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State of Nebraska, appellee, v. Joshua W. Nolan, appellant.

___ N.W.3d ___

Filed October 9, 2026. No. S-25-134.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof.** In a claim of ineffective assistance of counsel, a court may examine performance and prejudice in any order and need not examine both prongs if a defendant fails to demonstrate either.

7. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Appeal and Error.** In determining whether there is a reasonable probability that any deficient performance of trial counsel would have resulted in a different outcome in the proceeding, an appellate court may properly consider the strength of the admissible evidence relating to the controverted issues in the case.
9. **Effectiveness of Counsel: Trial: Appeal and Error.** When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics.
10. **Effectiveness of Counsel: Evidence.** In making the prejudice determination under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.
11. **Effectiveness of Counsel.** Counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance.
12. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
13. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
14. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
15. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
16. **Attorneys at Law: Effectiveness of Counsel.** A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
17. **Trial: Attorneys at Law: Effectiveness of Counsel: Witnesses.** The decision to interview witnesses must be evaluated in light of whatever trial strategy reasonably competent counsel devised in the context of the

particular case. Counsel need not interview every possible witness to have performed proficiently.

18. **Trial: Attorneys at Law: Effectiveness of Counsel.** Defense counsel's strategic choices made after a less than complete investigation are reasonable under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to the extent that reasonable professional judgments support the limitations on investigation.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Michael J. Wilson, of Berry Law, for appellant.

Michael T. Hilgers, Attorney General, and Nathan A. Liss for appellee.

FUNKE, C.J., CASSEL, STACY, PAPIK, and VAUGHN, JJ., and HALL and SMITH, District Judges.

VAUGHN, J.

I. INTRODUCTION

Joshua W. Nolan appeals from an order of the district court for Douglas County, Nebraska, denying his motion for postconviction relief following an evidentiary hearing. Nolan challenges the denial of two of his ineffective assistance of counsel claims. For the reasons set forth herein, we affirm.

II. BACKGROUND

1. DISTRICT COURT PROCEEDINGS

The events underlying Nolan's convictions and sentences involve the shooting death of Justin Gaines. Our opinion in Nolan's direct appeal sets forth the relevant facts as follows:

> The events leading up to Gaines' death began on the morning of September 19, 2009, the day of the shooting. Joshua Kercheval testified that at around 11:30 a.m. that day, [Trevelle J.] Taylor and Nolan had shown up at his house and that Kercheval drove Taylor and Nolan around Omaha. . . . But as they approached the intersection of

45th and Vernon Streets, Taylor told Kercheval to stop the car and Nolan and Taylor both got out. At that point, Kercheval parked the car and was sitting in the car texting on his telephone when he heard a few gunshots.

Meanwhile, at around 1 p.m., Gaines had driven past a home near 45th Street and Curtis Avenue and had seen Catrice Bryson, a close family friend, in the driveway. Bryson was at the house visiting a friend and her baby, but had stepped outside to smoke a cigarette. Gaines pulled into the driveway, parked right behind Bryson's car, and greeted Bryson with a hug. Bryson and Gaines began talking; Gaines sat back in his car, on the driver's side, one foot in, one foot out, with the car door open. . . . Toward the end of their conversation, Bryson went to get a pen from her car to give Gaines her telephone number.

When Bryson turned back around, she saw two individuals with guns behind Gaines' car and she heard shooting. The two shooters were on each side of Gaines' car, angled toward each other. Bryson described the shooter on the passenger's side of Gaines' car as a black male in his early twenties with a beard and goatee and shoulder-length hair in braids, wearing a "do-rag." Bryson identified the shooter on the passenger's side of Gaines' car as Nolan.

Gaines, while still sitting in the driver's-side seat of his car, was shot in the back. Once Gaines had been hit, the shooters made their escape, each fleeing in opposite directions on Curtis Avenue. At that point, Bryson began screaming for help. Several people responded, and the police arrived quickly thereafter. Gaines was transported to a nearby hospital, but never regained consciousness and was pronounced dead.

