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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2204, A10-1495**

State of Minnesota,
Respondent,

vs.

Mohamud Mahumad Yusuf,
Appellant.

**Filed July 5, 2011
Affirmed
Shumaker, Judge**

Stearns County District Court
File No. 73-CR-08-4084

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges the district court's denial of a postconviction evidentiary hearing and its denial of his petition for a new trial. Because the postconviction court properly determined that appellant merely presented arguments without factual support, there was no

evidentiary basis on which to grant the relief he requested. Therefore, we hold that the postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief without an evidentiary hearing.

FACTS

Appellant Mohamud Mahumad Yusuf was charged with first-degree burglary and two counts of second-degree assault after an altercation at the apartment of S.W. Yusuf and several other men, all of whom S.W. knew only by nicknames, were helping S.W. move out of her apartment on March 24, 2008, when Yusuf became aggressive with S.W. and A.I., one of the helpers. Yusuf was pushed out of the apartment but, moments later, broke through the door and came back inside. Once inside, Yusuf grabbed a knife from the kitchen, waved it at S.W., and then moved toward A.I. with the knife. S.W. ran upstairs and called the police, describing the perpetrator as a man named Yusuf Ali.

The police arrived and interviewed those present. A.I. stated that "Mohamud Mahumad Yusuf" was the man who attempted to stab him and S.W., and he gave the police Yusuf's address. A.I. told police that, when Yusuf was attempting to stab him, he said he thought Yusuf "was gonna kill" him. A.I. also stated: "Sir, I really think this dude is gonna send people after so if anything happen to me it's his . . . if anything happens to me . . . it's [Yusuf's] fault." W.O., an eyewitness, told the police that the perpetrator was "Yusuf, I don't know his middle name or last name, but he – his first name is Yusuf, and he was acting up." Later, the police found Yusuf at the address A.I. provided, and arrested him.

Shortly before Yusuf's trial, the prosecutor and a case coordinator met with A.I. at Stearns County jail, where he was being held on charges unrelated to the present case. The

prosecutor disclosed this meeting to Yusuf and stated that A.I.'s "recollection of events is consistent with his previous statement to law enforcement."

At Yusuf's bench trial in July 2008, S.W. testified that Yusuf was the man who had assaulted her and A.I. But contrary to S.W.'s testimony, and in contradiction to his previous statement to the police, W.O. testified that a man named Joseph committed the crimes. W.O. claimed that he told the police that a man possibly named Joseph was the perpetrator, but the police misunderstood him and thought he said "Yusuf." A.I., who was no longer in custody, did not appear as a witness at trial, despite having been subpoenaed by the state.

The district court found Yusuf guilty of first-degree burglary and two counts of second-degree assault and sentenced him to concurrent terms of 48 months and 27 months in prison. Yusuf appealed. This court granted Yusuf's request for a stay of his appeal and remanded the matter to district court for postconviction-relief proceedings. Yusuf's petition for postconviction relief alleged (a) newly discovered evidence; (b) a discovery violation; and (c) prosecutorial misconduct.

Yusuf sought postconviction relief based on an October 6, 2008 meeting among A.I., Yusuf's former attorney, and a defense investigator at the Stearns County jail. A.I. told Yusuf's former attorney and the defense investigator that a few days before Yusuf's trial, he recanted his allegations against Yusuf and told the prosecutor that Yusuf did not assault him and did not break into S.W.'s apartment, as he had previously told police. He also told them that the prosecutor had advised him to testify consistently with his statement to police, and that if he did not do so, the prosecutor said he would "go after" A.I. for a burglary charge or other charges pending against him, including felony terroristic threats, fifth-degree assault, disorderly conduct, and theft. Yusuf supported his postconviction-relief petition with

affidavits from his former attorney and the defense investigator, detailing the conversations with A.I. The state submitted an affidavit from the prosecutor, who claimed he had accurately disclosed the content of his meeting with A.I. prior to Yusuf's trial and that A.I. did not recant his statements to the police.

The postconviction court granted Yusuf's request for an evidentiary hearing on December 23, 2009, finding that a hearing was required because Yusuf had alleged facts that, if proven, entitled him to relief on grounds of (a) newly discovered evidence; (b) a discovery violation; and (c) prosecutorial misconduct. The evidentiary hearing was set for April 1, 2010.

