STATE OF MINNESOTA

IN SUPREME COURT

A19-0745

Becker County

Thissen, J.

Kenneth Eugene Andersen,

Appellant,

vs.

Filed: March 11, 2020
Office of Appellate Courts

State of Minnesota,

Respondent.

Zachary A. Longsdorf, Longsdorf Law Firm, P.L.C., Inver Grove Heights, Minnesota, for appellant.

Keith Ellison, Attorney General, Matthew Frank, Assistant Attorney General, Saint Paul, Minnesota; and

Brian McDonald, Becker County Attorney, Detroit Lakes, Minnesota, for respondent.

S Y L L A B U S

1. Appellant is not entitled to a new trial because the district court did not clearly err in finding that the testimony of appellant's witnesses was not credible.

2. The district court did not abuse its discretion when it denied appellant's request to reopen the record to allow the admission of additional evidence relating to claims that were not alleged in the second postconviction petition.

3. Appellant failed to sufficiently develop for appellate review his claim that a witness's purported expression of racial bias during a post-trial interview deprived appellant of a fair trial.

4. Appellant failed to show that his alleged claim of racial imbalance in the jury pool was the result of systematic exclusion of a distinctive group in the community.

5. Appellant was not prejudiced by the State's failure to disclose an interview conducted by an investigator who testified at trial.

Affirmed.

O P I N I O N

THISSEN, Justice.

In 2008, appellant Kenneth Eugene Andersen was convicted of first-degree premeditated murder. In this appeal, Andersen challenges the district court's denial of his second petition for postconviction relief. In *Andersen v. State* (*Andersen III*), 913 N.W.2d 417, 421 (Minn. 2018), we reversed in part the district court's denial of Andersen's second postconviction petition and remanded to the district court for its determination of whether an evidentiary hearing was required to consider the evidence set forth in the affidavits of Geraldine Bellanger and Stacy Weaver. After hearing from over a dozen witnesses, the district court found that the testimony by Bellanger and Weaver was not credible.

We conclude that Andersen did not establish that he is entitled to a new trial under the tests we set forth in *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997), and *State v. Caldwell*, 322 N.W.2d 574, 584–85 (Minn. 1982) (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)). We hold that the district court properly declined to grant him a new trial. The remainder of Andersen's arguments also do not entitle him to relief. We therefore affirm.

FACTS

In 2008, a jury found Andersen guilty of first-degree premeditated murder for the April 2007 shooting death of Chad Swedberg. Andersen challenged his conviction on direct appeal and we affirmed the conviction. *Andersen v. State* (*Andersen I*), 784 N.W.2d 320, 323 (Minn. 2010).

In 2010, Andersen filed his first postconviction petition. He raised claims of newly discovered evidence, violation of his right to counsel, prosecutorial misconduct, Confrontation Clause violations, and ineffective assistance of trial and appellate counsel. *Andersen v. State* (*Andersen II*), 830 N.W.2d 1, 6 (Minn. 2013). The petition was summarily denied by the district court and we affirmed. *Id.* at 14.

In September 2016, Andersen filed his second postconviction petition. *See Andersen III*, 913 N.W.2d at 417. In support of his postconviction petition, he alleged that newly discovered evidence, including affidavits from Geraldine Bellanger and Stacy Weaver, required an evidentiary hearing. *Id.* at 421–22. He also alleged a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and ineffective assistance of trial counsel. *Andersen III*, 913 N.W.2d at 425 n.8; *id*. at 429 n.14. Andersen argued that his claims could be considered based on the newly-discovered-evidence and interests-of-justice exceptions to the 2-year time bar on postconviction claims set forth in Minn. Stat. § 590.01, subd. 4 (2018). Without conducting an evidentiary hearing to assess credibility, the district

court summarily denied Andersen's second petition, concluding, among other things, that the Bellanger and Weaver affidavits were not credible. 913 N.W.2d at 422.

Andersen appealed. We affirmed in part, upholding the district court's summary denial of most claims raised in his second petition. *Id.* We rejected without prejudice claims based on post-trial interviews of witnesses and others conducted by an investigator that Andersen retained. We concluded that the investigator's unsworn reports were insufficient to support a claim for postconviction relief.