Several eyewitnesses to the aftermath of the shooting testified at trial. Heather Riesselman, at the time of the shooting, lived close to the house where the shooting

took place. On the day of the shooting, at approximately 1:40 p.m., Riesselman was outside on her porch with her daughter. At that time, Riesselman saw a young black man "jogging down the street." Riesselman described him as being roughly 5 feet 10 inches tall, medium build, medium complexion, with his hair in braids and with a long, thin goatee. Riesselman identified the man, in court, as Nolan.

Carrie Schlabs was Riesselman's next-door neighbor. At approximately 1:30 p.m. on the day of the shooting, Schlabs was at home with her husband and two friends when they heard gunshots and dove to the floor. Once the gunfire ceased, Schlabs heard screaming, so she got to her feet and ran out to her front porch. Once outside, Schlabs started running toward the screams on Curtis Avenue, to the south, and she saw a young man running to the north. Schlabs saw the young man holding his left side, which made her think that he had been shot. Schlabs ran up to him, getting to within a foot of him, and asked if he needed help. In response, the individual just smiled at Schlabs. At that point, Schlabs continued on toward the screams. While Schlabs could not remember any specific details of the young man's physical appearance or clothing, she remembered his face. Schlabs identified the man, in court, as Nolan.

Kercheval testified that after he had heard the gunshots, he had started the car, getting ready to drive off. But then Kercheval saw Nolan approaching the car and waited until Nolan jumped into the back passenger seat. Once Nolan was in the car, he told Kercheval to "Drive. Go."

State v. Nolan, 283 Neb. 50, 53-55, 807 N.W.2d 520, 529-30 (2012).

At the time of Nolan's arrest, he had a .44-caliber gun in his waistband. See *id*. While a .44-caliber gun was used to kill Gaines, the gun found on Nolan could not be definitively labeled as the murder weapon. See *id*.

Prior to trial, Nolan filed a motion to suppress eyewitness identifications. See *id*. After the hearing, which addressed the identifications made by Heather Riesselman and Carrie Schlabs, Nolan's motion to suppress was denied. After a jury trial, Nolan was convicted of first degree murder and use of a deadly weapon to commit a felony, and he was sentenced. Nolan appealed, and new counsel was appointed for the appeal.

2. Direct Appeal

On direct appeal, one of the errors Nolan assigned was trial counsel's failure to consult or call a fingerprint expert or identification expert to rebut the State's testimony. See *id*. This court found the record insufficient to review this claim on direct appeal. See *id*. Nolan filed a petition for writ of certiorari, and it was denied. See *Nolan v. Nebraska*, 568 U.S. 844, 133 S. Ct. 158, 184 L. Ed. 2d 78 (2012).

3. First Postconviction Proceeding

Nolan filed a motion for postconviction relief that was denied without an evidentiary hearing, and Nolan appealed. See *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015). On his postconviction appeal, this court determined that the district court erred when it denied Nolan relief without an evidentiary hearing on three of his claims and remanded the cause for an evidentiary hearing on the three claims. See *id.*

On remand, Nolan withdrew one of his three claims. The two remaining claims were addressed at an evidentiary hearing. Nolan's first remanded claim asserted that trial counsel was ineffective for failing to consult with and call an eyewitness identification expert. See *id*. Nolan's second remanded claim asserted that trial counsel was ineffective for failing to call Gwendolyn Anderson to testify on Nolan's behalf. See *id*. This claim was a layered claim and, thus, also asserted that appellate counsel was deficient for not raising this issue on direct appeal. See *id.*

4. Postconviction Proceedings After Remand

An evidentiary hearing was held on Nolan's motion for postconviction relief and motion for supplemental claim. The district court took judicial notice of the court file, including the bill of exceptions from the prior proceedings.

