

STATE OF MINNESOTA
IN SUPREME COURT

A21-0440

Hennepin County

Gildea, C.J.

De-Aunteze Lavion Bobo,

Appellant,

vs.

Filed: February 9, 2022
Office of Appellate Courts

State of Minnesota,

Respondent.

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. The district court did not abuse its discretion when it refused to admit hearsay statements by a witness under Minn. R. Evid. 804(b)(3).

2. Because the admissible evidence presented by appellant did not qualify under the newly discovered evidence exception in Minn. Stat. § 590.01, subd. 4(b)(2) (2020), the

district court did not abuse its discretion when it denied appellant's postconviction request for a new trial.

Affirmed.

Considered and decided by the court without oral argument.

OPINION

GILDEA, Chief Justice.

In 2007, De-Aunteze Bobo was convicted of murder and sentenced to life in prison. In this appeal, Bobo challenges the district court's denial of his fifth petition for postconviction relief. The district court refused to admit hearsay evidence under Minn. R. Evid. 804(b)(3) and concluded that Bobo failed to satisfy the newly discovered evidence exception in Minn. Stat. § 590.01, subd. 4(b)(2) (2020). Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

Our opinions in Bobo's previous appeals set forth the facts underlying his murder conviction. *See State v. Bobo (Bobo I)*, 770 N.W.2d 129 (Minn. 2009); *Bobo v. State (Bobo II)*, 820 N.W.2d 511 (Minn. 2012); *Bobo v. State (Bobo III)*, 860 N.W.2d 681 (Minn. 2015). In this case, we focus on the facts and procedure relevant to the newly discovered evidence claim raised in Bobo's fifth petition for postconviction relief.

At approximately 2:30 a.m. on June 2, 2006, James Roberts and Robert Nichols were sitting in a car outside of Stand Up Frank's, a bar in Northeast Minneapolis, when a large dark-colored SUV drove past and made a U-turn. When the SUV came by a second time, someone fired gunshots at the car, killing Roberts and wounding Nichols. Police

were initially unable to identify any suspects. But police later recovered the gun used in the drive-by shooting while executing an arrest warrant for Bobo's cousin, Leonard Slaughter, on unrelated charges. Police then began investigating Bobo as a known associate of Slaughter.

About 3 months after the shooting, Samuel James came forward with information. At the time, James—a relative and friend of Bobo's—was being held in custody awaiting sentencing for aggravated robbery. James told police that Bobo talked to him about the shooting while they were both being held in the Hennepin County jail. According to James, Bobo and Slaughter were at Slaughter's mother's house before the shooting. After leaving the house, Bobo drove his two-door, black Chevy Blazer with Slaughter as the passenger. Bobo allegedly told James that he instructed Slaughter to get a gun out—the gun recovered by police—and when they pulled up alongside another vehicle, Bobo told Slaughter to shoot both occupants. After the shooting, Bobo and Slaughter went back to Slaughter's mother's house and then got a ride to south Minneapolis. James explained that Slaughter had shown James the murder weapon several months before the shooting occurred—along with several other handguns—while Bobo, Slaughter, and another person were cooking crack at Slaughter's mother's house.

As part of an agreement to avoid further jail time for his robbery conviction, James testified before a grand jury and implicated Bobo as the driver involved in the shooting. James explained that his information about the shooting came from multiple conversations

with Bobo. James's grand jury testimony largely mirrored his earlier statements to police.¹ When James was asked whether he is afraid or "fearful" of Bobo and Slaughter, he responded, "Yeah, in a way, yes."

James signed two affidavits denying that he had provided any information to police about Bobo's criminal activity, which he gave to Bobo's mother. James signed the first affidavit after giving his statements to police and the second after testifying before the grand jury.

Bobo was subsequently charged with several crimes related to the shooting. During the jury trial, the State presented evidence that Bobo had access to multiple SUVs similar to the one described by eyewitnesses as being involved in the shooting and that cell phone tower records placed Bobo and Slaughter around Stand Up Frank's at the time of the shooting. When James was called to testify at the trial, several alleged gang members entered the courtroom. James refused to testify, denied knowing anything about the shooting, and repeatedly shouted that Bobo was innocent. The jury was excused from the courtroom and the district court heard from the State about several alleged attempts to intimidate James not to testify. Later, when James returned to the witness stand, defense counsel cross-examined James and elicited testimony that his statements to the grand jury

¹ There were minor discrepancies between James's statements to police and his grand jury testimony. James testified before the grand jury that Bobo was driving a two-door, black GMC Jimmy rather than a two-door, black Chevy Blazer. At the grand jury, James elaborated that the gun used in the shooting was hidden in a "stash box," which he described as a compartment under the center console where Bobo hid guns and drugs. James also testified at the grand jury that the reason Bobo instructed Slaughter to shoot the passenger was to eliminate any possible witnesses.

were false and that police had offered him a deal on his aggravated robbery conviction if he framed Bobo. Following the cross-examination, the district court permitted the State to introduce James's grand jury testimony as evidence of a prior inconsistent statement under Minn. R. Evid. 801(d)(1)(A).