Because the district court rejected the Bellanger and Weaver affidavits as not credible without conducting an evidentiary hearing, however, we reversed in part and remanded. *Id.* at 424. We instructed the district court to assume that the facts in the affidavits were true and assess whether an evidentiary hearing was necessary. *Id.* If it concluded that a hearing was necessary, we directed that the district court promptly conduct the hearing to determine whether Andersen was entitled to relief based on the affidavits. *Id.*

On remand, the district court concluded that Andersen was entitled to an evidentiary hearing on the allegations in the Bellanger and Weaver affidavits because, when taken as true, they satisfied the newly-discovered-evidence exception to the statute of limitations. The district court held an evidentiary hearing and heard testimony from over a dozen witnesses. After the hearing, Andersen moved to reopen and expand the record to include evidence relating to claims that were not alleged in the second postconviction petition. The district court denied the motion. Based on the testimony of witnesses at the hearing, the court ultimately concluded that the Bellanger and Weaver evidence was not credible and

that Andersen was not entitled to relief because the evidence failed to clearly and convincingly prove that Andersen was innocent of the offense. Andersen appealed.

ANALYSIS

We review a district court's decision on a petition for postconviction relief for an abuse of discretion. *See Zornes v. State*, 903 N.W.2d 411, 416 (Minn. 2017). "A [district court] abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017) (citation omitted) (internal quotation marks omitted).

A district court's credibility determinations are reviewed for clear error. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). We will disturb a district court's credibility determinations only when, after a thorough review of the record, we are left with the definite and firm conviction that a mistake has been made. *See Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013).

I.

Andersen argues that the district court improperly applied the clear and convincing standard from Minn. Stat. § 590.01, subd. 4, to determine whether he was innocent of murder and therefore entitled to a new trial. He argues that, before granting an evidentiary hearing, the district court had determined that the Bellanger and Weaver affidavits, taken as true, surmounted the clear and convincing hurdle of the newly-discovered-evidence exception to the 2-year time bar on postconviction petitions. *See id.*, subd. 4(b)(2). Accordingly, he asserts that the court should have applied either the *Rainer* test for newly discovered evidence, 566 N.W.2d at 695, or the *Larrison* test for false or recanted

testimony, *Opsahl v. State*, 677 N.W.2d 414, 422–23 (Minn. 2004), when substantively assessing the claims.

Under each test, the petitioner need satisfy his burden of proof only by a preponderance of the evidence, not by clear and convincing evidence. *State v. Hurd*, 763 N.W.2d 17, 34 (Minn. 2009) (discussing *Rainer*); *Opsahl*, 677 N.W.2d at 423 (discussing *Larrison*). But even under the less onerous standards of *Rainer* and *Larrison*, Andersen is not entitled to a new trial.

In *Rainer*, we established a test for determining whether to grant a new trial based on newly discovered evidence. To receive a new trial, a postconviction petitioner must show that the evidence (1) was not known to the defendant or defense counsel at the time of the trial; (2) could not have been discovered through due diligence before trial; (3) is not cumulative, impeaching, or doubtful; and (4) would probably produce an acquittal or a more favorable result. *Rainer*, 566 N.W.2d at 695. A petitioner's failure to prove any element of the test dooms his claim. *See Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013).

We have adopted the *Larrison* test for determining whether to grant a new trial based on falsified or recanted witness testimony. *See Opsahl*, 677 N.W.2d at 422; *see also Pippitt v. State*, 737 N.W.2d 221, 227 (Minn. 2007) ("[W]e have also indicated that *Larrison* applies more generally, such as 'when a court reviews an allegation that false testimony was given at trial.' " (quoting *Dukes v. State*, 621 N.W.2d 246, 257 (Minn. 2001))). To satisfy this test, a postconviction petitioner must be able to establish the following by a fair preponderance of the evidence: (1) the court must be reasonably well-satisfied that the testimony in question was false; (2) without that testimony the jury 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. *Id.* at 226–27; *see also Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). Failing to prove one of the first two prongs of the test means the petitioner does not prevail. *Campbell v. State*, 916 N.W.2d 502, 507 (Minn. 2018) (holding that the court need not reach the second and third prongs of the *Larrison* test because the petitioner failed to satisfy the first prong).

Under either of these tests, the credibility of the new evidence is critical. To satisfy the third prong of *Rainer*, the evidence must not be doubtful. 566 N.W.2d at 695. When a district court concludes that testimony offered by a witness for the petitioner is not credible, it is not an abuse of discretion to conclude that the testimony is doubtful. Likewise, to satisfy the first prong of *Larrison*, the new evidence must demonstrate that trial testimony was false. *Opsahl*, 677 N.W.2d at 423. When a district court determines that postconviction testimony that challenges trial testimony is not credible, it is not an abuse of discretion to conclude that the postconviction testimony was insufficient to show that trial testimony was false.

