

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK STRICKLIN, :  
Petitioner, :  
-vs- :  
STATE OF NEBRASKA, :  
Respondent. :  

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ON PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PETITIONER:

Derrick U. Stricklin  
Reg. No. 79759  
Nebraska State Penitentiary  
P.O. Box 2500  
Lincoln, Nebraska 68452

Petitioner, in pro se

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STATE OF NEBRASKA, APPELLEE, V.  
DERRICK U. STRICKLIN, APPELLANT.

— N.W.2d —

Filed December 3, 2021. No. S-20-681.

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. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. 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.
3. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
4. **Postconviction: Sentences: Appeal and Error.** The Nebraska Postconviction Act is intended to provide relief in those cases where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.
5. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.

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6. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
7. **\_\_\_\_\_. To show that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.**
8. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
9. **Effectiveness of Counsel: Proof.** In an ineffective assistance of counsel claim, deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
10. **Criminal Law: Evidence: Proof.** To establish an alibi defense, a defendant must show (1) he or she was at a place other than where the crime was committed and (2) he or she was at such other place for such a length of time that it was impossible to have been at the place where and when the crime was committed.
11. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
12. **Evidence: Appeal and Error.** Where competent evidence supports the district court's findings, the appellate court will not substitute its factual findings for those of the district court.
13. **Effectiveness of Counsel: Proof.** Trial counsel's failure to investigate various aspects of the case is not ineffective assistance of counsel, absent prejudice and a specific showing what the investigation would have revealed, what exculpatory evidence would have been discovered, or how such an investigation would have changed the outcome of the trial.

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Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

Gregory A. Pivovar for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ., and STEINKE and OTTE, District Judges.

FUNKE, J.

#### INTRODUCTION

Derrick U. Stricklin appeals from the denial of postconviction relief following an evidentiary hearing. Stricklin asserts his trial counsel was ineffective in failing to present an alibi defense and in failing to investigate and present evidence of other suspects. Stricklin also asserts the district court erred in denying his request to depose expert witnesses. We disagree with Stricklin's arguments and therefore affirm the order of the district court.

#### BACKGROUND

In 2013, in a joint trial, a jury convicted codefendants, Stricklin and Terrell E. Newman, on two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. The district court for Douglas County sentenced both men to life imprisonment for each murder conviction; 15 to 25 years' imprisonment for each use of a deadly weapon to commit a felony conviction; 20 months' to 5 years' imprisonment for the attempted manslaughter conviction; and 15 to 25 years' imprisonment for the possession of a deadly weapon conviction. All sentences were to run consecutively. This court affirmed Stricklin's convictions and sentences on direct appeal.<sup>1</sup>

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<sup>1</sup> *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

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Stricklin timely moved for postconviction relief, asserting several claims, which the district court denied without conducting an evidentiary hearing. Stricklin appealed directly to this court.<sup>2</sup> We affirmed the dismissal of the majority of Stricklin's claims, but remanded the matter back to the district court for an evidentiary hearing on two of the claims. The matter remanded to the district court included Stricklin's claims that trial counsel failed to file a notice of alibi and present evidence of his alibi defense and failed to investigate other potential suspects.<sup>3</sup>

The facts adduced at trial are fully set forth in our opinion affirming Stricklin's convictions and sentences.<sup>4</sup> Summarized, on December 2, 2012, Carlos Morales and Bernardo Noriega were shot and killed in a drug transaction at an automobile body shop in Omaha, Nebraska. The State alleged that Stricklin and Newman committed the crimes together. Newman's cell phone records showed that Newman was in communication with Morales and Stricklin on the day of the shootings and that Newman's cell phone was in the area of the murder scene during the relevant timeframe.<sup>5</sup>

The State's primary witness at trial, Jose Herrera-Gutierrez, claimed he was present during the shootings. Based upon information provided by Herrera-Gutierrez, officers compiled photographic lineups containing photographs of Stricklin and Newman. Herrera-Gutierrez identified Stricklin and Newman as the shooters; he testified that he recognized both men from three or four prior visits to the body shop, although he had never learned their names.

Herrera-Gutierrez testified that following a drug transaction, he witnessed Stricklin and Newman draw firearms.<sup>6</sup>

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<sup>2</sup> Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 2020).

<sup>3</sup> *State v. Stricklin*, 300 Neb. 794, 916 N.W.2d 413 (2018).

<sup>4</sup> *Id.*; *Stricklin*, *supra* note 1; *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018); *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015).

<sup>5</sup> *Id.*

<sup>6</sup> *Stricklin*, *supra* note 1.

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According to Herrera-Gutierrez, Newman instructed Morales to tell Herrera-Gutierrez and Noriega to lie down. Newman tied Herrera-Gutierrez' wrists. Herrera-Gutierrez stated that plastic was wrapped around his face and that he could breathe but was unable to see. He claimed that he heard the two or three gunshots that killed Morales and Noriega, that someone untied his wrists and took the plastic off his head, and that Stricklin and Newman left the scene without shooting him.

Despite testimony from various witnesses regarding the timeline of events, the evidence did not establish a precise time for the shootings. Morales' fiance discovered the bodies at 2:15 p.m. The police broadcast about the shootings went out at 2:34 p.m.

The State's theory was that Stricklin and Newman committed the crimes together, at approximately 12:30 p.m. Newman's cell phone records showed multiple contacts with Stricklin on December 2, 2012, right before and after the relevant period. The State adduced evidence showing that Newman and Stricklin called each other seven times between approximately 9:27 and 11:13 a.m. Newman received six calls from 11:42 a.m. to 12:36 p.m., at which time Newman's phone used a cell tower located in the immediate vicinity of the body shop.<sup>7</sup> After his 11:13 a.m. call with Newman, Stricklin did not make or receive a call until 12:34 p.m., when he received a call which went to voicemail. Stricklin did not send or receive any text messages during this period of inactivity. Stricklin made his next call at 2:15 p.m., which was to Newman.

Stricklin's motion for postconviction relief contained the following relevant allegations: Under his first claim, he alleged that he was in downtown Omaha with his "stepson" Hashim C. on the day of the shootings from approximately 9:30 a.m. until noon. Stricklin alleged that they ate at a restaurant, purchased gas, and each got a haircut at a barbershop. He alleged they later drove to his grandmother's house. He alleged that

<sup>7</sup> *Id.*

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during his drive, he made a phone call to a friend at 12:34 p.m. The call registered at a cell tower approximately 5 miles from the crime scene. He stated he received text messages during the drive.

Stricklin stated that he and Hashim arrived at his grandmother's house around 12:40 p.m. and that around 20 to 25 people were present, including his brother Daryel Stricklin. He stated Antoineya Richard (Antoineya), his girlfriend at the time and Hashim's mother, arrived at his grandmother's home and picked up Hashim around 2 or 3 p.m. Stricklin stated he made his trial counsel aware his alibi was supported by the barber, Hashim, Antoineya, and Daryel.

Under the second claim of his postconviction motion, Stricklin alleged his counsel was ineffective for failing to investigate as possible suspects Marcus Jefferson, Stricklin's half brother, and a man named "James Moore." Stricklin alleged Jefferson stated to him that Moore committed the murders due to a dispute involving money and "bad drugs."

Prior to the evidentiary hearing on the two claims ordered by this court, Stricklin filed a successive postconviction motion which alleged the State advanced a false prosecution theory by claiming to the jury that the cell phone location data represented the location of Stricklin or his phone rather than the location of a cell tower. The State moved to dismiss the successive motion for postconviction relief as time barred.

Stricklin also filed a motion to depose nine witnesses prior to the pending evidentiary hearing. The State objected to Stricklin's request to depose two of the witnesses, an agent with the Federal Bureau of Investigation and a representative from a cell phone provider, arguing the request went beyond Stricklin's first postconviction motion and the scope of our remand. The district court granted Stricklin's motion as to seven of the witnesses and took the State's objection regarding the remaining two witnesses under advisement. The court gave Stricklin leave to file a brief explaining how the two cell phone expert witnesses were relevant to the issues on remand.

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Thereafter, the court held a hearing on Stricklin's motion and issued an order denying the request. The court agreed with the State that Stricklin's proposed use of the testimony went beyond his alibi claim. The court found "Stricklin's cell phone records are in evidence and he can present and rely upon them at his evidentiary hearing without depositions of these witnesses." In the same order, the court dismissed Stricklin's successive postconviction motion which is not at issue in this appeal.

At the evidentiary hearing, the district court received depositions from Stricklin, Daryel, Antoineya, Hashim, and Stricklin's trial counsel.

In his deposition, Stricklin testified that on December 2, 2012, he went with Hashim to the barbershop for their 9 a.m. appointment. The barber was running late, so Stricklin and Hashim went to a restaurant and a gas station and returned for their haircuts around 10 a.m. Stricklin stated that he and Hashim got their hair cut by the same barber every week and that their haircuts would take approximately 2 hours. Stricklin testified that he left the barbershop between noon and 12:30 p.m. and that he placed a call to a friend and briefly stopped at the friend's house while on the way to his grandmother's house.

Stricklin further testified that he made counsel aware of his alibi defense early in the process and that the alibi defense was the "number one" trial strategy. He stated that counsel did not inform him he would not present the alibi at trial and that Daryel, Antoineya, and Hashim were present and ready to testify. When asked about his discussions with counsel regarding trial strategy, Stricklin testified, "We had, like, a lockdown defense, and he didn't do any of it. He didn't — he didn't cross-examine the witnesses or anything. He just sat there, like, he didn't know what was going on."

Antoineya testified that she was in a dating relationship with Stricklin from 2010 to 2014 and that he lived in her home. She thought that Stricklin and Hashim went to the barbershop

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at 11 a.m. and that Hashim returned home around 2 p.m. She spoke with Stricklin's counsel before trial on multiple occasions, and counsel knew she and Hashim were alibi witnesses, but she was never contacted to testify.

Daryel testified he was present at the family gathering at his grandmother's house. He recalled that he started eating around noon and that around 10 people were present. Daryel testified Stricklin arrived at his grandmother's between 12:30 and 1 p.m. Daryel recalled the time of Stricklin's arrival because he had to leave to go to a movie around the same time. He did not remember if anyone was with Stricklin when he arrived. ~~He spoke with Stricklin's counsel before trial and provided this information.~~

Hashim was 10 years old in December 2012 and 17 years old at the time of his deposition. Hashim testified Stricklin is basically his stepfather and they had a good relationship. Hashim testified he and Stricklin went for a haircut together every week. He thought it would take about an hour for both him and Stricklin to get a haircut. He stated that he did not do anything else with Stricklin on the day in question other than get food and return home. His mother mentioned to him he might be a witness at Stricklin's trial, but he never spoke with Stricklin's counsel.

Stricklin's trial counsel testified via deposition. Counsel stated that he had not reviewed the case file for years. Counsel acknowledged that at one point he had planned to put forward an alibi defense but that during the pretrial process, his view of the alibi defense changed. He testified he had "vague memories of potentially not going forward with an alibi as trial strategy." Counsel testified he believed the alibi contained a "pitfall," and he recalled sharing his concerns with Stricklin.

Counsel conceded he had not filed a notice of alibi defense in order to present the defense at trial,<sup>8</sup> claiming there was "a conscious decision that we were moving forward without

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<sup>8</sup> See Neb. Rev. Stat. § 29-1927 (Reissue 2016).

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an alibi." Counsel stated that he discussed the alibi with Daryel and Antoineya and that he decided to not interview Hashim, because he was unclear as to Stricklin's relationship with Hashim. Counsel did not interview the barber, stating he was concerned the barber feared Newman and, if forced to testify, might have testified in a way that would harm Stricklin's defense. Counsel thought he made a few attempts to speak to the barber, but stated that the barber retained an attorney and that he did not remember if he spoke with the barber's attorney. Counsel stated his decision not to pursue the alibi was strategic, because all the alibi witnesses were personally close with Stricklin and had a motive to support him. Further, counsel stated he was aware of Stricklin's claim of other potential suspects, because Stricklin had discussed it with him, but that he chose not to pursue them as a defense.

In its order discussing and weighing the evidence, the court found counsel's "concerns about the viability of Stricklin's alibi appear to be reasonable in light of the evidence presented at trial and the evidence in the current record." The court found that Stricklin did not establish a clear timeline for his alibi and that when all of the timeline evidence was considered, there were gaps in the evidence which failed to refute the State's theory that Stricklin and Newman committed the murders at approximately 12:30 p.m. The court found the gaps showed that counsel's "concerns about a 'pitfall' in the alibi were reasonable."

