STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1560

Larry Jonnell Gilbert, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed November 28, 2022
Reversed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-19-24192

Mark D. Nyvold, Fridley, Minnesota (for respondent)

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Halbrooks, Judge.*

SYLLABUS

I. If the state asserts that a postconviction claim is procedurally barred under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), the postconviction court abuses its discretion by granting relief without either explicitly determining that the claim is not procedurally barred or explaining an implied determination to that effect.

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

II. An expert witness's trial testimony is not false under the first prong of the *Larrison* test for false testimony merely because it is inconsistent with the posttrial testimony of a different expert.

OPINION

LARKIN, Judge

In this appeal from the postconviction court's order granting respondent a new trial, the state argues that the postconviction court erred by not determining whether respondent's claims were procedurally barred and by granting a new trial based on purportedly false testimony. We reverse.

FACTS

In 2019, law enforcement stopped a vehicle registered to respondent Larry Jonnell Gilbert. Gilbert was riding in the passenger seat, and there were three other people in the vehicle. Officers searched the vehicle and found a firearm in a backpack in the trunk. Gilbert had prior felony convictions and was not authorized to possess a firearm. The state charged him with unlawful possession of a firearm.

At trial, Amber Folsom, a forensic scientist with the Bureau of Criminal Apprehension (BCA), testified that she received DNA samples from Gilbert and another passenger in the vehicle. Folsom also received a DNA swab from the firearm. That swab contained a DNA mixture from four or more individuals. The major profile matched Gilbert's DNA sample and did not match the other passenger's sample.

Because it had "briefly rain[ed]" while the firearm was removed from the trunk of Gilbert's vehicle, the prosecutor asked Folsom if the rain could have affected the DNA test results:

> Q: Would you expect a firearm being exposed to rain for approximately one minute to have any effect on a DNA sample left on that firearm?
>
> A: No, that's a very short amount of time. I wouldn't expect the DNA to get washed away in a minute.
>
> Q: How long do you think it would take?
>
> A: Depending on how hard it's raining, if it's a light mist, it could be all day; if it's a hard rain, maybe hours.

Defense counsel cross-examined Folsom regarding that point:

> Q: Just because you just mentioned this rain thing, have you conducted any studies on rain and DNA washing away or are you guessing?
>
> A: It's just my opinion. I haven't studied it, no.
>
> Q: Has anyone studied it?
>
> A: I don't recall reading any journal articles on the topic so it's just my guess or opinion.

Later, the prosecutor asked Folsom about "transfer DNA":

> Q: [H]ave you seen cases of DNA transfer in your experience and education and training?
>
> A: Yes.
>
> Q: And in those cases . . . what is the cause of this transfer of DNA?
>
> A: It's usually a transfer from something that has a good amount of DNA already there. So, like, blood or saliva,

> something that has . . . a very good source of DNA to begin with could get transferred to another item that that person didn't actually have contact with.
>
> Q: Now in a situation where there is not blood or saliva, would you expect there to be a similar type of transfer or would you expect there not to be a similar type of transfer?
>
> . . . . .
>
> A: If there is not blood or some sort of DNA-rich sample that we're talking about transferring to another item, I would expect there to be a low amount of DNA that would get transferred and would result in showing up in the minor types, if there is a mixture. I wouldn't expect this low amount of DNA to transfer and end up being a major profile.

The jury found Gilbert guilty, and the district court sentenced him to serve 60 months in prison. He appealed his conviction, claiming that the district court erred in accepting a stipulation and in instructing the jury. *State v. Gilbert*, No. A20-0530, 2021 WL 668011, at *1 (Minn. App. Feb. 22, 2021), *rev. denied* (Minn. May 18, 2021). This court affirmed the conviction, and the supreme court denied further review. *Id*. at *5.

In March 2021, Gilbert petitioned for postconviction relief. He argued that Folsom "testified falsely about the dissipation of DNA with water and transfer DNA as it relates to major profiles." He requested a new trial or, in the alternative, an evidentiary hearing. Along with his petition, Gilbert filed an affidavit from a "forensic attorney," Jeffrey Benson. Benson stated that part of the BCA's required reading "for all analysts that work on DNA" was an article on DNA transfer, which indicated that "secondary transfer" of DNA "can result in a major profile."