Turning now to this petition, Bellanger's affidavit and testimony alleged that the victim's brother and sister-in-law told Bellanger that a man, A.B., had heard voices in his head telling him to kill the victim and had "about admitted to [them] that he did it." Bellanger's affidavit also claimed that A.B. told her that he had received a call from someone claiming responsibility for the murder and that the victim's brother and sister-in-law mentioned something about A.B. getting a confession to the murder. The district court concluded that the affidavit and testimony were "self-contradictory" because

Bellanger claimed that A.B. confessed to the murder but also said that another person had confessed to A.B. Moreover, at the evidentiary hearing, the victim's brother and sister-in-law both denied telling Bellanger about a confession by A.B. or by anyone else. They further denied knowing anything about A.B. hearing voices. And A.B. testified that he had never heard voices, that he had never confessed to killing the victim, and that no one had ever confessed to him.

The district court concluded that it could not "give greater weight to muddled and self-contradictory hearsay than to the testimony from the people who allegedly told Bellanger [those] things in the first place." The court also noted that Bellanger is Andersen's mother "and thus has a vested interest in clearing her son's name[,] which may impact how she interprets or remembers conversations from years past." At the evidentiary hearing, the district court admitted and carefully reviewed extensive testimony about the allegations in Bellanger's testimony. The district court's decision to credit certain witnesses over others was not clearly erroneous. We hold that the district court did not clearly err by finding that Bellanger's affidavit was not credible.

We reach the same conclusion regarding the Weaver affidavit. Weaver stated that on the morning of the murder he saw the victim's wife, her son, and her brother driving in White Earth. Andersen argues that this evidence is important because it calls into question the trial testimony of the wife and son regarding their whereabouts that morning.

But Weaver's testimony is inconsistent with the testimony of several other people. At the postconviction evidentiary hearing, the victim's wife testified that she was at home that morning. Her son and brother testified that they were not in the car together. Several

of the son's coworkers testified to seeing him at work starting at 7:35 a.m. And the victim's brother testified to seeing the son leave the house for work at 7:30 a.m. on the morning of the murder.[1]

As the district court stated, for "Weaver to have seen [the wife and son] that day in a way which is consistent with the testimony of [the other witnesses], the [wife and son] would have had to be traveling on the road for some time before 7:30, and then returned back home in order for [the son] to have been seen . . . leaving for work at 7:30." Because of the inconsistency between Weaver's testimony and the timeline established by other credible witnesses, the district court concluded that Weaver's testimony was not credible. Based on our review of the record, we are not left with a definite and firm conviction that the district court erred by reaching that conclusion.

Because we accept the district court's credibility determinations, we conclude that the evidence cannot satisfy the *Rainer* standard, which requires that evidence must not be "cumulative, impeaching, or doubtful." *See* 566 N.W.2d at 695. Bellanger's testimony is doubtful in light of the district court's finding that the testimony is self-contradictory and refuted by other witnesses, and that Bellanger has a vested interest in proving her son's innocence. Weaver's testimony is similarly doubtful based on the district court's finding that the testimony was inconsistent with the credible testimony of a number of other

[1] Weaver's testimony about the time he saw the victim's wife, her son and her brother was unclear. In his post-trial affidavit, he claimed that he saw those three individuals driving at 7:30 or 8:00 a.m., but his recollection changed at the hearing. There, he testified that he saw the three driving at day-break, which occurred earlier in the day.

witnesses. In addition, the district court found that the Weaver evidence was offered entirely for impeachment purposes.

Similarly, the first prong of *Larrison* requires that a court be "reasonably well-satisfied that the testimony in question was false." *Opsahl*, 677 N.W.2d at 423. Based on its credibility determinations, the district court concluded that it was "not well-satisfied that the testimony given by any material witness was false."

Based on our review of the evidentiary hearing testimony before the district court, as well as the court's thorough analysis of the facts, we conclude that the testimony does not satisfy the *Rainer* and *Larrison* tests. We therefore affirm the district court's denial of Andersen's motion for a new trial.

II.