On March 25, 2010, the Minnesota Supreme Court released *Ferguson v. State*, 779 N.W.2d 555 (Minn. 2010) (Jermaine Ferguson) (holding that a recanting witness's affidavit, rather than an investigator's statement, would be necessary before an evidentiary hearing would be required). The following day, the state requested a continuance because a potential state witness was unavailable for the April 1, 2010 hearing and, citing *Ferguson*, requested Yusuf submit an affidavit prior to the hearing detailing A.I.'s anticipated testimony. The postconviction court granted the state's request for a continuance and ordered Yusuf to file the affidavit requested by the state. The defense investigator spoke with A.I. three times in an effort to obtain an affidavit attesting to his statements, but after initially agreeing to sign such an affidavit, A.I. ultimately refused. Instead, Yusuf submitted an affidavit from the defense investigator, detailing her conversations with A.I. Although A.I. refused to sign an affidavit, he continued to maintain that he had recanted his story prior to trial and that the prosecutor had threatened adverse consequences if A.I.'s testimony contradicted his previous statements to police.

Under a writ of habeas corpus, A.I. was transported from the Saint Cloud Correctional Facility and appeared for the evidentiary hearing in Stearns County District Court on July 22, 2010. However, prior to entering the courtroom, A.I. invoked his Fifth Amendment right not to testify.

Without A.I.'s testimony, upon which Yusuf's petition for postconviction relief was based, the state argued that the evidentiary hearing should not proceed, and that the postconviction court should deny Yusuf's petition for postconviction relief. Because A.I. refused to sign an affidavit and refused to testify, the state argued that Yusuf failed to support his petition with facts sufficient to warrant an evidentiary hearing. Yusuf, on the other hand, argued that A.I.'s credibility could be determined only after an evidentiary hearing and urged the postconviction court to proceed.

The postconviction court noted that, although it would be able to judge the credibility of the individuals A.I. spoke with, it would still be unable to judge A.I.'s credibility. Accordingly, on July 29, 2010, the postconviction court ruled that without an affidavit or testimony from A.I., Yusuf had merely presented argumentative assertions without factual support, and the lack of reliable evidence rendered the evidentiary hearing unnecessary. Yusuf's postconviction-relief petition was denied.

The following day, Yusuf moved the postconviction court for reconsideration and submitted a supplemental memorandum of law. Yusuf asserted that at the July 22, 2010 evidentiary hearing, the prosecutor had threatened to charge A.I. with perjury if he testified consistently with the statements he made to the defense investigator. Yusuf alleged that as a direct result of the prosecutor's threat, A.I. invoked his Fifth Amendment right and refused to testify. This, Yusuf argued, further supported his prosecutorial-misconduct claim.

The postconviction court denied Yusuf's request for reconsideration on August 24, 2010, stating that A.I. had invoked his Fifth Amendment right prior to entering the courtroom; therefore, the state could not have interfered with his decision to testify. Further, the postconviction court noted that the prosecutor's alleged threats were only a response to Yusuf's arguments at the hearing.

Yusuf appealed the July 29 and August 24, 2010 orders. Pursuant to Yusuf's motion, this court dissolved the stay on Yusuf's first appeal and consolidated it with his most recent appeal.

D E C I S I O N

Yusuf challenges the postconviction court's denial of a postconviction evidentiary hearing and the court's denial of his postconviction-relief petition for a new trial. We review postconviction proceedings to determine whether the evidence was sufficient to support the postconviction court's findings, and we do not disturb the postconviction court's decision unless there was an abuse of discretion. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). We review issues of law de novo. *Rhodes v. State*, 735 N.W.2d 315, 318 (Minn. 2007).

In order to determine whether the postconviction court erred in not conducting an evidentiary hearing, we first consider whether Yusuf's petition alleged facts that, if proven, would entitle him to relief, which in this case is a new trial.

Evidentiary hearing

An evidentiary hearing is not necessary if the petition, files, and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). We have "interpreted this section to require the petitioner to allege facts that, if proven, would entitle him to the requested relief." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004).

“Allegations in a postconviction petition must be more than argumentative assertions without factual support.” *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002) (Alonzo Ferguson).

“Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing.” *King*, 649 N.W.2d at 156.

