STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1603

State of Minnesota,
Respondent,

vs.

Jose Angel Rangel,
Appellant.

Filed November 24, 2014
Affirmed; motion granted
Schellhas, Judge

Ramsey County District Court
File No. 62-CR-12-1371

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Thomas R. Ragatz, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

Ira W. Whitlock, Whitlock Law Office, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, 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

SCHELLHAS, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court erred by denying him a new trial based on newly discovered evidence. Appellant argues that he also should be granted a new trial based on prosecutorial misconduct, the interests of justice, and ineffective assistance of counsel. Also before this court is respondent's motion to strike certain documents contained in appellant's appendix. We affirm; motion granted.

FACTS

In 2011, appellant Jose Rangel did not live in J.V.'s home but regularly visited the home, where his three sons resided with J.V., along with J.V.'s seven-year-old daughter, A.I. While J.V. was at work, Rangel babysat the children and helped with chores. One evening in July, Rangel took A.I. upstairs because she was misbehaving. Later that evening, A.I. told her great-grandmother, A.T., and later her mother, J.V., that Rangel "was putting his penis in her mouth and things like that." The next day, A.T. took A.I. to Tennessee for a preplanned visit with A.I.'s maternal grandmother, M.T. Although Rangel denied A.I.'s allegations, J.V. contacted a social worker through her employer's employee-assistance program, and the social worker made a child-maltreatment report.

While in Tennessee, A.I. told M.T. that Rangel "would put his pants down and tell her to kiss him down there," that "[m]ilk, like baby's milk" would come out, and that "he puts—she put her finger in his butthole." M.T. called the police, and a forensic interviewer with Nashville Children's Alliance conducted a videotaped interview of A.I.

During the interview, A.I. said that Rangel kept saying "gross stuff," made A.I. "suck his private part," took pictures of her naked, put her finger inside his butt, pulled her hair, and "did it back and forth," and that this happened more than one time. After the interview, A.I. remained in Tennessee and resided with her paternal grandparents. Tennessee forwarded the interview information to Minnesota, and a child-protection investigator with Ramsey County Human Services (RCHS) and a St. Paul Police officer investigated. Rangel gave a statement to the police officer, denying the allegations, and offered a DNA sample. Rangel declined an interview with the child-protection investigator, who then closed the child-protection case file.

In February 2012, M.T. returned A.I. to Minnesota, where she reported to a school counselor that Rangel

> put his private parts in her mouth and in other parts of her body and that he took his clothes off and her clothes off and . . . forced her to take pictures of him with his cell phone and . . . he forced her to watch videos that showed he and her mom doing nasty things.

The school counselor contacted the police, and RCHS reopened a child-protection case, placed A.I. in a shelter, and petitioned for emergency protective custody of A.I. A registered nurse with Midwest Children's Resource Center conducted a videotaped interview of A.I., who reported that Rangel kissed her on her mouth. A.I. did not report additional conduct by Rangel.

In February 2012, respondent State of Minnesota charged Rangel with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii) (2010). In April 2012, A.I. returned to J.V.'s custody under protective supervision by

RCHS. The child-protection case remained open pending Rangel's trial, and RCHS maintained contact with J.V. and A.I. by telephone, e-mail, and home visits. In April 2013, a jury found Rangel guilty of first-degree criminal sexual conduct. Rangel moved the district court for an order vacating the jury verdict, granting a new trial, and "authorizing him to speak with [J.V.] and [A.I.], over the objections of their attorneys." The district court denied the motion.

This appeal follows.

D E C I S I O N

Motion to strike

The state moved to strike Rangel's brief, noting that the appendix contains a March 17, 2014 affidavit (Exhibit B) that was prepared for this appeal, was not considered by the district court, and is not part of the record on appeal. The state also moved to strike Exhibit B, as well as any references to it, and raised concerns about Exhibits C and D in Rangel's appendix. Rangel acknowledged that Exhibit B was not considered by the district court and that he should have sought to stay and remand the matter for postconviction proceedings. The state did not oppose a stay and remand for postconviction proceedings, but because of delays that already had occurred in the processing of this appeal, this court concluded that a stay was not appropriate. This court denied the state's motion to strike Rangel's brief but struck Exhibit B and ordered that the appeal panel not consider Exhibit B or any references to it. This court also ordered that the appeal panel determine whether Exhibits C and D are properly part of the

appellate record and whether they should be considered on appeal.[1] For the first time, in its brief, the state argues that, because the documents that comprise Exhibit A in Rangel's brief were "never filed, introduced or received into evidence at any stage of the proceedings," Exhibit A must not be considered because the documents are outside the appellate record.[2]

