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STATE OF NEBRASKA, APPELLEE, V. RYAN M. ELSEMAN, APPELLANT.

___ N.W.3d ___

Filed October 2, 2026. No. S-24-816.

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. ____: ____: ____. The district 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 state or federal Constitution.
5. ____: ____: ____. An evidentiary hearing is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.
6. **Trial: Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.

7. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Postconviction: Appeal and Error.** In an appeal from the denial of postconviction relief, an appellate court will not consider for the first time on appeal claims that were not raised in the verified motion.
9. **Effectiveness of Counsel: Proof.** Generally, 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. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
11. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were or could have been litigated on direct appeal.
12. ____: ____. Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.
13. **Criminal Law: Due Process: Witnesses.** The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law.
14. **Criminal Law: Witnesses.** An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.

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

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

Michael T. Hilgers, Attorney General, and Austin N. Relph for appellee.

Funke, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Bergevin, JJ., and Mellor, District Judge.

Papik, J.

Ryan M. Elseman appeals the district court's denial of his motion for postconviction relief without granting an evidentiary hearing. Elseman alleged in his motion that a person who served on his jury made statements during voir dire that revealed bias. Elseman's trial counsel challenged the prospective juror for cause, but the district court overruled the challenge. Elseman asserted that thereafter, his counsel provided ineffective assistance by not using a peremptory strike and by not preserving and appealing the district court's overruling of the challenge for cause. Elseman also alleged that the State violated his constitutional rights by failing to disclose implied plea agreements with two of the witnesses who testified against him. We find that Elseman was not entitled to an evidentiary hearing on his claims concerning the juror and on his claim alleging a failure to disclose an implied plea agreement with one witness. We find, however, that he was entitled to an evidentiary hearing on his claim regarding the alleged failure to disclose an implied plea agreement with another witness. We therefore affirm in part, and in part reverse and remand with directions.

I. BACKGROUND

1. Trial and Direct Appeal

Elseman was tried and convicted of first degree murder and use of a deadly weapon to commit a felony. Our opinion affirming Elseman's convictions on direct appeal includes an extended discussion of the case's facts and procedural history, see *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014), which we broadly summarize here.

The State alleged that Elseman and a group of others, including Marqus Patton, Drake Northrop, and Emily G., were on their way to buy marijuana from Kristopher Winters when

they changed plans and decided to rob Winters instead. At trial, the State adduced evidence that the group carried out this scheme. Northrop and Emily testified that Emily first entered Winters' house and then sent a text message to Elseman after which Elseman, Patton, and Northrop entered. Northrop testified that after he and the other men entered, Elseman threatened Winters, a scuffle ensued, and Elseman shot Winters. The State does not dispute that Northrop provided the only testimony that Elseman shot Winters.

Winters' mother testified at trial that she saw the men who entered the house as they were running away and that she screamed at them. She identified the men as three black males. Elseman is a white male.

Following his convictions, Elseman was sentenced to life imprisonment for the first degree murder conviction and 25 to 30 years' imprisonment for the use of a deadly weapon to commit a felony conviction. After sentencing, Elseman, represented by the same counsel who represented him at trial, filed a direct appeal. We affirmed. See *id.*

2. Motion for Postconviction Relief

Elseman later filed a pro se motion for postconviction relief, along with a motion for the appointment of counsel. The district court granted the motion for appointment of counsel and granted Elseman leave to file an amended motion for postconviction relief. Elseman, with the aid of counsel, later filed an amended motion for postconviction relief, which is the operative motion for purposes of this appeal. Elseman's motion for postconviction relief raised five claims, which we discuss in more detail in the following subsections.

(a) Claims Regarding Challenged Juror

Three of the claims in Elseman's operative motion for postconviction relief pertained to the seating of a juror Elseman alleged was biased. For ease of reference, we will refer to this individual as the "challenged juror." During voir dire at Elseman's trial, the district court asked prospective jurors

whether they had learned about Elseman or Patton from media coverage. The district court allowed Elseman's trial counsel to separately examine those prospective jurors who responded affirmatively. After the challenged juror acknowledged seeing media coverage regarding the case, this exchange took place:

> THE COURT: All right. We've got [the challenged juror] here who indicated a few minutes ago that he thinks he might remember something about this incident; is that fair?
>
> [Challenged juror:] Yeah, that's correct.
>
> THE COURT: Go ahead. Why don't you tell us?
>
> [Challenged juror:] Well, I think I remember now the initial — when the alleged crime happened. I remember some media coverage about it. I can recall the — some pictures, I think, of some of the accomplices. And I just remember that it was a botched — or a robbery attempt and the murder. It's just kind of coming back to me. I remember some of the faces from it.
>
> I remember thinking at the time, I think the media coverage stated there was some, that the gentleman who was killed, I just remember recollections of some of his neighbors or friends talking about what a great guy he was. I just kind of recall all of that. I remember thinking at the time it sure didn't look like a good deal, but that's the majority of it, I don't know, that I recall.
>
> I do vaguely remember, also, I think, some of the previous trial that you had mentioned with one of the other people in here and — but I really can't even recall that much about that.
>
> THE COURT: All right. And, of course, [Elseman's] on trial.
>
> [Challenged juror:] Yes, correct.
>
> THE COURT: The question is: Knowing what you recall about the incident, can you set that aside, listen to the evidence in this case and make the State meet its burden as far as [Elseman's] —

[Challenged juror:] I do believe that I can. I just thought it was important for me to let you know I do remember it. I remember my initial impulse that it was a very bad deal and I didn't feel very good about it.

