threatening email was sent to Amy on July 24, 2016. (15T. pp. 57-58). The email stated that the sender knew where her parents, brother, and sister lived and obtained this information from a website called radaris.com. (15T. pp. 58-59). The MacBook accessed the radaris.com website and searched for Amy’s relatives on July 8, 2016, and July 23, 2016. (15T. pp. 60-61).

35. On February 14, 2016, dogdayGod sent a message to Besa Mafia requesting to hire a hit and pay for it in Bitcoin. (15T. pp. 36-37). The MacBook was used to search for Bitcoin mining software later that day and an app called Bitcoin Wallet was installed on Allwine’s Samsung Galaxy G5 cell phone. (15T. p. 37; 12T. pp. 149 -50).

36. On March 22, 2016, dogdayGod sent a message to Besa Mafia indicating that Bitcoin was sent to the wrong Bitcoin “address.” (15T. p. 47). The message provided a 34-character code where the Bitcoin was sent and asked if Besa Mafia could “match up” the address. (15T. pp. 46-47).

37. Lanterman found that Allwine’s iPhone had been backed up to the MacBook. (15 T. pp. 47-48). A deleted note from the Notes app on Allwine’s iPhone was recovered on the MacBook. (15T. pp. 48-49). The note contained the same 34-character Bitcoin Wallet address referenced in dogdayGod’s message to Besa Mafia was found on the MacBook.⁵ (15T. pp. 48-49). The note with the Bitcoin Wallet address was created on Allwine’s iPhone on March 22, 2016, at 9:54:04 a.m. (15T. p. 50). DogdayGod sent the message to Besa Mafia that contained the 34-character Bitcoin Wallet address 23 seconds after the note was created and 40 seconds later the note was deleted. (15T. p. 50).

38. Following a seven-day trial, the jury convicted Allwine of First Degree Murder – Premeditated.

Allwine's Postconviction Motions:

39. Allwine requests that his conviction be vacated; that the Court grant a new trial; or that an evidentiary hearing be held on the basis of (1) juror misconduct and (2) ineffective assistance of appellate counsel.

From the foregoing Findings of Facts, this Court makes the following:

CONCLUSIONS OF LAW

1. Minn. Stat. §590.01, subd. 1, provides, in pertinent part, as follows:

[A] person convicted of a crime, who claims that: the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state ... may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to ... grant a new trial ... or make other disposition as may be appropriate.

2. Minn. Stat. § 590.04, subd. 1 provides that:

Unless the petition and the files and records conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response thereto, and promptly determine the issues, make findings of fact and conclusions of law with respect thereto, and either deny the petition or enter an order granting appropriate relief.

3. To obtain an evidentiary hearing on a petition for postconviction relief, the petitioner must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002)(citation omitted). "The reviewing court considers the totality of the evidence before the judge or jury in making this determination." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003)(citation omitted).

4. "The petition must allege "more than argumentative assertions without factual support.'" *Nissalke v. State*, 861 N.W.2d 88, 91 (Minn. 2015)(*rehearing denied* May 20, 2015)(citation omitted).

5. On appeal, a post-conviction court's determinations will not be overturned absent an abuse of discretion. *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn.1995).

⁵ Bitcoin transactions come out of a Bitcoin Wallet and each wallet has a unique 34-character code. (15T. pp. 16-17).

6. “[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 309 Minn. 246, 252 (1976).

7. The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided by the court of appeals or the supreme court in the same case. Minn. Stat. § 590.04, subd. 3.

8. “The *Knaffla* rule is subject to two exceptions: (1) if a claim is known to a defendant at the time of the direct appeal but is not raised, it will not be barred by the rule if the claim's novelty was so great that its legal basis was not reasonably available when direct appeal was taken; and (2) even if the claim's legal basis was sufficiently available, substantive review may be allowed when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.” *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846-47 (Minn. 2008).

Juror Misconduct:

9. Allwine claims that a juror told his former pastor that the jury was not convinced that he pulled the trigger and that they were “told” he had to be involved and therefore voted to convict. Allwine contends that this is contrary to the jury’s instructions. Allwine does not state who told the jury this statement.