"[T]he record on appeal consists of 'the papers filed in the [district] court, the offered exhibits, and the transcripts of the proceedings, if any.'" *State v. Anderson*, 733 N.W.2d 128, 139 n.4 (Minn. 2007) (quoting Minn. R. Crim. P. 28.02, subd. 8). "It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered." *Id*. (quotation omitted). Here, because the documents that comprise Exhibits A, C, and D were not filed with the district court and are outside the record on appeal, we grant the state's motion and will not consider them or any references to them in Rangel's brief.

Denial of motion for new trial

The district court heard Rangel's new-trial motion at the scheduled sentencing hearing and assisted defense counsel in clarifying the following bases for the motion: newly discovered evidence, prosecutorial misconduct, deprivation of a fair trial, and the

[1] Exhibit C is a copy of a March 27, 2013 supplemental affidavit of J.V. Exhibit D is a copy of the state's March 27, 2012 motion in the child-protection case to compel J.V. to make A.I. available to the representatives of the county attorney's office and to make A.I. available for weekly therapy sessions with her therapist.

[2] Exhibit A consists of seven pages of visit summaries and progress notes from A.I.'s therapist.

interests of justice. The court heard arguments, received testimony from Rangel's sister, and denied Rangel's new-trial motion. Rangel argues that the district court erred by denying him a new trial on the basis of newly discovered evidence.

Timeliness of new-trial motion

The state argues that Rangel's new-trial motion was untimely and that he therefore is not entitled to any relief. "Notice of a motion for a new trial must be served within 15 days after a verdict or finding of guilty." Minn. R. Crim. P. 26.04, subd. 1(3). The state raised the timeliness issue before the district court, but the district court proceeded to the merits without ruling on the timeliness issue. Rangel does not dispute that he served his new-trial motion after the 15-day time limit. We conclude that Rangel's new-trial motion was untimely, but we nevertheless proceed in our discretion to review the district court's denial of the motion on the merits.

Newly discovered evidence

Rangel argues that the district court should have granted him a new trial because A.I. allegedly recanted her trial testimony during a therapy session. A district court may grant a new trial on the ground of "[n]ewly discovered material evidence, which with reasonable diligence could not have been found and produced at the trial." Minn. R. Crim. P. 26.04, subd. 1(1)5. "[W]hen the newly discovered evidence is in the nature of a

recantation by a witness who testified at trial, we use the three-prong *Larrison*[3] test."[4] *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). For a court to grant a new trial based on a claim of newly discovered evidence of falsified testimony, a claimant "must establish, by a fair preponderance of the evidence, facts that would entitle him to a new trial under the *Larrison* test." *Ferguson v. State*, 645 N.W.2d 437, 445−46 (Minn. 2002). "Witness recantation merits postconviction relief if it satisfies the *Larrison* test . . . ." *State v. Ferguson*, 742 N.W.2d 651, 659 (Minn. 2007) (*Ferguson I*). "Courts generally view recanting affidavits and testimony with suspicion." *Id.* "We review the denial of a motion for a new trial for an abuse of discretion." *State v. Hawes*, 801 N.W.2d 659, 676 (Minn. 2011).

> Under *Larrison*, a [defendant] is entitled to a new trial based on false trial testimony if: (1) the court is reasonably well satisfied that the testimony given by a material witness was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the [defendant] was taken by surprise when the false testimony was given and was unable to meet it or did not know that the testimony was false until after trial.

Caldwell v. State, 853 N.W.2d 766, 772 (Minn. 2014). "The first two prongs of the *Larrison* standard are compulsory. The third prong is relevant but is not an absolute condition precedent to granting relief." *Id*. (quotation and citation omitted). "In Minnesota, failure to meet the third prong has never been relied upon to deny a new trial.