. . . .

[Defense counsel:] Ryan Elseman, what, if anything, do you remember about him, the stories, TV, if anything?

[Challenged juror:] I think just from mostly, I believe it was in the Omaha World-Herald right after the story broke. I just remember that he was alleged to have used the gun to kill — to kill the drug dealer.

. . . .

[Defense counsel:] I need to know that you're going to be fair and impartial on behalf of [Elseman].

[Challenged juror:] I believe that I can be.

[Defense counsel:] I'm always concerned when I hear a lot of "I believe I can."

[Challenged juror:] That's a good point. I guess I should say [when I heard the news coverage] I had a problem with the story. I had a problem, and I guess maybe I still do a little bit. I'm probably leaning a little bit more toward the State, if you will, but I realize they have to present the evidence. I think I can do that fairly, but I have to admit, based on the media coverage at the time . . . I remember thinking how heinous of a crime this was, how unnecessary it was for a murder to occur in a situation like this, based on what I read.

[Defense counsel:] As we sit here today, do you believe [Elseman's] more than likely guilty as charged?

[Challenged juror:] I'd like to think of myself as being open-minded.

[Defense counsel:] And I'm not saying that. I don't want you to misread me.

[Challenged juror:] I think that — I think it could be a problem.

[Defense counsel:] For [Elseman]?

[Challenged juror:] Yes.

[Defense counsel:] If you stayed on the jury?

[Challenged juror:] Right. I mean, a possibility of it, yes.

[Defense counsel:] All right. So — I'm going to phrase this — I don't want to put words in your mouth — but would you agree with me, then, the way you're feeling now is that [Elseman] could be at a distinct disadvantage in the event you were kept on the jury; is that a fair statement?

[Challenged juror:] I am saying that, yes.

[Defense counsel:] I appreciate your honesty.

THE COURT: Wait a minute. Once again, you've heard no evidence.

[Challenged juror:] That's correct.

. . . .

THE COURT: So right now, you know that there's a presumption of innocence, correct?

[Challenged juror:] I do understand that, yes.

THE COURT: And by "presumption" that means that's something that can be rebutted, but not — it isn't rebutted right now. So right now if I said to you, what would your verdict be, what would you say?

[Challenged juror:] It would have to be innocent.

THE COURT: You're right, because there's a presumption of innocence and he hasn't — there's no evidence to find him guilty.

[Challenged juror:] Correct.

THE COURT: That doesn't mean that there's something wrong with you changing your mind based upon what the State presents, see?

[Challenged juror:] Right.

Elseman's trial counsel moved to strike the challenged juror for cause, and the district court overruled the motion. Elseman's counsel did not use a peremptory strike on the challenged juror. He was seated and served on the jury as the foreperson.

In his operative motion for postconviction relief, Elseman alleged three separate claims concerning the seating of the challenged juror. Two of those claims alleged ineffective assistance of counsel. First, Elseman asserted his trial counsel should have used a peremptory challenge on the challenged juror. Second, he alleged his counsel provided ineffective assistance by failing to preserve and then appeal the district court's decision to overrule his motion to strike the challenged juror for cause. Specifically, Elseman alleged that his counsel should have made a record demonstrating that he used all available peremptory challenges on other prospective jurors and the challenged juror was thus forced upon him. This, Elseman alleges, would have preserved for appeal an argument that the district court erred by denying his challenge for cause under our opinion in *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890.

In addition to his claims of ineffective assistance of counsel, Elseman also raised a stand-alone claim of trial error concerning the seating of the juror. He asserted that because the juror demonstrated bias, the district court's decision to seat him was "structural error." Elseman claimed that a finding of structural error would require the district court to vacate his convictions and order a new trial.

(b) Claims Regarding Alleged Implied Plea Agreements

Elseman's other two claims in his operative motion for postconviction relief alleged that the State violated his constitutional rights by failing to disclose that Northrop and Emily had entered into implied plea agreements prior to their testimony at Elseman's trial.

At the time of Elseman's trial, Northrop had also been charged with first degree murder for his role in Winters' death. Northrop was asked at Elseman's trial what he had been

promised in exchange for his testimony. He twice responded, "Nothing."

On cross-examination, he testified that he hoped he would be able to go home as soon as he could after the trial. He also admitted he was testifying because he thought it would help his chances, agreeing on two occasions that he would "do whatever it took" to ensure he could get "out of this jam."

