STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2053

Justin Michael Fenney, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 8, 2020
Affirmed
Jesson, Judge

Ramsey County District Court
File No. 62-CR-12-8669

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Halbrooks, 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

JESSON, Judge

Appellant Justin Michael Fenney was convicted of first-degree criminal sexual conduct in March 2013 for penetrating his ex-girlfriend's anus with the handle of a toilet brush while physically assaulting her in her apartment. Fenney argues that the postconviction court erred by denying his August 2019 petition without an evidentiary hearing. We affirm.

FACTS

On October 25, 2012, appellant Justin Michael Fenney arrived at the apartment of his ex-girlfriend, L.H., and found her receiving oral sex from D.W.[1] After seeing the angry look on Fenney's face, D.W. dashed out of the apartment.

L.H. ran into her bedroom where her daughter was sleeping. Fenney then kicked the bedroom door open. He repeatedly hit, kicked, and choked L.H. L.H. pleaded with Fenney to stop hurting her, but Fenney broke L.H.'s nose, chipped her tooth, and pulled out her hair and extensions. When she was on the floor between the bathroom and living room, Fenney forcibly penetrated her anus with the handle of a toilet brush. L.H. passed out from the pain.

Officers who responded to a neighbor's 911 call discovered a significant amount of blood on the floor and walls of the apartment. The officers also discovered a toilet brush

[1] The facts recited herein are taken from Fenney's January 2013 court trial.

with a bloody handle in the bathroom along with what appeared to be fecal matter on the floor just inside the threshold of the bathroom door.

A medic who responded to the scene testified that L.H. was unable to walk the five or six steps to the medic rig and required the assistance of a stretcher. When asked if she was hurt, L.H. indicated that she had been injured in the back of her groin area. The medic asked if she had been assaulted by Fenney with the handle of a toilet brush, and she responded by nodding "yes."

The medics transported L.H. to the hospital where a physician performed emergency surgery to repair a one-inch external injury to her anus, a four-inch internal tear, and an one-inch perforation of her rectal wall. At trial, that physician testified that her injuries were consistent with the handle of a toilet brush being placed in her rectum with a great deal of force.

D.W., the man who fled the apartment shortly after Fenney's arrival, testified as well. He explained that at the point when he left the apartment, L.H. appeared physically fine and had not complained about having any physical injuries. D.W. also testified that there was no blood on the apartment's floors or walls and no fecal matter on the bathroom floor. Nor was there a bloody toilet brush handle on the bathroom floor.

During Fenney's court trial, while describing the injuries caused by Feeney, L.H. provided the following testimony regarding the injury to her rectum:

> Q: What point did you realize you had an injury to your bottom?
> A: I remember feeling it.
> Q: Where were you when you remember feeling it?
> A: In the living room.

Q: . . . Do you remember at all how that injury occurred?
A: I remember just saying, no. My hands were behind my back.
. . . .
Q: Do you remember . . . anything about how you got the injuries to your bottom?
A: I remember feeling the pain. It was kind of simultaneously with the kick.
Q: So you remember pain when you were being kicked?
A: I remember the pain and I was, like, pretty much going out and I remember being kicked.

On redirect examination, the state clarified that L.H. was "part way in the living room, part way in the bathroom" with her hands behind her back when she felt the injury to her bottom. L.H. also testified that up to the point when Fenney entered the apartment she did not have any physical injuries to her bottom. The district court found Fenney guilty of first-degree criminal sexual conduct and third-degree assault, and sentenced him to 270 months in prison on the criminal-sexual-conduct offense.

This court initially stayed Fenney's direct appeal and remanded the matter for postconviction proceedings. Following an evidentiary hearing, the postconviction court denied Fenney's petition, and this court affirmed Fenney's conviction and the denial of his postconviction petition for a new trial. *State v. Fenney*, No. A13-0978, 2015 WL 1880185 (Minn. App. Apr. 27, 2015), *review denied* (Minn. July 21, 2015). Fenney filed additional postconviction petitions in June and October 2016, and July 2017, all of which were denied by the postconviction court as procedurally barred.

Fenney filed the postconviction petition that is the subject of the present appeal in August 2019, asserting that he is entitled to a new trial on the basis of newly discovered evidence and false testimony. In support of his claims, Fenney submitted an affidavit of

D.W. in which D.W. attests that he and L.H. engaged in consensual anal intercourse just prior to Fenney's arrival at the apartment. Neither D.W. nor L.H. testified to this fact at trial. Due to the "significant weight" of the evidence of Fenney's guilt unaffected by the additional disclosure in D.W.'s affidavit, the district court denied Fenney's postconviction petition without holding an evidentiary hearing. This appeal follows.

D E C I S I O N

Fenney argues that the district court erred by denying his postconviction petition without holding an evidentiary hearing. We review a postconviction court's decision to deny a request for an evidentiary hearing for an abuse of discretion. *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). The postconviction court must consider the facts alleged in the petition in the light most favorable to Fenney. *Taylor v. State*, 910 N.W.2d 35, 38 (Minn. 2018).