10. Allwine’s claim is unsupported by the record. The jury was not told Allwine “had to be involved.” The jury was properly instructed on the elements of First Degree Murder. (17T – pp. 8-9). Allwine cites Minn. Stat. §631.09 as support for his claim of juror misconduct. Minn. Stat. §631.09 states as follows:

At the close of the evidence and after the court has charged the jury, the jury may decide the case in court or retire for deliberation. If the jury cannot agree on a verdict without retiring, the court shall swear one or more officers to take charge of the jury. The jury must be kept together in some private and convenient place. No person may be permitted to speak or communicate with any juror, unless by order of court, nor may a person listen to its deliberations. The jury must be returned to court upon agreeing on a verdict or when so ordered by the court. In case of mixed juries counties shall provide adequate, separate quarters for male and female jurors with proper accommodations. If the county fails to provide proper accommodations, the court shall order the jurors to be housed in a suitable hotel for the night.

This section applies only if the jury has failed to agree.

11. Allwine fails to explain how Minn. Stat. §631.09 was violated. Allwine's claim of juror misconduct is nothing more than argumentative assertions without factual support, which do not entitle him to relief.

12. Even if Petitioner's vague accusation is true, there is no evidence of misconduct here. The rules of evidence prohibit the inquiry that Allwine seeks:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form.

Minn. R. Evid. 606(b).

13. Allwine fails to allege sufficient facts that extraneous prejudicial information was improperly brought before the jury; that any outside influence was brought upon a juror; or that there were any threats of violence or violent acts against any juror.

14. Additionally, Allwine fails to allege when he learned of this claim of juror misconduct. If it was before his appeal, it is *Knaffla*-barred.

Ineffective Assistance of Appellate Counsel:

15. The state and federal constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686; 104 S.Ct. 2052, 2063 (1984).

16. Claims of ineffective assistance of appellate counsel are not *Knaffla*-barred in the first petition for postconviction relief filed after a direct appeal because the issue could not have been raised on direct appeal. *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

17. "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

18. “To receive an evidentiary hearing on an ineffective assistance of counsel claim, a petitioner must allege facts that would ‘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).

19. “[T]he standard for attorney competence is ‘representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.’” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)(citation omitted).

20. Review of counsel’s performance under the first prong of the *Strickland* test is highly deferential. *Griffin v. State*, 941 N.W.2d 404, 408 (Minn. 2020)(citation omitted).

21. “There is a strong presumption ‘that counsel’s performance fell within a wide range of reasonable assistance.’” *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003)(citation omitted).

22. “Counsel’s decisions regarding trial strategy are granted particular deference.” *Id.*

23. “Appellate counsel need not raise all possible claims on direct appeal, and a claim need not be raised if appellate counsel could have legitimately concluded that [it] would not [prevail].” *Leake* at 536 (citation omitted).

24. The Minnesota Supreme Court has held that “[l]awyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.” *Dobbins v. State*, 788 N.W.2d 719, 729 (Minn. 2010) (citation omitted). Appellate counsel need not raise issues merely because their client wants them to. *Id.*

25. “[T]here is no presumption of prejudice in an ordinary case involving a claim of ineffective assistance of counsel where there is no claim of a conflict of interest by defense counsel; rather, the defendant must show that counsel’s errors ‘actually’ had an adverse effect in that but for the errors the result of the proceeding probably would have been different.” *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987) (citing *Strickland* at 693-94).

26. “In determining whether prejudice has been shown, ‘the court must consider the totality of the evidence.’” *Id.*

Alleged failure of appellate counsel to submit evidence into the postconviction record before it closed

27. Allwine contends that appellate counsel was ineffective because she failed to introduce two expert reports and a crime scene access log. Dr. Arden's report was submitted on November 9, 2020, with Allwine's second motion to reconsider the Postconviction Order and computer expert John Carney's report was filed on December 3, 2020, with Allwine's third motion to reconsider the Postconviction Order. Allwine contends that the expert reports likely would have changed the verdict and that he was prejudiced because the Supreme Court's opinion denied his ineffective assistance of trial counsel claim based on the absence of the expert reports.

28. Allwine's argument ignores this Court's previous findings. In the Postconviction Order, this Court found "[w]hat evidence to present to the jury, including which witnesses to call, represents an attorney's decision regarding trial tactics and lies within the proper discretion of trial counsel." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). This Court concluded that trial counsel's "decisions regarding which experts to hire is protected trial strategy and is not ineffective assistance of counsel." That conclusion was not disturbed by the Supreme Court on appeal.