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[3] *See 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) (adopting a different test).

[4] Because of a dearth of caselaw involving application of the test for newly discovered evidence in the context of new-trial motions under Minn. R. Crim. P. 26.04, we primarily cite to caselaw involving postconviction petitions.

Instead, new trials generally have been denied based upon failure to satisfy the first and second prongs." *Ferguson*, 645 N.W.2d at 445.

"The first prong of the *Larrison* standard focuses on whether a material witness's testimony at trial was false." *Caldwell*, 853 N.W.2d at 772. Under the first prong, the district court may not simply determine that "a witness is generally unreliable" and may not rely on "a simple statement contradicting earlier testimony." *Pippitt*, 737 N.W.2d at 227 (quotations omitted). "[T]he court must be reasonably certain that the recantation is genuine before the first prong is met." *Id.* (emphasis omitted) (quotations omitted).

Here, the district court conducted an impromptu evidentiary hearing at the scheduled sentencing hearing. Rangel's sister testified about something that J.V. purportedly told her that A.I.'s therapist purportedly told J.V. that A.I. purportedly told her therapist—that "my grandma made me say everything, that [Rangel] did things to me." Rangel's sister did not testify with specificity as to what portions of A.I.'s testimony were allegedly false or why she had then chosen to recant. *See Ferguson v. State*, 779 N.W.2d 555, 559–60 (Minn. 2010) (*Ferguson II*) (considering presence of a reason for recantation); *Pippitt*, 737 N.W.2d at 227 (considering lack of specificity about what testimony was false). And Rangel did not present testimony or an affidavit from the source of the evidence, A.I., or from a direct observer of A.I.'s alleged recantation, i.e., A.I.'s therapist. Rangel's sister's testimony was triple hearsay and is not admissible. *See* Minn. R. Evid. 802 (stating that hearsay is not admissible except as provided in the rules of evidence). Rangel offers no exception to the hearsay rule. Rangel's sister's testimony would not result in evidence at trial that A.I. lied because the sister's testimony would

remain inadmissible hearsay. *Cf. Dobbins v. State*, 788 N.W.2d 719, 734 (Minn. 2010) ("Based on the hearsay evidence in the affidavit, it cannot be said that the postconviction court abused its discretion when it denied [petitioner] a new trial on the ground that it was not reasonably well satisfied that [the witness]'s testimony was false.").

The district court concluded that Rangel did not make "a showing of genuine recantation in this particular case." We agree. Rangel failed to satisfy the first *Larrison* prong. A court could not be reasonably well-satisfied that A.I.'s prior statements about Rangel's sexual misconduct were false based on Rangel's sister's statements alone. *See Ferguson*, 645 N.W.2d at 446 ("A court could not be reasonably well-satisfied that Edwards' trial testimony was false based on Turnipseed's statement alone. Therefore, we conclude that Ferguson has not established that he is entitled to a new trial."). Because Rangel failed to satisfy the compulsory first *Larrison* prong, we do not reach the second and third prongs. We agree with the district court and conclude that, on the record before it, the court did not abuse its discretion by denying Rangel a new trial based on newly discovered evidence. *See State v. Walker*, 358 N.W.2d 660, 661 (Minn. 1984) (concluding that defendant was not entitled to new trial based on recantation when older of two victims recanted "under highly suspicious circumstances" and had "been subjected to considerable pressure from others, including her mother, to recant"). On this record, we affirm the denial of a new trial on the basis of newly discovered evidence without prejudice. Rangel may file a postconviction petition to address the issue of A.I.'s alleged recantation on a sufficient showing of a genuine recantation. *See Ferguson I*, 742 N.W.2d at 660 (affirming summary denial of postconviction petition without prejudice).

Prosecutorial misconduct

"When reviewing objected-to alleged prosecutorial conduct, we have utilized a harmless-error test, the application of which varies based on the severity of the misconduct." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). "If the misconduct was serious, the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error. For less serious misconduct, the standard is whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (quotations and citation omitted).

