

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1487**

Carlos Kendall Duncan, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 31, 2023
Affirmed
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-17-132

Howard Bass, Bass Law Firm, PLLC, Burnsville, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Segal, Chief Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges the denial of his petition for postconviction relief following his conviction of attempted second-degree murder. He argues that the postconviction court abused its discretion by denying relief because (1) he received ineffective assistance of trial

counsel; and (2) newly discovered evidence that the victim recanted his trial testimony entitles him to a new trial. Because the postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief, we affirm.

FACTS

In January 2017, respondent State of Minnesota charged appellant Carlos Kendall Duncan with two counts of second-degree assault. The state later amended the complaint to include two more counts of attempted second-degree intentional murder. The complaint alleged that Duncan was responsible for a shooting that occurred on January 3, 2017. The facts at trial established that on that day, a silver Mercedes SUV pulled up next to two men, X.S. and D.M., who were sitting in a car in the Dorothy Day Center parking lot in St. Paul. The driver of the silver Mercedes fired five shots into the car of X.S. and D.M. before driving off. The two men managed to drive to a nearby hospital, where they were treated for non-life-threatening injuries.

When the shooting occurred, two St. Paul sewer workers were nearby, and one called 911 to report the incident. The worker reported seeing the driver and described him as a "stocky" Black male, around 24 or 25 years old with "a scar or tattoo on his left eye," driving a silver Mercedes. The worker provided the 911 operator with the license plate of the car. Meanwhile, a police officer went to interview D.M. at the hospital. At first, D.M. was not forthcoming and told the officer that an unknown male in an unknown vehicle shot him. As the conversation continued, D.M. described the shooter as a Black male with face tattoos driving a silver-colored vehicle. The officer was familiar with Duncan who went by the street name "Los" and believed that he fit the description D.M. provided. The officer

asked D.M. whether it was possible that Los was responsible for the shooting. D.M. nodded and said, “yes.” The officer showed D.M. a photo lineup that had been generated by a computer using randomly selected photographs based on the description of the shooter. D.M. identified Duncan in the photo lineup as the shooter. When the officers arrested Duncan a few days later, he was driving a silver Mercedes SUV with a license plate matching the one given by the city sewer worker.

In August 2017, the case proceeded to a jury trial. D.M. was served with a subpoena to testify on behalf of the state but failed to appear as ordered and indicated that he did not wish to testify. The district court issued a warrant. D.M. was arrested and placed in the Ramsey County jail until he testified. Duncan was also housed in the same jail during the trial. Duncan tried unsuccessfully to persuade D.M. not to testify.

When D.M. testified, he told the jury that on January 3, he and X.S. were sitting in the Dorothy Day parking lot when a “silver car” approached their car and “bullets just started flying from it.” The prosecutor asked D.M. if he saw the person in the driver’s seat of the silver vehicle and D.M. responded, “Yeah, I seen who it was.” D.M. then identified Duncan in the courtroom as the driver who shot into their vehicle. D.M. testified that he saw the vehicle and thought he saw a little of Duncan’s face but quickly turned away when the shooting started. He testified that he knew Duncan was the shooter because he had seen him once before driving the same silver vehicle. D.M. testified that he later identified Duncan in a photo lineup at the hospital and was “certain about [his] identification.”

After court adjourned for the day, Duncan was returned to the Ramsey County jail where he made a few phone calls that were recorded. In the calls, Duncan recounted to the

person on the other line that he told D.M., “Hey man, you ain’t got to do this sh-t, bro. I don’t even have no problem with you. It wasn’t personal. The [person] I had a problem with, he dead, bro.” Duncan told the person that D.M. “testified on [him].” In a second call, Duncan instructed the person on the other line to tell someone “to put on Facebook that [D.M.] just testified on me. Screenshot [D.M.’s] picture off his Facebook.” The district court allowed the recording to be admitted over Duncan’s objection, finding that the statements made by Duncan were relevant to the issues of identity and intent.