29. Allwine argued in his first motion to reconsider the Postconviction Order that he thought he had more time to submit expert reports before the record closed in his first postconviction motion. On October 16, 2020, this Court issued an Order denying Allwine's first motion to reconsider which stated as follows: "The Court ruled in the Postconviction Order that trial counsel was not ineffective for failing to hire certain experts. Thus, even if Defendant produced a report from an expert that differed from what was presented at trial, he is not entitled to relief." (Conclusion of Law 3).

30. Since this Court concluded that trial counsel engaged in trial strategy by deciding which experts to hire and call as witnesses at trial, the expert reports were irrelevant. Thus, Allwine has failed to show that any unreasonable representation by appellate counsel that prejudiced him.

Allegations that appellate counsel was ineffective for raising meritless issues

31. Appellate counsel argued in the first petition for postconviction relief that the prosecutor committed a discovery violation by failing to disclose exculpatory evidence she received after trial. This Court found in its Postconviction Order that "Minn. R. Crim. P.

9.01 and 9.03 do not impose an ongoing duty on the prosecutor to disclose evidence after trial.” *Allwine* contends that this demonstrates ineffective assistance of appellate counsel.

32. This bare allegation fails to meet the second prong of the *Strickland* test because it does not allege any facts related to how the result would have been different if appellate counsel had not raised this issue.

Alleged failure to timely submit alternative perpetrator evidence

33. Allwine alleges that appellate counsel was ineffective for failing to submit new evidence of regarding Kristin Elmquist (“Elmquist”), who owned a dog training business that competed with Amy’s business. Specifically, Allwine alleges that the emails suggest that Elmquist was dogdayGod.

34. Allwine claimed in his first Petition for postconviction relief that trial counsel failed to investigate Elmquist as an alternative perpetrator. He now contends that there was evidence that appellate counsel should have raised in the postconviction proceeding that supports Elmquist as an alternative perpetrator. “Assuming, without deciding, that Allwine's trial counsel did not pursue an alternative perpetrator theory, such an omission fails to state a claim of ineffective assistance of trial counsel as a matter of law. Under well-established law, the decision to pursue alternative perpetrators is a matter of trial strategy that we do not scrutinize.” *Allwine* at n. 19.

35. This allegation fails to meet the second prong of the *Strickland* test because it does not allege any facts related to how the result would have been different if appellate counsel had raised this issue.

Spreigl evidence

36. Allwine contends that appellate counsel failed to raise the issue that the trial court abused its discretion by allowing *Spreigl* evidence. Allwine also does not specify what *Spreigl* evidence was erroneously admitted or why it was unreasonable for appellate counsel to fail to raise this issue.

37. As such, Allwine has failed to rebut the “strong presumption ‘that counsel's performance fell within a wide range of reasonable assistance.’” *Miller* at 716.

Denial of motion for judgment of acquittal

38. Allwine contends that appellate counsel failed to raise the issue that the trial court abused its discretion by denying his motion for judgment of acquittal following the State’s case because “the evidence presented by the State pointed to” his innocence.

39. In finding the evidence sufficient to support his conviction, the Supreme Court relied on facts presented during the State's case, not during Petitioner's case. *See Allwine* at 187-88. Allwine fails to show that there is any reasonable likelihood this claim would have succeeded on appeal. Thus, Allwine fails to meet the second prong of the *Strickland* test because he does not allege sufficient facts related to how the result would have been different if appellate counsel challenged the denial of the motion for acquittal.

Brady violations

40. Allwine contends that appellate counsel was ineffective for failing to raise the issue that the prosecutor committed a *Brady* violation regarding the following evidence:

- 45 photos taken by the BCA after luminol was sprayed in the home that allegedly demonstrates that Allwine did not clean up the scene;
- Notes of Medical Examiner Investigator Jonathan Banks that demonstrate that Amy died after he left the home;
- Besa Mafia emails that prove that Allwine is not dogdayGod;
- Video from SuperAmerica that shows he was there the night Amy died which supports his alibi that he was not at the home when she died;
- Trailcam photos that contradict the State's timeline of when Amy was alive; and
- Hemo-trace test results from a blue washcloth that indicate dog blood which refutes the State's contention that Allwine used the washcloth to clean up Amy's blood.

41. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005)(citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)).

42. "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. In other words, the absence of the evidence must have caused prejudice to the defendant." *Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018)(citations omitted).

43. Allwine fails to sufficiently establish that the evidence is material. Most of the claimed violations were issues at trial. “Counsel's decisions regarding trial strategy are granted particular deference.” *Miller* at 716.

44. “[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,” *Strickland* admonishes reviewing courts to ‘judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.’ In *Strickland's* words, “[j]udicial scrutiny of counsel's performance must be highly deferential.” *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003)(citation omitted).

45. What issues to raise in a postconviction motion is protected strategy and is not ineffective assistance of counsel.

Alleged ineffective assistance of trial counsel

46. Allwine claims that appellate counsel was ineffective for failure to raise the issue that trial counsel was ineffective by failing to issue a subpoena for a supervisor of his employer to testify regarding his “lack of actions” on his computer the day Amy was killed.

47. Conclusion of Law 29 of this Court’s Postconviction Order states that an attorney’s decision on which witnesses to call is a question of trial strategy. *Doppler* at 633. Allwine has failed to demonstrate that the decision of appellate counsel to not challenge this issue was unreasonable.

Alleged failure to correct misleading testimony

48. Allwine claims that appellate counsel was ineffective for failure to raise the issue that the prosecutor committed misconduct by not correcting the false testimony of A.H. regarding a call to her by Allwine in mid-November that “did not happen;” Mark Lanterman’s testimony regarding tracing the Bitcoin to Allwine’s phone when it was a Besa Mafia address; and Dr. Mills’ testimony that Jonathan Banks arrived on scene at 7:00 p.m. when the Crime Scene Access log shows he did not arrive until 11:31 p.m. --- which changes the time of death window by 4.5 hours.

49. Regarding correction of the testimony of A.H., a woman Allwine dated, she never testified to the jury regarding a phone call in mid-November. A.H. testified that she went on one date with Allwine in April 2015. 13T- pp. 45-47 A.H. accidentally called Allwine from one of the “Steve” contacts in her phone, but she could not recall the date. *Id.*

The “testimony” Allwine references in his motion was the prosecutor making an offer of proof to the trial court outside the presence of the jury regarding the substance of A.H.’s testimony. 4T – p. 13.

50. As to the testimony of Dr. Mills and Mark Lanterman, Allwine has not demonstrated that their testimony was false. Even if he could demonstrate the testimony was false, he fails to show that the prosecutor knew the testimony was false and failed to correct it. Thus, Allwine has failed to show that appellate counsel acted unreasonably by not raising these claims of prosecutorial misconduct or that the outcome would have been different.

Alleged prosecutor misconduct – turning over evidence to a third party

51. Allwine contends that appellate counsel should have argued that prosecutors committed misconduct by allowing a third party, Mark Lanterman, to examine various electronic devices. Yet again, this is a question of which issues to raise on appeal, a strategic question not scrutinized by reviewing courts.

52. Allwine cites no authority for the proposition that it is misconduct to have a “third party” examine evidence in a case. As a result, Allwine has also failed to demonstrate that reasonable appellate counsel would have raised this issue or that raising the issue would have been reasonably likely to lead to a different outcome on appeal.

53. Allwine contends that Mr. Lanterman wanted to charge him \$40,000 for images which he could not afford. This has nothing to do with the prosecutor. Allwine’s appellate counsel submitted a Minn. Stat. §611.21 request for approximately \$45,000.00 in funds to obtain mirror images of digital forensic items from Mr. Lanterman after trial for an expert witness that he planned to retain for his postconviction relief petition. On September 5, 2019, that request was denied by this Court on the grounds that Allwine “failed to establish the need for the requested services and/or financial inability to pay for those services.” Thus, this is not an ineffective assistance of appellate counsel issue.

Alleged prosecution misconduct in closing argument

54. Allwine claims that appellate counsel was ineffective for failure to raise the issue that the prosecutor committed misconduct in closing arguments by making several statements without evidence.

55. This issue was raised by appellate counsel in the first postconviction proceeding as to some of the statements Allwine currently asserts were made “without evidence in the record.” Specifically, statements made in closing regarding Allwine’s church and its position on divorce. “The prosecutor's argument need not be ‘colorless,’ and it may include

conclusions and inferences that are reasonably drawn from the facts in evidence.” *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010)(citations omitted).

