

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-0452**

Marcel Moses, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed December 5, 2022  
Affirmed  
Worke, Judge**

Hennepin County District Court  
File No. 27-CR-18-20397

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and  
Wheelock, Judge.

**NONPRECEDENTIAL OPINION**

**WORKE**, Judge

Appellant challenges the district court's denial of postconviction relief, arguing that  
he received ineffective assistance of trial counsel and that the evidence was insufficient.

We affirm.

## FACTS

On August 11, 2018, 12-year-old K.R.-G. was at her aunt S.G.'s house watching her cousin while her aunt went to work. Her uncle D.N. stayed home to have a barbecue with friends, including appellant Marcel Moses. K.R.-G. knew some of D.N.'s friends, but she did not know Moses.

D.N. and his friends stayed outside while K.R.-G. stayed inside the house. At some point, Moses went inside the house and initiated conversation with K.R.-G. According to K.R.-G., Moses sat on the couch by her and kissed her. He then stood up, "pulled out his penis," and "put [it] in [her] mouth." Moses left and told K.R.-G., "It was between us." K.R.-G. started crying and called S.G. S.G. stated that when she arrived, K.R.-G. told her that "the one in the pink [shirt]" touched her. S.G. identified Moses as the only person wearing a pink shirt and she attacked him with a broom. S.G. then called the police.

On August 14, 2018, K.R.-G. participated in a CornerHouse interview. K.R.-G. stated that Moses asked her how old she was and if she had a boyfriend, and she ignored him. He then kissed her, put his tongue in her mouth, put his "thing" in her mouth, and "unbutton[ed]" her top and "put his hand in [her] shirt." K.R.-G. stated that one of D.N.'s friends was in the bathroom while this happened, and Moses "hurried up" when he heard this person exit the bathroom. In describing Moses, K.R.-G. stated, "I know . . . he had a tattoo on his face" "[bec]ause on his picture [that my auntie showed me yesterday] he had a tattoo on his forehead." The interviewer asked K.R.-G. if she saw a tattoo on him when she saw him at her aunt's house, and K.R.-G. said, "I dunno."

In February 2019, Moses went to trial on a first-degree criminal-sexual-conduct charge. K.R.-G. testified about the assault, and relevant portions of the CornerHouse interview were admitted into evidence. On cross-examination, Moses's attorney asked K.R.-G. if she remembered saying that "the person who did this had a tattoo on their forehead." K.R.-G. replied that she did not remember saying that. Moses's attorney then asked: "How do you know that it was Mr. Moses if you don't know whether he even had a tattoo on his forehead?" She replied: "I don't know." Moses's attorney asked: "But he doesn't have a tattoo on his forehead?" She replied: "I never said he did have one." On redirect, the prosecutor asked K.R.-G. if Moses was the person who assaulted her, and she replied, "Yep."

A forensic nurse examiner testified that she swabbed areas on Moses's body, including his mouth, penile shaft, penis head, scrotum, and pubic bone. The swabs were tested for serology, the detection and identification of bodily fluids. Bodily fluid was detected on swabs from Moses's penile shaft and pubic bone. A DNA analyst testified that the bodily fluids on the swabs could have possibly been "urine," "sweat," or "fecal matter," but it is a higher likelihood that it was human saliva. There was no detection of fluid on the swabs of Moses's penis head and scrotum. There was no semen detected on any swab from Moses. A forensic DNA analyst testified that DNA on Moses's pubic-bone swab contained a mixture of three contributors. The major contributor was Moses; the minor contributors could not be interpreted.

K.R.-G.'s mouth had been swabbed, and the analyst did not detect any semen on the swab. The swab from K.R.-G.'s mouth did have a "Y chromosome DNA profile . . . [that]

matche[d] the Y chromosome DNA profile obtained from [Moses],” meaning that “neither [Moses] nor any of his male paternal relatives [could] be excluded as a contributor to this DNA profile.” The DNA analyst testified that, in the general United States population, the Y chromosome could have a frequency of 1 in 699 individuals, and among African American individuals, it could be 1 in 187. On cross-examination, Moses’s attorney pointed out that the analysis did not compare the frequency of this “Y-STR profile . . . against the frequency in a Kenyan population.” Evidence showed that all the men who were at the barbecue are Kenyan.

Moses testified on his behalf and denied the allegations. The jury found Moses guilty of first-degree criminal sexual conduct—penetration or contact with a person under the age of 13 and the actor is more than 36 months older. The district court sentenced Moses to 108 months in prison.

In July 2019, Moses filed a notice of appeal, challenging the sufficiency of the evidence and the effectiveness of his trial attorney. He moved this court to stay the appeal to pursue postconviction relief, and this court granted the motion. In April 2020, Moses filed a petition for postconviction relief. He then moved to continue the postconviction proceedings at least six times, mainly to secure a DNA expert to review the evidence. In October 2021, this court dismissed Moses’s direct appeal because it had been pending for 18 months and Moses had failed to meet this court’s deadline to file an amended postconviction petition or request an extension.