Bobo did not testify during the jury trial but did present an alibi defense through the testimony of Slaughter's mother, who told the jury that Bobo had left her house shortly before the shooting, along with Bobo's child and the child's mother. The defense also presented testimony that another person had been a suspect in the murder but was ultimately ruled out by police because the suspect did not associate with Slaughter.

The jury found Bobo guilty of first-degree murder while committing a drive-by shooting, second-degree intentional murder, and second-degree murder while committing a drive-by shooting in connection with the death of Roberts. The jury also found Bobo guilty of drive-by shooting in connection with the wounding of Nichols. The district court convicted Bobo of first-degree murder and sentenced him to life in prison. Bobo filed a timely direct appeal which was stayed to allow him to pursue postconviction claims of ineffective assistance of counsel and juror misconduct. The district court denied Bobo's first petition for postconviction relief. We affirmed Bobo's conviction and the district court's denial of his first petition for postconviction relief. *Bobo I*, 770 N.W.2d at 133.

In 2010, Bobo filed second and third petitions for postconviction relief. In the second petition, Bobo presented an affidavit from James that reiterated testimony from the jury trial but did not implicate James in the shooting. Bobo's third petition for postconviction relief asserted a newly discovered evidence claim that James had confessed

to Demetrius Tyson and Jesse Clark that he was the driver. The district court summarily denied Bobo's second and third petitions for postconviction relief. We affirmed the dismissal of Bobo's second petition but reversed and remanded for an evidentiary hearing on the newly discovered evidence claims in his third petition. *Bobo II*, 820 N.W.2d at 520.

Before we decided *Bobo II*, Bobo filed a fourth petition asserting another newly discovered evidence claim that an eyewitness had identified James as the driver, not Bobo. The district court held an evidentiary hearing on Bobo's remanded third petition and the claim in his fourth petition. Bobo presented evidence from Tyson, the new eyewitness Jermaine Mack-Lynch, and James. Tyson testified that, while they were both in prison, James confessed to being in the car during the shooting. Mack-Lynch testified that he witnessed the shooting, and that James was in the driver's seat. Mack-Lynch explained that it was only later, when he and James were in jail together, that he recognized James as the driver of the vehicle involved in the shooting.

James's testimony during the postconviction evidentiary hearing was mostly the same as his testimony during the jury trial—including that Bobo is innocent—but did contain some new information. James told the district court that he was initially implicated in the shooting and was under the influence of alcohol or high on ecstasy when he provided his statements to police. James claimed that he did *not* testify during the grand jury proceeding but was forced to attend. James explained that he is currently incarcerated for two murders and his earliest release date is 2047. On the second day of the postconviction evidentiary hearing, James refused to testify further and invoked his Fifth Amendment right against self-incrimination.

The district court found Tyson's and Mack-Lynch's testimony not credible and denied Bobo's third and fourth petitions for postconviction relief.² Bobo appealed, and we affirmed. *Bobo III*, 860 N.W.2d at 683.

In 2020, Bobo filed his fifth postconviction petition for relief alleging another newly discovered evidence claim, which included an affidavit signed in 2018 by James asserting that he was the driver of the vehicle involved in the shooting, not Bobo. The petition also included an affidavit from the mother of Bobo's child claiming that she was with Bobo on the night of the shooting.

The district court granted Bobo's request for an evidentiary hearing. The district court allowed testimony from Bobo and James during the evidentiary hearing, but James exercised his Fifth Amendment right and refused to respond to most of the questions. James did testify for the first time, however, that he was with Bobo at Slaughter's mother's house after 10 p.m. the night of the shooting, and when he left, Bobo was still at the house with his child and the child's mother.³ The district court excluded the affidavit and testimony of the mother of Bobo's child because this evidence did not qualify as newly

² The district court found that Tyson, a self-proclaimed gang member and three-time felon, struggled to testify consistently with his affidavit and that James was not even in the same prison as Tyson when their alleged conversations occurred. The district court found that Mack-Lynch—incarcerated for second-degree murder at the time, a member of a different gang, and who had previously provided false testimony in another murder case in exchange for payment—provided vague and contradictory testimony, was provided a narrative by Bobo before he prepared his affidavit, and “admitted to serially lying.”

³ James testified that Slaughter's mother is his aunt.

discovered evidence.⁴ The district court also excluded recordings of jail calls between James and a reporter, as well as James's 2018 affidavit, because they failed to meet the standards for admissibility under Minn. R. Evid. 804(b)(3). Finally, the district court excluded the testimony of the private investigator who obtained James's signature on the 2018 affidavit to the extent that it was being offered solely to lay foundation for the affidavit.

After the evidentiary hearing, the district court denied Bobo's fifth petition for postconviction relief. Bobo now appeals.

