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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-248**

Daniel Howard Loye, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 16, 2010
Affirmed
Schellhas, Judge**

Isanti County District Court
File No. 30-CR-07-1232

Frederic W. Knaak, Greg T. Kryzer, Jessica A. Johnson, Knaak & Kryzer P.A., Vadnais Heights, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jeffrey Edblad, Isanti County Attorney, Amy Reed-Hall, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Following his conviction of criminal sexual conduct, appellant sought post-conviction relief, arguing that he should be granted a new trial based on the victim's

recantation of her trial testimony. The district court denied appellant's petition. Because the district court did not err by concluding that the victim's recantation was not extraordinary or unusual and did not justify a new trial, we affirm.

FACTS

Respondent State of Minnesota charged appellant Daniel Howard Loye with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2006), first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2006), third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2006), domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2006), and fifth-degree possession of methamphetamine in violation of Minn. Stat. § 152.025, subd. 2(1) (2006). Later, the state also charged appellant with fifth-degree domestic assault.

The state alleged in part that appellant forcibly sexually penetrated the victim, R.B., appellant's intermittent girlfriend. At trial, R.B. testified that, on the night in question, she picked up appellant from A.R.'s house and, while she was driving, appellant called her "nasty names," such as, "stupid f---ing c-nt," and punched her in the head multiple times. When R.B. attempted to drive to the police station, appellant "grabbed the steering wheel and pulled [R.B.] to the side of the curb," and he got out. After appellant exited the car, R.B. went to her home, which was a block away. Afterwards, while R.B. was in the kitchen, appellant entered the home through an unlocked door. Appellant threw R.B. into the kitchen counter, yelled at her, grabbed her by the head, and dragged her into the bedroom. Appellant would not let R.B. out of the room, punched her in the side of the head, kicked her, and, according to R.B.'s testimony,

“then he decided that we should have sex.” R.B. testified that she did not want to have sex with appellant, but he forced her down on the bed, pulled her hair as he ripped off her shirt, and covered her mouth so she could not yell for her son. Appellant also grabbed R.B.’s hands and squeezed while he tried to penetrate her. R.B.’s hands hurt and she “just gave up,” after which appellant had intercourse with her.

R.B. testified that, twice before this incident, she had obtained restraining orders against appellant and then sought to have the orders dismissed. The state presented evidence on battered-woman syndrome and offered pictures showing R.B.’s bruises.

The jury found appellant guilty of all six counts. Appellant challenged his conviction and sentence on direct appeal to this court. This court affirmed in *State v. Loye*, No. A08-1101, 2009 WL 1684425 (Minn. App. June 16, 2009) (*Loye I*), *review denied* (Minn. Aug. 26, 2009). While the *Loye I* appeal was pending, appellant filed a motion to vacate judgment or, in the alternative, grant a new trial, based on R.B.’s recantation of her trial testimony. In support of his motion, appellant submitted an affidavit of Daniel Babb, whom appellant’s counsel describes in his brief as a mutual acquaintance of appellant and R.B. In his affidavit, Babb stated that, while he and R.B. were attending an in-patient treatment program in Cambridge, R.B. “chose to voluntarily speak to [him] regarding her relationship with [appellant].” Among other things, Babb further stated: “[R.B.] conveyed to me that she had consensual sex with [appellant] on the occasion that she had testified that he had raped her.”

The district court held a hearing and concluded that the alleged recantation was “not so extraordinary or unusual that this Court would favor a new trial,” and that

“[v]ictim witnesses are known to recant all the time for several different reasons.” The district court applied the *Larrison* test to appellant’s recantation claim and concluded that appellant had not satisfied any of the criteria of the test. While the direct appeal was pending, the court denied appellant’s motion to vacate the judgment or grant a new trial. This appeal follows.

D E C I S I O N

In postconviction proceedings, appellate courts determine whether sufficient evidence supports the postconviction court’s findings and review legal determinations de novo. *State v. Turnage*, 729 N.W.2d 593, 597-98 (Minn. 2007); *Opsahl v. State*, 677 N.W.2d 414, 422-23 (Minn. 2004) (*Opsahl II*).¹ A postconviction court shall hold a hearing on a petition for postconviction relief “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2008).

“We apply a three-prong test known as the *Larrison* test to determine whether a petition for postconviction relief warrants a new trial based on recantation of trial testimony.” *Turnage*, 729 N.W.2d at 597 (citing *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928), *overruled by United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004)). Under the *Larrison* test, a new trial is warranted if: (1) “the court is reasonably

¹ The supreme court has issued three significant decisions in *Opsahl*. The first decision is *State v. Opsahl*, 513 N.W.2d 249 (Minn. 1994) (*Opsahl I*), in which the supreme court affirmed Opsahl’s conviction on direct appeal. The second is *Opsahl II*, 677 N.W.2d at 419, in which the supreme court remanded for an evidentiary hearing on one of Opsahl’s petitions for postconviction relief. The third is *Opsahl v. State*, 710 N.W.2d 776 (Minn. 2006), in which the supreme court affirmed the district court’s denial of appellant’s postconviction petition on remand.

well-satisfied that the testimony given by a material witness was false”; (2) “without the testimony, the jury might have reached a different conclusion”; and (3) “the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.” *Id.* (quotation omitted). The *Larrison* prongs must be established by a fair preponderance of the evidence. *State v. Reed*, 737 N.W.2d 572, 590 (Minn. 2007). A postconviction court’s determinations under the *Larrison* test are reviewed for an abuse of discretion. *Turnage*, 729 N.W.2d at 597.

In *Reed*, in an attempt to establish the recantation of testimony by a trial witness, the defendant relied on an affidavit from the witness’s daughter, who asserted that, shortly after the trial, the witness admitted that she lied during her testimony. 737 N.W.2d at 590. Citing the *Larrison* test, the supreme court repeated the longstanding rule that courts have “looked with disfavor on motions for a new trial founded on alleged recantations unless there are extraordinary and unusual circumstances.” *Id.* (quoting *State v. Hill*, 312 Minn. 514, 523, 253 N.W.2d 378, 384 (1977)). The court concluded that the defendant had not “established that any of [the witness’s] testimony was false, for the affidavit contains only hearsay related by her daughter and does not specify which parts of her testimony were allegedly fabricated,” and that the defendant had not satisfied any of the *Larrison* prongs. *Id.*

Here, as in *Reed*, the district court applied the rule that courts look with disfavor on motions for a new trial founded on alleged recantations unless there are extraordinary and unusual circumstances. And, as in *Reed*, the recantation was evidenced only by an

affidavit from a person other than the victim. The district court concluded that the circumstances were not extraordinary and unusual because the alleged recantation was by R.B., who was a victim of domestic violence. Noting that “[v]ictim witnesses are known to recant all the time for several different reasons,” the court concluded that none of the *Larrison* prongs was satisfied. We defer to the district court’s credibility determinations, and we agree with the district court that the alleged recantation in this case is not so extraordinary or unusual to justify a new trial. The district court did not err by concluding that appellant did not satisfy the first *Larrison* prong because he did not establish that R.B.’s trial testimony was false. We therefore need not analyze the remaining *Larrison* prongs.

Affirmed.