

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1759**

Brad Ronald Stevens, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 29, 2012
Affirmed
Ross, Judge**

Martin County District Court
File No. 46-K8-92-000350

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Terry W. Viessleman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, Fairmont, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Brad Stevens met R.W. at a party then sexually assaulted her in January 1991. A jury found him guilty of first-degree criminal sexual conduct and the district court

sentenced him to 134 months in prison. In 2005 the district court civilly committed Stevens as a sexually dangerous person. He petitioned for postconviction relief in 2011, and the district court denied the petition without an evidentiary hearing. Stevens appeals, arguing that he is entitled to a new trial or an evidentiary hearing because newly discovered eyewitness evidence supports his trial defense that the sexual encounter was consensual. Because the district court did not abuse its discretion by denying Stevens's request for a new trial or an evidentiary hearing, we affirm.

FACTS

A 1993 jury convicted Brad Stevens of criminal sexual conduct after hearing the following account, some of which was disputed. Eighteen-year-old R.W. met Stevens at her brother Rick's party in the early morning hours of January 6, 1991. Stevens approached R.W. and offered her a cup of beer. It was R.W.'s third. She soon started to feel sick. Rick testified that this was unusual because she has a high tolerance for alcohol. He took her into his bedroom to lie down. When R.W. started to doze off, Stevens roused her. He tried to kiss her but she told him to get away. Rick came in and pulled Stevens off of R.W. and told him to leave the bedroom. R.W. went into the bathroom and vomited. Stevens came into the bathroom and closed and locked the door behind him. R.W. told him to get out, but Stevens tried to kiss and touch her. Rick heard the commotion and again intervened. He broke into the locked bathroom and escorted Stevens out of the house.

R.W. started feeling better and left the party at around 3:00 a.m. As soon as she left, Stevens approached her from the side of the house and asked her for a ride. R.W.

first refused. He offered to buy her breakfast, and she changed her mind. Stevens took her keys, saying that she was too drunk to drive, and he drove.

After they ate at a Perkins restaurant, Stevens said he wanted to stop at the Gilbert Motel (also called the Fair Lakes Apartments) to introduce R.W. to his friends and to get drugs. Once they arrived, R.W. wanted to wait in the car, but Stevens urged her to go inside with him. He went around to R.W.'s side of the car, opened her door, and took her by the arm. He left the car running, telling R.W. that they would not be long.

Stevens led her to a room and knocked on the door. No one answered. Stevens pushed R.W. into the room, slammed her against the wall, slapped her, and demanded that she cooperate. There were no friends inside. He threw her on the bed and took her pants off. R.W. kicked and hit Stevens and told him to get off of her. She threatened to scream, and he put his hand over her mouth. Stevens forced himself inside R.W. vaginally. He told her that she wanted it, and he called her a bitch and a slut.

After Stevens had sex with R.W., she was crying. Stevens told her to stop and to wipe her face so that on the way out it did not appear as if anything was wrong. He warned her not to tell anyone about the incident, adding that his father was a police officer. R.W. drove Stevens home and he again warned her not to tell anyone.

R.W. went to bed and woke up at 5 p.m. Her mother testified that R.W. would not get out of bed and that she had a cut lip, puffy face, and bruises on her inner thigh. She saw blood on R.W.'s sheets and pajamas. R.W. told her mother that she had fallen down and that the blood was from menstruating.

That evening R.W. met her friend Stephanie. The accounts of that meeting differed in the trial testimony. According to R.W., Stephanie asked R.W. whether she had gotten “laid” the night before. Stephanie had been pressuring R.W. to lose her virginity. R.W. answered yes, but she told Stephanie she did not want to talk about it. According to Stephanie, R.W. was giggling and laughing after Stephanie asked whether she had sex. She testified that R.W. told her that she and Stevens were planning to go to a snowmobile race together. Stephanie did not notice any bruises on R.W.’s face. R.W. denied discussing going to a snowmobile race with Stevens.

A few days later, R.W. told her friend Melissa that she had been raped. Melissa told R.W. that she needed to report what had happened, but R.W. told her that she could not because Stevens’s father was a police officer. Two weeks later, R.W. told three other friends that she had been raped but that she had not reported it because of Steven’s warning. On January 29, 1991, R.W. learned that she was pregnant, and she had an abortion. Stephanie told an investigator that “it wasn’t until [R.W.] found out that she was pregnant that she started to say that [Stevens] raped her,” and Stephanie did not believe that R.W. was raped.

