STATE OF MINNESOTA
IN COURT OF APPEALS
A09-849

Edward Ross Bergren, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 12, 2010
Affirmed; motion granted
Stauber, Judge

St. Louis County District Court
File No. 69DUCR051997

Frederick J. Goetz, Erin R. Rellias, Goetz & Eckland, P.A., Minneapolis, Minnesota (for appellant)

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

Melanie S. Ford, St. Louis County Attorney, Mark S. Rubin, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Toussaint, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In this postconviction appeal seeking relief from his 2007 conviction of first-degree assault and fourth-degree criminal damage to property, appellant argues that the district court erred in summarily denying his petition when he produced evidence showing that the victim now admits that she lied in critical aspects of her testimony. We affirm.

FACTS

In July 2005, appellant was charged with first-degree assault under Minn. Stat. § 609.221 (2004); third-degree assault under Minn. Stat. § 609.223, subd. 1 (2004); and fourth-degree criminal damage to property under Minn. Stat. § 609.595, subd. 3 (2004). The charges stemmed from an incident occurring on July 8, 2005, in which appellant allegedly pushed his intoxicated girlfriend, D.L., out of his pickup while he was driving the vehicle.

At trial, D.L. testified that on the evening of July 7, 2005, she and appellant went to a club to drink and dance. D.L. testified that she became intoxicated and remembered nothing else about the evening until she woke up in the rehab area of the hospital. Subsequent tests indicated that D.L.'s blood alcohol concentration (BAC) in the early morning hours of July 8, 2005, was .182.

In addition to her limited recollection of the events involving the alleged assault, D.L. testified that a few weeks before the incident, she and appellant had an argument in appellant's truck. D.L. claimed that while appellant was driving down the freeway, he

reached over, opened the passenger-side door of the pickup, and told her to get out of the truck. According to D.L., she started crying and screaming when appellant started pushing her toward the open door. D.L. testified that she then shut the door, and the couple drove home. D.L.'s friend, L.K., testified that D.L. telephoned her later in the day and told her about the incident.

Following the trial, a jury found appellant guilty of all charged offenses. Appellant subsequently moved for a new trial based on newly discovered evidence. The newly discovered evidence consisted of a statement D.L. made to a defense investigator approximately two weeks after appellant was found guilty of the charged offenses. In the statement, D.L. claimed that she knew more about the events of July 7-8, than she had testified about at trial. According to D.L., she recalled leaving the club with appellant, and as they were driving home, reaching for the door of the pickup in an attempt to vomit outside of the vehicle. D.L. also stated that she felt pressured to testify as she did at trial by her family and domestic-violence-victim advocates.

The district court denied appellant's motions and sentenced appellant to 158 months in prison. On appeal, this court affirmed appellant's conviction. *State v. Bergren*, No. A06-743 (Minn. App. Sept. 4, 2007), *review denied* (Minn. Nov. 21, 2007).

A year after the supreme court denied appellant's petition for review, appellant filed a petition for postconviction relief on the grounds of newly discovered evidence. Specifically, appellant introduced an affidavit signed by D.L. on October 28, 2008, wherein she acknowledged that she lied to her friend, L.K., about the incident where appellant opened the passenger-side door of the vehicle and told her to get out of the

pickup while it was moving on the freeway. D.L. also changed her description of the events of July 7-8, 2005, now claiming that she fell out of the pickup when she opened the door while it was moving in order to lean out and vomit.

On April 7, 2009, the district court denied appellant's petition without an evidentiary hearing. The district court determined that it was not reasonably well-satisfied that D.L.'s trial testimony was false because D.L. has given "various versions of her recollections to various people." The court also found that even without D.L.'s testimony, the evidence presented at trial "makes it highly unlikely the jury would have reached a different verdict." This appeal followed.

D E C I S I O N

On appeal, this court examines the postconviction court's findings to determine if they are supported by sufficient evidence, but reviews issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). This court will not reverse a denial of postconviction relief except for abuse of discretion. *Id.*

A petitioner is entitled to an evidentiary hearing "unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Doppler v. State*, 771 N.W.2d 867, 871 (Minn. 2009) (quotations omitted). To warrant an evidentiary hearing, the petitioner must allege facts that, if proved, would entitle him or her to the requested relief. *State v. Kelly*, 535 N.W.2d 345, 347 (Minn. 1995). "Any doubts about whether an evidentiary hearing is necessary should be resolved in favor of the party requesting the hearing." *Doppler*, 771 N.W.2d at 871.

