

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1628**

David Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 22, 2010
Affirmed
Wright, Judge**

Hennepin County District Court
File No. 27-CR-04-002659

David Johnson, Stillwater, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this appeal from the denial of postconviction relief, appellant argues that the district court abused its discretion by summarily denying his claims of (1) witness

recantation, (2) reliance on improper aggravating factors, (3) prosecutorial misconduct, and (4) denial of due process. We affirm.

FACTS

Appellant David Johnson was charged with aiding and abetting kidnapping and aiding and abetting attempted first-degree murder for his role in the November 6, 2003 abduction, beating, and close-range shooting of J.R.¹ J.R. testified at Johnson's trial, as did two of Johnson's codefendants, Demond Davis (known as Kenneth R. Daniels) and Rochelle Coney. The jury found Johnson guilty of both offenses. The district court subsequently convened a sentencing jury,² which heard evidence regarding aggravating factors for sentencing. The sentencing jury found three aggravating factors applicable to each offense. Based on those factors, the district court departed upward from the presumptive sentence and imposed two concurrent sentences of 240 months' imprisonment.

Johnson appealed. We affirmed Johnson's conviction but reversed his sentence, remanding for resentencing with a criminal-history score that was not derived from certain prior offenses that were not supported with sufficient proof. *State v. Johnson*, A05-1028, 2006 WL 2347795, at *1, *19 (Minn. App. Aug. 8, 2006), *review denied* (Minn. Dec. 13, 2006). On remand, the district court again imposed two concurrent

¹ The facts underlying Johnson's conviction are set forth in greater detail in our opinion in Johnson's direct appeal. *State v. Johnson*, No. A05-1028, 2006 WL 2347795, at *1 (Minn. App. Aug. 8, 2006), *review denied* (Minn. Dec. 13, 2006).

² The district court excused the first jury after the jury rendered its decision on June 23, 2004. Because the United States Supreme Court released its decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), on June 24, 2004, the district court impaneled a second jury to decide the aggravating factors.

sentences of 240 months' imprisonment. We affirmed the sentences in Johnson's second appeal. *State v. Johnson*, No. A07-1480, 2008 WL 2966825, at *1 (Minn. App. Aug. 5, 2008), *review denied* (Minn. Oct. 1, 2008).

Johnson subsequently petitioned the district court for postconviction relief, seeking a new trial based on claims of ineffective assistance of trial counsel and witness recantation. Johnson submitted the affidavit of Kenneth R. Daniels in support of his petition. Johnson also sought to have his sentences reduced to the presumptive terms, arguing that the aggravating factors on which the district court relied in sentencing him were improper and inadequately established. While the postconviction petition was pending, Johnson submitted an amended petition expanding on his witness-recantation argument. The district court considered the original and amended postconviction petitions and concluded that Johnson's claims were either procedurally barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), or without merit. The district court denied postconviction relief without a hearing; and this appeal followed.

D E C I S I O N

A petitioner seeking postconviction relief must establish by "a fair preponderance of the evidence" the facts alleged in the petition. Minn. Stat. § 590.04, subd. 3 (2008). If the petition and the files and records of the proceeding conclusively demonstrate that the petitioner is not entitled to relief, the district court may summarily deny postconviction relief without a hearing. *See id.*, subd. 1 (2008). We review the district court's decision in a postconviction proceeding to determine whether there is sufficient evidence to support the district court's findings, and generally we will not disturb the district court's

decision absent an abuse of discretion. *Jihad v. State*, 594 N.W.2d 522, 524 (Minn. 1999).

When a direct appeal has been taken, all matters raised in the appeal and all issues that the defendant knew or should have known about at the time of the direct appeal will not be considered on a subsequent petition for postconviction relief. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741; *see also King v. State*, 649 N.W.2d 149, 156 (Minn. 2002) (citing *Knaffla* rule); Minn. Stat. § 590.01, subd. 1(2) (2008) (barring postconviction relief for claims that petitioner “could have . . . raised on direct appeal”). An exception to the *Knaffla* rule exists when (1) the petitioner is presenting a novel legal issue or (2) the interests of justice require review. *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007). Summary denial of a postconviction petition does not constitute an abuse of discretion if the petition is procedurally barred based on a previous appeal or postconviction proceeding. *Quick v. State*, 757 N.W.2d 278, 281 (Minn. 2008).

I.

Johnson first challenges the district court’s summary denial of his request for a new trial based on Daniels’s recantation. We review the postconviction court’s determinations under the *Larrison* test for an abuse of discretion. *State v. Turnage*, 729 N.W.2d 593, 597 (Minn. 2007) (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) (modifying test)). A new trial based on the recantation of trial testimony is warranted if the “*Larrison* test” has been satisfied. *Id.* First, the postconviction court must be reasonably well-satisfied that the trial testimony was false. *Ferguson v. State*, 779

N.W.2d 555, 559 (Minn. 2010). Second, the record must establish that, without the false testimony, the jury might have reached a different verdict. *Id.* A relevant factor, albeit not a requirement of the *Larrison* test, is that the petitioner was taken by surprise at trial or did not know that the testimony was false until after trial. *Id.*

Johnson argues that the district court erroneously applied the *Larrison* test when it rejected his recantation argument. The district court focused its analysis on the second requirement of the *Larrison* test and denied relief based on Johnson's failure to establish that, without the allegedly false testimony, the jury would have reached a different verdict. *See Ferguson*, 779 N.W.2d at 561 (stating that petitioner's failure to establish second *Larrison* requirement can be independent basis for denial of recantation claim). The district court concluded that, "even without the testimony of Daniels, the jury would not have reached a different conclusion." The record amply supports this determination.