Additionally, the court found Stricklin failed to prove any prejudice, because even if counsel had presented the alibi defense, the defense was so weak that the result of the trial would not have been any different. The court discussed and weighed the deposition testimony and concluded the evidence showed Stricklin had no alibi between approximately 11 a.m. and 12:34 p.m. The court found Stricklin's phone records placed him in the downtown Omaha area between 9:19 and 10:45 a.m. The court credited Stricklin's testimony that he

You have to  
call 100 drivers  
how far I get him  
away in 4 minutes, &  
I get him in 10 minutes  
you have to  
call 100 drivers  
and get him in  
4 minutes, because the  
drivers never work  
36, 40, 45 minutes  
So, I have to call 100 drivers

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and Hashim arrived at the barber for their haircuts at around 10 a.m. Noting that Stricklin and Hashim had short hair and weekly haircuts, the court credited Hashim's testimony that their haircuts would have been finished within approximately 1 hour. The court found that Stricklin's alibi defense left a gap that "corresponds to the time of the murders." The court found that "[c]ompounding the damage [of the gap] to Stricklin's alibi defense, his cell phone's communications immediately before this gap are with a cell phone number attributed to Newman at trial." The court found "the evidence that Stricklin has supplied does not establish that [he] was at a place other than the crime scene for such a length of time that it was impossible for him to have been at the place where and when the crime was committed."<sup>9</sup>

Although the court had denied Stricklin leave to depose two cell phone record experts, the court considered Stricklin's offer of proof regarding the expert testimony. The court found even if the court had allowed the depositions and received the evidence, the analysis would not change, because Stricklin's cell phone records did not fill the gaps in his alibi and therefore did not support his alibi defense.

Lastly, the district court rejected Stricklin's claim that his trial counsel was ineffective in failing to investigate and present evidence of alternative suspects. The court found Stricklin had presented no exculpatory evidence on this issue and no evidence other than hearsay implicating Jefferson and Moore.

#### ASSIGNMENTS OF ERROR

Stricklin assigns the district court erred in denying his ineffective assistance of counsel claim, when counsel failed to present an alibi defense and failed to investigate and present evidence of other possible suspects. Further, Stricklin assigns the court erred in denying his request to depose cell phone record experts.

<sup>9</sup> See *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988).

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STANDARD OF REVIEW

[1] 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.<sup>10</sup>

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.<sup>11</sup> When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.<sup>12</sup> 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*,<sup>13</sup> an appellate court reviews such legal determinations independently of the lower court's decision.<sup>14</sup>

ANALYSIS

[3-5] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.<sup>15</sup> The Nebraska Postconviction Act is intended to provide relief in those cases where a miscarriage of justice may have occurred; it is not intended to be a procedure to secure a routine review for any defendant dissatisfied with his or her sentence.<sup>16</sup> A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement

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<sup>10</sup> *State v. Beehn*, 303 Neb. 172, 927 N.W.2d 793 (2019).

<sup>11</sup> See *id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>14</sup> *Beehn*, *supra* note 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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of the defendant's rights under the Nebraska or federal Constitution.<sup>17</sup>

[6-8] Stricklin had the same counsel at trial and on direct appeal. To prevail on a claim of ineffective assistance of counsel under *Strickland*,<sup>18</sup> the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.<sup>19</sup> To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>20</sup> To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.<sup>21</sup> A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.<sup>22</sup> "The likelihood of a different result must be substantial, not just conceivable."<sup>23</sup>

[9] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."<sup>24</sup>

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<sup>17</sup> *Stricklin*, *supra* note 3.

<sup>18</sup> *Strickland*, *supra* note 13.

<sup>19</sup> *Stricklin*, *supra* note 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

<sup>24</sup> *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988), quoting *Strickland*, *supra* note 13. Accord, *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989).

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Deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.<sup>25</sup>

ALIBI DEFENSE

Stricklin argues counsel was ineffective in failing to present his alibi defense. Stricklin claims he had frequent discussions with counsel regarding plans to present an alibi at trial, that counsel did not inform him he would not present the alibi, and that counsel's actions had foreclosed the possibility of an alibi due to the failure to file a notice of alibi. Stricklin contends that the importance of the alibi defense was clear from the beginning to the end, and there is no evidence counsel abandoned the alibi based on trial strategy, other than counsel's vague recollections. Stricklin argues counsel admitted he did not interview Hashim or the barber and did not hire anyone to investigate the alibi.

For the analytical purposes of resolving Stricklin's appeal, the court will assume Stricklin has established counsel's failure to present his alibi defense constituted deficient performance. However, in light of the court's ultimate holding on Stricklin's ineffective assistance of counsel claim, the court need not decide the question of deficient performance. Ultimately, we conclude Stricklin has failed to prove he was prejudiced by counsel's performance.

As a rule, a "violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced."<sup>26</sup> Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the

<sup>25</sup> *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

<sup>26</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

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proceeding would have been different.”<sup>27</sup> “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>28</sup> Assuming Stricklin has established deficient performance, Stricklin must also show there is a reasonable probability that but for counsel’s failure to present his alibi defense, the result of his trial would have been different. Therefore, we turn to consider the merits of Stricklin’s alibi defense, had it been presented to the jury.

[10] As noted by the trial court, Nebraska precedent indicates that a defendant asserting an alibi defense bears a heavy evidentiary burden. To establish an alibi defense, a defendant must show (1) he or she was at a place other than where the crime was committed and (2) he or she was at such other place for such a length of time that it was impossible to have been at the place where and when the crime was committed.<sup>29</sup>

Stricklin claims he could not have been present during the shootings, according to the State’s theory that the shootings occurred around 12:30 p.m., because he proved through witness testimony and cell phone record evidence that he was located at least 5 miles away from the scene of the crime at 12:34 p.m. However, as we discuss, the evidence does not support Stricklin’s alibi, especially at the critical time.

[11,12] The district court explained there was nothing accounting for Stricklin’s presence between approximately 11 a.m. and 12:30 p.m. Stricklin complains the district court accepted his testimony that the haircuts commenced at

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<sup>27</sup> *Strickland*, *supra* note 13, 466 U.S. at 694.

<sup>28</sup> *Id.*, 466 U.S. at 686.

<sup>29</sup> NJI2d Crim. 8.1, comment, citing *Moreno*, *supra* note 9; *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *Mays v. State*, 72 Neb. 723, 101 N.W. 979 (1904); *Peyton v. State*, 54 Neb. 188, 74 N.W. 597 (1898). See, *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Veatch*, 16 Neb. App. 50, 740 N.W.2d 817 (2007).

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10 a.m., but not his testimony that the haircuts were not finished until around noon. However, in an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.<sup>30</sup> Where competent evidence supports the district court's findings, the appellate court will not substitute its factual findings for those of the district court.<sup>31</sup>

The trial court further explained that the phone records undermined the credibility of Stricklin's alibi and showed that Stricklin and Newman were in contact with one another based on ~~their numerous phone communications on the date of the~~ the shootings. At trial, the State called a records custodian with a cell phone provider who testified that Stricklin's phone records showed there was a call between Stricklin and Newman at 11:13 a.m., and then no phone activity on Stricklin's phone until 12:34 p.m. The court found this to be evidence of "a gap that corresponds to the time of the murders." Further, the phone records disprove Stricklin's testimony that he placed a call at 12:34 p.m. and received text messages during his drive to his grandmother's, because the phone records show that Stricklin received a call at 12:34 p.m., which went to voicemail, and that he did not receive text messages during this time. Even recognizing the fact that Stricklin's phone was located approximately 5 miles away from the crime scene at 12:34 p.m., such evidence does not establish that Stricklin was unable to be present at the body shop with Newman when the shootings occurred.<sup>32</sup>

The record does not support Stricklin's claim that he was at another place for such a length of time that it was impossible for him to have committed the murders. We agree with the district court that in light of the incriminating phone records

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<sup>30</sup> *State v. Russell*, 308 Neb. 499, 954 N.W.2d 920 (2021).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

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and an eyewitness identification, Stricklin failed to show a reasonable probability that presentation of his alibi defense at trial would have changed the outcome. Stricklin has failed to establish he was prejudiced by counsel's decisions. As such, Stricklin's claim that his counsel was ineffective for failing to present an alibi defense is without merit.

OTHER SUSPECTS

[13] Stricklin contends counsel was ineffective in failing to investigate and present evidence of other suspects. However, Stricklin's asserted theory regarding other suspects is not based on any evidence in our record, other than speculation based on hearsay. Stricklin attempted to refer to police reports contained in the presentence investigation report. However, the district court did not receive those materials into evidence and did not consider them. Thus, there is no evidence to support a reasonable probability of a different outcome had counsel presented evidence of other suspects. Trial counsel's failure to investigate various aspects of the case is not ineffective assistance of counsel, absent prejudice and a specific showing what the investigation would have revealed, what exculpatory evidence would have been discovered, or how such an investigation would have changed the outcome of the trial.<sup>33</sup> This assignment of error is without merit.

DEPOSITION OF CELL PHONE EXPERTS

Stricklin argues the court erred in not granting him leave to depose two cell phone experts. Stricklin contends that the experts would have interpreted the cell phone records in a manner corroborating his alibi. The State argues the court correctly found Stricklin's request to be outside this court's mandate upon remand.

As noted, following remand for an evidentiary hearing on two of Stricklin's postconviction claims, Stricklin moved

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<sup>33</sup> See *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

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to depose nine additional witnesses. The State objected to Stricklin's request to depose two cell phone record expert witnesses, and the court sustained the objection. In doing so, the court found that challenging the use of Newman's cell phone records was beyond the scope of the alibi claim raised in Stricklin's first motion for postconviction relief. Additionally, the court noted that Stricklin's cell phone records were received into evidence at trial and could be relied upon to support his claims on remand without the additional depositions of expert witnesses.

The construction of a mandate issued by an appellate court presents a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.<sup>34</sup> A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.<sup>35</sup>

Stricklin has not argued the district court erred in interpreting this court's mandate, and we find no error by the district court in that regard. Nor has Stricklin explained how his request was within the scope of the mandate.

To the extent any of the proposed expert testimony would have been relevant to Stricklin's alibi defense and thus within the scope of our mandate, we review the court's denial of a discovery request for an abuse of discretion.<sup>36</sup> Here, the court considered Stricklin's offer of proof regarding the expert testimony for purposes of evaluating his alibi defense and concluded that even if it had allowed the depositions and received the evidence, the result would have been the same. The court found Stricklin's phone records undermined, rather than supported, his alibi defense, because the phone records established a gap that corresponded with the time of the murders and showed

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<sup>34</sup> *State v. Harris*, 307 Neb. 237, 948 N.W.2d 736 (2020).

<sup>35</sup> *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

<sup>36</sup> See *Jackson*, *supra* note 32.

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Stricklin's contacts with Newman right before and after the murders. We find no abuse of discretion by the district court. This assignment of error is without merit.

CONCLUSION

The order of the district court dismissing Stricklin's motion for postconviction relief is affirmed.

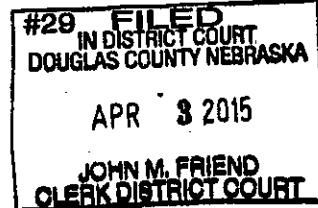
AFFIRMED.

HEAVICAN, C.J., and FREUDENBERG, J., not participating.



**OPINION OF THE SUPREME COURT OF NEBRASKA**

Case Title  
STATE OF NEBRASKA, APPELLEE,  
V.  
DERRICK U. STRICKLIN, APPELLANT.



Case Caption

STATE V. STRICKLIN

Filed April 3, 2015. No. S-14-182.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN,  
Judge. Affirmed.

Jeremy C. Jorgenson for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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Filed April 3, 2015. No. S-14-182.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
2. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
7. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
8. **Trial: Joinder.** There is no constitutional right to a separate trial.
9. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
10. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
11. **Trial: Joinder.** Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.
12. **Rules of Evidence.** Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.
13. **Trial: Evidence.** Evidence which is not relevant is not admissible.
14. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
15. **Trial: Joinder.** A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.
16. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

**17. Rules of Evidence: Rules of the Supreme Court: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.

**18. Rules of Evidence: Hearsay.** When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each statement.

**19. Confessions: Rules of Evidence.** For a statement against penal interest, the question under Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true.

**20. \_\_\_\_: \_\_\_\_.** As an initial matter, to qualify as a statement against penal interest under Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), the statement must be self-inculpatory.

**21. Confessions: Rules of Evidence: Words and Phrases.** A "statement" within the meaning of Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part.

**22. Rules of Evidence: Hearsay.** Individual remarks under examination pursuant to the hearsay exception of Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), must meet the test of whether the particular remark at issue meets the standard set forth in the rule.

**23. \_\_\_\_: \_\_\_\_.** In determining whether a statement is admissible under the residual hearsay exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.

**24. \_\_\_\_: \_\_\_\_.** In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement. A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.

**25. Rules of Evidence: Hearsay: Appeal and Error.** Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.

**26. Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.

**27. Rules of Evidence: Witnesses: Prior Convictions.** When impeaching a witness pursuant to Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2008), after the conviction is established,

the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.