Andersen also argues that the district court abused its discretion by denying his request to reopen the record to allow the admission of additional evidence relating to claims that were not alleged in the second postconviction petition. Andersen sought to reopen the record to add claims under *Rainer* and *Brady*. He based these claims on testimony at the evidentiary hearing that the son of the victim's wife found cigarette butts at the scene soon after the murder. He asserts that this new information, along with prior evidence that A.B. found shell casings at the scene, entitles him to a new trial. This information was not included in the Bellanger or Weaver affidavits.[2]

[2] Andersen also sought to introduce new evidence related to the sale of a van to Weaver. He claimed that the evidence calls into question the credibility of trial witnesses. Andersen does not make any legal arguments about the van sale in his briefs to us. And,

We have previously called a district court's decision to close evidence at the end of a hearing an evidentiary ruling. *See Miles*, 840 N.W.2d at 204–05. Evidentiary rulings "rest within the sound discretion of the trial court, and we will not reverse such evidentiary rulings absent a clear abuse of discretion." *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003); *see also Dobbins v. State*, 845 N.W.2d 148, 156 (Minn. 2013) (stating that the district court "did not abuse its discretion when it refused to expand the scope of the evidentiary hearing on remand").

We remanded this case for the express purpose of requiring the district court to determine whether the Bellanger and Weaver affidavits, taken as true, supported Andersen's petition for a new trial and, if so, to conduct an evidentiary hearing to assess the credibility of the Bellanger and Weaver evidence. *See Andersen III*, 913 N.W.2d at 424 ("To encourage future compliance with the rule that a [district court] must not make credibility determinations without first holding an evidentiary hearing, a prophylactic reversal is required in this case.").

The district court did so. It then declined Andersen's request to offer additional evidence beyond the allegations in the Bellanger and Weaver affidavits. The court concluded that there "must be some finality as to what evidence is before the Court in this matter." It ruled that "[n]othing in this order necessarily prevents the filing of a later petition in the event that additional new evidence is discovered." The district court did not abuse its discretion by declining to consider additional evidence.

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in any event, the district court's refusal to allow Andersen to introduce the new evidence was not an abuse of discretion for the reasons stated in this section of the opinion.

III.

Next, we consider Andersen's claim that a witness's expression of racial bias during a post-trial interview means that he is entitled to a new trial. At trial, the State used the witness's testimony to contradict Andersen's alibi that he was not at the location of the murder when the murder occurred. Andersen now states that he did not know about the witness's purported racial bias until an investigator interviewed the witness after the trial.

Andersen argues that he was denied a meaningful opportunity to a fair trial and defense due to the unknown racial bias of the witness. In support, he cites *Peña-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855 (2017). In that case, the Supreme Court of the United States held that Rule 606(b) of the Federal Rules of Evidence, which generally bars consideration of juror statements that impeach the verdict, must give way when the juror statement discloses that racial bias was a significant motivating factor in a juror's vote to convict. The *Peña-Rodriguez* Court relied on over a century of precedent "enforc[ing] the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.* at ___, 137 S. Ct. at 867.

Andersen asserts that some similar rule should apply when the purported racial bias of a witness comes to light post-trial. But he does not explain why the holding in *Peña-Rodriquez* compels that conclusion or how *Peña-Rodriguez*'s interpretation of Rule 606(b) affects our application of Minnesota's postconviction procedures. Although we construe pro se postconviction claims liberally and with an understanding eye, *see Fox v. State*, 913 N.W.2d 429, 433 (Minn. 2018), we decline to infer and rule upon a complex constitutional argument based on the limited analysis and authority that Andersen provided

in his brief. *See State v. Bartylla*, 755 N.W.2d 8, 22–23 (Minn. 2008). Thus, Andersen is not entitled to relief on this ground.

IV.

Andersen also argues that he is entitled to a new trial because the lack of White Earth Band members in the jury pool violated his right to a fair trial. Assuming without deciding that his claim is not barred by *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), Andersen still has not shown that the composition of the jury pool violated his right to a fair trial.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a jury pool that reflects a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994). To make a prima facie showing that the jury venire did not reflect a fair cross-section of the community, a defendant must show "that the group allegedly excluded is a 'distinctive' group in the community, that the group in question was not fairly represented in the venire, and that the underrepresentation was the result of a 'systematic' exclusion of the group in question from the jury selection process." *Williams*, 525 N.W.2d at 542. To meet the third requirement, a defendant must show that "over a significant period of time—panel after panel, month after month—the group of eligible jurors in question has been significantly underrepresented on the panels and that this results from . . . unfair or inadequate selection procedures used by the state." *Id.* at 543. Andersen did not submit evidence to satisfy the third element of a fair cross-section claim.

In *State v. Roan*, 532 N.W.2d 563, 569 (Minn. 1995), we held that a jury selection system that "use[d] registered voters, driver's licenses, and registered Minnesota identification card holders" did not systematically exclude people of color. The same type of jury selection system used in *Roan* was used at the time of Andersen's 2008 trial. *See generally* Minn. Gen. R. Prac. 805 and 806.