After the state presented its witnesses and evidence, Duncan declined to testify on his behalf and the defense did not call any witnesses. The jury deliberated and returned a verdict of guilty on all counts. The district court sentenced Duncan to 367 and one-half months in prison.

Direct Appeal

After his conviction, Duncan filed a direct appeal, arguing that the district court erred in admitting evidence of the two phone calls he made from jail and that it was plain error to admit testimony from three police officers about prior contacts with Duncan. *State v. Duncan*, No. A17-2049, 2019 WL 1006792, at *1 (Minn. App. Mar. 4, 2019), *rev. denied* (Minn. May 28, 2019). This court held that the district court did not abuse its discretion in admitting the phone call statements into evidence. *Id.* at *3-4. This court also concluded that the district court did not commit plain error when it allowed three officers to testify at trial about prior contacts with Duncan because the identity of the shooter was a primary issue in the case and the admission of testimony did not affect Duncan’s substantial rights. *Id.* at *5. Finally, this court addressed Duncan’s pro se arguments noting that they were

outside the record or unsupported by legal argument. *Id.* at *6. Thus, this court affirmed Duncan's convictions.

Petition for Postconviction Relief

In October 2019, Duncan filed a pro se petition for postconviction relief. He argued that he was denied effective assistance of trial counsel because his trial attorney failed to investigate witnesses for his defense. He also argued that he received ineffective assistance of appellate counsel because his appellate counsel failed to raise ineffective assistance claims on direct appeal.

Shortly before the scheduled hearing on the petition, D.M. wrote a letter recanting his testimony. D.M. said that he was under the influence of drugs and alcohol and did not see the shooter or the vehicle. He wrote that he only testified against Duncan so that the state would drop drug charges that he was facing around that time. In a later affidavit, D.M. again asserted that his testimony was untrue.

Duncan hired an attorney to represent him in the postconviction proceedings. The postconviction court allowed Duncan to withdraw his pro se petition for postconviction relief and file a new petition with assistance of counsel. The new petition for postconviction relief asserted that Duncan received ineffective assistance from both trial and appellate counsel and that the recantation of D.M.'s testimony entitled Duncan to a new trial. The postconviction court granted an evidentiary hearing, finding that the facts viewed in a light most favorable to Duncan, if true, could exonerate him of the crime he is incarcerated for.

Postconviction Relief Hearing

The postconviction court held an evidentiary hearing. The state presented testimony of Duncan's trial attorney who testified that she received the state's notice to introduce evidence of a photo lineup when she first was assigned the case but made the decision not to pursue a suppression motion. She testified that she researched the district court judge's prior rulings on suppression motions and consulted colleagues about whether it was worthwhile to pursue the motion. Ultimately, the trial attorney did not move to suppress because she "didn't think a suppression motion would be successful on the matter" and that her energy was "better spent elsewhere."

The trial attorney also testified that she received Duncan's case after his original attorney retired and investigated several potential witnesses that the original attorney had identified. One witness was a woman who claimed to be with Duncan on the day of the shooting. Another witness asserted that she owned the silver Mercedes in question and that it was in the vehicle repair shop on the day of the shooting. The trial attorney testified that she had multiple conversations with both women and eventually ruled them out as witnesses.

As for the owner of the silver Mercedes, the trial attorney testified that the potential witness could not provide information about who had access to the silver Mercedes or who possessed it on the relevant dates. The trial attorney also testified that she often had trouble getting in contact with the woman who claimed that she was with Duncan on the day of the shooting and had trouble tracking her down before trial. She testified that she was worried about the potential witness being cross-examined because she did not "come across

terribly believabl[e].” The trial attorney testified that she knew that the witness was present during trial and was willing to testify for the defense. But the trial attorney spoke with Duncan, and they made the joint decision not to call the witness because they believed she may be more harmful than helpful to his defense.