**28. Rules of Evidence: Witnesses.** Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008), permits questioning during cross-examination only on specific instances of conduct not resulting in a criminal conviction.

**29. Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

**30. Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.

**31. Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.

**32. Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.

**33. Rules of Evidence: Jurors: Affidavits.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008), does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.

**34. Jury Misconduct: Trial: Appeal and Error.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.

**35. Witnesses: Juror Misconduct: Appeal and Error.** An appellate court reviews the trial court's determinations of witness credibility and historical fact for clear error and reviews de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.

**36. Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.

**37. Criminal Law: Juror Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.

**38. Jury Misconduct.** Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.

**39. Trial: Evidence: Appeal and Error.** Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for

the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Chief Judge.

CASSEL, J.

## I. INTRODUCTION

This case is Derrick U. Stricklin's direct appeal from multiple felony convictions, including two convictions for first degree murder. Stricklin's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a planned drug transaction. The State alleged that Stricklin committed the crimes with an accomplice, Terrell E. Newman, and the two were tried together. Stricklin's assignments of error relate to the consolidation of his and Newman's trials, the exclusion of statements made by a confidential informant, the scope of his cross-examination of the State's primary witness, the instructions given to the jury, prosecutorial misconduct, and juror misconduct. Finding no merit to his claims, we affirm his convictions and sentences.

## II. BACKGROUND

### 1. SHOOTINGS

Morales operated an automobile body shop in Omaha, Nebraska. On the morning of December 2, 2012, Morales' fiance dropped him off at the shop and returned home. At approximately 2:15 p.m., she returned to the shop to pick up Morales in order to take him to their son's birthday party.

Morales' fiance arrived at the shop, opened the shop's door, and called for Morales. When he did not respond, she climbed the stairs to the shop's office and saw Morales lying on his stomach with "blood coming out" of him. She observed another man lying face down, but she did not know who the man was. She called the 911 emergency dispatch center, but the operator was unable to understand her. She observed a man outside the shop, and the man was able to give the shop's address to the 911 operator.

Police officers identified the men in the office of Morales' shop as Morales and Noriega. Both men were deceased upon the officers' arrival, and autopsies revealed that both men died of gunshot wounds to the head.

While investigating the shootings, officers interviewed Jose Herrera-Gutierrez, who claimed to have been present during the incident. Although Herrera-Gutierrez did not know the names of the shooters, he had recognized them from prior occasions at Morales' shop. He knew that one of the shooters had a brother who was potentially a business partner of Morales' and that the other shooter was associated with a green Volkswagen Beetle that Herrera-Gutierrez had seen at Morales' shop. Based upon the information provided by Herrera-Gutierrez, officers compiled photographic lineups containing photographs of Stricklin and Newman, and Herrera-Gutierrez identified them as the shooters.

### 2. TRIAL

Stricklin was charged by information with seven counts, including two counts of first degree murder, attempted first degree murder, three counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Newman was charged with

the same offenses. Upon the State's motion, Stricklin's and Newman's trials were consolidated into a joint trial.

**(a) Herrera-Gutierrez' Testimony**

The events of December 2, 2012, revolved around a drug transaction planned to occur at Morales' shop. Herrera-Gutierrez testified that Morales had asked him if he could get Morales some cocaine. Herrera-Gutierrez and Noriega were supposed to deliver the cocaine to the shop.

At approximately 11:30 a.m., Herrera-Gutierrez and Noriega left a restaurant to go to Morales' shop. Upon their arrival, Herrera-Gutierrez exited the vehicle and telephoned Morales to unlock the shop's door. Morales opened the door and came outside. Herrera-Gutierrez saw Noriega linger in the vehicle for a moment, grab something, and put it underneath his arm. Herrera-Gutierrez testified that the thing Noriega had grabbed was "that cocaine."

The three proceeded into Morales' shop and up the stairs to the shop's office. Herrera-Gutierrez testified that when they arrived in the office, two black males were already present. Herrera-Gutierrez identified them as Stricklin and Newman. And he testified that he had recognized them from prior visits to the shop. He had seen Stricklin approximately four times at the shop, and he had seen Newman approximately three times at the shop. However, he had never learned their names, because Morales had not mentioned any names.

Upon entering the office, Noriega gave the cocaine to Morales and Morales set the cocaine on a table. Newman approached the table, and he and Morales opened the cocaine. Although Stricklin had a "see-through bag" containing wrinkled bills, Newman told Morales that he was going to get the money.

Newman turned around as if he was going to leave the office. But rather than leaving, he turned back around with a gun in his hand. Newman pointed the gun at them, and Herrera-Gutierrez saw that Stricklin also had a gun. Newman instructed Morales to tell Herrera-Gutierrez and Noriega to lie down. Herrera-Gutierrez and Noriega lay face down on the ground. Newman tied Herrera-Gutierrez' wrists, and a piece of plastic was wrapped around his face. Although Herrera-Gutierrez was able to breathe, he was unable to see if Stricklin and Newman were doing the same to Noriega.

Herrera-Gutierrez heard Stricklin and Newman instruct Morales to lie down as well. He heard Morales say, "No, you respect me, my house is your second house," and Newman reply, "I'm sorry, [Morales], business is business." Herrera-Gutierrez felt Morales lie down close to him. Herrera-Gutierrez was then lifted up a "little bit" and a plastic bag was placed over his head. Right after the bag was placed over his head, he heard "boom, boom, boom" and someone screaming. He testified that he heard two or three gunshots.

Herrera-Gutierrez started to feel like he was "asphyxiating." After he heard the shots, he heard a voice that he thought was Noriega, "lamenting, like AH, AH, AH." He then heard one more shot.

Someone grabbed Herrera-Gutierrez, the bag was taken off his head, and his hands were untied. He was dropped back to the ground, where he stayed and did not try to move. He heard footsteps, as if someone was walking quickly, and then heard someone turn around, as if the person had forgotten something and returned to grab it. After approximately 5 minutes, Herrera-Gutierrez turned around and saw a "circle" of blood where Morales was lying. He called

out to Morales, but Morales made no response. Herrera-Gutierrez ran out of the office, walked down a nearby street, and was eventually picked up by a passing driver. After being dropped off, he traveled to the home of Noriega's family in order to tell them what had happened.

#### (b) Verdicts and Sentences

The jury returned verdicts finding Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person.

Stricklin was sentenced to life imprisonment for each of the first degree murder convictions, 15 to 25 years' imprisonment for each of the three use of a deadly weapon convictions, 20 months' to 5 years' imprisonment for the attempted intentional manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon by a prohibited person conviction. Each sentence was ordered to run consecutively.

#### 3. APPEAL

Stricklin filed a timely notice of appeal--an appeal which is taken directly to this court.<sup>1</sup>

#### III. ASSIGNMENTS OF ERROR

Stricklin assigns, restated and reordered, that the district court erred in (1) consolidating his and Newman's trials, overruling his motion to sever, and permitting the State to use exhibit 288; (2) excluding the statements of a confidential informant; (3) prohibiting him from questioning Herrera-Gutierrez concerning his prior drug dealing; (4) failing to include all relevant and mandatory language in the instructions given to the jury; (5) overruling his motion for new trial on the basis of juror misconduct; and (6) overruling his motion to reopen the evidence. Stricklin further asserts that the State committed prosecutorial misconduct during its closing argument.

#### IV. STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.<sup>2</sup> A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.<sup>3</sup>

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.<sup>4</sup> Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.<sup>5</sup>

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<sup>1</sup> See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

<sup>2</sup> *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

<sup>3</sup> *Id.*

<sup>4</sup> *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

<sup>5</sup> *Id.*

[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.<sup>6</sup>

[6] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.<sup>7</sup>

[7] In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.<sup>8</sup>

## V. ANALYSIS

We address Stricklin's assignments of error in the order in which they occurred before the district court, beginning with the consolidation of his and Newman's trials.

### 1. JOINT TRIAL

[8,9] Stricklin contends that the district court erred in granting the State's motion to consolidate his and Newman's trials and in overruling his subsequent motion to sever. The law governing separate and joint trials is well settled. There is no constitutional right to a separate trial.<sup>9</sup> The right is statutory and depends upon a showing that prejudice will result from a joint trial.<sup>10</sup> The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.<sup>11</sup>

[10] The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.<sup>12</sup>

[11] As to the first question, the district court specifically found that Stricklin and Newman could have been charged in a single indictment or information. We find no error in this conclusion. The charges against Stricklin and Newman were identical and arose from their alleged involvement in the shooting deaths of Morales and Noriega. Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.<sup>13</sup>

As to prejudice, Stricklin's arguments arise from the admission of certain evidence at trial, specifically Newman's cell phone records and exhibit 288. Cell phone records played a significant role at trial in corroborating Herrera-Gutierrez' testimony and in tying Stricklin and Newman to Morales' shop on December 2, 2012. Newman's cell phone records showed multiple

<sup>6</sup> *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

<sup>7</sup> *Id.*

<sup>8</sup> *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

<sup>9</sup> *Foster*, *supra* note 2.

<sup>10</sup> *Id.* See Neb. Rev. Stat. § 29-2002 (Reissue 2008).

<sup>11</sup> *Foster*, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

calls with Morales and Stricklin on December 2. And exhibit 288 showed six calls received by Newman from 11:42 a.m. to 12:36 p.m. and indicated that the cell tower used to service Newman's cell phones for the calls was located in the immediate vicinity of Morales' shop.

Stricklin asserts that he was prejudiced by the admission of Newman's cell phone records and exhibit 288, because this evidence would not have been admissible against him in a separate trial. We disagree.

[12-14] Both the evidence of Newman's cell phone records and exhibit 288 would have been relevant, admissible evidence in a separate trial against Stricklin. Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.<sup>14</sup> Evidence which is not relevant is not admissible.<sup>15</sup> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>16</sup>

The State's theory of the case was that Stricklin and Newman committed the crimes together. And the State presented the testimony of Herrera-Gutierrez identifying Stricklin and Newman as the shooters. Newman's cell phone records and exhibit 288 served to bolster the State's theory and to corroborate Herrera-Gutierrez' identification of Stricklin and Newman. Newman's cell phone records showed that Newman was in communication with both Morales and Stricklin on the day of the shootings. And from exhibit 288, the jury could properly infer that Newman was in some proximity to Morales' shop at the time that he received the six calls. Because Newman was Stricklin's alleged accomplice, this evidence further supported the State's theory and was relevant to the issue of Stricklin's guilt.

[15] Because the evidence of Newman's cell phone records and exhibit 288 would have been admissible against Stricklin in a separate trial, Stricklin has failed to show that the consolidation of his and Newman's trials caused him prejudice. A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.<sup>17</sup>

Stricklin further claims that exhibit 288 was a demonstrative exhibit for which a limiting instruction was required, and he attempts to compare this case to *State v. Pangborn*.<sup>18</sup> In *Pangborn*, we determined that the trial court abused its discretion in permitting the jury to use a demonstrative exhibit during deliberations without providing a limiting instruction.<sup>19</sup>

Contrary to Stricklin's assertion, exhibit 288 was not admitted as a demonstrative exhibit, but as substantive evidence. Foundation was provided for the calls and the location of the cell

<sup>14</sup> *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

<sup>15</sup> See rule 402.

<sup>16</sup> Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

<sup>17</sup> *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

<sup>18</sup> *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

<sup>19</sup> See *id.*

tower shown on the exhibit, and the exhibit was admitted into evidence. Thus, no limiting instruction was required. This assignment of error is without merit.

## 2. CONFIDENTIAL INFORMANT

Stricklin assigns that the district court erred in excluding evidence of statements made by a confidential informant. And he argues that the exclusion of the statements violated his constitutional right to present a complete defense.

### (a) Facts

At a hearing on the defendants' motions in limine, a detective testified as to certain statements made by an informant who had spoken to Morales approximately 1 week before the shootings. According to the detective, the informant stated that Morales was seeking to obtain two firearms, because he was having problems with two black males. The informant stated that one of the male's nicknames was "Sip."

According to the detective, the informant was not sure of the origin of Morales' problems with the males. But the informant believed that Morales' problems possibly arose from a "drug tax" for selling drugs in the neighborhood. However, Morales never told the informant exactly what the tax was for. The informant further stated that he did not provide Morales with any firearms.

Additionally, the detective testified that he met with the informant on two occasions and that he showed the informant photographic lineups containing photographs of Stricklin and Newman. However, the informant did not identify either Stricklin or Newman as being "Sip."

The district court excluded the evidence of the confidential informant's statements on the basis that the evidence contained two levels of hearsay: (1) Morales' statements to the informant and (2) the informant's statements to the detective. And the court concluded that Morales' statements did not fall under either the exception for statements against interest<sup>20</sup> or the residual hearsay exception.<sup>21</sup>

### (b) Resolution

[16,17] Our case law and rules of evidence provide that hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>22</sup> Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.<sup>23</sup>

<sup>20</sup> Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

<sup>21</sup> Rule 804(2)(e).