To determine whether an evidentiary hearing is required, we first turn to the requirements—all of which Fenney must establish—to obtain a new trial based on newly discovered evidence. These requirements are known as the *Rainer* test. *See Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). The four prongs of the Rainer test are:

> (1) that the evidence was not known to the defendant . . . at the time of the trial;
> (2) that the evidence could not have been discovered through due diligence before trial;
> (3) that the evidence is not cumulative, impeaching, or doubtful; and
> (4) that the evidence would *probably produce an acquittal or a more favorable result.*

Id. (emphasis added).

But the showing required to obtain an evidentiary hearing is less than that required for a new trial. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). Upon reviewing the purported new evidence with the four *Rainer* requirements in mind, the postconviction court "must grant an evidentiary hearing whenever material facts are in dispute that . . . must be resolved in order to determine the issue on the merits." *Id.* (quotation omitted). However, "[a]n evidentiary hearing is unnecessary if the substance of the affidavit purporting to contain newly discovered evidence, when taken at face value, is insufficient to entitle the petitioner to the relief requested." *Scherf v. State*, 788 N.W.2d 504, 508 (Minn. 2010). Here, the postconviction court (without reaching the first three prongs of *Rainer*) determined that D.W.'s affidavit did not satisfy the fourth prong—that the evidence would probably produce an acquittal or more favorable result—and denied the petition.

This decision was not an abuse of discretion. At trial, both D.W. and L.H. testified that L.H. was unhurt when D.W. ran out of the apartment. The testimony of the medic, the treating physician, and L.H. all supported the postconviction court's conclusion that Fenney caused the injuries to L.H.'s rectum by forcibly inserting the toilet brush into her anus.

No evidence was presented at trial that identified D.W. as a potential source of L.H.'s injuries. More importantly, while D.W.'s affidavit asserts that he had "consensual anal [intercourse]" with L.H. on the night in question, at no point does D.W. attest that L.H. was *injured* as a result of this intercourse, or that he observed that L.H. was injured

before fleeing the apartment contrary to his trial testimony. Because on its face D.W.'s affidavit neither counters the evidence presented at trial, which identified Fenney as the source of L.H.'s injuries, nor presents new evidence that L.H. was injured prior to Fenney's arrival at the apartment, the affidavit is not likely to produce a more favorable result for Fenney. Therefore, the postconviction court did not err by declining to hold an evidentiary hearing. *See Scherf*, 788 N.W.2d at 508 (stating that an evidentiary hearing is unnecessary if the newly discovered evidence is, on its face, insufficient to entitle the petitioner to the requested relief).

Still, Fenney contends that the postconviction court should have held an evidentiary hearing based on the false testimony of D.W. and L.H., as demonstrated by D.W.'s affidavit. In doing so, he points to a line of cases which address a three-prong test for false or recanted testimony.[2] In order to meet this test for a new trial, Fenney must establish by a fair preponderance of the evidence that:

> (1) . . . the testimony in question was false;
> (2) without that testimony the [fact-finder] might have reached a different conclusion; and
> (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial.

Opsahl, 677 N.W.2d at 423.[3]

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[2] Fenney refers to the three-prong test for false or recanted testimony as the *Larrison* test. *See Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). While *Larrison* has been overruled, Minnesota courts continue to apply its test in cases involving false testimony. *Ortega v. State*, 856 N.W.2d 98, 103 n.6 (Minn. 2014). Therefore, we, like the supreme court in *Ortega*, cite to the *Larrison* test as it is set forth in *Opsahl*. *See id.* at 103.

[3] "[T]he third prong is not a condition precedent for granting a new trial, but rather a factor a court should consider when deciding whether to grant the petitioner's request." *Opsahl*, 677 N.W.2d at 423.

D.W. provided false testimony, Fenney asserts, when he testified: "I performed oral sex on her for a brief moment" without mentioning anal intercourse. Also, Fenney asserts that L.H. provided false testimony when she responded to the question: "Did you engage in any sexual contact with [D.W.] that evening?" with the answer: "When I came to, I was naked and [D.W.'s] head was between my legs."[4] However, even assuming these statements constituted false testimony, Fenney has not created a dispute of material fact on the second prong of the false testimony test—without the false testimony the district court may have reached a different conclusion—which would entitle him to an evidentiary hearing.

For reasons similar to our discussion of the fourth prong of the *Rainer* test, this purported "false testimony" neither undermines the evidence that Fenney caused L.H.'s injuries, nor supports Fenney's theory that D.W. injured L.H. during consensual anal sex prior to Fenney's arrival.

In sum, the postconviction court did not abuse its discretion by declining to hold an evidentiary hearing on Fenney's claim that he is entitled to a new trial on the basis of false trial testimony.

Affirmed.

[4] L.H. testified that she had been drinking throughout the day and passed out right after putting her daughter to bed.