**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-2166**

David Kenneth Christian, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 31, 2011**
**Affirmed; motion granted in part and denied in part**
**Connolly, Judge**

Mower County District Court
File No. 50-K4-00-1117

Beau D. McGraw, McGraw Law Firm, P.A., Oakdale, Minnesota (for appellant)

Lori A. Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

**U N P U B L I S H E D  O P I N I O N**

**CONNOLLY**, Judge

Appellant seeks relief from his 2000 conviction of two counts of second-degree murder and one count of first-degree assault on an accomplice liability theory, relying on

an affidavit in which a witness recants her trial testimony. Because we see no abuse of discretion in the district court's denial of appellant's petition for postconviction relief, we affirm.

## FACTS

In June 2000, three women, Janet Hall, Janea Weinand, and Tanisha Patterson, were staying in a motel room and engaging in prostitution. Two men, Hall's half-brother Scot Christian (Christian) and Vernon Powers, told them to identify any man who appeared to be carrying large amounts of cash so he could be robbed. On June 29, 2000, Weinand noticed that a man staying in another room in the motel appeared to have a lot of money with him. She told Hall and Patterson.

Later that night, Powers, Christian, appellant David Christian (Christian's brother and Hall's half-brother), and appellant's girlfriend, Natasha Munos, came to the women's room. Weinand told the group about the man who had a lot of money and said something to the group about robbing him. A plan was devised in which Weinand would knock on the man's door and Powers and Christian, carrying guns, would then enter and take the money.

It is undisputed that, about 1:30 a.m. on June 30, all seven people got into Powers's truck, which appellant was driving. Appellant backed the wrong way down a one-way street to get to a parking space near the room of the man with the money and left the engine running while Weinand, Powers, and Christian got out and went to the man's room. Weinand knocked, entered, and identified one of the four people in the room as

the man who had the money; Powers and Christian then entered the room and attempted the robbery. Two of the room's occupants were killed and a third was wounded.

Weinand, Powers, and Christian returned to the vehicle, and appellant drove it away. The four of them were arrested soon afterwards. A Grand Jury indicted appellant, Christian, and Vernon Powers of first degree murder involving premeditation, two counts of second degree murder involving intent, two counts of unintentional murder, and one count of first-degree assault.

Hall was arrested later, after she was interviewed by the police on July 3 and 4. The case against her was dropped, but she was identified as a material witness in the trial of appellant, Christian and Powers, and agreed that she would "appear and provide truthful testimony" and would "have no contact with any of the Defendants in this case." All three defendants were found guilty; Powers and Christian received life sentences, while appellant was sentenced to 493 months. Appellant's conviction and sentence were affirmed by this court. *State v. Christian*, No. C5-01-1840, 2002 WL 31415382, at *3, (Minn. App. Oct. 29, 2002), *review denied* (Minn. Dec. 30, 2002) *(Christian I*).

Appellant first sought postconviction relief on the grounds of ineffective assistance of trial and appellate counsel. The petition was denied, and the denial was affirmed. *Christian v. State*, No. A04-281 (Minn. App. Oct. 5, 2004), *review denied* (Minn. Dec. 22, 2004) (*Christian II*). He later sought postconviction relief on grounds of newly discovered evidence and the improper joinder of the trials of appellant and his codefendants. Again, the petition was denied, and the denial was affirmed. *Christian v.*

*State*, No. A05-1240 (Minn. App. Apr. 4, 2006), *review denied* (Minn. June 28, 2006) (*Christian III*).[1]

In 2009, Hall submitted an affidavit saying that (1) she had not told the truth at either the Grand Jury hearing or the trial when she testified that appellant participated in the planning of the robbery; (2) she had felt pressured by the prosecutor and the police to testify as she did; and (3) "[appellant] did not take part in planning the robbery which led to the murders for which [he] is in prison."

Appellant's third petition for postconviction relief was based on Hall's affidavit. After a hearing, his petition was denied. He challenges the denial, arguing that the postconviction court abused its discretion in denying his petition on the ground that he was convicted on false testimony.[2] Respondent State of Minnesota moves to strike portions of appellant's brief and appendix.

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[1] Appellant also sought relief in the federal court system. *See Christian v. Dingle*, 577 F.3d 907 (8th Cir. 2009) (affirming (1) a federal district court decision that appellant's joinder with his codefendants for trial and the state district court's decision not to sever appellant's trial were not an unreasonable application of clearly established federal law and (2) the denial of habeas corpus relief).