Emily, who was also charged with first degree murder but was 15 years old when Winters was killed, testified that she also hoped for leniency, specifically that her case would be moved to juvenile court, where the maximum penalty would be lower. She admitted she had spoken to the prosecutors about moving her case to juvenile court, and her motion to transfer her case there had been pending for over a year. Like Northrop, Emily testified that she had not been promised anything but agreed she would do "whatever it takes" to get her case moved to juvenile court.

In its closing argument, the State mentioned the above testimony. The prosecutor said:

> No doubt great lengths will be talked about in [defense counsel's] closing about the credibility of [Emily] and Northrop because of a deal they're going to get.
>
> Do I want to make deals with people like [Emily] and Northrop? No. Again, this is the real world, and people aren't going to do something for nothing, certainly not people like [Northrop] and Emily[.] No, they're not coming in here, out of the goodness of their heart, and admitting to committing first degree murder, which is what the two of them did. On numerous occasions they have admitted to it. They both expect something in return. And what weight you give that towards their credibility is going to be up to you.

Elseman's motion for postconviction relief asserted that several facts indicated that Northrop and Emily reached implied plea agreements with the State. With respect to Northrop,

Elseman alleged that following his convictions, Northrop pled guilty to an amended charge and was sentenced to a term of 10 years' incarceration. Elseman also alleged that in June 2016, Northrop's former cellmate sent Patton's counsel a letter stating that one day, Northrop returned from a meeting with his counsel "'very happy'" and stated that "'as long as he followed what the prosecutor had told him, they promised him no more than 10 years.'" Elseman also alleged that at an evidentiary hearing on Patton's motion for postconviction relief, an employee of the public defender's office testified that during a meeting with her, Northrop stated that his attorney "'told me that he couldn't promise me that I had a deal but that I had a deal.'" Elseman also alleged that Northrop's former cellmate testified at the evidentiary hearing on Patton's motion for postconviction relief that Northrop told the cellmate that "'as long as he followed what [the prosecutors] had told him, he would get a 10 to 15 or a 10 to 10, maybe, or something like that.'" Elseman alleged that the former cellmate further testified that Northrop said his attorney told him "he couldn't admit he had a deal" and that he "'wasn't supposed to tell anybody that.'"

As for Emily, Elseman alleged that after his convictions, Emily's case was transferred to juvenile court. Elseman also alleged that at the evidentiary hearing on Patton's motion for postconviction relief, Emily's attorney testified that while there was no express agreement about transferring Emily's case to juvenile court, the attorney was "'confident'" that it would be done.

3. Denial of Motion for Postconviction Relief

The district court denied the motion for postconviction relief without an evidentiary hearing. The district court found that each of the claims pertaining to the challenged juror were affirmatively refuted by the record. The district court concluded that there was no showing that the challenged

juror was partial or unable to set aside any pretrial opinions. Accordingly, the district court reasoned, Elseman could not show prejudice from trial counsel's failure to use a peremptory strike on the challenged juror. And, for the same reason, the district court concluded that any appeal of the district court's overruling of his motion to strike the challenged juror for cause would have been unsuccessful and thus, counsel was not deficient for failing to preserve and appeal that issue. The district court also found that Elseman's stand-alone claim of trial error relating to the seating of the challenged juror failed because he could not show error.

The district court further found that Elseman was not entitled to an evidentiary hearing on his claims relating to implied plea agreements with Northrop and Emily. For this finding, the district court cited several reasons. First, it concluded that Elseman could have raised the issue on direct appeal and thus, the claims were procedurally barred. Second, the district court concluded that Elseman had failed to allege facts demonstrating that Northrop and Emily had actually reached plea agreements at the time of Elseman's trial. Here, the district court specifically stated that Elseman's claim regarding Northrop depended on allegations about what Northrop had said to the employee at the public defender's office that conflicted with his testimony at Elseman's trial; the district court likened Northrop's statements to "recantation" and concluded "[s]uch evidence" was "suspect" under *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

Finally, the district court concluded that even if Northrop and Emily failed to disclose implied plea agreements, that was, at most, harmless error. On this point, the district court reasoned that both Northrop and Emily were questioned at trial about their hopes for leniency and that the State acknowledged in its closing argument that "each of the witnesses was going to get a 'deal.'"

Elseman filed a timely appeal.

II. ASSIGNMENTS OF ERROR

Elseman assigns five errors on appeal. Each of his assigned errors corresponds to one of his five claims for postconviction relief. With respect to each claim, he assigns that the district court erred by finding that he was not entitled to an evidentiary hearing.

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. *State v. Trail*, 319 Neb. 84, 21 N.W.3d 61 (2025).

IV. ANALYSIS

Elseman argues that he should have received an evidentiary hearing on each of his five claims for postconviction relief. Before analyzing his arguments with respect to each claim, we briefly review legal principles governing claims for postconviction relief.