The state opposed Gilbert's postconviction petition, arguing that it was procedurally barred under *Knaffla* because Gilbert was aware of Folsom's testimony "at the time of his direct appeal." In an informal letter, Gilbert's counsel responded to the state's procedural argument and asserted that she spoke with Gilbert's appellate attorney before he filed the direct appeal and "alerted him of the issue of what [she] believed to be false testimony of [Folsom]." She argued that the failure of Gilbert's appellate attorney to raise the false-testimony issue on direct appeal was either a result of "ineffective assistance of counsel" or because, until Benson provided his affidavit, the issue was "not yet ripe."[1]

In July 2021, the postconviction court ordered an evidentiary hearing on Gilbert's petition. The court's order did not address the state's argument that Gilbert's claim was procedurally barred.

At the evidentiary hearing, Gilbert called Cynthia Cale, a forensic DNA consultant. Cale testified that she was unaware of any studies regarding water dissipation of DNA. Cale also testified about transfer DNA, stating, "There's been studies showing, you know, the transfer of body fluids, which are -- tend to be the higher level DNA samples. But there's other publications on the transfer of skin cells and documented secondary transfer of skin cells." Cale testified that "you can't use the quality of the profile to predict the mode of transfer."

Cale testified that Folsom's trial testimony regarding the likelihood of a non "DNA-rich" sample showing up as the major profile was incorrect. Cale testified, "I don't believe

[1] Gilbert did not raise an ineffective-assistance-of-counsel claim in his postconviction petition, and the postconviction court made no findings on that issue.

that's true. I had contributor inversions occur in my research from having just a ten-second handshake up to a two-minute handshake."[2] Cale further testified:

> And there's other research that has shown that while the -- typically, the person that handles it is going to be the most prominent profile, it's -- that's not always the case. There's always a chance that you can see that contributor inversion, and it's not -- it's dependent on the person: you know, how long they had contact with the individual that actually handled the weapon, those other factors influencing transfer such as activities performed before, you know, if some kind of touching happens between two people, and then the person that actually ultimately ended up touching the weapon did some other activities, that can influence transfer.

Following the hearing, the postconviction court determined that Folsom's testimony regarding water dissipation and DNA transfer was "false." As to water dissipation, the postconviction court reasoned that Folsom's "opinion testimony was purely speculative." Based on the additional information from Cale, the postconviction court concluded "that there, in fact, are no studies related to water dissipation of DNA" and that "Folsom's testimony related to the same was false." As to DNA transfer, the postconviction court reasoned that "[t]he information to which [Cale] referred and the studies she had done herself illustrate that [Folsom's] testimony was incorrect and misleading." Although the postconviction court did not find that Folsom "was intentionally misleading or false in her testimony," the postconviction court determined that "the information presented to the jury was" and that "[g]iven this picture, it is clear that [Folsom's] testimony related to transfer

[2] According to Cale, a contributor inversion "means that the person who either was last to touch the item or the only person to touch the [item] isn't necessarily the dominant profile on the object."

DNA was false." Finally, the postconviction court determined that Folsom's "false testimony was material to the jury's determination, and impacted its determination." The postconviction court therefore granted Gilbert's request for a new trial.

The state appeals.

ISSUES

I. Did the postconviction court abuse its discretion by granting Gilbert's request for relief without first determining that his claim was not procedurally barred under *Knaffla*?

II. Did the postconviction court abuse its discretion in concluding that Folsom's testimony was false and granting a new trial on that basis?

ANALYSIS

A person convicted of a crime who claims that the conviction violated the person's constitutional or statutory rights may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2020). We review a postconviction court's decision to grant a new trial for an abuse of discretion. *State v. Hurd*, 763 N.W.2d 17, 34 (Minn. 2009). In doing so, we review the postconviction court's underlying factual findings for clear error and its legal conclusions de novo. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013). An abuse of discretion occurs if a postconviction court exercises its discretion in an arbitrary or capricious manner, errs in its application of the law, or makes clearly erroneous factual findings. *Onyelobi v. State*, 966 N.W.2d 235, 237 (Minn. 2021).