Rangel argues that he is entitled to a new trial due to prosecutorial misconduct. He argues that the state engaged in misconduct by moving, in J.V.'s child-protection case, to compel J.V. to make A.I. available to the state prior to trial. He claims that the state violated a district court order that prohibited the parties from accessing J.V.'s child-protection file. Rangel misreads the district court's order, which does not prohibit the parties from contacting J.V. or A.I. The order specifically addresses documents in RCHS's child-protection file related to J.V. and A.I. As the district court implicitly recognized during pretrial, the state's motion in J.V.'s child-protection case to compel J.V. to make A.I. available to the state prior to trial did not violate the order. And, as the district court properly noted, even if the state violated the order, Rangel was in no way prejudiced by the state's meeting with A.I. because the state never had an opportunity to speak with A.I. about Rangel's criminal case. The district court in the child-protection case granted the state's motion in such a manner that the state was prevented from having

private contact with A.I. In fact, J.V. testified that the state informed J.V. and A.I. that it would not discuss the case with A.I. during the meeting because all parties present were witnesses.

Rangel also argues that he was denied a fair trial due to prejudicial actions of the state prior to trial. He asserts that "[t]he prosecutors, police and child protection workers used their power to intimidate and pressure [A.I.] and [J.V.] in [their] effort to secure a conviction of [him] in this matter." Specifically, Rangel asserts that "[t]he prosecutors and their agents purposely used the [child-protection] case concerning [A.I.] and [J.V.] to intimidate them and force [A.I.] to testify against [him]." But the only record support for Rangel's assertion is J.V.'s testimony, which she largely contradicted during her cross-examination, and both child-protection workers denied any coercion. A bare assertion of prosecutorial misconduct without support from the record has no merit. *See State v. Vance*, 714 N.W.2d 428, 444 (Minn. 2006) (concluding that defendant's "bare assertion" that "prosecutor 'wept' during her opening statement and while presenting the state's case" had no merit absent record support). And Rangel cites no legal authority to support the proposition that such conduct, if true, would constitute prosecutorial misconduct. "We treat such [an] unsupported claim[] as waived and do not consider [it] unless prejudicial error is obvious on mere inspection." *State v. Rossberg*, 851 N.W.2d 609, 620 (Minn. 2014) (quotation omitted).

Even if the state erred by pressuring J.V. and A.I. to testify, the error was harmless. The state told the jury in its opening statement that it did not know what A.I. would say during her testimony. J.V. testified that the state did not discuss the case with

her or A.I. And, most significantly, J.V. testified *as a defense witness for Rangel*. To the extent that the state or its agents attempted to pressure or intimidate J.V., their efforts were unsuccessful. We conclude that all of Rangel's claims of prosecutorial misconduct are meritless.

Interests of justice

Citing *State v. Green*, 747 N.W.2d 912, 918−19 (Minn. 2008), Rangel seems to argue that the district court erred by denying his new-trial motion based on the interests of justice. In *Green*, the supreme court noted that, "in analyzing the interests of justice, [it has] considered a number of factors." 747 N.W.2d at 918 (quotation marks omitted). Those factors include "the degree to which the party alleging error is at fault for that error," "the degree of fault assigned to the party opposing the motion for new trial," "whether some fundamental unfairness to the defendant needs to be addressed," and that "the grant of a new trial in the interests of justice appears to be reserved for extraordinary situations." *Id*. at 918−19. Acknowledging that a new trial will not be granted in the absence of "exceptional circumstances," Rangel argues that a new trial will be granted "when necessary to protect [him] from fundamental unfairness and to protect the integrity of judicial proceedings," citing *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). In consideration of the factors discussed in *Green* and the categories of exceptional cases discussed in *Gassler*, 787 N.W.2d at 586−87, we conclude that the district court did not abuse its discretion when it denied Rangel's motion for a new trial.

Citing *State v. Beecroft*, 813 N.W.2d 814, 846−47 (Minn. 2012), Rangel also argues that this court should grant him a new trial based on the interests of justice

because "[t]he Minnesota appellate courts use [their] supervisory power to award new trials in the interest of justice." As an intermediate appellate court, we do not exercise supervisory power reserved to the Minnesota Supreme Court. *See State v. Ramey*, 721 N.W.2d 294, 302 n.6 (Minn. 2006) ("The court of appeals does not exercise supervisory powers that are reserved to this court."). Even the supreme court "typically will not award a criminal appellant a new trial in the absence of prejudicial error." *Beecroft*, 813 N.W.2d at 846.