1. Postconviction Legal Standards

[2,3] 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. *State v. Lessley*, 312 Neb. 316, 978 N.W.2d 620 (2022). Thus, 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. *Id.*

[4,5] The district 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 state or federal Constitution. *Id.* On the other hand, an evidentiary hearing

is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

With these standards in mind, we turn to Elseman's claims.

2. Claims Regarding Challenged Juror

We first address Elseman's various claims regarding the challenged juror, beginning with his claim that trial counsel should have preserved and appealed the district court's overruling of his motion to excuse the challenged juror for cause.

(a) Claim That Trial Counsel Should Have Appealed

Elseman submits that reasonable trial counsel would have preserved and appealed the overruling of his motion to excuse the challenged juror for cause and that if his trial counsel had done so, his convictions would have been reversed by this court on direct appeal. We agree with the district court's determination that this claim is refuted by the record. As we will explain, we find that even if counsel had appealed, such an appeal would not have been successful.

At the heart of this claim is Elseman's contention that the district court erred by overruling his motion to excuse the challenged juror for cause. In particular, Elseman argues that by overruling his challenge and allowing the challenged juror to be seated, the district court violated federal and state constitutional guarantees, as well as a Nebraska statute. We address Elseman's constitutional arguments first.

(i) Constitutional Argument Regarding Challenged Juror

[6] Both the 6th Amendment to the U.S. Constitution, applied to the states through the 14th Amendment, and article I, § 11,

of the Nebraska Constitution guarantee to criminal defendants the right to a speedy and public trial by an impartial jury. See *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998). This court has determined that while those constitutional provisions require that a juror be excused or a mistrial declared when a juror cannot be fair and impartial, "the competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise." *Id.* at 15, 573 N.W.2d at 775.

We have also recognized that the task of determining whether a person on the venire should be dismissed for cause or whether a juror should be dismissed after commencement of the trial is largely entrusted to the discretion of the trial court. See *Krutilek, supra*. In *Krutilek*, we explained that the discretion afforded to trial courts in this area is considerable. We cited approvingly, for example, to decisions in which appellate courts deferred to trial courts' resolutions of challenges for cause even when a juror or potential juror was equivocal about his or her ability to be impartial. We also noted that the appraisal of whether a juror can be fair or impartial may involve weighing factors not reflected in an appellate record.

Applying those principles in *Krutilek*, we held that a trial court did not abuse its discretion by overruling a motion to strike for cause a juror who stated he would "'do [his] best'" to be impartial despite knowing one of the witnesses. 254 Neb. at 16, 573 N.W.2d at 775. We distinguished these facts from an earlier case in which a juror expressly stated a belief that he could not be a fair and impartial juror. The juror in *Krutilek* did not unequivocally state he could be fair and impartial, nor did he state he could not be fair and impartial. *Id.* Even so, we determined that the trial court was in the best position to determine whether the juror could be fair and impartial. In the absence of "something specific in the record that would indicate otherwise," we found no abuse of discretion. *Id.* at 18, 573 N.W.2d at 776.

We understand *Krutilek* and our other cases in this area to be consistent with U.S. Supreme Court decisions regarding the Sixth Amendment right to an impartial jury. The U.S. Supreme Court has said that when a juror's impartiality is at issue, the relevant questions are whether the juror swore that "he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). But the U.S. Supreme Court has also recognized that the determination of whether a prospective juror can be impartial is not susceptible to stringent appellate review. See, *Skilling v. United States*, 561 U.S. 358, 386, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) ("[r]eviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record . . ."); *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) (comparing trial judge's function at voir dire to function of juries at trial and observing that "[i]n neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses"). Accordingly, a trial court's finding of juror impartiality may only be overturned for "manifest error." *Mu'Min v. Virginia*, 500 U.S. 415, 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (internal quotation marks omitted).

Elseman contends that the challenged juror's affirmative response when asked if Elseman "could be at a distinct disadvantage" if the challenged juror was kept on the jury was an unequivocal statement that he could not be fair and impartial. Because the challenged juror made an unequivocal statement that he could not be fair and impartial, Elseman argues, the district court was constitutionally obligated to sustain his motion to excuse the challenged juror for cause.

We disagree that the challenged juror unequivocally stated that he could not be fair and impartial. We do not deny that

the challenged juror made several statements that merited additional inquiry. In addition to agreeing that Elseman "could be at a distinct disadvantage" if he was kept on the jury, the challenged juror also acknowledged reading about the case in media reports, learning that Elseman was the alleged shooter, forming an "initial impulse" that Winters' death was a "very bad deal," and thinking that this was a "heinous" and "unnecessary" crime.