Andersen alleges that Native Americans living on reservations are and will continue to be excluded from jury pools in Becker County because those jury pools are randomly selected from voter registration and driver's licenses and few White Earth Native Americans vote in state elections. But Andersen adduced no historical or contemporaneous evidence or statistical analysis to factually support his argument that the jury selection as conducted in Becker County in 2008 systematically excluded White Earth Band members—or Native Americans more generally.[3] Because Andersen failed to provide any evidence to support his claim of systematic exclusion, we cannot conclude that the Becker County juror selection system violated his right to a fair trial.

V.

Finally, Andersen contends that two claims arise from his post-trial discovery of an interview that occurred before trial between Officer Jeff Nelson and the victim's wife and her son. First, he alleges that the State committed a *Brady* violation by failing to disclose the interview. *See Brady*, 373 U.S. at 83. Second, he alleges that the interview satisfies

[3] Because Andersen makes only a conclusory legal argument, and we conclude that the claim fails on the third "systematic exclusion" prong, we express no opinion on how to define a "distinctive group" under these circumstances.

the *Larrison* test for false or recanted testimony because it calls into question the truth of Officer Nelson's trial testimony. We view the alleged facts in the light most favorable to Andersen. *See Fox*, 913 N.W.2d at 433 ("If, taking the facts alleged in the light most favorable to the petitioner, the 'petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief,' the [district court] may dismiss the petition." (quoting Minn. Stat. § 590.04, subd. 1 (2018))). Under that standard, his claims fail as a matter of law.

Before the murder, Officer Nelson interviewed the murder victim, Swedberg, regarding the theft of an all-terrain vehicle (ATV). In that interview, the victim denied knowledge of the ATV and implicated Andersen in the theft. At Andersen's trial, Officer Nelson testified about Swedberg's allegation that Andersen stole the ATV. The State used the officer's testimony to help establish motive by showing that, at the time of the murder, there was tension between Andersen and Swedberg. During his testimony, Officer Nelson noted that Swedberg had been "forthcoming, friendly, [and] cooperative" in the interview.

After his trial and conviction, Andersen obtained a 2007 interview with the victim's wife and her son, conducted by Officer Nelson. In the interview conducted after the murder but before trial, the wife and son stated that Swedberg knew the ATV was on the property. Andersen contends that the State knew about the interview and did not disclose it. Andersen claims that the interview shows that at the time of trial, Officer Nelson knew Swedberg had lied about his knowledge of the stolen ATV. Accordingly, he argues, Officer Nelson was aware that Swedberg had not been "forthcoming" in their conversation.

Viewing the interview in the light most favorable to Andersen, all it shows is that Officer Nelson knew Swedberg was not forthcoming. That does not require reversal under *Brady*. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process." 373 U.S. at 87. To establish a *Brady* claim, the accused must prove, among other things, that he was prejudiced by the nondisclosure. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005). For the prejudice prong to be satisfied, the evidence must be "material." *Id.* at 460. Evidence is material only when, had the evidence been disclosed, there is a reasonable probability that the result of the proceeding would have been different. *Id.*

There is no reasonable probability that the evidence that Swedberg was not honest with Officer Nelson in his interview would have led to a different result. The material—and still undisputed—fact derived from Officer Nelson's testimony is that Swedberg implicated Andersen in a theft in the time leading up to the murder, giving Andersen a motive. Assuming Swedberg lied to Officer Nelson about his knowledge of the ATV, that lie does not call into question the fact that Swedberg implicated Andersen in the ATV theft. If anything, the fact that Swedberg may have lied about his own involvement in the ATV theft while implicating Andersen strengthens the State's argument that Andersen had a motive for the murder. And whether Officer Nelson knew that Swedberg may have been lying is not material. There is no reasonable probability that the opportunity to cross-examine Officer Nelson on this point would have changed the outcome of Andersen's trial.

For the same reasons, Andersen's *Larrison* claim fails. Viewing the facts in the light most favorable to Andersen, we conclude that, even if Andersen had known about and been able to challenge Officer Nelson's testimony that Swedberg was forthcoming in the interview, there is no reasonable probability that the jury might have reached a not guilty verdict. *See Opsahl*, 677 N.W.2d at 423 (stating that a new trial is appropriate under *Larrison* only when the jury might have reached a different conclusion without the false testimony). Therefore, Andersen is not entitled to relief on this ground.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.