<sup>22</sup> See, Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

<sup>23</sup> See, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008); *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[18] Stricklin does not contest the district court's conclusion that the evidence of the confidential informant's statements contained two levels of hearsay. When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each statement.<sup>24</sup> We discuss each of the hearsay exceptions considered by the district court.

*(i) Statement Against Interest*

Rule 804(2)(c) provides that when the declarant is unavailable as a witness, a statement may be admitted when it,

at the time of its making . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[19] For a statement against penal interest, the question under rule 804(2)(c) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true.<sup>25</sup>

[20] None of Morales' statements were sufficiently against his penal interest so as to fall within the purview of rule 804(2)(c). Morales had stated that he sought to obtain two firearms, that he was having trouble with two black males, that one of the males was called Sip, that the males wanted him to pay a tax, and that he owed "a lot" of money. None of these statements tended to expose Morales to criminal liability. Morales had not disclosed the basis for the tax or admitted to selling drugs; the informant only assumed that the tax was for selling drugs. Further, the informant stated that he did not provide Morales with any guns. As an initial matter, to qualify as a statement against penal interest under rule 804(2)(c), the statement must be self-inculpatory.<sup>26</sup>

[21,22] Stricklin argues that the investigation into the shootings revealed that Morales was in fact selling drugs. But in considering whether a statement qualifies as a statement against penal interest, a court must constrain its analysis to the individual statement at issue.<sup>27</sup> A "statement" within the meaning of rule 804(2)(c) is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part.<sup>28</sup> Individual remarks under examination pursuant to the hearsay exception of rule 804(2)(c) must meet the test of whether the particular remark at issue meets the standard set forth in the rule.<sup>29</sup>

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<sup>24</sup> See, Neb. Evid. R. 805, Neb. Rev. Stat. § 27-805 (Reissue 2008); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

<sup>25</sup> See *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

Morales' statements, standing alone, did not tend to expose him to criminal liability. Thus, his statements did not fall within the purview of rule 804(2)(c).

*(ii) Residual Hearsay Exception*

Under rule 804(2)(e), when the declarant is unavailable as a witness, a hearsay statement "not specifically covered" by any other hearsay exception may still be admitted if the statement has "equivalent circumstantial guarantees of trustworthiness" and the court determines that

(i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Further, the proponent of the statement must notify the adverse party of his or her intent to offer the statement and of the particulars of the statement, including the name and address of the declarant.<sup>30</sup>

[23] We have stated that in determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.<sup>31</sup>

[24] Moreover, in determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement.<sup>32</sup> A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.<sup>33</sup>

[25] Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.<sup>34</sup>

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<sup>29</sup> See *id.*

<sup>30</sup> See rule 804(2)(e).

<sup>31</sup> See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

<sup>32</sup> *Phillips*, *supra* note 25.

<sup>33</sup> *Id.*

<sup>34</sup> *Epp*, *supra* note 31.

Using these factors, we find no abuse of discretion in the district court's conclusion that Morales' statements were not admissible under the residual hearsay exception. Morales' statements did not exhibit similar guarantees of trustworthiness as a statement against penal interest, because his statements did not incriminate him in any wrongdoing. As to other factors affecting trustworthiness, Morales' statements were oral, the circumstances of the statements in seeking to obtain illegal firearms did not necessarily motivate Morales to speak truthfully, the statements were not made under oath, Morales was not subject to cross-examination, and there is no evidence that Morales subsequently reaffirmed the statements.

We further consider the probative value of Morales' statements in addition to their trustworthiness. Stricklin asserts that Morales' statements proved that two other black males had a motive to kill Morales. However, Morales' statements did not prove that Stricklin and Newman were innocent of the crimes. And his statements were not evidence of third-party guilt. The statements established only that Morales was having problems with persons other than Stricklin and Newman.

The above factors demonstrate that Morales' statements failed to exhibit sufficient guarantees of trustworthiness in order to be admitted under the residual hearsay exception. Because Morales' statements were inadmissible hearsay, we find no error in the exclusion of the evidence of the confidential informant's statements under the hearsay rule.

### *(iii) Complete Defense*

Stricklin relies on *Holmes v. South Carolina*<sup>35</sup> for the assertion that the exclusion of the confidential informant's statements violated his constitutional right to present a complete defense. In *Holmes*, the U.S. Supreme Court held that a defendant's right to present a complete defense was violated when the trial court used an arbitrary rule to exclude evidence of third-party guilt.

However, in *State v. Phillips*,<sup>36</sup> we addressed a similar argument and concluded that the exclusion of a hearsay statement under the hearsay rule did not violate a defendant's right to present a complete defense. In the case at bar, the evidence of the confidential informant's statements was properly excluded under the hearsay rule. Thus, Stricklin's right to present a complete defense was not violated.

### **3. CROSS-EXAMINATION OF HERRERA-GUTIERREZ**

Stricklin assigns that the district court abused its discretion in limiting the scope of his cross-examination of Herrera-Gutierrez. He contends that he should have been permitted to question Herrera-Gutierrez regarding his gang affiliation, his knowledge of the confidential informant, and his history of drug trafficking, including the circumstances of a 2002 conviction.

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<sup>35</sup> *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

<sup>36</sup> See *Phillips*, *supra* note 25.

### (a) Facts

Before Herrera-Gutierrez testified, the State moved to prevent Stricklin and Newman from asking any questions regarding Herrera-Gutierrez' membership in a gang and, specifically, his affiliation with "MS-13." The State further sought to prevent any questions regarding Herrera-Gutierrez' knowledge of the confidential informant. The district court sustained the State's motion as to the informant and as to Herrera-Gutierrez' affiliation with "MS-13." But it permitted the defendants to make a general inquiry into his membership in a gang.

And during cross-examination, Newman's counsel asked Herrera-Gutierrez, "You're pretty familiar with the sale of drugs. Is that fair to say?" Herrera-Gutierrez responded, "I don't think so because if it was that way, I would have a nice house, cars, but I didn't have money to pay my rent." Newman's counsel then asked, "You went to federal prison for it, didn't you?" The State objected, and the district court determined that the form of the question was improper.

Newman's counsel made an offer of proof, in which Stricklin joined, that Herrera-Gutierrez had been indicted by a federal court in 2002, had signed a plea agreement as to one count of knowingly and intentionally distributing less than 50 grams of methamphetamine, and had pled guilty. The district court explained that Herrera-Gutierrez could be questioned regarding the prior conviction and that if he denied it, the record of conviction could be offered. However, the court determined that he could not be asked any questions regarding the circumstances of the conviction. And it further provided that any questions regarding the sale of drugs were to be limited to the individuals and locations involved in this case.

### (b) Resolution

Stricklin's assertions regarding Herrera-Gutierrez' affiliation with a gang and his knowledge of the confidential informant are without merit. There was no indication that Herrera-Gutierrez was a member of "MS-13." Further, the district court permitted the defendants to ask general questions as to Herrera-Gutierrez' membership in a gang, and neither defendant chose to do so. As to Herrera-Gutierrez' knowledge of the confidential informant, the court correctly concluded that Herrera-Gutierrez could provide no testimony that would overcome the exclusion of the confidential informant's statements under the hearsay rule.

[26] As to the scope of cross-examination, we find no abuse of discretion in the limitation of questions regarding Herrera-Gutierrez' history of drug trafficking and his 2002 conviction. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.<sup>37</sup>

[27] Evidence of the circumstances of Herrera-Gutierrez' 2002 conviction was inadmissible under Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2008). That rule permits the offer of evidence of a witness' having committed a crime punishable by death or imprisonment of more than 1 year, or a crime which involved dishonesty or false statement regardless of the punishment, provided that not more than 10 years have elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date. But once having established the conviction, the inquiry must end there, and it is improper to

<sup>37</sup> *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.<sup>38</sup>

[28] As to Herrera-Gutierrez' prior history of drug trafficking, Stricklin was authorized to inquire into specific instances of conduct not resulting in conviction under Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008). There appears to have been some confusion regarding the interplay between rules 608(2) and 609, and we have not previously addressed the issue. However, several federal courts have arrived at a uniform conclusion. They hold that the federal equivalent of rule 608(2) applies only to specific instances of conduct that were not the basis of a criminal conviction. Evidence relating to a conviction is treated solely under the federal equivalent of rule 609.<sup>39</sup> Because rules 608(2) and 609 are substantially similar to their federal counterparts, we adopt the federal courts' conclusion.<sup>40</sup> Rule 608(2) permits questioning during cross-examination only on specific instances of conduct not resulting in a criminal conviction.

[29] Moreover, rule 608(2) conditions inquiry into specific instances of conduct upon the trial court's discretion. And under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.<sup>41</sup> In the case at bar, the district court permitted inquiry into any incidents of prior drug trafficking involving the locations and individuals in this case. But the court determined that any other instances of drug trafficking were too remote for cross-examination. We find no abuse of discretion in this determination. This assignment of error is without merit.

#### 4. JURY INSTRUCTIONS

Stricklin contends that instructions Nos. 5 and 6 omitted key and vital language in instructing the jury on the elements of the charged offenses. Specifically, he asserts that the instructions failed to charge the jury as to the requirement that the defendant intentionally used a deadly weapon to commit the crime, as to attempted robbery, and as to death as a natural and continuous result of the defendant's acts. He further claims that the omission of such language caused the jury confusion, as evidenced by a letter sent to the trial judge during deliberations. Because only instruction No. 6 pertained to Stricklin, we restrict our analysis to that instruction.

First, there is no indication that instruction No. 6 caused the jury confusion. The letter espoused by Stricklin in his appellate brief does not appear within the record on appeal.

[30] Second, Stricklin failed to object to the district court's jury instructions at trial. The failure to object to instructions after they have been submitted to counsel for review will

<sup>38</sup> See, *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014); *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

<sup>39</sup> See, *U.S. v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009); *U.S. v. Lightfoot*, 483 F.3d 876 (8th Cir. 2007); *U.S. v. Parker*, 133 F.3d 322 (5th Cir. 1998); *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991).

<sup>40</sup> See *Pangborn*, *supra* note 18.

<sup>41</sup> *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.<sup>42</sup>

Instruction No. 6 contained no plain error. The jury was instructed on the felony murder theory of first degree murder, and the intentional use of a deadly weapon is not an element of felony murder.<sup>43</sup> While such intentional use is an element of the offense of use of a deadly weapon to commit a felony, instruction No. 6 charged the jury on all of the necessary elements of that offense.

Further, there was no need to instruct the jury as to death as a natural and continuous result of the defendant's acts. The comment to NJI2d Crim. 3.5 provides that "[i]n the normal case there will be no issue regarding causation and no instruction on proximate cause need be given." In the case before us, there was no dispute that Morales' and Noriega's deaths were caused by the gunshot wounds sustained during the robbery at Morales' shop.

And there was no need to instruct the jury as to attempted robbery. Based upon the evidence received at trial, the jury could determine either that Stricklin and Newman were the two black males who had committed the robbery and killed Morales and Noriega, or that they were not. There was no issue as to whether the robbery forming the basis for felony murder actually occurred. This assignment of error is without merit.

##### 5. PROSECUTORIAL MISCONDUCT

Stricklin assigns that the State committed prosecutorial misconduct during its closing argument. During its argument, the State emphasized the multiple calls between Stricklin and Newman on the morning of December 2, 2012, and the lack of calls between the two after 11:13 a.m.:

So they're calling back and forth from 9:26 in the morning until 11:13. And in between there on Newman's records, you'll see his calls with [Morales]. At 11:13 . . . Stricklin has no more calls. From 11:13 until 12:34, he has no more calls. And the call that he wants you to believe he's traveling while it's being made, that call wasn't answered at 12:34. Why are there no more calls? The two of them are together. And in my mind, . . . Stricklin turned his phone off. He had no incoming or outgoing calls at all between 11:13 and 12:34.

[31,32] Stricklin objected to the State's comments, and the district court overruled the objection. However, he did not move for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.<sup>44</sup> A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial

<sup>42</sup> *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

<sup>43</sup> See NJI2d Crim. 3.5.

<sup>44</sup> *Robinson*, *supra* note 22.

misconduct.<sup>45</sup> Stricklin has waived any error resulting from the State's comments due to his failure to move for mistrial.<sup>46</sup> This assignment of error is without merit.

## 6. NEW TRIAL

Stricklin assigns that the district court erred in overruling his motion for new trial on the basis of juror misconduct. His arguments relate both to the evidence received by the court and to the court's ultimate conclusion that he was not prejudiced by juror misconduct.