Contrary to Elseman, however, we do not understand any of these statements, alone or taken together, to rise to the level of an unequivocal expression that the challenged juror could not be fair and impartial. Even if the challenged juror formed initial impressions based on media reports, it does not follow that he was incapable of setting those impressions aside and fairly deciding the case based on the evidence presented. Further, the challenged juror's affirmative response to the question of whether Elseman "*could* be at a distinct disadvantage," if the challenged juror was left on the jury was, by its terms, equivocal. (Emphasis supplied.) The word "could" is "used to indicate possibility." See The New Oxford American Dictionary 389 (2001). So while the challenged juror perhaps acknowledged a *possibility* that his presence on the jury would place Elseman at a disadvantage, his answer to that precise question also left open the possibility that it would not.

Furthermore, the challenged juror made several other statements suggesting that, notwithstanding the statements highlighted above, he was, in fact, capable of serving as a fair and impartial juror. The challenged juror stated that he "believe[d]" he could set aside what he learned and require the State to carry its burden to prove Elseman's guilt. He also stated that he "believe[d]" he could be "fair and impartial" to Elseman. And while he at one point said he was "leaning a little bit more toward the State," he just moments later acknowledged that the State had to present evidence. When asked by Elseman's counsel if he believed Elseman was more than likely guilty, the challenged juror refused to agree, saying he

"like[d] to think of [himself] as being open-minded." Finally, after answering the question about whether Elseman could be at a disadvantage if the challenged juror was left on the jury, the challenged juror engaged in an exchange with the district court in which he demonstrated that he understood the presumption of innocence and that he could not vote to convict Elseman in the absence of evidence proving his guilt.

Summing up matters, even if Elseman's trial counsel had preserved and appealed the district court's overruling of his motion to excuse the challenged juror for cause, he would not have been able to identify an unequivocal statement by the challenged juror that he could not be fair and impartial. He also would have been forced to reckon with several other statements suggesting the challenged juror was capable of serving as a fair and impartial juror. Given this record and the considerable deference owed to trial courts in determining whether the dismissal of an allegedly biased juror is constitutionally required, we determine that any argument that the district court violated Elseman's constitutional rights by overruling the motion to excuse the challenged juror for cause would not have been successful.

(ii) Statutory Argument Regarding Challenged Juror

In addition to arguing that the district court committed constitutional error by overruling his motion to excuse the challenged juror for cause, Elseman also argues that the district court's decision failed to comply with a statute, Neb. Rev. Stat. § 29-2006 (Cum. Supp. 2024). Section 29-2006 lists several circumstances in which jurors must be excused. Relevant to this case is subsection (2) of that statute. It provides that a juror who has "formed or expressed an opinion as to the guilt or innocence of the accused" should generally be excused, but it also sets out a process that, if followed, allows for the possibility of such a juror to serve:

> [I]f a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case.

§ 29-2006(2).

Elseman argues that in this case, the challenged juror had formed or expressed an opinion as to Elseman's guilt based on reading media reports. Elseman contends that, as a result, § 29-2006(2) permitted the challenged juror to serve only if he, under oath, made the statement described in the statute. And Elseman submits that the challenged juror failed to make such a statement. Elseman thus concludes that if his counsel had argued on direct appeal that the district court failed to comply with § 29-2006(2), he would have received a new trial. Again, we disagree.

At trial, Elseman's counsel did not mention § 29-2006(2), let alone argue that the challenged juror should be excused for failure to comply with that statute. Because the district court was not alerted to any argument that the challenged juror should be excused based on § 29-2006(2), we would have reviewed an argument that the district court was required to do so for plain error only. If a party makes an argument that a trial court committed error without first bringing that argument to the attention of the trial court, we will generally

review only for plain error. See, e.g., *State v. Horne*, 315 Neb. 766, 1 N.W.3d 457 (2024). As we have explained, this practice encourages litigants to raise arguments in the trial court "'so that any errors can be corrected before their full impact is realized.'" *Id.* at 774, 1 N.W.3d at 464 (quoting *State v. Pearson*, 775 N.W.2d 155 (Minn. 2009)).

[7] If Elseman's counsel had made an argument on direct appeal that the challenged juror should have been excused because he had not made the statement described in § 29-2006(2), we would not have found plain error. As discussed above, the challenged juror did not unequivocally communicate that he could not be fair and impartial and, in fact, made several statements in his exchange with the district court and defense counsel expressing his belief that he *was* capable of fairly deciding the case based on the evidence presented at trial. Viewed through the lens of plain error, even if these statements did not precisely mirror the statement described in § 29-2006(2), they expressed the same sentiment—while § 29-2006(2) requires a juror to state that he or she "feels able" to "render an impartial verdict upon the law and the evidence," the challenged juror stated that he "believe[d]" he could be "fair and impartial." We have said that plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). We have additionally observed that plain error "is not a vehicle that should be routinely used to 'save' an issue for appeal where a proper objection should have been, but was not, made at trial." *Id.* at 583, 873 N.W.2d at 418. For the reasons we have expressed, we conclude that it would not have resulted in damage to the integrity, reputation, or fairness of the judicial process to allow the district court's seating of the challenged juror to stand.