J.R.'s testimony alone is more than sufficient to support the guilty verdicts. J.R. graphically described how Johnson, whom she recognized by sight and voice, beat her and stomped on her head after she had been tied up and beaten for several hours at Coney's house. According to J.R., she heard Johnson ask for his gun before he and several others beat her until she lost consciousness. When she regained consciousness in the trunk of her car, J.R. tried to escape. But several people stopped her. Johnson then held J.R. against the car seat while another man shot her.

At trial, both Coney and Daniels corroborated J.R.'s testimony regarding Johnson's criminal conduct. Indeed, the only testimonial evidence contradicting J.R.'s

account was provided by Johnson when he maintained that he “didn’t put [his] feet on [J.R.]” and “didn’t hold [J.R.] to get shot.”

Eliminating Daniels’s testimony removes one corroborating witness, leaving the extensive and detailed testimony of J.R. and Coney against Johnson.³ On this record, the district court did not abuse its discretion by summarily denying Johnson’s petition for postconviction relief based on Daniels’s recantation. This conclusion applies with equal force to Johnson’s sentence because the evidence presented to the sentencing jury, including Daniels’s testimony, was virtually identical to that presented to the jury during the guilt phase of the proceeding.

Finally, although Johnson repeatedly asserts that Coney also gave “false testimony,” these assertions do not warrant application of the *Larrison* test. Johnson emphasizes that Coney admitted at Johnson’s sentencing that she had lied about some facts in her trial testimony. But Johnson does not articulate a separate challenge to his conviction based on this alleged false testimony. Moreover, any such challenge needed to be raised in Johnson’s direct appeal. The district court, therefore, did not abuse its discretion by determining that any challenge to Johnson’s conviction based on Coney’s “false testimony” is procedurally barred under the *Knaffla* rule.

³ Although Johnson cites the district court’s accomplice instruction and argues that Coney’s testimony should be disregarded, this argument is unavailing. *See* Minn. Stat. § 634.04 (2008) (requiring corroboration of accomplice’s testimony). J.R.’s testimony provided the necessary corroboration, and the jury’s verdict would not have been different without Daniel’s testimony.

II.

Johnson next argues that the district court abused its discretion by summarily rejecting his arguments challenging the aggravating factors found against him. Johnson contends that his enhanced sentences are improper because the district court “did not identify and separately analyze each aggravating factor found by the juries to justify both departures.” Johnson presented the same argument in his direct appeal. *Johnson*, 2006 WL 2347795, at *15. But he contends that these sentencing arguments should be revisited in light of Daniels’s recantation. We disagree. Because the evidence adduced at trial has no bearing on the propriety of the district court’s jury instructions on the aggravating factors, Daniels’s recantation does not warrant a reevaluation of this procedurally barred issue. Accordingly, the district court did not abuse its discretion by summarily denying Johnson’s sentencing challenge.

III.

Johnson also challenges the district court’s summary denial of his prosecutorial-misconduct claims. Johnson first argues, based on Daniels’s affidavit, that the prosecutor committed misconduct by instructing Daniels to give false testimony. But he did not present this claim to the district court. Rather, in both his original and amended petitions he alleged “such other grounds relating to the constitution and laws of the United States or the State of Minnesota which appear from the records and affidavit herein and such [] grounds the court may decide to have litigated even though not specifically raised by the petitioner.” Although Johnson referred to prosecutorial misconduct and witness tampering in the list of claims that followed, failure to provide any supporting argument

or legal authority relieved the district court of any obligation to address them. *Cf. State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (stating that pro se claims not supported by either arguments or citations to legal authority will not be considered on appeal). Because Johnson did not properly present his prosecutorial-misconduct claim to the district court, we decline to address it for the first time in this appeal. *Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008).

Johnson also claims that the prosecutor committed misconduct by making comments during closing argument that were not supported by the record. This claim repeats arguments considered and rejected in Johnson's direct appeal. *See Johnson*, 2006 WL 2347795, at *8-10. Because Johnson has not established that any exceptions to the *Knaffla* rule apply, we conclude that the district court did not abuse its discretion by summarily denying a claim of prosecutorial misconduct based on the prosecutor's closing argument.

IV.

Finally, Johnson argues that the district court abused its discretion by summarily denying his claim that his right to due process was denied. Although Johnson included a reference to this claim in his list of "other grounds . . . not specifically raised," he did not present any argument or authority on the issue. Because Johnson failed to present this claim to the district court, it is not properly before us. *See Brocks*, 753 N.W.2d at 676.

Affirmed.