Duncan’s postconviction counsel presented testimony from an expert defense lawyer. The expert witness testified that after reviewing the record, she concluded that Duncan’s trial attorney was constitutionally ineffective. She testified that the trial attorney did not provide effective representation when she failed to challenge the photo lineup—the key issue in the case—as unreasonably suggestive because Duncan was the only Black male with visible tattoos. The expert witness believed the failure to challenge the lineup was not “sound trial strategy.” Similarly, she testified that the failure to call the owner of the silver Mercedes and the women who claimed to be with Duncan during the shooting as witnesses constituted ineffective assistance of counsel and was also not “sound trial strategy.” But she agreed that she did not speak to the alibi witnesses as part of her review of the case and had no way to predict how the witnesses would come across to the jury.

Postconviction counsel for Duncan also called D.M. to testify at the evidentiary hearing, but D.M. did not show up for the hearing. D.M. was later arrested and taken into custody. The postconviction court granted a second evidentiary hearing to allow D.M. to testify. At the second hearing, D.M. said that the testimony he gave at Duncan’s 2017 trial was false and that he provided the false testimony in exchange for a promise to not be prosecuted for an unrelated drug offense. He first testified that he did not remember what happened on the day of the shooting. When pressed further, he testified that he

remembered being in a vehicle when someone started shooting at him, but that he did not see who it was or know who they were. D.M. also testified that he never identified Duncan from the photo lineup. On cross-examination, when asked further about whether he saw the shooter, D.M. testified, “I don’t even know this man, didn’t see no car pull up or nothing. I just heard gunshots and ducked, that’s a natural reaction. Y’all asking me all these questions, and I’m get confused in a minute. I really don’t know what happened.”

Following the hearing, the postconviction court denied Duncan’s petition for postconviction relief. In doing so, the postconviction court found the testimony of the trial attorney and the expert witness to be credible but that D.M. was not credible because he “contradicted himself, seemed confused, and failed to provide an understandable and credible reason for his alleged[] false testimony.” The postconviction court found that Duncan failed to show that his trial attorney’s representation was ineffective and that her decisions not to move to suppress the photo lineup or call certain witness were reasonable matters of trial strategy. And because the postconviction court found that Duncan’s ineffective-assistance-of-trial-counsel claim failed, the postconviction court found that Duncan’s ineffective-assistance-of-appellate-counsel claim also failed because it was premised on the trial-counsel claim.

The postconviction court also concluded that Duncan was not entitled to a new trial based on D.M.’s recantation. The postconviction court found that it was “not reasonably well satisfied by a preponderance of the evidence that [D.M.’s] trial testimony was false.” The postconviction court found that, although D.M. recanted essential portions of his trial testimony, he failed to provide “sufficient indicia of trustworthiness to assure this court

that the recantation was genuine.” The postconviction court found that D.M.’s testimony at the evidentiary hearing was elicited with mostly leading questions and that it was unclear what induced D.M. to falsely testify at Duncan’s trial. But the postconviction court found that D.M.’s testimony during Duncan’s trial was “direct, specific[,] and responsive” and that he “made what appeared to be a confident identification[.]”¹

This appeal follows.

DECISION

Duncan argues that the postconviction court abused its discretion in denying his postconviction petition. This court reviews a postconviction court’s decision to deny postconviction relief for an abuse of discretion. *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020). We will not reverse the postconviction court’s decision unless the court “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Hannon v. State*, 957 N.W.2d 425, 432 (Minn. 2021) (quotation omitted).

I. The postconviction court did not abuse its discretion in determining that Duncan is not entitled to relief on his ineffective-assistance-of-counsel claim.

Duncan first argues that the postconviction court abused its discretion by failing to grant a new trial on his ineffective-assistance-of-counsel claim. The right to effective assistance of counsel is guaranteed to all criminal defendants by the United States and Minnesota Constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. To prevail on

¹ We note that the district court judge who presided over the postconviction proceedings also presided over Duncan’s jury trial.

his ineffective-assistance-of-counsel claim, Duncan must establish (1) “that counsel’s representation fell below an objective standard of reasonableness”; and (2) “there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). An attorney provides reasonable assistance when they exercise “the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotation omitted). “[T]here is a strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). At an evidentiary hearing on a postconviction petition, the petitioner bears the burden of proof to establish the facts alleged in the petition “by a fair preponderance of the evidence.” Minn. Stat. § 590.04, subd. 3 (2022).