[8] Finally, we acknowledge that Elseman generally alleged in his postconviction motion that his trial counsel was ineffective for not *preserving* and appealing the district court's overruling of his motion to excuse the challenged juror for cause. The only allegations in Elseman's postconviction motion pertaining to error preservation concerned Elseman's claim that if counsel used peremptory strikes on other jurors, he should have made a record of that fact to generally preserve a claim that the trial court erred in overruling his motion to excuse the challenged juror for cause as required by *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890. Because Elseman's postconviction motion did not allege ineffective assistance concerning the preservation of an argument that the district court failed to follow § 29-2006(2), we do not consider it here. In an appeal from the denial of postconviction relief, an appellate court will not consider for the first time on appeal claims that were not raised in the verified motion. *State v. Ammons*, 314 Neb. 433, 990 N.W.2d 897 (2023).

[9,10] As we have explained, if Elseman's trial counsel had appealed the seating of the challenged juror on the grounds raised by Elseman, that appeal would not have succeeded. It follows that Elseman's ineffective assistance of counsel claim is refuted by the record. Generally, 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. *State v. Haas*, 317 Neb. 919, 12 N.W.3d 787 (2024). To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. Had counsel appealed the seating of the challenged juror, there is no reasonable probability the outcome of Elseman's direct appeal would have been different. Elseman was not entitled to an evidentiary

hearing on his claim that his counsel was ineffective in failing to appeal the seating of the challenged juror.

(b) Claim That Trial Counsel Should Have Used Peremptory Strike

We turn next to Elseman's claim that his trial counsel was ineffective for not using a peremptory strike on the challenged juror. We find this claim is also affirmatively refuted by the record.

As we just mentioned, in order to prevail on a claim of ineffective assistance of counsel, Elseman must demonstrate that his counsel performed deficiently and that, as a result of that deficient performance, he suffered prejudice. See *id*. A number of courts have recognized that to establish prejudice based on counsel's failure to exercise peremptory challenges, a defendant must show that, as a result of counsel's failure to use peremptory challenges, the jury panel contained at least one biased juror. See, e.g., *Miller v. Francis*, 269 F.3d 609 (6th Cir. 2001); *U.S. v. Quintero-Barraza*, 78 F.3d 1344 (9th Cir. 1995); *State v. Dean*, 2015 Ohio 4347, 146 Ohio St. 3d 106, 54 N.E.3d 80 (2015); *Peterson v. State*, 154 So. 3d 275 (Fla. 2014). Here, for reasons we have already covered, Elseman cannot show that the challenged juror was biased. Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

(c) Stand-alone Claim of Trial Court Error

Elseman also argues that the district court erred by not granting an evidentiary hearing on his claim that the district court erred when it seated the challenged juror at trial. Again, we find that Elseman was not entitled to an evidentiary hearing on this claim.

Unlike Elseman's other claims regarding the challenged juror, this claim is not framed as a claim of ineffective assistance of counsel, but as a stand-alone claim of district court error. When, as here, a defendant is represented by the same attorney at trial and on direct appeal, claims of *ineffective*

assistance of counsel can be raised in a postconviction motion free of a procedural bar. See, e.g., *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018). The rationale for this rule is that, under those circumstances, a motion for postconviction relief is the defendant's first opportunity to raise such claims. *See id.*

[11] A motion for postconviction relief cannot, however, be used to secure review of issues that were or could have been litigated on direct appeal. *State v. Jaeger*, 311 Neb. 69, 970 N.W.2d 751 (2022). When raised in a motion for postconviction relief, such issues are procedurally barred. See *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014). Elseman offers no reason why his stand-alone claim of trial court error could not have been raised on direct appeal.

Likely recognizing the looming procedural bar, Elseman seeks to avoid it by claiming that the error he asserts here is of a type that would allow it to be reached via a motion for postconviction relief. In his motion for postconviction relief, Elseman alleged that the seating of the challenged juror amounted to "structural error" and thus required "automatic reversal." Now on appeal, Elseman adds an argument that the seating of the challenged juror was plain error and contends that this court can recognize plain error in this appeal of a postconviction proceeding.

[12] Elseman's contention that if plain error is shown, a claim that would otherwise face a procedural bar can be reached on postconviction review is flatly contradicted by our precedent. We have held that plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court. *Allen, supra*.

Elseman's invocation of structural error is also unavailing. "Structural error" is the term the U.S. Supreme Court uses to refer to those errors that are not subject to harmless-error analysis. See, e.g., *State v. Galindo*, 315 Neb. 1, 994 N.W.2d 562 (2023). As the U.S. Supreme Court has said, "in the case of a structural error where there is an objection at trial and

the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Weaver v. Massachusetts*, 582 U.S. 286, 299, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) (quoting *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). But Elseman does not point to any authority suggesting that structural errors are not subject to a state law procedural bar. And, in any case, to qualify as a structural error, there must first be error. But, for reasons we have discussed, Elseman cannot show that his constitutional rights were violated at all by the seating of the challenged juror. The district court did not err in denying Elseman relief on his stand-alone claim of trial error without granting an evidentiary hearing.