Exhibits 500 (the deposition of Anderson), 501 (the deposition of trial counsel), 502 (the deposition of Brian Bornstein, Ph.D.), and 503 (Bornstein's report with cited sources) were offered at the hearing. Exhibits 500, 501, and 502 were received with the understanding that the district court would rule on deposition objections in its order after the parties submitted written arguments. The district court stated it would "consider [exhibit] 503 in terms of the objections that the State is raising in connection with [exhibit] 502 itself, and then will make that ruling at the — at that time."

The district court issued a judgment styled as an order denying Nolan's postconviction motion (2025 Order). The 2025 Order referred to exhibits 501 and 502's being received into evidence, but none of the other exhibits or objections are specifically referenced or discussed. Nolan appeals.

Additional background facts will be discussed below with respect to each assignment of error.

III. ASSIGNMENTS OF ERROR

Nolan assigns, restated, that the district court erred in denying postconviction relief because (1) his trial counsel was ineffective for failing to call an eyewitness identification expert and (2) his appellate counsel was ineffective for failing to assign on direct appeal that Nolan's trial counsel failed to sufficiently investigate and present the testimony of Anderson.

IV. STANDARD OF REVIEW

[1,2] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. *State v. Newman*, 310 Neb. 463, 966 N.W.2d 860 (2021). An appellate court

upholds the trial court's findings unless they are clearly erroneous. *Id*. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

[3,4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *Newman, supra*. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Newman, supra*.

V. ANALYSIS

We first set forth the standards regarding claims of ineffective assistance of counsel applicable to all such assignments of error and then separately analyze each of Nolan's claims.

1. Legal Principles Governing Ineffective Assistance of Counsel

[5,6] To establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. See *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004). The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *Id*. A court may examine performance and prejudice in any order and need not examine both prongs if a defendant fails to demonstrate either. *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025).

[7,8] To show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient

to undermine confidence in the outcome. *Id.* In determining whether there is a reasonable probability that any deficient performance of trial counsel would have resulted in a different outcome in the proceeding, an appellate court may properly consider the strength of the admissible evidence relating to the controverted issues in the case. *Id.*

[9] When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. *Id.* There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id.* Ultimately, the Constitution guarantees criminal defendants only a fair trial and a competent attorney. *Id*.

[10] In making the prejudice determination under *Strickland*, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. See *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018). Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. *Id*. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. *Id*.

[11] We have held that counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance. *State v. Kipple*, 310 Neb. 654, 968 N.W.2d 613 (2022).

2. Nolan's Claims

(a) Failure to Call Eyewitness Identification Expert

(i) Postconviction Allegations

Nolan assigned that trial counsel was ineffective for failing to call an eyewitness identification expert to testify at the

hearing on his motion to suppress in-court identifications and at trial. Nolan asserts that an eyewitness identification expert was necessary because the identifications by Riesselman, Schlabs, and Catrice Bryson suffered from impairing factors that required expert explanation. Nolan argues that without expert, peer-reviewed scientific research, the jury could not accurately assess the reliability of the critical eyewitness identification testimony. Nolan also argues that trial counsel's cross-examination and arguments did not offer the same psychological concepts testified to by Bornstein in his deposition. Nolan argues that the expert testimony would have explained why the identifications could be incorrect, inaccurate, or untruthful. Nolan argues that there is a reasonable likelihood the jury would have acquitted Nolan had trial counsel called an expert.

(ii) Additional Background

a. Identifications by Riesselman and Schlabs

Four days after the shooting, Riesselman identified Nolan, after examining a photographic lineup for 10 to 15 minutes, as the individual she saw running. In addition, Riesselman wrote on the lineup she was "80% positive" of the identification.

Prior to the suppression hearing, Riesselman attended a meeting at the prosecutor's office. Schlabs attended the meeting to support Riesselman. At the meeting, while the photographic lineup was being passed to Riesselman to confirm her handwriting, Schlabs saw Nolan's photograph in the lineup and recognized him as the "shooter," stating, "Oh my God, that's him. That's who I ran up to." Schlabs testified at the suppression hearing that she did not see the handwriting on the lineup. Prior to this identification, Schlabs had not made any statements to law enforcement about having encountered or witnessed the man, despite law enforcement's having been at her house to interview another person about the incident.