I.

The state argues that the postconviction court abused its discretion by granting Gilbert's request for postconviction relief without first determining that Gilbert's claim

was not procedurally barred. An appellate court generally does not consider issues that were not raised and decided in district court. *State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990); *see Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). That practice prevents parties from attempting to raise new issues or theories for the first time on appeal. *See State v. Grunig*, 660 N.W.2d 134, 136 (Minn. 2003) ("The waiver rule is an administrative rule dictating that appellate courts will not decide issues that were not raised in the [district] court."). Those are not the circumstances here. In its response to Gilbert's postconviction petition, the state unequivocally asserted that Gilbert's claim was "barred under *State v. Knaffla*."

"Under the *Knaffla* rule, if a postconviction claim was raised, known, or should have been known when a direct appeal was filed, that claim is procedurally barred and will not be considered in a later petition for postconviction relief." *Griffin v. State*, 883 N.W.2d 282, 286 (Minn. 2016). "There are only two exceptions to this rule." *Laine v. State*, 786 N.W.2d 635, 638 (Minn. 2010). An unraised claim is not *Knaffla*-barred "if (1) the claim is novel or (2) the interests of fairness and justice warrant relief." *Griffin*, 883 N.W.2d at 286 (quotation omitted). A postconviction court's determination whether a claim is *Knaffla*-barred is reviewed for an abuse of discretion. *Reed v. State*, 793 N.W.2d 725, 730 (Minn. 2010) (concluding that postconviction court did not abuse its discretion by determining claim was *Knaffla* barred).

The *Knaffla* rule is a well-established procedural bar to postconviction relief. *See* Minn. Stat. § 590.01, subd. 1 ("A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct

appeal of the conviction or sentence."); *Martin*, 825 N.W.2d at 745 ("[W]when a direct appeal has been taken, all matters raised therein, and all claims known or that should have been known, will not be considered in a subsequent petition for postconviction relief."). Even though the state raised the *Knaffla* rule as a procedural bar to Gilbert's postconviction claim and presented argument on that issue, the postconviction court did not expressly determine the issue. Nor did the postconviction court offer any explanation to support an implied determination that Gilbert's claim was not procedurally barred. In doing so, the postconviction court exercised its discretion in an arbitrary manner. *See In re Krenik*, 884 N.W.2d 913, 916 (Minn. App. 2016) ("A decision based on whim or devoid of articulated reasons is arbitrary."), *aff'd sub nom. Appeal of Krenik*, 903 N.W.2d 224 (Minn. Nov. 1, 2017). We therefore conclude that the postconviction court abused its discretion.

Under the circumstances, a remand for the postconviction court to explain its consideration of the *Knaffla* bar could be appropriate. *See State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (remanding because the district court failed to exercise its discretion). But we need not do so because, as explained below, the postconviction court's ruling on the merits cannot be sustained. *See Griffin*, 883 N.W.2d at 287 (declining to decide whether *Knaffla* exception applied because the petitioner's claims lacked merit).

II.

The state challenges the postconviction court's grant of a new trial, arguing that the court abused its discretion by analyzing Gilbert's claim under the *Larrison* test, which

applies when a defendant seeks a new trial based on a claim of false testimony.[3] *See Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998) (applying *Larrison* test). The state argues that the postconviction court should have instead analyzed Gilbert's claim under the *Rainer* test for newly discovered evidence. *See Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997) (setting forth test for determining whether to grant a new trial based on newly discovered evidence).