### (a) Facts

After submission of the verdicts, Stricklin moved for a new trial and attached an affidavit from one of the jurors. In the affidavit, the juror stated that he had made a telephone call to his brother after the first day of deliberations and before a verdict had been reached. During the conversation, the juror's brother revealed that the juror's family had a connection to the defendants. The affidavit provided, in relevant part:

4. When the phone call was placed, I was the only person on the jury at that time that wanted to vote not guilty.

5. The purpose for having a discussion with [my brother] about the deliberations was two-fold:

a. First, at some point late in the trial . . . I realized that I recognized people in the audience who were familiar to me, then subsequently realized that I knew both of the defendants and my family has family relationships with them. In fact, at some point I learned that . . . Newman had an altercation with my father . . . and injured his shoulder in the past. . . .

b. Second, I felt that I was being pressured by the other jurors to change my vote to guilty and felt that I was in a moral dilemma because I didn't think that the State had proven their case. I discussed the fact that I wasn't sure how long I could hold the other jurors off and maintain my position of not guilty.

6. During the deliberations, the other jurors persuaded me to change my vote to guilty primarily because the defendants did not testify and attempt to clear their names.

7. On October 10, 2013[,] I returned to the deliberations room with the other jurors and changed my vote to guilty.

A hearing was conducted, and the juror testified that on the third or fourth day of trial, he had recognized a person in the audience that he knew from "growing up." The juror spoke with his brother after the first day of the jury's deliberations. The juror told his brother that he was serving on a jury for a murder trial. Although the juror did not inform his brother of Stricklin's or Newman's name, his brother knew about the trial and explained that he knew Stricklin and Newman. The juror's brother told the juror that Stricklin and Newman had known their father from growing up together. Although the juror's brother and father were not his biological family, the juror testified that he considered them as such.

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<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

As to the juror's knowledge of Stricklin and Newman, the juror confirmed that prior to the conversation with his brother, he had not made a connection between himself, his family, and either of the defendants. And he testified that he had never met Stricklin or Newman and that he had not known who they were. Additionally, the juror indicated that his brother did not inform him that Newman and their father had a negative history or relationship. And his brother did not tell the juror that Newman and their father had ever been involved in a physical altercation.

The juror also testified as to his vote, and he confirmed that he had discussed his desire to vote not guilty with his brother. The juror told his brother that he was the only member of the jury who wanted to vote not guilty and that he did not know what he was going to do.

At the hearing, the district court excluded certain portions of the juror's affidavit on the basis that they impermissibly revealed the juror's mental processes under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008). However, in its subsequent written order, the court stated that the portions were excluded because they were misleading.

Additionally, the district court received an affidavit from the presiding juror, stating that no outside or personal information regarding either Stricklin or Newman was brought to the jury's attention during deliberations.

The district court overruled Stricklin's motion for new trial. The court agreed that the juror had committed misconduct in communicating with his brother during deliberations; however, it concluded that no prejudice resulted from the misconduct. And it further rejected the defendants' assertion that the juror had committed additional misconduct in failing to reveal his family connection with the defendants.

(b) Resolution

(i) Evidence

Stricklin's arguments as to the evidence considered by the district court pertain to the stricken portions of the juror's affidavit. The court excluded all portions of the affidavit relating to the juror's vote, the jury's deliberations, the juror's knowledge of Stricklin and Newman, and the altercation between the juror's father and Newman. And during the juror's testimony, it further prevented the defendants from inquiring into whether the juror believed that the State had failed to meet its burden of proof, whether the juror had been experiencing a "moral dilemma," and whether the jury had considered the defendants' failure to testify.

We find no prejudicial error in the exclusion of the above evidence. The admissibility of evidence concerning the validity of a jury's verdict is governed by rule 606(2), which provides:

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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his 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. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[33] Additionally, we have explained that no evidence may be received concerning the effect of any statement upon a juror's mind, its influence upon the juror, or the mental processes of a juror.<sup>47</sup> Rule 606(2) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.<sup>48</sup>

The juror's statements as to his desire to vote not guilty, pressure from the other jurors to change his vote, the juror's "moral dilemma," and the jury's reliance upon the defendants' failure to testify fell directly within the purview of rule 606(2). These statements revealed the juror's mental processes and attempted to impeach the jury's verdicts on the basis of its motives, methods, and discussions during deliberations. As such, the statements were inadmissible and could not have been considered by the district court. And the questions posed to the juror during his testimony similarly attempted to elicit such improper information.

Stricklin argues that the district court's exclusion of the above statements, particularly the jury's reliance upon the defendants' failure to testify, violated the court's duty to undertake a full investigation into the allegations of juror misconduct. And he cites the U.S. Court of Appeals for the Fifth Circuit's holding in *United States v. McKinney*<sup>49</sup> that when jury misconduct is alleged in a motion for new trial, the trial judge must conduct a full investigation to ascertain whether jury misconduct actually occurred and, if it occurred, the judge must determine whether or not it was prejudicial.

[34] We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.<sup>50</sup>

However, this duty to hold an evidentiary hearing does not extend into matters which are barred from inquiry under rule 606(2). And the jury's consideration of the defendants' failure to testify was clearly barred from inquiry under that rule.<sup>51</sup> The district court permitted the juror to be examined as to the nature of the alleged misconduct and the extent of the extraneous information that he received. We see no violation of the court's duty to conduct an evidentiary hearing.

As to the statements in the affidavit regarding the juror's knowledge of Stricklin and Newman and the altercation between Newman and the juror's father, the exclusion of the statements did not cause Stricklin prejudice. At the hearing, the defendants were permitted to

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<sup>47</sup> See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

<sup>48</sup> See *id.*

<sup>49</sup> *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970).

<sup>50</sup> *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998).

<sup>51</sup> See, *U.S. v. Kelley*, 461 F.3d 817 (6th Cir. 2006); *U.S. v. Rodriguez*, 116 F.3d 1225 (8th Cir. 1997).

question the juror as to his conversation with his brother, his family's relationship with the defendants, his knowledge of the defendants, and whether he had been informed of any negative history or altercation involving his father and Newman.

Finally, we find no error in the district court's receipt of the affidavit of the presiding juror. The affidavit merely denied that extraneous information was brought to the jury's attention during deliberations. Rule 606(2) permits a juror to provide evidence on the limited question of "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."

*(ii) Misconduct*

[35] Stricklin also challenges the district court's ultimate conclusion that he was not prejudiced by juror misconduct. We review the trial court's determinations of witness credibility and historical fact for clear error and review *de novo* the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.<sup>52</sup>

[36,37] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.<sup>53</sup> In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.<sup>54</sup>

The record establishes that the juror committed misconduct in communicating with his brother during deliberations. The juror testified that he called his brother during deliberations and discussed the status of his vote and the other jurors' votes prior to the submission of the verdicts. This was clear misconduct.

[38] However, we agree with the district court that Stricklin was not prejudiced by the extraneous information received by the juror during the telephone call to his brother. Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.<sup>55</sup> The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process.<sup>56</sup>

The extraneous information received by the juror would not have affected an average juror's deliberative process. The district court determined that the juror had testified credibly that his brother informed him only that his father and the defendants had a neutral acquaintance. The juror confirmed that his brother did not tell him that his father and Newman had a negative history or relationship or that his father and Newman had been involved in a physical altercation.

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<sup>52</sup> See, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

<sup>53</sup> *Thorpe*, *supra* note 52.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002).

We agree with the district court that such knowledge of a neutral family acquaintance would not motivate an average juror to change his vote from not guilty to guilty.

Moreover, the jury was instructed to determine the facts based solely upon the evidence presented at trial and to disregard any personal knowledge. And the affidavit of the presiding juror established that no extraneous information was presented to the other jurors during deliberations. Based upon the nature of the extraneous information received by the juror, the limitation of that information to the juror, and the instruction to disregard personal knowledge, we conclude that the juror's misconduct did not prejudice Stricklin and deprive him of a fair trial.

Stricklin claims that in addition to communicating with a nonjuror, the juror committed misconduct in failing to reveal his family connection to the defendants prior to the submission of the verdicts. However, this claim similarly fails for lack of prejudice. As previously discussed, the district court determined that the juror had testified credibly that his brother revealed only a neutral family acquaintance with the defendants. And the juror testified that he did not personally know the defendants and that he never knew who they were. Thus, assuming that the juror committed misconduct in failing to reveal his family connection, Stricklin failed to show that such a remote connection prevented the juror from being impartial. This assignment of error is without merit.

#### 7. WITHDRAWAL OF REST

Stricklin contends that the district court erred in overruling his motion to withdraw his rest and to submit additional evidence on the issue of juror misconduct. After the hearing on his motion for new trial, Stricklin sought to introduce an affidavit from the juror's brother that provided:

When [the juror] called me the first day of deliberations, it was clear that he knew that our family knows the Defendants. He wasn't honest when he said at the Motion for New Trial that he didn't really know the Defendants. He told me that he didn't recognize them until he recognized people in the audience.

The district court overruled the motion to withdraw rest and excluded the affidavit. On appeal, Stricklin contends that the relevant factors weighed in favor of reopening the evidence and receiving the affidavit.

[39] Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.<sup>57</sup>

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<sup>57</sup> *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008).

The district court considered the above factors, and it determined that the defendants had not been diligent in offering the affidavit of the juror's brother. The brother was known to the defendants prior to the hearing, but they did not produce his statements.

And the district court further observed that receiving the affidavit would result in unfair surprise or unfair prejudice. At the hearing on the motion for new trial, the witnesses had been sequestered and, thus, they were not present for each other's testimony. The brother's affidavit "skirt[ed] the hearing's sequestration order," because it attempted to impeach the testimony given by the juror. If the brother had been present at the hearing, he would not have been allowed to hear and respond to the juror's testimony.

Based upon the district court's analysis of the relevant factors, we see no abuse of discretion in the denial of Stricklin's motion to withdraw his rest and to reopen the evidence. This assignment of error is without merit.

#### VI. CONCLUSION

We find no merit to Stricklin's assertions that the district court erred in consolidating his and Newman's trials, excluding the statements of the confidential informant, and instructing the jury. And the court did not abuse its discretion in limiting the scope of his cross-examination of Herrera-Gutierrez, overruling his motion for new trial, and denying his request to reopen the evidence. Further, Stricklin failed to preserve his claim of prosecutorial misconduct for appellate review. We affirm Stricklin's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



*Lane Layne*  
\_\_\_\_\_  
Clerk/Deputy Clerk

S-14-182

SUPREME COURT NO.

CR13-427

TRIAL TRIBUNAL NO.

April 3, 2015

DATE OPINION FILED

April 3, 2015

DATE OPINION CERTIFIED

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STATE OF NEBRASKA, APPELLEE, V.  
DERRICK U. STRICKLIN, APPELLANT.

— N.W.2d —

Filed August 17, 2018. No. S-17-914.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews *de novo* a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
5. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
6. \_\_\_\_: \_\_\_\_\_. In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.

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7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented by the same lawyer both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
8. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
9. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
10. \_\_\_\_: \_\_\_\_\_. To show that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
11. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
12. **Judges: Recusal.** To demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
13. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
14. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
15. **Trial: Attorneys at Law: Presumptions.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and there is a strong presumption that counsel acted reasonably.
16. **Trial: Prosecuting Attorneys.** Prosecutors generally may not give their personal opinions on the veracity of a witness or the guilt or innocence

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of the accused. The principle behind this rule is that the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.

17. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's post-conviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.
18. **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.
19. **Trial: Effectiveness of Counsel: Evidence.** 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. Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.
20. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.
21. **Postconviction: Evidence: Presumptions: Proof.** The threshold showing that must be made to entitle a prisoner to an evidentiary hearing on a postconviction claim of actual innocence is extraordinarily high, because after a fair trial and conviction, the presumption of innocence vanishes.

Appeal from the District Court for Douglas County: SHELLEY R. STRATMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stuart J. Dornan and Jason E. Troia, of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ., and HALL, District Judge.

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STACY, J.

A jury found Derrick U. Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. He was sentenced to life imprisonment for the murders and to additional terms of years for the other offenses, the sentences to run consecutively. We affirmed his convictions and sentences on direct appeal.<sup>1</sup>

Stricklin now moves for postconviction relief, raising claims of ineffective assistance of counsel and a claim of actual innocence. The district court denied relief without conducting an evidentiary hearing. Stricklin filed this timely appeal. We affirm in part, and in part reverse and remand for an evidentiary hearing.

#### I. FACTS

Stricklin's trial was consolidated with codefendant Terrell E. Newman. The underlying facts are set forth in our opinion in Stricklin's direct appeal.<sup>2</sup> Summarized, Stricklin's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a drug transaction at an automobile body shop owned by Morales. Jose Herrera-Gutierrez was also present during the drug transaction and the shootings, and he was the State's primary witness at trial. Herrera-Gutierrez identified Stricklin and Newman as the shooters and testified that he recognized both men from prior visits to Morales' shop. He had seen Stricklin approximately four times at the shop, and he had seen Newman approximately three times at the shop.