At the suppression hearing, Riesselman and Schlabs both identified Nolan as the individual they saw the day of the shooting and Riesselman testified she was sure of her identification.

As to Schlabs, the district court's order denying the motion to suppress stated that "[t]here was nothing in the identification process as it relate[d] to [Schlabs] that [was] unduly or impermissibly suggestive or [showed] that a substantial likelihood of misidentification existed" and that Schlabs subsequently made an in-court identification, which had the indicia of reliability based on the factors in *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). As to Riesselman's identification, the district court stated that "[i]t is possible that [Schlabs'] reaction could have influenced [Riesselman] into the certainty of identification she expressed at the hearing." The district court stated that "even if the [c]ourt were to find that there were impermissible pretrial suggestions with respect to [Nolan's] identity the [c]ourt believe[d] that this taint, if any, was removed by [Riesselman's] subsequent in-court identification of [Nolan]." After applying the *Faust* factors, coupled with Riesselman's 80 percent initial identification, the court found that her identification had "the indicia of reliability which would remove any taint that may have been present at the meeting with [Schlabs]."

As stated above, at trial, Riesselman and Schlabs identified Nolan as the individual they saw the day of the shooting.

b. Identification by Bryson

Bryson failed to identify Nolan in a photographic lineup 3 days after the shooting, instead identifying a "filler." She testified at trial that she had been informed that she had not picked out Nolan from the lineup. Bryson also testified that after the lineup, she saw Nolan in a news report about his arrest for the shooting. As stated above, at trial, Bryson identified Nolan as one of the shooters.

c. Deposition of Trial Counsel Regarding Eyewitness Identification Expert

At trial counsel's deposition, trial counsel testified he did not consult or consider consulting an eyewitness identification expert. He testified that it was not a trial strategy not to consult or call an eyewitness identification expert but that, at the time of trial, he was not aware of anyone that had called an eyewitness identification expert in Douglas County and it was "[n]ot really something anyone talked about."

However, he agreed it was fair to say that he was aware eyewitness identification was becoming something that was being focused on nationwide. Trial counsel was aware there was some academic discussion about the existence of experts in the field of eyewitness identification—specifically, the reliability of eyewitness identifications under a variety of circumstances—but testified that he was unaware of an actual person who had testified about it.

Trial counsel testified that his trial strategy was to attack the credibility of Riesselman and Schlabs but just "not from a scientific or psychological angle." Trial counsel testified he also attacked the credibility of Bryson.

d. Deposition of Bornstein

At his November 2019 deposition, Bornstein, a professor emeritus in the department of psychology at the University of Nebraska, testified he had a roughly 20- to 25-year subspecialty focusing on eyewitness memory and identification. Bornstein specifically recalled testifying to eyewitness identification issues in two criminal trials and giving deposition testimony in another case. The first criminal trial was in South Dakota in the early 2000s. He testified that the deposition testimony was in an Iowa case "more than ten years ago, probably." He also stated that 7 or 8 years prior to his deposition in this case, he testified about eyewitness identification in the Douglas County District Court. He further testified there have

been many cases where he has reviewed documents and written reports but was not required to testify.

Bornstein testified that his review of documents related to this case suggested that several variables could have compromised the reliability of the eyewitnesses in this case. Among the variable categories were (1) "post-identification feedback," (2) "unconscious transference," (3) "arousal or stress along with weapon focus," (4) "cross-race effect," (5) eyewitnesses' levels of confidence at identification, (6) fairness of lineup procedures, and (7) decision processes employed by the eyewitnesses. Bornstein concluded that to a reasonable degree of scientific certainty, the "system and estimator variables" diminished the reliability of the eyewitnesses' memory in Nolan's case. However, he conceded that he did not really know if those factors did influence the eyewitnesses.