In reviewing the denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel, we “will consider the court’s factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court’s decision or conclude that the court abused its discretion because postconviction relief is warranted.” *Nicks*, 831 N.W.2d at 503-04.

Duncan argues that his trial attorney was constitutionally ineffective because she (1) failed to challenge the photograph lineup; and (2) failed to investigate and call potential witnesses. We begin by analyzing the facts that Duncan alleged to support his claim that

his trial attorney was ineffective for failing to challenge the photo lineup in a motion to suppress evidence.

Failure to File Motion to Suppress Evidence

Duncan argues that his trial attorney's failure to move to suppress evidence of the photo lineup was a prejudicial error. He contends that the photo lineup was impermissibly or unduly suggestive, creating a substantial likelihood of misidentification. "A claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). Thus, the actual prejudice prong here turns on whether the district court would have granted a motion to suppress evidence of the photo lineup. *See id.* (noting that the actual prejudice prong in a sexual assault case turned on whether the district court "would have granted a motion to suppress the DNA evidence if one had been made").

"The use of unduly suggestive identification procedures may constitute a violation of a defendant's right to due process." *State v. Fox*, 396 N.W.2d 862, 864 (Minn. App. 1986) (citing *Neil v. Biggers*, 409 U.S. 188, 196 (1972)). A constitutional violation may be found if the procedures used in a photo lineup "were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* (quotation omitted). The determination of whether an identification procedure created a substantial likelihood of irreparable misidentification involves a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we ask "whether the defendant was unfairly singled out for identification." *Id.* If so, we determine whether the "totality of the circumstances establishes that the evidence was reliable." *Id.*

Here, the photo lineup consists of six pictures of Black males with black hair. All six men are wearing white shirts. Five of the males appear to have some facial hair and all appear to have similar features. Duncan argues that the photo lineup unfairly singles Duncan out and is thus impermissibly suggestive because the photograph of Duncan is the only photograph depicting a Black male with facial tattoos, the unique identifying feature in this case. But his photograph, like all others in the lineup, shows his face from a head-on angle. From that angle, Duncan's facial tattoo is hardly visible, if at all. In *Fox*, this court determined that a photo lineup in which the defendant's photograph was the only one with a scar on the left side of his face was not unduly suggestive because the scar was "not so conspicuous as to render the line-up impermissibly suggestive." 396 N.W.2d at 864. Like *Fox*, we conclude that the photo lineup did not single Duncan out and thus was not impermissibly suggestive because the unique identifying feature is hardly visible and not conspicuous.

Because we conclude that the photo lineup is not impermissibly suggestive, we also conclude that Duncan did not suffer actual prejudice from his trial attorney's failure to move for the suppression of the photo lineup because the motion would have been denied if made. *See Johnson*, 673 N.W.2d at 150-51.

Failure to Investigate and Call Witnesses

Next, we analyze the facts that Duncan alleged to support his claim that his trial attorney was ineffective for failing to investigate certain witnesses and call those witnesses to testify to back up his alibi at trial. Duncan argues that his trial attorney's performance was objectively unreasonable because his counsel decided not to call the woman who

owned the silver Mercedes or the woman who claimed to be with Duncan during the shooting as trial witnesses.