Yusuf first argues that the postconviction court improperly denied him an evidentiary hearing because he had failed to provide an affidavit from A.I. prior to the hearing. Yusuf never produced the court-ordered affidavit from A.I. The postconviction court nevertheless allowed the evidentiary hearing to proceed under the assumption that A.I. would testify at the hearing. It was only after A.I. appeared and refused to testify, invoking his Fifth Amendment rights, that the postconviction court determined an evidentiary hearing was unnecessary. Because the postconviction court did not deny Yusuf an evidentiary hearing for failing to provide the court with an affidavit from A.I. in advance, Yusuf’s argument in this regard is without merit.

Yusuf also argues that he is entitled to an evidentiary hearing unless the evidence conclusively shows that he is entitled to no relief. Each of Yusuf’s postconviction claims for relief was based upon statements made by A.I. Yusuf claimed that he was entitled to a new trial based on newly discovered evidence that prior to trial A.I. told the prosecutor that Yusuf did not have a knife and did not try to stab him, as he had previously told police. Yusuf also argued for postconviction relief on the basis of a discovery violation; specifically, that the state failed to disclose A.I.’s alleged statements that Yusuf was not the perpetrator. Yusuf claimed that the state’s suppression of A.I.’s statements violated his due-process rights. Finally, Yusuf sought postconviction relief because of the prosecutor’s misconduct in failing

to disclose A.I.'s statements that Yusuf had not committed burglary and assault and because of the prosecutor's threats to A.I.

Yusuf supported the claims in his postconviction petition for relief with affidavits from his former attorney and the defense investigator, and he alleged that A.I. would testify at an evidentiary hearing. In response to Yusuf's petition, the state submitted affidavits from the prosecutor and the case coordinator to whom A.I. claimed to have made statements exculpating Yusuf. The prosecutor stated that A.I. had verified the accuracy of his previous statement to police and did not make any statements exculpatory to Yusuf to him during or after the pretrial interview. He also denied that he ever threatened A.I. generally or with the specific statements alleged in Yusuf's petition. In her affidavit, the case coordinator stated that she had attended A.I.'s pretrial interview and subsequently prepared a supplemental report. She stated that she did not recall the meeting and relied on her supplemental report, which was included with her affidavit. The report contains no mention of A.I. exculpating Yusuf at the meeting.

When A.I. refused to sign an affidavit or testify, the only evidence supporting Yusuf's postconviction-relief claims was the affidavits of his former attorney and the defense investigator. Yusuf argues that he should have been granted an evidentiary hearing to present the testimony of his former attorney and the defense investigator. But without A.I.'s testimony or affidavit, the remainder of Yusuf's evidence is hearsay and is insufficient to require the postconviction court to hold an evidentiary hearing.

In *Ferguson v. State*, the petitioner based his postconviction-relief petition on the alleged recantation of a witness's testimony. 779 N.W.2d at 561. In the petitioner's first appeal, the supreme court held that an unsworn memorandum from an investigator that

recounted what the witness allegedly reported to him was insufficient to warrant an evidentiary hearing and was inadequate to satisfy an element required for a claim of witness recantation. *Id.* at 558. But, a sworn affidavit from the witness himself did not raise the hearsay issues present with the unsworn memorandum and constituted a greater showing of a genuine recantation that warranted an evidentiary hearing. *Id.* at 560–61. Because A.I. refused to testify or to provide an affidavit, the rest of Yusuf’s evidence, which raises hearsay issues, does not constitute a showing sufficient to merit an evidentiary hearing. Accordingly, we hold that the district court did not abuse its discretion in refusing to proceed with an evidentiary hearing.

Newly discovered evidence

The postconviction court found that the affidavits Yusuf presented did not satisfy the standard for new evidence necessitating a new trial. We apply an abuse-of-discretion standard to review the postconviction court’s determination of whether to grant a new trial based on new evidence. *Race v. State*, 504 N.W.2d 214, 217 (Minn. 1993). The evaluation of the postconviction court’s ruling is “limited to a determination of whether there is sufficient evidence to sustain the postconviction court’s findings.” *Rainer v. State*, 692 N.W.2d 692, 695 (Minn. 1997).

Yusuf argued that the information provided by his former attorney and the defense investigator constituted new evidence that entitled him to a new trial. New evidence warrants a new trial where a defendant establishes

- (1) that the evidence was not known to him or his counsel at the time of trial, (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material, and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner.

Rhodes, 735 N.W.2d at 318 (quotations omitted).