3. Claims Regarding Alleged Implied Plea Agreements

We next take up Elseman's argument that the district court should have granted him an evidentiary hearing on his claims that the State violated his constitutional rights by not disclosing that it had reached implied plea agreements with Northrop and Emily. We first discuss his claim regarding Northrop.

(a) Alleged Implied Plea Agreement With Northrop

Elseman contends that he has adequately alleged facts suggesting that the State reached an implied plea agreement with Northrop. If such an agreement was reached, Elseman argues, the State was required to disclose it under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (*Brady*), and once Northrop denied the existence of any such agreement, the State was required to correct that testimony under *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (*Napue*).

[13,14] Elseman is correct that if prosecutors reached an agreement with Northrop or Emily that they would receive leniency in exchange for their testimony against Elseman, the

State was required to disclose it. This court has held that the existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness and that failure to bring that to the attention of the jury denies the defendant due process of law. *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014). An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, however, need not be revealed to the jury. *Id.* Additionally, Elseman is correct that if the State knew Northrop or Emily lied when they denied being promised anything in exchange for their testimony, the State was required to correct that testimony. Under *Napue*, the knowing use of perjured testimony by the prosecution deprives a criminal defendant of his or her right to a fair trial. See *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

The district court found that Elseman was not entitled to an evidentiary hearing on his claim concerning Northrop for several reasons. It first found that Elseman's claim was procedurally barred because he could have asserted it on direct appeal. We disagree. It is true that a motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and which were or could have been litigated on direct appeal. See *State v. Galindo*, 315 Neb. 1, 994 N.W.2d 562 (2023). We have held, however, that when a claim is based on evidence that was not available on direct appeal or in a prior postconviction motion, it is not procedurally barred. See *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). In this case, Elseman's claim that Northrop reached an agreement with the State depended on evidence that emerged during Patton's postconviction proceedings and thus was not available at the time of Elseman's direct appeal. Accordingly, the claim is not procedurally barred.

The district court also determined that Elseman was not entitled to an evidentiary hearing on this claim because he failed to adequately allege that Northrop had anything more

than a hope of leniency. Here, the district court appeared to conclude that it could not consider Elseman's allegations as to what Northrop had said to others suggesting he had reached an implied plea agreement because that amounted to "recantation" testimony that was "suspect" under *Lotter, supra*.

We disagree with the district court that it would be improper to consider Elseman's allegations that Northrop had made statements to others suggesting he reached an implied plea agreement. In *Lotter*, we explained that we had previously held that a motion for postconviction relief cannot be used to escape the statute of limitations for a motion for new trial based on newly discovered evidence and emphasized that the same holding would apply to a recently discovered recantation. We did not hold that statements like those Elseman alleges Northrop made here were barred from consideration in determining whether a defendant is entitled to an evidentiary hearing on a motion for postconviction relief.

Finally, the district court determined that Elseman was not entitled to an evidentiary hearing because even if there was an implied plea agreement between Northrop and the State, the failure to disclose the agreement would amount to, at most, harmless error. Again, we disagree with the district court's conclusion.

A defendant is not automatically entitled to relief under *Brady* or *Napue* upon a mere showing that the prosecution failed to disclose favorable evidence or that it knowingly failed to correct false testimony. Both claims are subject to materiality inquiries. To establish a *Brady* violation, Elseman must show not only that the prosecution failed to disclose favorable evidence, but also that the evidence was material to guilt or punishment. See *Galindo, supra*. Evidence qualifies as material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Galindo, supra*. To establish a violation of *Napue*, a defendant must show that the prosecution either knowingly solicited or knowingly

failed to correct false testimony. See *Glossip v. Oklahoma*, 604 U.S. 226, 145 S. Ct. 612, 221 L. Ed. 2d 90 (2025). But if such a showing is made, the defendant is entitled to relief under *Napue* if there is "any reasonable likelihood" the false testimony "[could] have affected the judgment of the jury." *Glossip*, 604 U.S. at 246 (internal quotation marks omitted). The U.S. Supreme Court has said that, "[i]n effect, this materiality standard requires the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (internal quotation marks omitted).

The district court appeared to conclude that even if there was an implied plea agreement that Northrop failed to disclose, it would not be material under *Brady* or *Napue*. The district court reached that conclusion based on the fact that Northrop was cross-examined about his hopes for leniency and thus, the jury already had reasons to question his motives for implicating Elseman. The district court also asserted that Northrop's testimony was corroborated by other evidence at trial and that the prosecutor's closing argument suggested that Northrop would "get a 'deal.'"