Appellant argues that the district court erred in denying his petition for postconviction relief because he produced the October 28, 2008, affidavit from D.L. wherein she admitted that her trial testimony was not truthful. When a new trial is sought based on newly discovered evidence that is in the nature of a recantation by a witness who testified at trial, Minnesota courts apply the three-prong *Larrison* test. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007) (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, the postconviction court should consider the following three factors: (1) whether the court is "reasonably well-satisfied" that the trial testimony was false; (2) whether "without that testimony the jury might have reached a different conclusion;" and (3) whether "the petitioner was taken by surprise at trial or did not know of the falsity until after trial." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). The third prong of the *Larrison* test "is not a condition precedent for granting a new trial, but rather a factor the court should consider in making its determination." *Doppler*, 771 N.W.2d at 872.

The state argues that appellant's argument is barred, at least in part, under the *Knaffla* rule. This rule provides that once a direct appeal has been taken, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976).

Here, appellant earlier sought a new trial based on newly discovered evidence. This evidence consisted of D.L.'s statements to a defense investigator that she recalled

more about the events of July 7-8, 2005, than she had testified about at trial. Specifically, D.L. stated that she recalled leaving the club with appellant, and as appellant drove home, she recalled reaching for the door of the pickup in an attempt to vomit outside of the vehicle. The district court denied the motion and this court affirmed after appellant raised the issue in his direct appeal. To the extent that appellant's argument in this appeal implicates D.L.'s post-trial statements regarding her new recollection of the events of July 7-8, 2005, that argument is *Knaffla* barred because the issue was raised in appellant's direct appeal.

However, appellant did produce new evidence that was not argued in his direct appeal. This evidence consisted of D.L.'s October 28, 2008 affidavit that she lied to her friend L.K. about the first incident in which she claimed that appellant attempted to push her out of his moving vehicle. Specifically, in her affidavit, D.L. claimed that about two months prior to the July 7-8 incident, she went to L.K.'s house to do drugs. D.L. stated that on the way home on the freeway after appellant picked her up,

> [appellant] and I were talking about my drug using. I had threatened to kill myself by jumping out of the truck. And I got very upset when he had replied 'go ahead and jump.' The next day I was still upset, so when I called my friend [L.K.] I had lied and told her that [appellant] had threatened to push me out of the truck. When really I was mad that he didn't care when I threatened to kill myself by jumping out of the truck.

After reviewing D.L.'s affidavit, the district court was not "reasonably well-satisfied" that D.L.'s trial testimony was false. As the district court found:

> [D.L.] has told several differing stories about the events of July 8, 2005. Her October 28, 2008 statement is similar to the

> one given to [appellant's] investigator after his trial however [her later story] is now supplemented with the detail that she did indeed open the door and fall out. Additionally, the October 28, 2008 statement addresses the prior similar incident that [D.L.] testified to at trial and was corroborated by L.K. There is still the problem that [D.L.] gave various versions of her recollections to various people. This is compounded by the fact that her latest statement tells yet another version. Obviously, she lied somewhere along the way. Without more, these new statements alone do not create any certainty that D.L.'s latest recantation is any more genuine than her prior recantation or trial testimony.

We conclude that the district court's reasoning is compelling. The record reflects that D.L.'s recollection of the events has consistently changed, and a determination of which version is the truthful version is a credibility determination. Although the better procedure might have been to hold an evidentiary hearing to examine D.L., the district court was intimately familiar with the proceedings, testimony, varying statements, and the parties involved in this case, and the court was not "reasonably well-satisfied" that D.L.'s trial testimony was false. Therefore, we cannot conclude that the district court abused its discretion in finding that appellant had not satisfied the first prong of the *Larrison* test.

The district court also found that appellant was unable to satisfy the second prong of the *Larrison* test. This prong considers whether "without that testimony the jury might have reached a different conclusion." *Opsahl*, 677 N.W.2d at 423.

Here, witnesses testified at trial that they observed appellant appearing to punch something in his truck while yelling obscenities at D.L. These witnesses also testified that they saw appellant drag D.L. out of the truck and drop her on the ground while he

grabbed his cell phone and cigarettes. In addition, the state presented evidence that appellant parked in a dark alley about one-half block away from the emergency room entrance, and the jury heard testimony that appellant was belligerent at the hospital, refused to cooperate with hospital staff and law enforcement, and was very rough with D.L. even though she appeared to be unconscious or semi-conscious. Finally, the state introduced photographs of the highway showing blood splatters on the pavement, and the state presented evidence that D.L.'s injuries were consistent with the allegations. In light of the totality of the evidence presented, it is unlikely that the jury would have reached a different conclusion if D.L. had not testified that appellant had attempted to push her out of his moving truck a few weeks before the July 7–8, 2005 incident. Accordingly, the district court did not err in denying appellant's petition for postconviction relief.[1]

Affirmed; motion granted.

[1] Appellant filed a motion to strike page five of the appendix to the state's brief and all references thereto. This document was not part of the record before the postconviction court. An appellate court generally "may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). If a party includes in its brief documents that are not properly before the court on appeal, the court will strike the documents. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993). Because the document included as page five of the state's appendix was not part of the record below, appellant's motion to strike is granted.