The postconviction court found that Yusuf did not satisfy the third and fourth elements required to support a claim of newly discovered evidence. Because Yusuf does not meet the fourth element of the test, the postconviction court did not abuse its discretion in denying Yusuf's request for a new trial, and because our analysis of the fourth element is dispositive, we need not address the other elements.

We analyze the fourth prong of the new-evidence test by examining the admissibility and weight of the evidence introduced. *See Race*, 504 N.W.2d at 218-19 (holding that the postconviction court did not abuse its discretion in finding that evidence would not have caused a more favorable result because other evidence introduced by the state at trial would have accounted for and discredited the defendant's new evidence); *Wayne v. State*, 498 N.W.2d 446, 448 (Minn. 1993) (holding that the postconviction court did not abuse its discretion in finding that evidence would not have caused an acquittal or more favorable result because the defendant could not lay proper foundation for an anonymous letter containing the evidence, so the letter could not be admitted).

In *Rainer*, the supreme court affirmed the postconviction court's ruling that evidence contained in an anonymous letter would not have led to an acquittal or a result more favorable for the defendant because the letter constituted inadmissible hearsay. 566 N.W.2d at 695-96. The postconviction court reached a similar conclusion here.

The postconviction court found that the only evidence Yusuf presented to support his petition was A.I.'s statement against interest reported by Yusuf's former attorney and the defense investigator.

The statement-against-interest hearsay exception applies to statements that exculpate the defendant only when “corroborating circumstances clearly indicate the trustworthiness of the statement.” Minn. R. Evid. 804(b)(3); *see State v. Higginbotham*, 298 Minn. 1, 5, 212 N.W.2d 881, 883 (1973) (stating hearsay exception for statements against interest only applies to statements exculpating the accused if they are “proven trustworthy by independent corroborating evidence that bespeaks reliability”). “The enhanced guarantee of trustworthiness for such statements is necessary because hearsay tending to exculpate the accused must be regarded with suspicion.” *State v. Hurd*, 763 N.W.2d 17, 36 (Minn. 2009) (citing *Higginbotham*, 298 Minn. at 5, 212 N.W.2d at 883).

Yusuf provides no such corroborating evidence to indicate the trustworthiness of A.I.’s statements. To the contrary, as the postconviction court explained, the circumstances surrounding A.I.’s alleged statements demonstrated their lack of reliability. Because A.I.’s statements were not corroborated, they do not satisfy the exception for statements against interest. *See* Minn. R. Evid. 804(b)(3). As inadmissible hearsay, A.I.’s statements would not result in an acquittal or a more favorable result for Yusuf. Because the evidence conclusively shows that Yusuf is entitled to no relief, the postconviction court did not abuse its discretion when it denied Yusuf an evidentiary hearing.

Additionally, an evidentiary hearing to determine A.I.’s credibility in his absence was unnecessary because, without his testimony or affidavit, the postconviction court was unable to assess his credibility. Yusuf misconstrues the postconviction court’s explanation of why A.I.’s statements do not satisfy the hearsay exception as being the court’s determination of A.I.’s credibility, which would have been assessed at an evidentiary hearing. But the

postconviction court specifically stated that it did not assess A.I.'s credibility because, without testimony or a sworn statement from A.I., it had no way of doing so.

We also note that even with A.I.'s allegedly exculpatory statements, there was still a strong case against Yusuf. There was significant evidence presented at Yusuf's trial implicating him in the burglary and assault. This evidence included testimony from one of the victims, S.W.; testimony from a responding police officer; testimony from a security guard who arrived on the scene; and physical evidence corroborating A.I.'s statement to police. While one witness, W.O., who previously reported to police that Yusuf was the perpetrator, testified that a man named Joseph actually committed the crimes, the district court found that W.O.'s statement at trial was not credible. Given A.I.'s inconsistent stories, his vacillating willingness to testify or provide a sworn statement, and the weight of the evidence contradicting his claim, evidence of A.I.'s statements would not likely result in a more favorable outcome for Yusuf. *See State v. Williams*, 593 N.W.2d 227, 235–36 (Minn. 1999) (holding that the weight of other evidence at trial can be sufficient to show that the undisclosed evidence is not material and that a new trial would not have been warranted).