Gilbert raised a false-testimony claim in his postconviction petition and specifically relied on the *Larrison* test in doing so. The postconviction court analyzed Gilbert's claim under that test. Caselaw suggests that on review, an appellate court may apply the test for newly discovered evidence instead of the *Larrison* test if the newly discovered evidence test is more appropriate. *See Pippitt v. State*, 737 N.W.2d 221, 228 (Minn. 2007) (applying test for newly discovered evidence rather than *Larrison* test). But "the *Larrison* standard applies broadly to *all* allegations of false trial testimony." *Caldwell v. State*, 853 N.W.2d 766, 775 (Minn. 2014); *see Ferguson v. State*, 645 N.W.2d 437, 447 (Minn. 2002) ("[T]he proper test to apply when evaluating a claim for a new trial based on newly-discovered evidence of falsified testimony is the three-prong *Larrison* test."). For example, in *State v. Caldwell*, the supreme court held that a defendant was entitled to a new trial because "the uncontroverted testimony of the state's fingerprint expert" was "subsequently discovered

[3] Although the case that established the *Larrison* test has been overruled, Minnesota courts continue to apply the test in cases involving witness-recantation and false-testimony claims. *Campbell v. State*, 916 N.W.2d 502, 506 n.2 (Minn. 2018); *see Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928) (establishing test), *overruled by United States v. Mitrione*, 357 F.3d 712 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

to have been incorrect." 322 N.W.2d 574, 575 (Minn. 1982). We therefore consider the theory presented to and decided by the postconviction court: False testimony under the *Larrison* test.

Three factors comprise the *Larrison* test: (1) the court "is reasonably well-satisfied that the testimony given [at trial] by a material witness was false," (2) "without the 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 of its falsity until after trial." *Martin*, 825 N.W.2d at 740. The defendant must establish the first two *Larrison* factors, but a lack of proof regarding the third factor is not fatal. *State v. Turnage*, 729 N.W.2d 593, 597 (Minn. 2007). An appellate court reviews a determination that testimony is false within the meaning of the *Larrison* test for an abuse of discretion. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) (holding that the postconviction court did not abuse its discretion when it determined that it was not well satisfied that any witness gave false testimony at trial).

As to the first prong of the *Larrison* test, false testimony is established if a trial witness credibly recants her trial testimony or makes credible posttrial statements that materially contradict her trial testimony; it may also be established through other credible evidence that a witness testified dishonestly at trial. *See Dobbins v. State*, 788 N.W.2d 719, 737 (Minn. 2010) (an evidentiary hearing on petitioner's allegation that witness's trial testimony was false was appropriate where petitioner supported his claim with an affidavit from another individual who swore that the trial witness confessed to the killing); *Caldwell*, 853 N.W.2d at 771 ("[T]he sworn affidavit of the third party in this case—an investigator

who interviewed all three witnesses—affirms, under the penalty of perjury, that the investigator heard each of the witnesses recant their trial testimony."); *Martin*, 825 N.W.2d at 743 ("The affidavits of Mack-Lynch and Pettis formally recant their sworn testimony that Martin was one of the individuals who shot Lynch."); *Ferguson v. State*, 779 N.W.2d 555, 557-59 (Minn. 2010) (concluding that postconviction petitioner was entitled to evidentiary hearing where trial witness gave a statement after trial that contradicted his trial testimony concerning the petitioner's presence at scene of murder); *Ferguson*, 645 N.W.2d at 446 ("Ferguson has alleged that Edwards lied at trial which, if proved, would satisfy the first two prongs of the *Larrison* test.").

However, a statement that merely contradicts earlier testimony, evidence of a witness's general unreliability, and a witness's failure to give a full explanation of her trial testimony are insufficient to establish false trial testimony under the *Larrison* test. *Martin v. State*, 865 N.W.2d 282, 290 (Minn. 2015); *Opsahl*, 710 N.W.2d at 782.

In this case, Folsom has not recanted her trial testimony. And she has not made a posttrial statement that materially contradicts her trial testimony. Moreover, Folsom's trial testimony regarding water dissipation of DNA was qualified. Folsom testified about what she "expect[ed]" to occur if a firearm was exposed to rain, and under cross-examination, she admitted that her statements were merely her "opinion" and that she had not "studied it." Indeed, on cross-examination, Folsom described her opinion as "just my guess."