In the spring, R.W. went to another party at Rick’s house, this time for her graduation. R.W. had told Rick that Stevens sexually assaulted her and about the abortion. Rick testified that he saw Stevens at the party, ran over to him, and pushed him to his car. R.W.’s other brother, Randy, told Stevens that he had “a good notion to rip [his] head off for what [he] did.” He demanded, “You better leave.” According to Randy, Stevens apologized, saying he was sorry about raping R.W.

Stevens denied sexually assaulting R.W. and testified that she was pursuing him and that their intercourse was consensual. He testified that when they were having breakfast at Perkins, they discussed an upcoming snowmobile race and he told her to call him if she wanted to go. After they had breakfast, R.W. did not want to go home, so Stevens suggested the Gilbert Motel. At the motel, they kissed and Stevens asked R.W. whether she wanted to have sex, and she did not refuse. He denied ejaculating and testified that R.W. never cried. Stevens asserted that R.W. was fabricating the sexual assault and denied putting any drugs in her beer at the party.

Stevens's mother also testified. She told the jury that R.W. had called their house three times after the incident. The first was on January 6 after she had taken Stevens to the snowmobile races. R.W. called, asked for Stevens, and identified herself by name. She also called two other times. R.W. contradicted this testimony, denying that she ever called Stevens's home.

R.W. never initiated a police report. She was contacted by Fairmont police officer Greg Brolsma in February 1992. He had heard about the allegations while he investigated another case. R.W. informed him that Stevens had sexually assaulted her. He asked R.W. whether she wanted Stevens prosecuted, but she wanted several weeks to decide. And when R.W. learned from Officer Brolsma that Stevens's father was no longer a police officer, she favored his prosecution.

The jury heard the conflicting testimony in May 1993 and found Stevens guilty of first-degree criminal sexual conduct. The district court sentenced him to 134 months in prison. Stevens did not directly appeal.

The district court ordered Stevens to be civilly committed in April 2005 as a sexually dangerous person. A year later Stevens filed a petition for postconviction relief and requested that the court appoint a public defender. The district court denied his petition in August 2008 without appointing a public defender. This court reversed and remanded the case to the district court because the court had not transmitted Stevens's postconviction petition to the state public defender as required by statute. Stevens moved to establish a substitute trial record and the district court granted the motion.

Stevens again petitioned for postconviction relief in June 2011, with the assistance of counsel. He sought a new trial or an evidentiary hearing because of newly discovered evidence—a 2005 affidavit and the claim that R.W. had falsified her testimony. The affidavit was sworn by Mahlon Bazil, and it stated as follows:

I witnessed Brad Stevens on or about January 4th 1991 at the Fairlakes Apartment building early in the morning around 4:00 a.m.

Brad and a female were coming out of an apartment, I followed them down from the upstairs and this girl and him were laughing and joking and looked like they were enjoying themselves, then they left the apartment building.

The district court denied Stevens's petition. It held that the Bazil affidavit did not warrant a new trial because its substance was doubtful given the passage of time and it did not clearly and convincingly establish that Stevens was innocent. The district court determined that Stevens was not entitled to postconviction relief based on R.W.'s allegedly false testimony because the cited variations in R.W.'s testimony between the trial in 1993 and the civil commitment hearing in 2005 were minor and inconsequential.

Stevens appeals.

DECISION

Stevens argues that he is entitled to postconviction relief, specifically, a new trial or an evidentiary hearing, because he has discovered new evidence. We review a summary denial of a petition for postconviction relief for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

New Trial

The district court did not abuse its discretion by refusing to grant a new trial based on the Bazil affidavit. Newly discovered evidence warrants a new trial only if the following are all established:

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

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997); Minn. Stat. § 590.01, subd. 4(b)(2) (2010).