The State's theory of the case was that Stricklin and Newman committed the crimes together. Newman's cell phone records showed that Newman was in communication with both Morales and Stricklin on the day of the shootings, and also

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<sup>1</sup> *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

<sup>2</sup> *Id.*

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showed that Newman's cell phone was in the area of the murder scene during the relevant timeframe.<sup>3</sup>

A jury found Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. He was sentenced to consecutive sentences of life imprisonment for each murder conviction, 15 to 25 years' imprisonment for each use of a deadly weapon conviction, 20 months' to 5 years' imprisonment for the attempted manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon conviction.<sup>4</sup> The district court denied his motion for new trial, and he filed a direct appeal.

Stricklin was represented by the same counsel at trial and on direct appeal. In his direct appeal, Stricklin assigned the trial court erred in (1) denying his motion to sever, (2) excluding statements of a confidential informant, (3) limiting his cross-examination of Herrera-Gutierrez, (4) failing to include relevant language in certain jury instructions, (5) overruling his motion for new trial based on juror misconduct, and (6) overruling his motion to reopen the evidence. This court affirmed his convictions and sentences.<sup>5</sup>

Stricklin then filed the instant motion for postconviction relief, along with a motion for appointment of counsel. His postconviction motion alleges counsel was ineffective for (1) not moving to recuse the trial judge; (2) failing to object to jury instructions Nos. 6, 11, 12, and 20; (3) failing to file notice of his alibi defense and present certain alibi evidence; (4) failing to object and move for a mistrial during closing arguments; (5) failing to raise a confrontation objection at a hearing on his motion for new trial; (6) abandoning, during the hearing on the motion for new trial, all arguments except juror misconduct; (7) failing to call a witness at the hearing

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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on the motion for new trial; (8) failing to obtain a crime scene investigator; (9) failing to object to cell phone record evidence on “authentication” grounds; (10) failing to depose and call certain identified witnesses and investigate certain defenses; (11) failing to file a motion in limine regarding the admissibility of testimony of a confidential informant; (12) unreasonably advising him to waive his right to testify; (13) failing to assign as error on direct appeal the insufficiency of the evidence to support his convictions and the improper identification of Stricklin as one of the perpetrators; and (14) failing to obtain a complete record for appeal. Finally, Stricklin alleges a claim of actual innocence. The district court denied the postconviction motion without conducting an evidentiary hearing. Stricklin filed this appeal.

## II. ASSIGNMENTS OF ERROR

Stricklin assigns, restated, that the district court erred in (1) denying him an opportunity to amend his motion for postconviction relief, (2) denying him an evidentiary hearing on his motion for postconviction relief, (3) finding he did not meet the threshold for actual innocence, and (4) denying his motion for postconviction relief.

## III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews *de novo* a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.<sup>6</sup>

## IV. ANALYSIS

### 1. GENERAL PROPOSITIONS GOVERNING POSTCONVICTION

[2,3] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground

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<sup>6</sup> *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017); *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017).

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that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.<sup>7</sup> In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.<sup>8</sup>

[4-6] A trial court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.<sup>9</sup> If a postconviction motion alleges only conclusions of fact or law, or if the records and files in a case affirmatively show the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.<sup>10</sup> Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.<sup>11</sup>

[7] Here, Stricklin was represented by the same counsel at trial and on appeal, and his postconviction motion alleges counsel provided ineffective assistance both at trial and on direct appeal. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented by the same lawyer both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.<sup>12</sup>

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<sup>7</sup> *Vela, supra* note 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

<sup>12</sup> *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

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Recognizing this, the district court addressed all of Stricklin's ineffective assistance of counsel claims.

[8-11] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.<sup>13</sup> To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,<sup>14</sup> the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.<sup>15</sup> To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>16</sup> To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.<sup>17</sup> A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.<sup>18</sup>

2. MOTION TO AMEND  
POSTCONVICTION MOTION

Stricklin assigns error to the district court's "denying [him] an opportunity to amend his motion for postconviction relief." We review the district court's decision in this regard for an abuse of discretion.<sup>19</sup>

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<sup>13</sup> *Thorpe*, *supra* note 11; *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013).

<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>15</sup> See *Vela*, *supra* note 6.

<sup>16</sup> See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018).

<sup>17</sup> See *Vela*, *supra* note 6.

<sup>18</sup> *Id.*

<sup>19</sup> *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

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Approximately 4 months after filing his verified motion for postconviction relief, Stricklin filed a motion seeking “permission to Amend the Motion for Postconviction after the Court grants appointment of Counsel.” Newman filed a similar motion in his postconviction proceeding. At a joint telephonic hearing on the motions, the court asked for clarification:

THE COURT: Okay. There was a motion filed by both . . . Newman and . . . Stricklin on August 17, 2016, which was a Request for Counsel and a Request to Amend the Postconviction Motion. I need to ask, and I’ll start with you, Mr. Newman, are you asking to amend at this time?

MR. NEWMAN: Yes.

THE COURT: What are you asking to amend?

MR. NEWMAN: The motion for postconviction.

THE COURT: How are you asking for that to be amended?

MR. NEWMAN: By way of counsel.

THE COURT: Okay. So — what I want to make clear is, there was a motion asking for counsel, and then if counsel is appointed you want to keep open your ability to amend your Motion for Postconviction. Am I understanding that correctly?

MR. NEWMAN: Yes. Correct.

THE COURT: Okay. But you’re not asking to amend here today?

MR. NEWMAN: No.

THE COURT: All right. And I’ll ask you the same questions, Mr. Stricklin. Are you asking to amend your postconviction today?

MR. STRICKLIN: No.

THE COURT: Okay. Again, I’ll just make it clear with Mr. Stricklin. So you’re asking if the Court determines that an evidentiary hearing is warranted, then you’re asking for Counsel to be appointed and then the ability to amend at that time; is that correct?

MR. STRICKLIN: Correct.

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THE COURT: All right. So that matter will remain pending until the Court reviews — because I still have to review whether or not the evidentiary hearing will be granted, and then we can go from there.

MR. STRICKLIN: Okay.

The record affirmatively shows Stricklin was not seeking leave to immediately amend his postconviction motion in order to add factual allegations or include additional claims.<sup>20</sup> Instead, he intended the motion to serve as a placeholder of sorts for a possible future motion to amend by appointed counsel. Given the conditional nature of Stricklin's request, we find no abuse of discretion in denying the motion.

3. FAILURE TO SEEK RECUSAL  
OF TRIAL JUDGE

Stricklin's postconviction motion alleges his trial counsel was ineffective for not moving to recuse the trial judge and for abandoning an opportunity to have an evidentiary hearing on such a motion. Stricklin alleges that during his trial, "individuals and spectators in the audience" noticed "favoritism" and "deference favoring the state prosecution to the point of no return." Stricklin's postconviction motion alleges these concerns were brought to the attention of his counsel, and he claims counsel was ineffective for failing to pursue recusal based on these concerns. His motion does not explain what gave rise to these concerns nor does he allege any supporting facts.

[12,13] To demonstrate prejudice from counsel's failure to seek recusal, Stricklin must allege facts sufficient to demonstrate there was a reasonable probability such a motion would have been successful.<sup>21</sup> To demonstrate that a trial judge

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<sup>20</sup> Cf. *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010) (defendant requested leave to amend even if counsel was not appointed), *disapproved*, *Robertson*, *supra* note 19.

<sup>21</sup> See, e.g., *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018) (unless motion to suppress would have been successful, it cannot be said counsel was deficient in failing to file such motion).

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should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.<sup>22</sup> A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.<sup>23</sup>

Here, Stricklin's conclusory allegations of "favoritism" and "deference favoring the state" were insufficient to overcome the presumption of judicial impartiality and, without more, would not have required recusal. Moreover, the record affirmatively shows that when instructing the jury, the court specifically admonished it regarding such issues, explaining:

I am not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely.

You must not interpret any of my statements, actions, or rulings, nor any of the inflections of my voice as reflecting an opinion as to how this case should be decided.

[14] Because defense counsel is not ineffective for failing to raise an argument that has no merit,<sup>24</sup> we find no error in the postconviction court's denial of this claim without an evidentiary hearing.

#### 4. JURY INSTRUCTIONS

Stricklin argues his counsel was ineffective for failing to object to jury instructions Nos. 6, 11, 12, and 20. The district court denied Stricklin's motion as to instructions Nos. 5, 11, and 12, because it found errors related to those instructions had been addressed and rejected on direct appeal. The court

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<sup>22</sup> *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

<sup>23</sup> *Id.*

<sup>24</sup> *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

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denied Stricklin's motion as to instruction No. 20, because it found Stricklin failed to allege either what objection trial counsel should have made or what proposed alternative instruction should have been requested.

In his brief on appeal, Stricklin concedes that instruction No. 5 was addressed in his direct appeal and he presents no further argument regarding that instruction or his assigned error for instruction No. 6. Stricklin also concedes instructions Nos. 11 and 12 were addressed in codefendant Newman's direct appeal, but Stricklin contends he is not procedurally barred from raising those claims on postconviction, because he had the same counsel at trial and on direct appeal.<sup>25</sup> While it is true the claims of ineffective assistance premised on instructions Nos. 11 and 12 are not procedurally barred, Stricklin presents the same arguments regarding those instructions that Newman raised on direct appeal. And, in *State v. Newman*,<sup>26</sup> our opinion resolving Newman's direct appeal, we found such claims were meritless:

Instruction No. 11 provided the jury with definitions. Newman contends that the instruction was erroneous for omitting the phrase "'or intentional manslaughter,'" as stated in the pattern jury instruction. He does not identify the erroneous definition or the relevant pattern jury instruction, but we presume that he refers to the definition of "'[a] felony.'" Notwithstanding any error in that definition, the jury correctly understood that the offense of attempted intentional manslaughter constituted a felony. The jury found Newman guilty of attempted intentional manslaughter and the corresponding charge of use of a deadly weapon to commit a felony.

As to instruction No. 12, Newman contends that the instruction failed to correctly charge the jury on intent. However, instruction No. 12 was modeled on the relevant

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<sup>25</sup> See *McKinney, supra* note 12.

<sup>26</sup> *State v. Newman*, 290 Neb. 572, 585, 861 N.W.2d 123, 135 (2015).

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pattern jury instruction. As such, the instruction was not erroneous.

None of Newman's allegations of error in the instructions given to the jury caused him prejudice. Thus, the record affirmatively establishes that this claim of ineffective assistance of counsel is without merit.

Our reasoning in *Newman* shows that if Stricklin's counsel had challenged jury instructions Nos. 11 and 12, that challenge would likewise have been meritless. Because Stricklin's counsel cannot be ineffective for failing to raise an argument that has no merit,<sup>27</sup> the district court correctly denied postconviction relief on the claim involving instructions Nos. 11 and 12.

With respect to instruction No. 20, Stricklin alleges his counsel should have asked the court for a limiting instruction informing the jury that the records of Newman's cell phone use could not be considered in Stricklin's case. But in Stricklin's direct appeal, we specifically held Newman's cell phone records were admissible evidence against both Stricklin and Newman.<sup>28</sup> And we rejected the suggestion that a limiting instruction was necessary regarding an exhibit showing calls to Newman's cell phone and the location of the cell tower used to service those calls.<sup>29</sup> Because it would not have been error to deny such a limiting instruction if counsel had requested it, Stricklin's allegations of ineffective assistance as to instruction No. 20 were also insufficient to warrant an evidentiary hearing. We find no error in the postconviction court's denial of this claim without an evidentiary hearing.

##### 5. ALIBI DEFENSE

Stricklin alleges his counsel was ineffective for failing to file notice of and present an alibi defense. In his postconviction

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<sup>27</sup> See *Vo*, *supra* note 24.

<sup>28</sup> *Stricklin*, *supra* note 1, 290 Neb. at 552, 861 N.W.2d at 381 ("the evidence of Newman's cell phone records and exhibit 288 would have been relevant, admissible in a separate trial against Stricklin").

<sup>29</sup> *Id.*

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motion, Stricklin alleges that at 10 a.m. on the day of the crimes, he took his stepson to a barber shop in downtown Omaha, Nebraska. He further alleges they left the barber shop around noon and drove to Stricklin's grandmother's house "located on 36th and Himebaugh." He alleges he took the "North freeway" en route to his grandmother's house and that during the drive, he made a call on his cell phone at 12:34 p.m. The postconviction motion does not allege how long Stricklin stayed at his grandmother's house, but it does allege that four named witnesses would corroborate this alibi. The motion further alleges Stricklin's cell phone records would corroborate this alibi.

The district court found these allegations were insufficient to warrant an evidentiary hearing, because they did not "definitively state [Stricklin] was not at the murder scene and merely suggest [Stricklin] may have been at these other places at some point in the day." Stricklin's brief concedes his motion did not affirmatively allege he was not at the crime scene, but he contends it was sufficient to describe that he was somewhere else at the time the State claims the shootings occurred and to allege that numerous alibi witnesses would corroborate that claim.