We are not persuaded that, at least at this stage of the proceedings, it could be determined that the existence of a plea agreement between Northrop and the State would not be material under *Brady* or *Napue*. The district court concluded that the existence of an implied plea agreement would not be material, in part, because Elseman's cross-examination exposed another reason to question Northrop's credibility—Northrop's general hope for leniency. The U.S. Supreme Court's opinion in *Napue*, however, specifically rejected the argument that a prosecutor's failure to correct false testimony about the existence of a plea agreement could be rendered immaterial by the fact that "the jury was apprised of other grounds for believing that [a witness] may have had an interest in testifying" against the defendant. 360 U.S. at 270. Other courts have similarly concluded that even if a witness

is cross-examined about hopes for leniency, that does not render immaterial the failure to disclose a plea agreement that the defendant would receive consideration for his or her testimony. See, e.g., *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Jackson v. Brown*, 513 F.3d 1057 (9th Cir. 2008); *U.S. v. Mason*, 293 F.3d 826 (5th Cir. 2002); *Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002).

The district court also concluded that there could be no prejudicial constitutional violation with respect to a plea agreement with Northrop because Northrop's testimony was corroborated by other evidence. Even if there was some corroboration, we still do not believe it can be determined at this stage that, if Northrop reached a plea agreement with the State, any failure to disclose and failure to correct testimony could not be material. In other words, we are not convinced that the State has proved beyond a reasonable doubt that any failure to disclose an implied plea agreement with Northrop did not contribute to the verdicts. Here, it must be recalled that Northrop was the only witness who testified that Elseman shot Winters and that Winters' mother initially identified the men who ran away from her house as three black males, despite the fact that Elseman is white.

Finally, we do not believe the prosecutor's suggestion that Northrop would later receive leniency in exchange for his testimony would allow us, at this stage, to determine that the failure to disclose an actual, implied plea agreement was immaterial for purposes of *Brady* and *Napue*.

In sum, we are not persuaded by the reasons offered by the district court for denying Elseman an evidentiary hearing on his claim that the State violated his rights to due process by not disclosing an implied plea agreement with Northrop. As recounted above, a district 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 state or federal Constitution. *State v. Lessley*, 312 Neb.

316, 978 N.W.2d 620 (2022). In our view, Elseman's claim that the State failed to disclose an implied plea agreement with Northrop meets that standard. Accordingly, Elseman is entitled to an evidentiary hearing on his allegation that the State violated his rights under *Brady* and *Napue* by failing to disclose an implied plea agreement with Northrop and then failing to correct Northrop's testimony that no such agreement existed.

(b) Alleged Implied Plea Agreement With Emily

Elseman's postconviction motion also alleged that the State reached an implied plea agreement with Emily and that the State violated his rights under *Brady* and *Napue* by first failing to disclose the agreement and then failing to correct Emily's testimony that no such agreement existed. As with his claim concerning Northrop, he argues on appeal that the district court erred by not granting him an evidentiary hearing on this claim.

We concluded above that Elseman was entitled to an evidentiary hearing on his claim alleging that the State reached an implied plea agreement with Northrop, but we do not reach the same conclusion with respect to his claim alleging that the State reached an implied plea agreement with Emily. We do so because while Elseman made several factual allegations supporting his assertion that the State reached an implied plea agreement with Northrop, he alleged little more than a conclusory statement that the State reached an implied plea agreement with Emily.

The most that Elseman alleged concerning an implied plea agreement with Emily was that Emily's attorney testified at an evidentiary hearing on Patton's motion for postconviction relief that he was confident that Emily's case would be transferred to juvenile court. But, as we held in Patton's direct appeal, testimony from Emily's attorney that he was confident her case would be moved to juvenile court "[falls] short" of establishing an implied plea agreement with Emily.

State v. Patton, 287 Neb. 899, 914, 845 N.W.2d 572, 584 (2014). Rather, we explained, such testimony is consistent with Emily's testimony that she was hoping for leniency in exchange for her testimony but had received no promises or assurances from the State.

An evidentiary hearing is not required on a motion for postconviction relief when the motion alleges only conclusions of fact or law without supporting facts. See *State v. Jaeger*, 311 Neb. 69, 970 N.W.2d 751 (2022). Because Elseman failed to allege facts supporting his assertion that the State reached an implied plea agreement with Emily, the district court did not err when it did not grant him an evidentiary hearing on that claim.

V. CONCLUSION

For reasons we have explained, we find that the district court did not err in denying Elseman postconviction relief without granting an evidentiary hearing on his claims relating to the challenged juror. The district court also did not err in denying postconviction relief without granting an evidentiary hearing on his claim that the State violated his rights under *Brady* and *Napue* with respect to an alleged implied plea agreement with Emily. However, Elseman is entitled to an evidentiary hearing on his claim that the State violated his rights under *Brady* and *Napue* by failing to disclose an implied plea agreement with Northrop and then failing to correct Northrop's testimony denying such an agreement existed. Accordingly, we affirm in part, and in part reverse and remand for an evidentiary hearing limited to that claim.

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

MILLER-LERMAN, J., not participating in the decision.

FREUDENBERG, J., not participating.