We conclude that the postconviction court properly determined that Yusuf failed to allege facts sufficient to entitle him to the relief requested. *See Opsahl*, 677 N.W.2d at 423. Thus, we hold that the postconviction court did not err when it denied Yusuf relief based on his claim of newly discovered evidence.

Discovery violations

Yusuf also argues that the state's failure to disclose exculpatory evidence before trial violates *Brady v. Maryland* and Minn. R. Crim. P. 9.01. "[T]he suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the

constitutional guarantee of due process.” *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963)). A *Brady* violation requires a showing of three elements: (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) prejudice to the defendant must have resulted and the evidence must be material. *Pederson v. State*, 692 N.W.2d 452, 459-60 (Minn. 2005).

The only evidence Yusuf offers to support his assertion that the state suppressed evidence is inadmissible hearsay. Even if the facts alleged by Yusuf are true, we conclude he is not entitled to a new trial because he has failed to show that A.I.’s statements are exculpatory. A.I. has refused to attest to his statements and there is no indication he will agree to do so in the future. Therefore, we hold that the postconviction court did not abuse its discretion in denying Yusuf’s petition for postconviction relief without an evidentiary hearing.

Prosecutorial misconduct

Next, Yusuf claims A.I. refused to testify at Yusuf’s evidentiary hearing because the prosecutor threatened to charge him with perjury if he testified consistent with his alleged statements to Yusuf’s former attorney and the defense investigator. Yusuf asserts the prosecutor’s threat constitutes prosecutorial misconduct entitling him to a new trial or, in the alternative, to an evidentiary hearing. We must first determine if the state committed any misconduct. *State v. Jenkins*, 782 N.W.2d 211, 232 (Minn. 2010). If it did, this court “will grant a new trial when the misconduct impaired the defendant’s right to a fair trial.” *Id.*

In warning a witness about possible self-incrimination during testimony, the state's "requisite warnings may not be given in a fashion which exert such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *State v. Swynigan*, 304 Minn. 552, 557, 229 N.W.2d 29, 33 (1975) (quotations omitted).

A.I. invoked his Fifth Amendment right not to testify prior to entering the courtroom. This is confirmed by the hearing transcript, where, after announcing the case, the postconviction court stated, "I guess before we proceed any further . . . it's my understanding that [A.I.] is not going to testify today, is that correct?" A.I. and his attorney confirmed that he was invoking his Fifth Amendment right and would not testify. The postconviction court, in its denial of Yusuf's request for reconsideration, found that the state had not had any contact with A.I. on July 22, 2010, prior to his decision to invoke the Fifth Amendment, and therefore could not have influenced A.I.'s decision not to testify. Yusuf has failed to allege or provide any evidence that the prosecutor had any contact with A.I. on the day on which he invoked his right not to testify.

This case is comparable to *Swynigan*, in which the witness asserted his Fifth Amendment right on his own initiative and on the advice of his own attorney. *Id.* In *Swynigan*, the prosecutor's comment came after the witness claimed the privilege and while the judge and counsel were discussing the propriety of the court's grant of immunity from prosecution to a defense witness. *Id.* The supreme court concluded that the defendant "offered no affirmative evidence to show that the witness was in fact intimidated or that his choice was anything other than voluntary," concluding there was no threat, no intimidation, and nothing that would justify a new trial. *Id.* Similarly, Yusuf has not provided any

evidence of intimidation or that A.I.'s choice to invoke the Fifth Amendment was not voluntary.

Yusuf also argues that the state influenced A.I.'s decision not to testify because the prosecutor threatened to charge A.I. with perjury prior to the postconviction court ruling on Yusuf's objection to A.I.'s invocation of the Fifth Amendment. But this argument is unpersuasive because the postconviction court ultimately decided that A.I. properly invoked his Fifth Amendment right not to testify and dismissed A.I. from the proceeding.

We also note that the prosecutor did not affirmatively raise the issue of perjury but rather the prosecutor was only responding to Yusuf's arguments. Further, A.I. had already invoked the Fifth Amendment before the prosecutor made the statements to which Yusuf now takes issue. *See State v. Graham*, 764 N.W.2d 340, 350 (Minn. 2009) (looking at the manner in which the state raised the self-incrimination issue to determine whether the witness made a free and voluntary choice to testify).

Because the prosecutor did not act improperly, Yusuf is not entitled to a new trial or an evidentiary hearing for prosecutorial misconduct.

Affirmed.