[15] At trial, the State relied on cell phone evidence linking Stricklin and Newman to the crime scene between 11:42 a.m. and 12:36 p.m. Thus, based on the State's theory of the case, the crimes occurred during the general time period Stricklin has alleged alibi witnesses would confirm he was someplace else. Stricklin alleges his counsel knew of this alibi information and was deficient in failing to present it. Stricklin's brief acknowledges that trial counsel is afforded due deference to formulate trial strategy and tactics and that there is a strong presumption that counsel acted reasonably.<sup>30</sup> But he argues that the reasonableness of trial counsel's strategy in rejecting his alibi defense cannot be determined without an evidentiary hearing. We agree.

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<sup>30</sup> See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

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We find Stricklin has alleged facts which, if proved, are sufficient to show both deficient performance and prejudice regarding his alibi defense. Stricklin is entitled to an evidentiary hearing on whether trial counsel was ineffective for failing to file notice of and present evidence of his alibi defense.

#### 6. CLOSING ARGUMENTS/MISTRIAL

Stricklin alleges his trial counsel was ineffective for failing to move for mistrial based on prosecutorial misconduct. His motion alleges two instances of alleged misconduct, but he argues only one of them on appeal, so we limit our analysis to that instance.<sup>31</sup>

During closing arguments, Stricklin's counsel referred to cell phone records showing Stricklin's cell phone neither made nor received any calls between 11:13 a.m. and 12:34 p.m. During his closing argument, defense counsel suggested the lack of calls during that timeframe was because Stricklin was driving. In the prosecutor's rebuttal, she responded to that argument, stating:

At 11:13 . . . Stricklin has no more calls. From 11:13 until 12:34, he has no more calls. And the call that he wants you to believe he's traveling while it's being made, that call wasn't answered at 12:34. Why are there no more calls? The two of them are together. And in my mind . . . Stricklin turned his phone off. He had no incoming or outgoing calls at all between 11:13 and 12:34.

In response to this statement, Stricklin's attorney objected, stating, "That's not in evidence." The prosecutor countered that the cell phone records were in evidence, and the trial court overruled the objection.

In Stricklin's direct appeal, he alleged the prosecutor's comments amounted to prosecutorial misconduct. We found Stricklin had not preserved the issue for appellate review

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<sup>31</sup> See *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018) (errors must be both specifically assigned and specifically argued to be considered by appellate court).

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because his counsel had not requested a mistrial based on the prosecutor's comments.<sup>32</sup> Now, in his postconviction motion, Stricklin alleges his trial counsel was ineffective for failing to move for a mistrial and thus preserve for appellate review the issue of prosecutorial misconduct.

The district court denied postconviction relief on this claim without an evidentiary hearing, finding the prosecutor's comments did not mislead or unduly influence the jury and further finding that any resulting prejudice was not substantial enough to damage the integrity, reputation, or fairness of the judicial process. We agree.

[16] Prosecutors generally may not give their personal opinions on the veracity of a witness or the guilt or innocence of the accused.<sup>33</sup> The principle behind this rule is that the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.<sup>34</sup> We have emphasized the importance of this rule and have admonished prosecutors to avoid using phrases such as "'I believe'" or "'the State believes'"<sup>35</sup> when arguing their case to the jury.

But here, to the extent Stricklin suggests the prosecutor's remark "in my mind" was an attempt to express a personal opinion, it was not one relating to the veracity of a witness or to Stricklin's guilt or innocence. Rather, the prosecutor was responding to an argument advanced by defense counsel on the possible interpretation of cell phone evidence. While prosecutors would be wise to avoid language expressing their personal opinion on any matter, the statement at issue here was not

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<sup>32</sup> *Stricklin*, *supra* note 1.

<sup>33</sup> *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018). See, also, Neb. Ct. R. of Prof. Cond. § 3-503.4 ("[a] lawyer shall not . . . in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused").

<sup>34</sup> *Hernandez*, *supra* note 33.

<sup>35</sup> *Id.* at 928, 911 N.W.2d at 549.

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misconduct. Thus, Stricklin's trial counsel was not deficient for failing to move for a mistrial based on the remark. The district court correctly denied postconviction relief on this claim without an evidentiary hearing.

7. SAME CLAIMS AS NEWMAN

Stricklin raises several claims of ineffective assistance of counsel that are identical, or nearly identical, to claims raised by Newman in his motion for postconviction relief. These claims relate to: trial counsel's failure to object during the motion for new trial, trial counsel's failure to obtain a crime scene investigator, and trial counsel's failure to challenge the authentication of Newman's cell phone records. These assignments of error are analyzed, and rejected, in *State v. Newman*,<sup>36</sup> our opinion resolving Newman's appeal of his postconviction motion. We briefly address them here as well.

(a) Failure to Object During  
Motion for New Trial

Stricklin, like codefendant Newman, alleges his trial counsel should have objected when an attorney appointed to represent a juror accused of misconduct made a substantive representation about the juror's knowledge at a particular point in time, instead of eliciting such information from his client. Stricklin alleges that due to his counsel's deficient performance in not objecting to the remark, the juror's attorney was permitted to testify on behalf of his client and Stricklin was deprived of the opportunity to confront and cross-examine the juror. As we concluded in Newman's case, the files and records affirmatively refute this claim.

The record shows Stricklin and Newman both filed motions for new trial on the basis of juror misconduct, and the motions were heard together. Although Stricklin's counsel did not object to the substantive remark made by the juror's attorney, Newman's trial counsel did object, and argued the juror's

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<sup>36</sup> *State v. Newman*, ante p. 770, \_\_\_ N.W.2d \_\_\_ (2018).

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attorney should not be permitted to testify for his client. The court agreed and subsequently allowed both Stricklin and Newman to call the juror as a witness and ask questions about the timing and substance of the telephone conversation the juror had with his brother.

Thus, although Stricklin's counsel did not join in the objection raised by Newman's counsel, Stricklin can show no prejudice resulting from this failure. The files and records affirmatively refute his claim that he was denied an opportunity to question the juror directly, and the postconviction court did not err in denying an evidentiary hearing on this issue.

(b) Crime Scene Investigator

Stricklin alleges his trial counsel was ineffective in failing to hire a crime scene investigator to rebut Herrera-Gutierrez' testimony. Stricklin's allegations are nearly identical to those made by Newman in his motion for postconviction relief. And Stricklin's allegations fail for the same reasons articulated in our opinion analyzing Newman's claims.

Stricklin alleges his trial counsel was "content to cross-examine" the State's witnesses and was deficient for not hiring a crime scene investigator or specialist to refute the evidence regarding footprints and blood splatter, and to do additional DNA testing. But Stricklin's postconviction motion presents no allegations regarding what such an investigator or specialist would have testified to if called or how such testimony would have rebutted the State's evidence or affected the outcome of the case.

[17] A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence the investigation would have procured and how it would have affected the outcome of the case.<sup>37</sup> The district court correctly concluded that Stricklin's conclusory allegations about the failure to

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<sup>37</sup> *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

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hire a crime scene investigator did not warrant an evidentiary hearing.<sup>38</sup>

(c) Cell Phone Records

Stricklin alleges his counsel was ineffective for failing to object to the authenticity of the cell phone records received into evidence at trial. Stricklin alleges that if his attorney had objected to the cell phone evidence on the ground of "authentication of who was actually using the cellphones in question," the corroborative cell phone evidence would have been excluded. Stricklin's allegations are nearly identical to those made by Newman in his motion for postconviction relief, and they fail for the same reason.

As we discussed in *Newman*, the files and records affirmatively show an authentication objection would not have been successful and, therefore, Stricklin's counsel could not have been ineffective for failing to make such an objection.<sup>39</sup> The district court correctly denied postconviction relief on this claim without an evidentiary hearing.

8. MOTION FOR NEW TRIAL

Stricklin alleges his trial counsel was ineffective in handling his motion for new trial. He alleges counsel was deficient in two respects: (1) abandoning certain grounds that had been alleged in the motion and (2) failing to adduce certain evidence at the hearing.

(a) Abandoned Arguments

Stricklin alleges his trial counsel filed a motion for new trial alleging juror misconduct, irregularities in the proceedings, the verdict was not supported by sufficient evidence, the verdict was contrary to law, error in the jury instructions, and failure to sustain his motion for directed verdict. At the hearing on the motion for new trial, counsel argued only the issue of juror

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<sup>38</sup> See *id.*

<sup>39</sup> See, *Newman*, *supra* note 36; *Vo*, *supra* note 24.

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misconduct. Stricklin alleges his counsel abandoned the other arguments out of "neglect and inattention," and he alleges generally that if the other grounds had been pursued they would have been meritorious.

Stricklin's conclusory allegation that the abandoned arguments would have been meritorious is not supported by any factual allegations and is insufficient to show either deficiency in performance or resulting prejudice. The district court did not err in denying postconviction relief on this claim without an evidentiary hearing.

(b) Failure to Call  
Additional Witness

As noted, Stricklin's motion for new trial was premised on juror misconduct when, after the first day of deliberation, a juror made a telephone call to his brother and discussed the status of his vote. Stricklin alleges his counsel performed deficiently during the hearing on his motion.

At the hearing on the motion for new trial, portions of an affidavit from the juror were admitted into evidence and the juror was questioned by counsel for both Stricklin and Newman. The juror admitted he had telephoned his brother during an evening recess from deliberations. The juror told his brother, who lives in Georgia, that he was a juror in a murder trial, that he was the only juror wanting to vote "not guilty," and that he did not know what he was going to do. During the conversation with his brother, the juror also learned that his father was an acquaintance of Stricklin and Newman. Eventually, the jury returned a unanimous verdict of guilt.

After this hearing, the district court found the juror had committed misconduct, but that Stricklin had not been prejudiced by the misconduct. On direct appeal, we agreed, reasoning:

[W]e agree with the district court that Stricklin was not prejudiced by the extraneous information received by the juror during the telephone call to his brother.

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Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process.

The extraneous information received by the juror would not have affected an average juror's deliberative process. The district court determined that the juror had testified credibly that his brother informed him only that his father and [Stricklin and Newman] had a neutral acquaintance. . . . We agree with the district court that such knowledge of a neutral family acquaintance would not motivate an average juror to change his vote from not guilty to guilty.<sup>40</sup>

In his postconviction motion, Stricklin alleges his counsel was ineffective because he asked objectionable questions about the juror's thought process and he "should have known better." He also alleges his attorney was deficient for not calling the juror's brother as a witness during the hearing. Because Stricklin's brief argues only the latter allegation, we limit our analysis accordingly.<sup>41</sup>

Stricklin alleges that if his attorney had called the juror's brother to testify, the brother would have established that (1) the juror was aware before beginning deliberations that his family knew Stricklin and Newman and (2) the juror's father once injured his shoulder in an altercation with Newman. The district court found this alleged testimony, even if proved, would have been cumulative to similar testimony adduced during the hearing, so any deficiency could not have prejudiced Stricklin. Our *de novo* review leads us to the same conclusion.

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<sup>40</sup> *Stricklin*, *supra* note 1, 290 Neb. at 569-70, 861 N.W.2d at 391-92.

<sup>41</sup> See *Fetherkile*, *supra* note 31.

Several individuals testified at the hearing on the motion for new trial, including the juror accused of misconduct and the private investigator hired by the defense. Stricklin and Newman also testified via an offer of proof. The private investigator testified the juror had told him that the day before deliberations began, he started thinking he might know Stricklin and Newman, because he recognized some people in the gallery, and that was one of the reasons he called his brother. Newman testified that he knew the juror's family but had not recognized the juror. Newman also described an altercation with the juror's father: "It was just once. Me and him was wrestling around, and I hip tossed him and threw his shoulder out of a socket."

Because the purported testimony of the juror's brother would have been cumulative to other similar testimony, any deficient performance by trial counsel in not calling the brother did not result in prejudice to Stricklin. The district court did not err in denying this claim without an evidentiary hearing.

#### 9. FAILURE TO INVESTIGATE

Stricklin alleges that despite his request, trial counsel failed to "independently interview, depose, subpoena, or contact" various witnesses. In this regard, Stricklin presents some claims which are nearly identical to Newman's, and other claims which Newman did not raise.

[18,19] A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.<sup>42</sup> 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.<sup>43</sup> Strategic decisions made by trial counsel will not be second-guessed so long as those decisions are reasonable.<sup>44</sup>

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<sup>42</sup> *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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(a) Same Witnesses  
as Newman

Stricklin alleges his counsel failed to "independently interview, depose, subpoena, or contact" many of the same potential witnesses identified in Newman's postconviction motion. Like Newman, Stricklin alleges these witnesses would have testified to hearing that unnamed "Mexicans" or "Latino's" had killed Noriega and Morales; to hearing gunshots near the crime scene around 1:15 p.m. on the day of the shootings; to observing two men standing in a parking lot near the crime scene around 1 p.m. on the day of the shootings; to being scared of Herrera-Gutierrez and not believing his story "add[ed] up"; to observing Herrera-Gutierrez "acting crazy" on the day of the shootings; and to the belief that Noriega and Morales were "killed over drugs."