At the postconviction hearing, Cale testified that she was unaware of any studies about water dissipation of DNA, but Cale acknowledged that "environmental factors . . . have a detrimental impact on DNA." Cale's testimony on that point did not

materially contradict Folsom's testimony. Indeed, the impeachment value of Cale's testimony is debatable given Folsom's admission that her opinion was just a "guess." On this record, the postconviction court abused its discretion by determining that Folsom's testimony regarding water dissipation was false under the first prong of the *Larrison* test. *See Martin*, 865 N.W.2d at 290 ("[A] statement merely contradicting earlier testimony or a conclusion that a witness is generally unreliable is not sufficient.").

As to transfer DNA, Folsom testified that based on her experience, DNA transfer "usually" results from a "good source" of DNA, such as blood or saliva. Folsom testified that if such a source were not present, she would expect "a low amount of DNA" to be transferred and that such a transfer would show up in the "minor types," and not in the major profile.

At the posttrial hearing, Cale acknowledged that "body fluids" tend to have "higher level DNA samples," but she testified that skin cells may be a source for DNA transfer and that "you can't use the quality of the profile to predict the mode of transfer." Cale further testified that "typically" the person handling an item will provide "the most prominent profile," but sometimes the person who touched an item last, or the only person to touch the item, does not show up as the "dominant profile."

Although Cale's testimony regarding DNA transfer had impeachment value, her testimony did not render Folsom's testimony false under the first prong of the *Larrison* test. Experts may disagree about certain aspects of their respective science. When that happens, the fact-finder must determine the credibility of the experts and how much weight to give to a particular piece of testimony. *See State v. Ostlund*, 416 N.W.2d 755, 756

(Minn. App. 1987) ("Where reputable doctors present conflicting expert opinions on the cause of death, the trier of fact must determine the credibility of the witnesses and the weight to be given their testimony."), *rev. denied* (Minn. Feb. 24, 1988). But a difference of opinion between two experts alone is generally not a basis to deem the trial testimony of one of the experts false. *See Martin*, 865 N.W.2d at 290 (noting that "a statement merely contradicting earlier testimony" does not satisfy the first prong of the *Larrison* test).

Gilbert likens this case to *Caldwell*, in which the state's fingerprint expert testified at trial that a fingerprint found on a significant piece of evidence "was identical to the known print of [Caldwell's] right thumb." 322 N.W.2d at 580. After trial, three additional experts analyzed the fingerprint and concluded it could not have come from Caldwell. *Id.* at 582. In a subsequent, related trial, the prosecutor told the district court "that he would ask the jury to disregard the latent print as a misidentified fingerprint." *Id.* The supreme court concluded that the testimony of the state's expert "was damning—and it was false." *Id.* at 586.

The *Caldwell* case is readily distinguishable from this case. In *Caldwell,* three experts opined that the challenged expert testimony could not have been true, and the state effectively conceded that the fingerprint had been misidentified by its expert. *Id.* at 582. We have no such concession here, and Cale's sole opinion is not comparable to the three consistent expert opinions in *Caldwell*. Unlike the supreme court in *Caldwell*, we cannot say that "there appears to be no doubt" that Folsom's testimony was inaccurate. *Id*. at 587.

In sum, "the first prong of the *Larrison* test is not met by a simple statement contradicting earlier testimony." *Pippitt*, 737 N.W.2d at 227 (quotation omitted). "It is

likewise not sufficient under *Larrison* to determine that a witness is generally unreliable." *Id.* (quotation omitted). Those were the circumstances before the postconviction court. The postconviction court therefore abused its discretion by determining that Folsom's testimony regarding transfer DNA was false under the first prong of the *Larrison* test.

DECISION

The postconviction court abused its discretion by granting Gilbert's request for postconviction relief without either expressly determining that Gilbert's claim was not procedurally barred under *Knaffla* or explaining an implied determination to that effect. The postconviction court further abused its discretion by granting a new trial based on testimony that was not shown to be false within the meaning of *Larrison*.

Reversed.