The affidavit does not establish the third or fourth elements. The district court found that the affidavit is doubtful in substance for three reasons: 14 years had passed since the crime; the affidavit does not identify R.W. as the woman with Stevens; and it does not assert personal knowledge about whether R.W. consented to sex with Stevens. The district court's reasoning is well supported. We observe also that, in addition to failing to directly identify R.W. as the unidentified "female" laughing with Stevens, the affidavit offers no description even indirectly suggesting that R.W. was the female whom

Bazil saw. There is no reference to age, race, height, weight, hair color—nothing. And the affidavit refers to “January 4th” while the assault occurred two days later on January 6. That an unidentified, undescribed female was allegedly laughing with Stevens “on or about” two days before the encounter is not evidence that can overturn his conviction.

It follows that because the affidavit is of doubtful evidentiary quality, the result of Stevens’s trial would not have been different if the jury had been told by Bazil that he saw “a female” laughing and joking with Stevens within two days of the incident. The district court did not abuse its discretion by denying Stevens’s request for a new trial based on Bazil’s affidavit.

We reach the same result concerning Stevens’s claim of newly discovered evidence in the form of supposedly false testimony. He asserts that because R.W.’s testimony at his 2005 civil commitment hearing differed from her testimony at his 1993 criminal trial, her 1993 testimony was false and requires a new trial. To be granted a new trial based on newly discovered evidence of false testimony “(1) the court must be reasonably well-satisfied that the trial testimony was false; (2) without the false 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.” *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002). The third element is no longer a requirement but is a factor to consider when deciding whether to grant a new trial. *Dobbins v. State*, 788 N.W.2d 719, 733–34 (Minn. 2010).

Stevens's four incidents of R.W.'s differing testimony do not establish that her 1993 trial testimony was false. At trial, R.W. denied discussing snowmobile races with Stevens at Perkins but she admitted at the civil commitment hearing that they discussed going to them. R.W. also testified at trial that Stevens tried to kiss her in her brother's room but that she told him to leave her alone, but at the civil commitment hearing she stated that she kissed him in the bedroom. She testified at trial that no kissing occurred during the alleged sexual assault, but during the commitment hearing she stated that Stevens was kissing her during the incident. Finally, R.W. testified at trial that she had sustained injuries to her inner thighs on both legs during the sexual assault, but when asked at the commitment hearing what kind of injuries she sustained, she did not mention her thighs.

The variations between R.W.'s 1993 trial testimony and 2005 civil commitment testimony are minor and tangential compared to her consistent testimony about the central events. At trial R.W. did not specifically deny kissing Stevens in her brother's bedroom; she stated only that he tried to kiss her and that she told him to get away; she testified at the commitment hearing that Stevens was kissing her when he slammed her against the wall when they entered the motel room and at trial she testified that Stevens did not kiss her *during* the sexual assault; and at the commitment hearing she was asked generally where she had sustained injuries, such as bruising, but she was never asked about her thighs. These inconsistencies do not amount to false testimony. The only evidence that appears to be conflicting is the testimony bearing on whether R.W. and Stevens discussed going to the snowmobile races together. This variation is not so

substantive as to call Stevens's conviction into serious doubt; the conversation took place before the assault and had no bearing on whether the sex was consensual. At most, it would offer some basis for an impeachment question, but it is too far afield to require reversal. Minor recollection or testimonial variations are not surprising after 12 years. The district court did not abuse its discretion by denying Stevens's request for a new trial based on newly discovered allegedly false testimony.

Evidentiary Hearing

Stevens asserts that even if the new evidence did not automatically trigger a new trial, at least it entitled him to an evidentiary hearing to explore whether a new trial was warranted. The showing required to receive an evidentiary hearing is lower than that required for a new trial. *Dobbins*, 788 N.W.2d at 734. A postconviction court must hold an evidentiary hearing “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2010). If the postconviction court has any doubt about whether to conduct a hearing, an evidentiary hearing should be granted. *Wilson v. State*, 726 N.W.2d 103, 107 (Minn. 2007). For the reasons already discussed, even if the jury believed the Bazil affidavit about an unidentified female laughing with Stevens on or about two days before the sexual encounter, and even if R.W. had testified at trial as she did at the commitment hearing, the verdict would likely have been unaffected.

We recognize that Stevens presented a trial defense that was plausible and might have called R.W.'s account into question. But the jury weighed the competing accounts and was persuaded to believe R.W.'s version and to disbelieve Stevens's, and the new

evidence is not of a compelling nature that would require a new trial or even an evidentiary hearing. Stevens has failed to present any facts that, even if proven, would entitle him to a new trial. The district court did not abuse its discretion.

Affirmed.