Duncan bears the burden on appeal to show that a reasonably competent attorney would have called the witnesses and the failure to do so prejudiced him. But the decision about what witnesses to call at trial is generally considered a tactical trial strategy properly left to the discretion of his trial attorney. *See Anderson v. State*, 830 N.W.2d 1, 13 (Minn. 2013) (noting that the decision to call exculpatory witnesses falls within trial strategy and is not reviewable on appeal); *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (stating that strategic trial decisions include “what evidence to present to the jury, what witnesses to call, and whether to object” to the state’s evidence) (quotation omitted); *White v. State*, 711 N.W.2d 106, 111 (Minn. 2006) (“Trial strategy includes decisions about what evidence to present to the jury.”). And we do not review ineffective-assistance-of-counsel claims when the conduct involves trial strategy. *Chavez-Nelson*, 948 N.W.2d at 671; *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

In sum, Duncan cannot show actual prejudice from his trial attorney’s decision to not move to suppress evidence. And on appeal we do not review the trial attorney’s decision to not call witnesses because it is a matter of trial strategy. We therefore conclude that the postconviction court did not abuse its discretion in denying relief on Duncan’s ineffective-assistance-of-counsel claim.²

² The district court determined that because Duncan failed to show his trial attorney was ineffective, he also failed to show that his appellate attorney was ineffective for failing to raise an ineffective-assistance-of-trial-counsel claim on appeal. *See Vance v. State*, 752 N.W.2d 509, 514 (Minn. 2008) (“When a petitioner bases his ineffective-assistance-of-

II. The postconviction court did not abuse its discretion in determining that Duncan is not entitled to relief based on his claim that a trial witness provided false testimony.

Duncan next argues that he is entitled to a new trial because a witness for the state recanted his trial testimony. Minnesota courts apply the three-prong *Larrison* test when evaluating false-testimony claims to determine whether a petitioner is entitled to a new trial. *Opsahl*, 677 N.W.2d at 422 (citing *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928)). Under that test, a petitioner is entitled to a new trial if: (1) the court is “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 422-23. The first two prongs are “compulsory,” while the third is a relevant factor a court should consider. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013). Under this test, “the credibility of the new evidence is critical.” *Andersen v. State*, 940 N.W.2d 172, 178 (Minn. 2020).

Here, the postconviction court granted Duncan an evidentiary hearing based on D.M.’s recantation letter. After the evidentiary hearing, the postconviction court denied Duncan’s request for relief, finding that D.M.’s postconviction evidentiary-hearing testimony lacked sufficient indicia of reliability and that his trial testimony was more reliable because it was direct and specific. And because the postconviction court found

appellate-counsel claim on appellate counsel’s failure to raise an ineffective-assistance-of-trial-counsel claim, he first must show that trial counsel was ineffective.”). Duncan does not challenge this determination on appeal.

that D.M.'s evidentiary-hearing testimony was not credible, the postconviction court determined that Duncan failed to establish the first prong: that D.M.'s trial testimony was false. We discern no abuse of discretion in the postconviction court's conclusion.

At trial, D.M. was asked whether he saw the person in the driver's seat of the silver Mercedes and D.M. responded, "Yeah, I seen who it was." When asked to identify the driver, D.M. immediately pointed to Duncan and testified that he was the driver. He testified that he briefly saw Duncan's face before being shot at and turning his head. He testified that he had seen Duncan driving the same silver vehicle sometime in the past. And he testified that when an officer showed him a photo lineup, he picked Duncan from the photographs. D.M. testified that he was "certain about [his] identification." In comparison, at the postconviction evidentiary hearing, D.M. at first said he remembered nothing that happened that day but, when pressed further, testified that he remembered being shot at but saw no one. He also claimed that he never identified Duncan in a photo lineup. Throughout his testimony, D.M. had trouble remembering details and admitted that he was confused. Ultimately, he testified that he "really [did not] know what happened."

The postconviction court found that D.M.'s testimony at the evidentiary hearing was "shifting and confus[ing]" and largely elicited from leading questions. And the postconviction court found that D.M. could not provide an explanation or clarification as to what induced him to falsely testify. But the postconviction court found that D.M.'s trial testimony was direct, spontaneous, and believable. "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.” *Andersen*, 940 N.W.2d at 178. Based on our review of the evidentiary-hearing testimony and the postconviction court’s credibility determinations, we conclude that the testimony does not satisfy the first prong of the *Larrison* test. Thus, the postconviction court properly concluded that Duncan is not entitled to a new trial and did not abuse its discretion in denying Duncan’s petition for postconviction relief.

Affirmed.