[2] Appellant also argued to the district court, but does not argue on appeal, that Hall's 2009 affidavit was newly discovered evidence. Therefore, this issue is not before us. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997). But we note and concur with the district court's rejection of appellant's argument: "[Hall's postconviction statement that appellant] was present during a discussion of a possible robbery, but was *not paying attention* . . . does not, by any stretch of the definition, constitute 'clear and convincing evidence' of [appellant's] innocence." *See* Minn. Stat. § 590.01, subd. 4(b)(2) (2010) (providing that one requirement of "newly discovered evidence" is that the evidence must establish "by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted").

## D E C I S I O N

This court will not disturb the decision of a postconviction court absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001).

### I. False Testimony

> A petitioner is entitled to a new trial based on recanted trial testimony under *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), *vacated and remanded on other grounds* 543 U.S. 1097, 125 S. Ct. 984 (2005)] only if (1) the court is 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.

*Evans v. State*, 788 N.W.2d 38, 47-48 (Minn. 2010) (quotation omitted). The district court, in a detailed and carefully reasoned opinion, noted that appellant's petition "fail[ed] to meet any of the three prongs. . . ."

#### A. District Court's Belief That the Recanted Testimony Was False

Prior to the postconviction hearing, Hall gave two statements under oath that were often contradictory with each other and with her testimony at the hearing. The postconviction court concluded:

> [I]t is virtually impossible for any court to sort out which of [Hall's] statements is a "false" statement, let alone be "reasonably satisfied" that trial testimony is false. Given [Hall's] track record for lack of truthfulness, her familial relationship with [appellant], her demeanor at the post trial hearing, and the lack of any extrinsic evidence that the current "version" is true and the previous versions are false, the first prong is not met, except in a very abstract sense by [Hall's] declaration alone.

We completely agree. Moreover, the transcripts of the postconviction hearing and of Hall's interviews with the police before she was charged demonstrate that she was already lying to the police then in an attempt to assist the other defendants. Thus, the assertion in Hall's affidavit that she lied because she feared for her own conviction and felt pressured by police and prosecutors is no more accurate than her other assertions.

**B. The Impact of the Recanted Testimony on the Jury's Verdict**

In *Evans*, "[the] analysis of the second prong of *Larrison* [was] dispositive of th[e] appeal . . . ." *Id.* at 48. That is equally true here: the jury would have reached the same conclusion whether or not Hall testified. Moreover, this court has already considered the sufficiency of evidence other than Hall's testimony supporting appellant's conviction.

At the time of his original appeal, appellant did not consider Hall's testimony significant, much less dispositive. "[Appellant then] contend[ed] . . . that . . . the verdict [was] based primarily on Weinand's testimony." *Christian I*, 2002 WL 31415382, at *3. *Christian I* mentioned Hall's testimony that "appellant was in the room during the discussion of the robbery," *id.* at *4, but noted that Weinand testified far more extensively to appellant's involvement.

Weinand testified, among other things, "that before appellant went to get the truck, he said, '[Y]'all got the guns; right?'" and that "[t]he three men [appellant, Christian, and Powers] and Weinand talked in the motel room about the plan while the other women waited in the truck." *Id*. at *2. *Christian I* rejected appellant's claims that Weinand's testimony was "inadequate and uncorroborated" or "inherently incredible." *Id*. at *4-5. In addition to Weinand's testimony, *Christian I* cited Munos's testimony that "appellant

. . . was involved in a conversation with Scot Christian, Powers, and Weinand before the robbery and backed the truck into a parking space at the motel"; Patterson's testimony that "appellant was involved in planning the robbery and drove the truck to [the victims'] room . . . and backed into a parking space"; and Weinand's mother's corroboration of Weinand's testimony that "after the incident, appellant wrapped the two guns in a towel and placed them in the second truck . . . [from which she] retrieved the guns . . . and gave them to the police." *Id.* at *4. *Christian I* concluded that "[a]ll of [the] corroborating evidence linked appellant to the robbery and the shootings and suggested that appellant participated in the crimes" and that "evidence reveals that [appellant] played an active role in the discussion, planning, and cover-up of the robbery." *Id*. at *4 -*5.

Moreover, Hall's testimony at trial was inherently incredible and repeatedly impeached, particularly in regard to appellant's presence in the hotel room. On direct examination, Hall was asked who was in the room when the discussion about a robbery first occurred. She answered "Everybody" and said "Yes" when asked if "everybody" was "Scot . . . Christian [and appellant] and Vernon Powers and the other girls." When asked what happened, Hall said "they" went outside the room for a while, came back, told the girls to pack, and then left again to go to the bar. When asked who went to the bar, she said "Scottie, Vernon, and I can't remember if [appellant] went with them or not; but I know he was in the room with me and [Munos] throughout one of the conversations, so I'm not sure at what time he was in the room or not." Counsel showed Hall the transcript of her testimony to the grand jury, when she had said "They left, Vernon [Powers], Scottie [Christian], [ appellant], Janea [Weinand] and Sunshine [Patterson]."