The district court addressed all of these allegations collectively and concluded Stricklin had failed to allege how depositing or subpoenaing any of these witnesses would have produced a different outcome at trial. For the same reason, we found these allegations insufficient to show prejudice in Newman's postconviction case, we find them insufficient in Stricklin's case.

Considering the alleged testimony of these potential witnesses in the context of all the evidence adduced at trial, we conclude the testimony would not have altered the evidentiary picture and would, at best, have had an isolated or trivial effect on the jury's findings. We find no error in the district court's denial of the claims involving these witnesses without an evidentiary hearing.

(b) Police Investigation

Stricklin's motion alleges his counsel did not investigate "irregularities" in the police investigation. He alleges the lead detective told crime scene technicians not to preserve blood evidence, gave false testimony at the suppression hearing, failed to check Herrera-Gutierrez' fingerprints against

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crime scene prints, and would unexpectedly show up at the jail while Stricklin was meeting with his trial counsel, which Stricklin alleged was an attempt to intimidate him.

Stricklin has not alleged which witnesses would have testified to these irregularities, nor has he alleged how his counsel's failure to investigate any of these alleged actions prejudiced his defense. For these reasons, we find no error in the district court's denial of an evidentiary hearing on this claim.

(c) Other Possible Suspects

Stricklin's postconviction motion also alleges his counsel failed to investigate and present evidence of two other potential suspects: Marcus Jefferson and James Moore.

Stricklin alleges that 2 days after the shooting, his half brother, Marcus Jefferson, told him that Morales had been "murdered by a guy named James Moore" because Morales had sold Moore "bad drugs" and refused to correct the problem or refund the money. Stricklin alleges he told his counsel about this discussion but counsel failed to investigate Moore as a potential suspect.

Stricklin also alleges he asked his counsel to investigate Jefferson as a potential suspect. Stricklin alleges he told his counsel that after the shootings, Jefferson seemed to know details of the crime that were not yet public. He also alleges Jefferson had a motive to murder Morales, because Morales owed Jefferson "alot [sic] of money" as a result of a fire in Morales' shop that destroyed Jefferson's "show car."

Stricklin's motion generally suggests that if his counsel had investigated this information, Jefferson and Moore would have been identified as suspects and the result of the trial would have been different. We conclude these allegations are sufficient, if proved, to allege both deficient performance and prejudice. Thus, Stricklin is entitled to an evidentiary hearing on his allegation that counsel was ineffective for failing to investigate the information related to Jefferson and Moore.

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10. MOTION IN LIMINE AND  
CONFIDENTIAL INFORMANT

Stricklin alleges his trial counsel was ineffective when he failed to "contact, interview, or depose" a confidential informant. Details relating to the confidential informant are set forth in our opinion on Stricklin's direct appeal.<sup>45</sup>

The parties learned, summarized, that a confidential informant had told police that 1 week before the crimes occurred, Morales told the informant he wanted to obtain firearms, because he was "having problems with two black males," one of whom was nicknamed "'Sip.'"<sup>46</sup> The informant told police he was not sure of the origin of Morales' problems with the men but believed it possibly arose from a "drug tax" for selling drugs in the neighborhood.<sup>47</sup>

Both Stricklin and Newman filed motions in limine asking the court to allow the police detective to testify about the confidential informant's statements. The district court overruled the motions in limine, finding the evidence was inadmissible hearsay. On Stricklin's direct appeal, we affirmed, reasoning the proffered testimony involved two layers of hearsay and did not fall under any of the exceptions argued to and considered by the trial court.<sup>48</sup>

In his postconviction motion, Stricklin alleges that after learning the identity of the confidential informant, his counsel failed to contact that informant or otherwise investigate what the informant had told police. Stricklin also alleges that he asked his counsel to show the confidential informant a photograph of "Sip" to confirm his identity. Stricklin alleges counsel never did so and, if he had, could have obtained enough corroborating evidence of trustworthiness so that the testimony of

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<sup>45</sup> *Stricklin*, *supra* note 1.

<sup>46</sup> *Id.* at 553, 861 N.W.2d at 382.

<sup>47</sup> *Id.* at 554, 861 N.W.2d at 382.

<sup>48</sup> *Id.*

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the confidential informant would have been admissible under the residual hearsay exception.<sup>49</sup>

Stricklin's argument appears to misunderstand the nature of the hearsay issue presented on direct appeal. In that appeal, we focused on the admissibility of Morales' statements that he was seeking firearms because he was having issues with "Sip." We held that such a statement was not against Morales' penal interest<sup>50</sup> and was not admissible under the residual hearsay exception.<sup>51</sup> With respect to the latter, we reasoned Morales' statements did not necessarily motivate him to speak truthfully, the statements were not made under oath, Morales was not subject to cross-examination, and there was no evidence he subsequently reaffirmed the statements.<sup>52</sup> We also reasoned that Morales' statements established only that Morales was having trouble with other persons—it did not establish that Stricklin and Newman were innocent of the crimes.

None of the allegations Stricklin makes in his motion would affect this analysis. We find the files and records affirmatively show counsel was not ineffective in this regard. Accordingly, the district court did not err in denying postconviction relief without an evidentiary hearing on this issue.

11. ADVISING STRICKLIN

NOT TO TESTIFY

[20] Stricklin alleges his counsel was ineffective for advising him not to testify. Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to

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<sup>49</sup> See, Neb. Rev. Stat. §§ 27-803(23) and 27-804(2)(e) (Reissue 2016); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

<sup>50</sup> See § 27-804(2)(c).

<sup>51</sup> See § 27-804(2)(e).

<sup>52</sup> *Stricklin*, *supra* note 1.

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testify or (2) if counsel's tactical advice to waive the right was unreasonable.<sup>53</sup>

Stricklin waived his right to testify in open court, and he makes no claim that his waiver was not free and voluntary or that counsel interfered with his freedom to decide whether to testify. Instead, he alleges his attorney's advice not to testify was legally unreasonable and thus deficient, because it was incorrect to suggest he could have been asked about details of his prior crimes.

Specifically, Stricklin alleges he chose not to testify based on counsel's advice that if he testified, the State could adduce evidence that he went to prison for "selling drugs" and he would be "'opening up a can of worms.'" He alleges this advisement was inaccurate and suggests his attorney should have advised him that if he testified, the jury could learn he was a convicted felon but that details of his prior crimes would be inadmissible.<sup>54</sup>

Stricklin's postconviction motion does not allege what his testimony would have been at trial or how it would have changed the outcome of the trial. Instead, he alleges he was prejudiced because there was evidence the jury convicted him due to his silence. In support of such a contention, he points to one paragraph in the affidavit of the juror accused of misconduct. In that paragraph, the juror avers he changed his vote to guilty "primarily because [Stricklin and Newman] did not testify and attempt to clear their names." The trial court sustained the State's objection to this paragraph and struck it pursuant to Neb. Rev. Stat. § 27-606(2) (Reissue 2016). We express no opinion on whether an inadmissible averment in a juror's affidavit can ever support a showing of prejudice under *Strickland*, because we conclude, under the first prong of *Strickland*, that counsel's advice was not deficient.

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<sup>53</sup> *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

<sup>54</sup> See Neb. Rev. Stat. § 27-608(2) (Reissue 2016).

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The State points out that at the time of Stricklin's trial, the law was unclear as to whether Stricklin could have been cross-examined under § 27-608(2) about the details of his prior felony drug conviction, and thus, the advice counsel gave him was not unreasonable. In fact, we addressed the interplay between § 27-608 and Neb. Rev. Stat. § 27-609 (Reissue 2016) for the first time in Stricklin's direct appeal, noting it appeared there had been confusion on that issue and we had not previously addressed it.<sup>55</sup>

After analyzing federal court decisions involving the federal equivalent to §§ 27-608(2) and 27-609, we held that when impeaching a witness pursuant to § 27-609, once the conviction is established, the inquiry must end there and it is improper to inquire into the details.<sup>56</sup> And we held that although § 27-608(2) permits questioning during cross-examination on specific instances of prior conduct, those instances are limited to conduct not resulting in a prior conviction.<sup>57</sup>

At the time Stricklin's counsel advised him, this court had not yet addressed the interplay between §§ 27-608(2) and 27-609. Thus, the tactical advice of Stricklin's counsel was, at the time, not unreasonable and the district court did not err in denying this claim of ineffective assistance without an evidentiary hearing.

12. INSUFFICIENCY OF EVIDENCE  
AND LACK OF IDENTIFICATION

Stricklin alleges his counsel was ineffective because, on direct appeal, he failed to include assignments of error that (1) the evidence at trial was insufficient to support his convictions and (2) there was an unduly suggestive identification of him as the perpetrator. Stricklin alleges generally that these claims

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<sup>55</sup> *Stricklin*, *supra* note 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

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would have been meritorious if raised and further alleges that counsel refused to raise these claims even though Stricklin "beg[ged]" him to. The record and files affirmatively refute these claims.

(a) Identification

Although Stricklin's counsel did not argue on direct appeal that the pretrial identification procedure was unduly suggestive, the procedure was similar for both Stricklin and Newman. Newman did present such a claim on direct appeal, and we concluded it lacked merit.<sup>58</sup> Thus, Stricklin's appellate counsel could not have been ineffective in failing to raise this claim.<sup>59</sup>

(b) Insufficient Evidence

Stricklin alleges his counsel was deficient in failing to assign, on direct appeal, that the evidence was insufficient to prove guilt beyond a reasonable doubt, because Herrera-Gutierrez' testimony was not credible and was uncorroborated by forensic or circumstantial evidence. Newman raised the same claim in his direct appeal, and we found it lacked merit, reasoning:

Newman's arguments invite us to exceed the scope of our appellate review. We decline to do so. We have repeatedly stated that an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. From the jury's verdicts, it is apparent that the jury found Herrera-Gutierrez to be credible. It is not the province of this court to question that determination. This assignment of error is without merit.<sup>60</sup>

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<sup>58</sup> *Newman*, *supra* note 26.

<sup>59</sup> See, *Fetherkile*, *supra* note 31; *State v. McLeod*, 274 Neb. 566, 577, 741 N.W.2d 664, 674 (2007) ("[d]efense counsel is not ineffective for failing to raise an argument that has no merit").

<sup>60</sup> *Newman*, *supra* note 26, 290 Neb. at 582, 861 N.W.2d at 133-34.

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The same analysis applies here. Thus, if Stricklin's counsel had assigned error to the sufficiency of the evidence on direct appeal, the assignment would have been meritless. The district court did not err in denying postconviction relief without an evidentiary hearing on this claim.

13. FAILURE TO OBTAIN  
RECORD FOR APPEAL

Stricklin alleges his counsel was ineffective on direct appeal because he failed to include a complete transcript in the appellate record. Specifically, Stricklin argues his attorney failed to include two items in the appellate transcript: (1) his motion to sever and (2) a supplemental jury instruction.

Stricklin's postconviction motion does not allege how these omissions affected the outcome of his appeal. His allegations are therefore insufficient to allege prejudice and do not warrant an evidentiary hearing. The district court correctly denied postconviction relief on these claims without an evidentiary hearing.

14. ACTUAL INNOCENCE

Stricklin alleges he is entitled to postconviction relief because he is actually innocent. He alleges all of his allegations of ineffective assistance of counsel support this claim, and he also alleges that the evidence adduced was so lacking in credibility that it cannot be used to establish his guilt.

[21] Newman made essentially the same allegations and raised the same argument in his appeal from the district court's denial of an evidentiary hearing on his motion for postconviction relief. As we noted in our resolution of Newman's appeal, the threshold showing that must be made to entitle a prisoner to an evidentiary hearing on a postconviction claim of actual innocence is extraordinarily high, because after a fair trial and conviction, the presumption of innocence vanishes.<sup>61</sup>

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<sup>61</sup> *Newman, supra* note 36, citing *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

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Stricklin's allegations, like those made by Newman, largely attack the weight of the evidence used against him and do not meet the high threshold. The district court did not err in denying postconviction relief on this claim without an evidentiary hearing.

V. CONCLUSION

The district court properly denied an evidentiary hearing on most of Stricklin's allegations, as Stricklin either failed to make sufficient factual allegations to support his claims or the files and records affirmatively show he is not entitled to relief.

However, Stricklin is entitled to an evidentiary hearing on his claims that trial counsel (1) failed to file notice of and present evidence of his alibi defense and (2) failed to investigate information regarding potential suspects Jefferson and Moore.

We thus affirm in part, and in part reverse and remand for an evidentiary hearing limited to these two claims.

AFFIRMED IN PART, AND IN PART REVERSED  
AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.