(iii) 2025 Order

After a hearing, the district court denied Nolan's request for postconviction relief. In the 2025 Order, the district court stated that Nolan's trial counsel was unaware of "any expert testimony in this area, though there was some growing discussion of the issue of eyewitness testimony nationally at the time of trial." The district court went on to state that trial counsel testified that such testimony did not occur in Douglas County at the time of trial and that trial counsel was not aware of such experts being used by prominent local criminal defense attorneys. The district court stated that Nolan's trial counsel utilized other tools, such as cross-examination, to execute the trial strategy of impeaching the credibility of the eyewitnesses. Ultimately, the district court held that it could not "say that hiring an expert was a necessary tool for counsel to effectively execute this strategy" and that Nolan's trial counsel "adequately raised the issues to the jury."

The district court also stated:

> Even though a newer statute states that such experts are admissible, older case law indicates that issues around

> eyewitness testimony are within the realm of laypeople's understanding and that these issues are best left for juries to resolve. *Compare Neb. Rev. Stat.* § 27-707 (Cum. Supp. 2020) *with State v. George*, 264 Neb. 26, 42, 645 N.W.2d 777, 790 (2002).

The district court stated that while trial counsel did not use psychological terms to attack the eyewitnesses' credibility, the record "clearly shows" that trial counsel's attacks spoke to the same psychological concepts that Bornstein discussed in his deposition. The district court stated that "[t]he simple fact that potential expert testimony could reduce the credibility of these witnesses does not ipso facto call into question the jury's verdict. Even after fully cross-examining these witnesses, a jury resolved their credibility issues in favor of the State . . . ." Finally, the district court held that Nolan had not shown that additional impeachment evidence could change the jury's verdicts and, as such, could not meet his burden.

(iv) Resolution

Neb. Rev. Stat. § 27-707 (Cum. Supp. 2024), which went into effect in November 2020, states, "The testimony of an expert witness regarding eyewitness identification and memory may be admitted in any criminal or civil proceeding pursuant to the rules governing admissibility of evidence set forth in the Nebraska Evidence Rules."

However, trial in this matter was held in August 2010. Thus, we must consider the law and circumstances in place at that time to determine whether Nolan's trial counsel was deficient for failing to call an eyewitness identification expert. Three decisions inform our understanding.

First, in *State v. Ammons*, 208 Neb. 812, 814-15, 305 N.W.2d 812, 814 (1981), we held that expert testimony on the reliability of eyewitness identifications was unnecessary and stated:

> The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the

> competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. . . . The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the jury.

Second, in *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989), the district court refused to admit the testimony of an expert that the in-court identification of a witness who was shown two photographs of one person in two different arrays was, as a result, really an identification of the photographs the witness had been shown. On appellate review, this court stated:

> Recently, in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), this court reaffirmed the rule of *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981), that it is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated. (See, also, *State v. Beermann, ante* p. 380, 436 N.W.2d 499 (1989), concerning the general impropriety of one witness' testifying about the weight to be given another's testimony.)

Sardeson, 231 Neb. at 602, 437 N.W.2d at 485. This court went on to state that not only was the decision not to admit the evidence far from an abuse of discretion, it was "the only correct ruling possible." *Id.*

Third, in *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002), a defendant alleged a layered ineffective assistance of counsel claim predicated on trial counsel's failure to request a specific jury instruction concerning the reliability of eyewitness evidence where the defendant alleged there were problems with the eyewitness identifications. This court, quoting *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990), stated:

> "[I]t is the jury's function to determine the credibility of the eyewitness. [The defendant's] jury was instructed on

> credibility, the State's burden of proof, and the substantive elements of the crimes involved. These instructions allowed the jury to properly evaluate the credibility of the witnesses' identification testimony. . . . Therefore, [the defendant's] attorney was not deficient in failing to request such a jury instruction [on eyewitness evidence reliability]."

George, 264 Neb. at 40-41, 645 N.W.2d at 789. Ultimately this court held that the assignment was without merit, explaining that "the record here shows that in both trials, the jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes for which [the defendant in *George*] was convicted." *Id*. at 41, 645 N.W.2d at 789.