On cross-examination, Hall was asked if appellant left the motel to join those who were planning the robbery. She answered:

> I believe [appellant] went out there, but I'm not quite sure when he went out there, you know what I'm saying, because he was in the room with me. It was just me, him and [Munos] in the room at one point in time, and then at a point in time he wasn't in the room with us.

When asked, "you don't know where [appellant] went, though; correct?" she answered "Correct." But Hall later testified that appellant left to go to a bar with Powers, Christian, Weinand, and Patterson, while she and Munos stayed in the motel room. Thus, appellant's trial testimony about whether appellant was in the room was inconsistent with her grand jury testimony, and, as the district court accurately observed, both were inconsistent with her testimony at the postconviction hearing.

> Her testimony at the [postconviction] hearing was mixed. She stated at one point that [appellant] was not present during discussions, without being precise as to place or time, and at a different point she testified he *was* in the room, but was "off in his own world" and not paying attention to the referenced robbery.

Hall's testimony about appellant's driving of the vehicle was equally inconsistent. When asked at trial how appellant parked the vehicle near the victims' room, Hall said, "It was frontwards. It had to be frontwards because I could see out the front window, and I do remember seeing out the front window." When asked, "Are you sure he parked frontward up against the building?" Hall answered, "I am positive." When asked, "Do you remember telling the grand jury under oath that it [the vehicle] was backed in?" Hall answered, "Obviously, I don't. But if it's on paper and I said it, then I said it, but I

remember it being parked frontwards." When asked, "Did you testify truthfully before the grand jury?" she answered, "Yes, I did", but later, when asked, "[Y]ou told the grand jury that it was parked backwards?" she replied "My mistake." When Hall was asked if she was supposed to have no contact with any of the three defendants she answered, "Yeah," but again said "Yeah" when asked if she had been in contact with appellant and said she had talked twice to appellant's lawyer.

Thus, as the district court concluded, "Hall had already contradicted and perjured herself on multiple occasions regarding multiple points before the jury. The likelihood that the jury would or could have found her revised testimony sufficiently compelling to change their verdict [on appellant's guilt] is virtually non-existent." Appellant fails to meet the second prong of the *Larrison* test.

### C. The Possibility that the Recanted Testimony Surprised Appellant

While the first two prongs of *Larrison* are compulsory for postconviction relief, the third is not. *State v. Turnage*, 729 N.W.2d 593, 597 (Minn. 2007). In any event, the trial transcript shows that neither appellant nor his counsel was surprised by Hall's trial testimony, which contradicted the portions of her grand jury testimony that implicated appellant. In the district court's words,

> Hall essentially became a defense witness, virtually repudiating all of the salient points of her grand jury testimony implicating [appellant], with the sole exception of his presence in the motel room. She fully cooperated with [appellant's] counsel, and had to be declared a hostile witness by the state, which resulted in the introduction of sworn grand jury testimony. Nothing that was said at the post trial proceedings contradicted what she had said at trial, with the

> exception of the mutually contradictory "he wasn't there" or he *was* there but "wasn't paying attention."

Thus, appellant failed to meet the third prong as well as the first two.

There was no abuse of discretion in the denial of appellant's petition for postconviction relief on the basis of recanted evidence.

## II. Motion to Strike

The state has moved to strike three affidavits in appellant's appendix and any references to them in appellant's brief. Appellant did not reply to the motion.

One of the affidavits is Hall's 2009 affidavit on which appellant's postconviction relief petition was based. The list of documents filed with the district court indicates that the affidavit was filed with the district court, the Mower County Attorney and the Office of the Attorney General, and the affidavit is in the district court file. The record on appeal includes "[t]he papers filed in the trial court." Minn. R. Civ. App. P. 110.01. Thus, Hall's affidavit is part of the record.

The two other affidavits were prepared by appellant's codefendants, Powers and Christian, in 2005. The state claims appellant did not offer them at the 2010 postconviction hearing but simply attached them to his memorandum. The affidavits were not referred to at the postconviction hearing and are not referred to in the district court's order. The list of documents filed with the district court indicates that Christian's affidavit was filed, and it is in the file; thus, it should not be stricken. Powers's affidavit is not listed, is not in the district court's file, and should be stricken.

The state's motion is granted with respect to Powers's affidavit and denied with respect to Hall's and Christian's affidavits.

**Affirmed; motion granted in part and denied in part.**