In November 2021, Moses filed an amended petition for postconviction relief, arguing that his trial attorney was ineffective for his handling of the DNA evidence. The

district court denied Moses's petition without an evidentiary hearing. This appeal followed.

## DECISION

Moses argues that the evidence was insufficient to sustain his conviction and that he received ineffective assistance of trial counsel. He also challenges the sufficiency of the evidence in his pro se supplemental brief. We must first determine whether the insufficient-evidence claim is properly before us.

Moses filed a direct appeal and intended to challenge the sufficiency of the evidence. However, we dismissed the appeal. Moses filed an amended postconviction petition, challenging the effectiveness of his trial counsel, but he did not challenge the sufficiency of the evidence. He now appeals the denial of postconviction relief.

The supreme court has stated that a postconviction petitioner “who merely *files* a direct appeal, but whose claims do not receive actual appellate review” because the appeal is dismissed on procedural grounds, is entitled to review on a postconviction appeal. *See Rairdon v. State*, 557 N.W.2d 318, 322 (Minn. 1996). But the issues should be raised in a postconviction petition. *See State v. Olson*, 609 N.W.2d 293, 299 (Minn. App. 2000) (stating that when direct appeal is dismissed on procedural grounds, a postconviction petitioner may raise substantive issues in a postconviction appeal), *rev. denied* (Minn. July 25, 2000); *see also Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007) (declining to consider postconviction argument not raised in district court); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that reviewing court must generally consider only issues presented and considered below).

Although Moses did not specifically challenge the sufficiency of the evidence in his amended postconviction petition, we will consider the claim on appeal for several reasons. First, Moses’s insufficient-evidence claim has not yet received appellate review. Second, both parties briefed the issue. *See State v. Thompson*, 937 N.W.2d 418, 421-22 n.2 (Minn. 2020) (stating that appellate court may review issue not considered by district court when interests of justice so require, review would not unfairly surprise a party because the parties briefed the issue, and the dispute involves an issue of law). Finally, Moses’s ineffective-assistance-of-counsel and insufficient-evidence claims are interwoven. Because Moses claims that had his attorney been effective, the evidence would be insufficient to sustain his conviction, we begin our review with the ineffective-assistance-of-counsel claim.

### ***Ineffective assistance of counsel***

Moses argues that his trial attorney was ineffective because of the way he cross-examined K.R.-G. about the face tattoo and how he handled the DNA evidence. In its order denying postconviction relief, the district court concluded that Moses’s complaints amounted to challenges to trial strategy, which is generally not reviewable.

This court reviews the denial of postconviction relief for an abuse of discretion. *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). “A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To prove an ineffective-assistance-of-trial-counsel claim, Moses must show that his counsel’s performance “fell below an objective standard of

reasonableness” and that “there is a reasonable probability that, but for counsel’s unprofessional errors,” the result would have been different. *See Petersen v. State*, 937 N.W.2d 136, 139-40 (Minn. 2019) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). “A strong presumption exists that counsel’s performance fell within a wide range of reasonable assistance [and] [p]articular deference is given to the decisions of counsel regarding trial strategy.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citation omitted); *see also State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (“Appellate courts, which have the benefit of hindsight, do not review for competency matters of trial strategy.”).

Moses argues that K.R.-G.’s comments during the CornerHouse interview created an issue with identification. During the interview, K.R.-G. stated, “I know . . . he had a tattoo on his face” “[bec]ause on his picture [that my auntie showed me yesterday] he had a tattoo on his forehead.” The interviewer asked K.R.-G. if she saw a tattoo on him when she saw him at her aunt’s house, and K.R.-G. said, “I dunno.”

During cross-examination, Moses’s attorney asked K.R.-G. if she remembered saying that “the person who did this had a tattoo on their forehead,” and “[i]n fact, . . . said, I know he has a tattoo because I also made sure when my auntie showed me a picture of him that he had a tattoo on his forehead.” K.R.-G. replied that she did not remember saying that. Moses’s attorney asked: “How do you know that it was Mr. Moses if you don’t know whether he even had a tattoo on his forehead?” She replied: “I don’t know.” Moses’s attorney asked: “But he doesn’t have a tattoo on his forehead?” She replied: “I never said he did have one.”

Moses argues that his attorney's cross-examination was ineffective. He claims that his attorney should have asked K.R.-G. if she remembered making the prior statement about the tattoo, and when she replied that she did not remember making the statement, to show her the statement in which she said that he had a tattoo. But trial counsel's cross-examination of witnesses generally is considered trial strategy, which is not reviewed for competence. *See Doppler*, 590 N.W.2d at 633; *see also State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003) (rejecting ineffective-assistance claim based in part on manner of cross-examination); *State v. Irwin*, 379 N.W.2d 110, 115 (Minn. App. 1985) (stating that manner of cross-examination is tactical decision and that "failure to conduct cross-examination in a certain manner" does not demonstrate ineffective assistance), *rev. denied* (Minn. Jan. 23, 1986).