In *George*, the defendant also claimed that the district court erred in overruling his motion to appoint an expert witness concerning the reliability of eyewitness identification. Relying on *Ammons*, this court ultimately found no merit in the claim. See *George, supra*.

This court's decisions in *Ammons*, *Sardeson*, and *George* make it clear that prior to the enactment of § 27-707, not only would the failure to call an eyewitness identification expert not constitute ineffective assistance of counsel, it would not have been permissible.

Nolan argues that even if the expert testimony would not have been admissible at trial, it would have changed the outcome of the motion to suppress hearing. We find this argument unpersuasive, given Bornstein's deposition testimony where he was asked, "[B]ut you can't testify, and you don't really know if those factors did influence these witnesses do you?" To which he responded, "I do not." Thus, we cannot conclude there is a reasonable probability that any deficient performance of trial counsel would have resulted in a different outcome in the proceeding. See *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025).

For these reasons, we agree with the district court's determination that trial counsel's performance did not fall below

the level required of him and that, even if it did, Nolan was not prejudiced.

(b) Failure to Investigate and Present Testimony of Anderson

(i) Postconviction Allegations

Nolan alleges a layered claim that appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to sufficiently investigate and present the testimony of Anderson.

Nolan asserts that Anderson's description of the individual she saw running the day of the shooting was inconsistent with the descriptions given by Riesselman, Schlabs, and Bryson. Thus, independently interviewing and calling Anderson would have assisted in attacking the credibility of their identifications, and Nolan argues that the loss of this testimony was prejudicial to him. Specifically, Nolan points to Anderson's describing seeing an individual wearing a baseball cap, football jersey, and jean shorts; Riesselman's describing seeing an individual with approximately shoulder-length "cornrow" braids wearing a long white T-shirt and jean shorts with colorful embroidery; and Bryson's recalling seeing an individual with braids "with a do-rag on top."

Nolan acknowledges that trial counsel pointed out in closing arguments "a couple of the obvious problems" with the eyewitness identifications, see brief for appellant at 43, such as Riesselman's change in certainty, Schlabs' identification occurring only after the meeting in the prosecutor's office, Joshua Kercheval's inconsistency, and Bryson's description of a red basketball jersey and inconsistent identification. However, Nolan argues that the loss of Anderson's testimony cost Nolan valuable support for his misidentification defense. Further, Nolan argues that had this assignment been raised on direct appeal, it would have changed the result of the direct appeal or preserved the claim for postconviction proceedings.

(ii) Additional Background

a. Deposition of Trial Counsel Regarding Anderson

At his November 2019 deposition, trial counsel testified that he was aware of Anderson, but based on the information she provided to law enforcement, he made the decision not to call her as a witness. He testified he did not believe he ever spoke with Anderson, other than during a conversation about why she was not being called to testify, in which he informed her the State would contact her if the State was going to call her.

Trial counsel testified that Anderson lived on the street one of the shooters allegedly ran down after the shooting and that Anderson told law enforcement during her initial interview that she heard shots and yelling and then looked out her window to see a "light skinned" black male in his early 20s running down the street past her house while "holding his pants." Trial counsel testified that Anderson described the individual she saw running as being "about 5 foot 10, skinny, [and] wearing a football jersey [and] blue jean shorts."

Trial counsel testified that when later interviewed by a detective, Anderson described the individual as "a light skinned black male with a football jersey and jean shorts." Trial counsel testified that she described the top of the individual's pants as being below the hip and told the detective the individual "could barely run because his pants were too low." According to trial counsel, Anderson described the individual to the detective as being 5 foot 8 inches or 5 foot 9 inches tall and "skinny looking but wearing big clothes" with a backward hat. However, according to trial counsel, Anderson could not remember the color of the hat and was unable to make an identification from a photographic lineup.

In describing his reasoning for not calling Anderson as a witness, trial counsel testified that prior to trial, Bryson's identification of Nolan had not occurred, and that both Riesselman

and Schlabs had described the individual they observed as wearing loose-fitting jean shorts or jeans; being barely able to run; and holding onto his waist, waistband, or something in his waistband. Trial counsel testified that "to some extent [that is] what Anderson told the police, as well."