56. Allwine fails to explain how the statements he alleges are misconduct were misstatements of the evidence at trial, as opposed to accurate statements of or reasonable inferences from the evidence. Thus, Allwine fails to show that failure to raise these claims was unreasonable or that raising the claims were reasonably likely to change the outcome on appeal.

57. Allwine also claims that appellate counsel was ineffective for failure to raise the issue that the prosecutor committed misconduct in closing arguments by improperly challenging one of the witnesses regarding time of death. The prosecutor stated:

Dean Cranston. Nice guy. Hard worker.
He's a shift worker. He said so. Wasn't wearing
his watch that day. There are times he doesn't even
know what day it is. Now, I am not being critical,
but you need to consider that in terms of the timing
of all of this, or in terms of his memory. Remember
people lie, people forget, people are mistaken. I
think it's clear, in view of all of the other
evidence, that Mr. Cranston was simply mistaken.

It was not unreasonable for appellate counsel to fail to raise this as an issue. This is protected strategy.

Alleged misstatement of facts by trial counsel

58. Allwine argues that appellate counsel should have raised an ineffective assistance of trial counsel claim based on statements trial counsel made during his closing argument. Again, what issues to raise on appeal is a question of appellate strategy that is not second-guessed by a reviewing court.

59. Allwine also mischaracterizes trial counsel’s closing argument. Counsel argued that the witnesses called by the defense provided an accurate timeline of when Amy was still alive. 17T – pp. 59-63. Trial counsel argued that the jury should not accept the medical examiner’s stated time of Amy’s death. *Id.* Appellate counsel was not ineffective for failing to claim ineffective assistance of trial counsel when trial counsel was not ineffective, and failure to raise the issue did not change the outcome of the appeal.

Alleged failure of appellate counsel to fulfill duty of complete discovery

60. Allwine contends that appellate counsel was ineffective for failing to subpoena Elmquist (alternative perpetrator); Jonathan Banks Investigator Notes; business records from

Elmquist's dog boarding businesses; and Mark Lanterman's "trial testimonial history" for impeachment. Allwine also contends that appellate counsel was ineffective for failing to obtain affidavits from a DNA and blood spatter expert and other information/documentation outside the trial record.

61. Again, this Court concluded in its Postconviction Order "[w]hat evidence to present, including which witnesses to call, represents an attorney's decision regarding trial tactics and lies within the proper discretion of trial counsel." *Doppler* at 633. Appellate counsel's decision not to subpoena certain witnesses or obtain a large amount of information outside the trial record is not unreasonable. The extent of counsel's investigation represents trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). A defendant who alleges ineffective assistance of counsel for failure to investigate must show actual prejudice. *Gates* at 562.

62. Thus, Allwine has failed to meet his burden of showing that appellate counsel's representation fell below an objective standard of reasonableness. Allwine has also failed to allege prejudice. Allwine's bare assertions—still unsupported, despite the passage of more than four years since his conviction—do not demonstrate prejudice.

Alleged failure of appellate counsel to challenge the overall fairness of the trial

63. Finally, Allwine contends that appellate counsel was ineffective for failing to challenge "the overall fairness of the trial." Again, what issues to raise on appeal is a question of appellate strategy that reviewing courts do not second-guess.

64. Allwine cites no authority in support of this proposition. Indeed, neither this Court nor the supreme court have found any errors at trial, whether by the judge, prosecutor, or defense counsel. Appellate counsel did not act unreasonably by not making a claim that the trial was unfair from a broader perspective. Nor did the failure to raise the claim affect the outcome of the appeal.

From the foregoing Conclusions of Law, this Court makes the following:

ORDER

1. The Petition for Postconviction Relief is **DENIED**.

2. The Court Administrator shall provide a copy of this Order to Petitioner, the Washington County Attorney's Office, the Minnesota Clerk of the Appellate Courts, and Minnesota Attorney General Keith Ellison, which constitutes due and proper notice of its provisions for all purposes.

Date: _____

BY THE COURT:

Douglas B. Meslow
Judge of District Court

MINNESOTA
JUDICIAL
BRANCH