Ineffective assistance of counsel

Rangel argues that he is entitled to a new trial because he received ineffective assistance of counsel. We apply the *Strickland* test to ineffective-assistance-of-counsel claims. *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Under *Strickland*, to prevail on a claim of ineffective assistance of counsel, a defendant must show that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quotation omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65 (1984)). Under the first prong, "[a]n attorney's performance is substandard when the attorney does not exercise the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted). Under the second prong, "the defendant must show that counsel's errors actually had an adverse effect in that but for the errors the result of the proceeding probably would have been different."

Nissalke, 801 N.W.2d at 111 (quotation omitted). "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). "We need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

A.I.'s competency to testify

Rangel argues that defense counsel's performance was deficient because he waived a competency hearing for A.I., who testified at trial. Rangel argues that during a competency hearing, the district court "might have learned of the conspiracy against [him]." "A child younger than 10 years old is presumed competent to testify unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined." *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013) (quotation omitted). In a competency hearing, "[t]he district court must assess the child's ability to remember and relate facts generally, rather than ask about the specifics of any anticipated testimony." *Id.* "A competency hearing is not a credibility hearing." *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990). "The jury will judge the child's credibility and decide the weight to assign the testimony." *Id.* Uncovering the alleged "conspiracy" against Rangel would have required the district court to endeavor a proscribed line of questioning during the competency hearing. Cross-examination was the proper setting for such questions.

We will not fault defense counsel for declining to exhaust a judicial process when he could have legitimately concluded that he would not prevail in doing so. *See Leake*,

737 N.W.2d at 536 ("Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts."). Here, in preparation for trial, defense counsel spoke with J.V.'s attorney and the guardian ad litem's attorney and viewed video recordings of A.I.'s interviews. Based on his knowledge of the case and A.I., defense counsel informed the district court that "competency [wa]s not something [he could] raise or challenge as [he] may have thought earlier." This statement reflects a strategic decision to forego a defense or legal argument, and we will not question it.

Defense counsel's cross-examination

Rangel argues that defense counsel's performance was deficient because he "failed to ask the most basic and fundamental confrontation questions" during cross-examination of A.I. and M.T. Rangel argues that defense counsel should have asked directly whether the witnesses were perjuring themselves and why. Rangel's argument challenges defense counsel's strategy, and we therefore need not review it. *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (determining that defense counsel's decisions not to "vigorously cross-examine" one witness and "impeach" another witness were "matters of trial strategy, which are not reviewed for competency"); *see also Sanchez-Diaz*, 758 N.W.2d at 848 ("[W]e will not review ineffective assistance of counsel claims based on trial strategy.").

Handling of posttrial motion

Rangel argues that defense counsel's performance was deficient because he poorly handled the new-trial motion. Rangel asserted at oral argument that defense counsel was ineffective because he failed to obtain expeditiously certain documentation in connection

with the posttrial motion—the documentation included in Rangel's appendix, which we decline to consider in this appeal. Rangel did not brief the issue regarding the documentation, and we will not consider it. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) ("Issues not argued in briefs are deemed waived on appeal." (quotation omitted)). In regard to his other claims about counsel's deficient handing of the posttrial motion,

> failure of trial counsel to make a motion for a new trial d[oes] not constitute ineffective assistance of counsel because the failure to move for new trial does not affect the right of a criminal defendant to obtain review of the issues which may have been raised in a motion for new trial.

State v. Ahmed, 708 N.W.2d 574, 585 (Minn. App. 2006) (quotation omitted).

Here, defense counsel did make a posttrial motion, albeit untimely, and the district court considered it on the merits. Regardless of how defense counsel handled the posttrial motion, Rangel has not demonstrated prejudice due to his defense counsel's representation. We therefore conclude that, on the record before us, Rangel's ineffective-assistance-of-counsel claims fail under the *Strickland* analysis, but Rangel's right to pursue an ineffective-assistance-of-counsel claim in a petition for postconviction relief is preserved.

Affirmed; motion granted.