Trial counsel went on to testify that although Anderson could not identify Nolan and some other aspects of her description did not fit with Riesselman's and Schlabs', he decided that, strategically speaking, it could "cut both ways" because some of what Anderson told law enforcement could be seen as corroborating what Riesselman and Schlabs told law enforcement. Trial counsel testified that Anderson's description also fit with the State's theory that Nolan was running down the street concealing a firearm, making it difficult for him to run. Trial counsel did not feel that he needed to call Anderson as part of his trial strategy and testified that he "was really afraid that it might end up hurting [the defense]."

b. Deposition of Anderson

At her May 2019 deposition, Anderson testified that the day of the shooting, she did not hear gunshots; however, she did look out her door and saw a male running down "Vernon Street." She testified she did not see his face, only "the back of him." Anderson testified that she couldn't really tell how old he was but that he was a "young guy" and "had on, looked like, jeans that these young kids wear, you know, down by their waist or butt, somewhere, and then a big shirt." She testified that the big shirt went past his buttocks and that he "[c]ouldn't hardly run because his pants were down too low." She testified that he wore a backward cap, was skinny, and looked like he might have been about 5 foot 7 inches tall and that she did not see anything in his hands.

Anderson testified that after he disappeared down the street, she went outside and saw a man lying in the grass. Anderson also testified that law enforcement talked to her that

same day but that she was never shown a photographic lineup and had no other contact with anyone until she heard from Nolan's trial counsel about a month prior to the deposition.

(iii) 2025 Order

In denying postconviction relief, the district court determined that Anderson's testimony cuts both ways. It acknowledged that Anderson's testimony could have helped Nolan in that it had some contrast to the identifications made by Riesselman, Schlabs, and Bryson. However, the district court went on to explain that the State's theory was that Nolan was concealing a firearm in his shorts as he fled from the scene. The district court further stated that Nolan's trial counsel indicated that the decision not to call Anderson, without interviewing her about what she saw and "only relying on the police reports, was driven by her similar description to the State's theory." The district court reasoned that trial counsel's decision was "clearly a decision of trial strategy," which it found reasonable and declined to second-guess.

(iv) Resolution

[12] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015).

[13,14] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *Id*. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*.

[15] When a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's

performance by focusing on whether trial counsel was ineffective under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test. *Huston, supra*. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *Id*. Thus, we must consider Nolan's argument that trial counsel was ineffective for refraining from calling Anderson to testify without independently interviewing her.

[16-18] A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *State v. Newman*, 310 Neb. 463, 966 N.W.2d 860 (2021). A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel. *Id.* The decision to interview witnesses must be evaluated in light of whatever trial strategy reasonably competent counsel devised in the context of the particular case. *Id.* Counsel need not interview every possible witness to have performed proficiently. *Id.* In every case, trial lawyers could have done something more or something different. *Id.* The issue is only what is constitutionally compelled. *Id.* Defense counsel's strategic choices made after a less than complete investigation are reasonable under *Strickland* to the extent that reasonable professional judgments support the limitations on investigation. See *Newman, supra.*

The deposition testimony of trial counsel shows that he was aware of Anderson and that, in his decision not to call her as a witness, he considered her descriptions to law enforcement of the individual she saw running. More specifically, trial counsel considered, and was concerned about, the consistencies in Anderson's descriptions with the State's theory of the case. We agree with the district court's determination that trial counsel's decision not to call Anderson as a witness, even without speaking to her personally, was a reasonable decision of trial strategy and that thus, trial counsel was not

ineffective. As such, Nolan suffered no prejudice when appellate counsel failed to bring this ineffective assistance of trial counsel claim on direct appeal, as it would not have changed the result. For these reasons, the decision of the district court is affirmed.

VI. CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

FREUDENBERG and BERGEVIN, JJ., not participating.