Additionally, Moses cannot show prejudice. His attorney asked K.R.-G. if she remembered saying that "the person who did this had a tattoo on their forehead." When she replied that she did not remember saying that, Moses's attorney pointed out that Moses does not have a tattoo on his forehead. When the interview was later admitted into evidence, the jury observed the comments K.R.-G. made during the interview about the face tattoo, and the jury was able to weigh any contradiction between K.R.-G.'s interview statement and her trial testimony.

Moses also argues that his attorney was ineffective for failing to investigate the photograph of the man with the tattoo that K.R.-G.'s aunt showed her and for failing to call K.R.-G.'s aunt to testify about the photograph. But, again, "[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." *Doppler*, 590 N.W.2d at 633.

Moses next argues that his attorney ineffectively handled the DNA evidence. He claims that his attorney failed to investigate and retain an expert to counter the state's expert witness. Trial counsel's decisions about whether to obtain expert assistance and testimony are considered tactical judgments that are within counsel's broad discretion. *See Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (stating appellant failed to show counsel's performance fell below an objective standard of reasonableness for failing to call expert witness). The existence of DNA evidence does not mean that an attorney must hire an expert witness. This, again, is not a challenge that is reviewable for competence. *See Doppler*, 590 N.W.2d at 633.

Moses claims that he has shown that his attorney was ineffective for failing to call an expert because, during his trial, he told the district court that he had not had enough time with his attorney to review the case and believed that he needed a forensic expert. But Moses's belief that he needed an expert and his attorney's decision to not call an expert does not show that Moses's attorney was ineffective. *See Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (stating disagreements over trial strategy generally will not establish an ineffective-assistance-of-counsel claim).

Additionally, Moses fails to show prejudice. In his postconviction petition, Moses failed to show that had his attorney called a DNA expert, the result would have been different—that is, Moses would have been found not guilty. First, in his postconviction proceeding, the district court granted Moses \$2,500 to retain a DNA expert to review the

evidence. But he did not provide an affidavit from the expert indicating that the DNA evidence was analyzed improperly or that the state's expert testified about it incorrectly.

Second, when Moses claimed during trial that his attorney was ineffective for his handling of the DNA evidence, his attorney stated that he has been on a DNA working group, went to the National Forensic College, and instructed on DNA evidence at a law firm. He explained that he had exchanged emails with the state's forensic scientist discussing what he believed were "potentially serious issues involving the calculations that they used when determining the likelihood rate of this particular Y-STR profile." Moses's attorney then conducted cross-examination on the DNA expert for nearly 30 transcribed pages of testimony.

Moses's trial attorney was well-versed in DNA evidence, he investigated, and he conducted a thorough cross-examination. Moses's attorney's decision to not call a DNA expert and instead rely on vigorous cross-examination to show issues with the DNA evidence was trial strategy that this court will not review. Moses asserts that a defense DNA expert would have more weight with the jury. He argues that a jury will question why the defense did not have an expert witness when the state did. While the appearance of an expert witness may have a favorable effect on a jury, the decision to call an expert witness is still a matter of trial strategy. *See Doppler*, 590 N.W.2d at 633. Moses has failed to establish an ineffective-assistance-of-counsel claim, and the district court did not abuse its discretion by denying his request for postconviction relief.

### *Sufficiency of the evidence*

Moses argues that the evidence is insufficient to support his conviction. When reviewing the sufficiency of the evidence, this court's review is limited to review of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In doing so, this court assumes that the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Moses mainly challenges K.R.-G.'s credibility and asserts that she was inconsistent. In cases that depend primarily on conflicting testimony, it is particularly important to assume that the jury believed the state's witnesses because it is the jury's exclusive function to weigh witness credibility. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). A "jury is free to accept part and reject part of a witness's testimony." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). "Inconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *Id.*

K.R.-G. testified that Moses assaulted her. In finding Moses guilty, the jury found K.R.-G. credible. *See State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990) (stating a conviction can be based solely on testimony from one credible witness). This evidence alone is sufficient to sustain the conviction. *See Minn. Stat. § 609.347, subd. 1* (2018)

(providing testimony of a sexual-assault victim need not be corroborated). But other evidence corroborated K.R.-G.'s testimony.

K.R.-G.'s aunt testified that K.R.-G immediately reported the assault. K.R.-G.'s aunt and uncle both testified that K.R.-G. identified her attacker as the man wearing a pink shirt. Evidence showed that Moses was the only man wearing a pink shirt at the barbecue.

The swab from K.R.-G.'s mouth had a "Y chromosome DNA profile." Moses and his male paternal relatives could not be excluded as contributors to this DNA profile. The DNA profile occurred in 1 in 699 individuals, and 1 in 187 African American individuals. All the men who were at the house are Kenyan. One of the men at the barbecue testified that there are approximately 52 ethnic tribes in Kenya, and membership is based on who your parents are. He testified that Moses was the only man at the barbecue that belonged to a different tribe. Thus, Moses and his male paternal relatives could not be excluded as contributors to the Y chromosome DNA profile found in K.R.-G.'s mouth. And there was evidence that Moses was the only man at the barbecue that was from a different familial tribe. Therefore, while K.R.-G's testimony did not need to be, it was corroborated by other evidence at trial. The record evidence supports the jury's verdict.

**Affirmed.**