ANALYSIS

On appeal, Bobo argues that the district court improperly excluded James's affidavit and the recordings of jail calls as not admissible under Minn. R. Evid. 804(b)(3). Bobo also contends that the newly discovered evidence is sufficient to justify a new trial. We review a district court's decision to admit or exclude evidence and the decision to deny a postconviction petitioner a new trial for an abuse of discretion. *Ferguson v. State*, 826 N.W.2d 808, 812, 815 (Minn. 2013). But "[w]e review legal issues de novo and factual findings for clear error." *Campbell v. State*, 916 N.W.2d 502, 506 (Minn. 2018).

I.

We turn first to Bobo's argument that the district court abused its discretion when it excluded James's 2018 affidavit and the recordings of jail calls as not admissible under Minn. R. Evid. 804(b)(3).

⁴ Bobo does not challenge this decision on appeal.

The parties do not dispute that James's affidavit and the recorded jail calls are hearsay, *see* Minn. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"), and thus inadmissible unless an exception to hearsay applies, *see* Minn. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature."). But Bobo argues that the district court erred by refusing to admit the affidavit under Rule 804(b)(3) as an exception to the hearsay rule.

Rule 804(b)(3) states that "[a] statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true" is "not excluded by the hearsay rule if the declarant is unavailable as a witness." Minn. R. Evid. 804(b)(3). But "[a] statement tending to expose the declarant to criminal liability and offered in a criminal case is *not* admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* (emphasis added).

Here, because James exercised his Fifth Amendment right against self-incrimination to avoid testifying, he is "unavailable" for purposes of Rule 804(b). *See State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995) ("Unavailability can be established by a witness deciding to invoke his/her Fifth Amendment right against self incrimination."). Further, James's affidavit and the recordings of the jail calls subject him to criminal liability because he confesses to being the driver in the shooting, for which Bobo was sentenced to

life in prison. Thus, the remaining question is whether “corroborating circumstances clearly indicate the trustworthiness of” James’s statements. Minn. R. Evid. 804(b)(3).

We have identified six factors (the *Ferguson* factors) that “serve as guidance” for “determining whether the ‘corroborating circumstances’ requirement of Rule 804(b)(3) has been satisfied.” See *Ferguson*, 826 N.W.2d at 813–14.⁵ Ultimately, “[t]he trustworthiness of a hearsay statement under Rule 804(b)(3) depends on the totality of the circumstances.” *Id.* at 814.

Here, the district court’s order provided extensive analysis on why James’s affidavit and the recordings of the jail calls are not sufficiently trustworthy to be admissible under Rule 804(b)(3). The district court emphasized that James’s affidavit and jail calls are inconsistent with his prior testimony and that his “overall credibility and character” weigh against the admission of the evidence. See *Ferguson*, 826 N.W.2d at 813 (identifying these factors as relevant in the Rule 804(b)(3) analysis).

The district court did not abuse its discretion in determining, after an evidentiary hearing, that James’s testimony was not sufficiently trustworthy to be admissible under

⁵ The six *Ferguson* factors are:

- (1) whether other evidence corroborates the facts in the hearsay statement;
- (2) the extent to which the hearsay statement is consistent with the declarant’s prior testimony and other statements;
- (3) the relationship between the declarant and other witnesses and parties, including the defendant;
- (4) whether the declarant has reason to fabricate the statement;
- (5) the overall credibility and character of the declarant; and
- (6) the timing of the statement.

Ferguson, 826 N.W.2d at 813.

Rule 804(b)(3). James has given multiple statements in Bobo's case. But prior to this postconviction proceeding, James had never testified that he was the driver during the shooting or was with Bobo prior to the murder. Instead, James testified to the grand jury and provided statements to law enforcement that Bobo was the driver during the shooting. Moreover, James has repeatedly given different versions of what he claims the facts to be. The district court, which has heard all these different versions from James, was well within its discretion in concluding that James was simply not a credible witness.

Bobo's numerous arguments to the contrary are unavailing. Bobo's main argument suggests that James's affidavit is inherently reliable because the affidavit is a written, signed, and notarized sworn document. We disagree that the form of the affidavit makes it *inherently* reliable. In fact, we have consistently refused to admit such affidavits under Rule 804(b)(3). *See, e.g., Campbell*, 916 N.W.2d at 507 (noting that while "the affidavit is notarized, it contains multiple layers of hearsay"); *Jackson v. State*, 883 N.W.2d 272, 275–78 (Minn. 2016) (refusing to admit a witness's written statement under Rule 804(b)(3) after he asserted his Fifth Amendment right against self-incrimination); *Ferguson*, 826 N.W.2d at 812–13 (same); *State v. Richardson*, 393 N.W.2d 657, 665–67 (Minn. 1986) (same). Further, the *Ferguson* factors focus on the declarant's credibility, potential biases, and whether other facts support the hearsay statement, and not just on the form of the hearsay statement. *See Ferguson*, 826 N.W.2d at 813. Finally, James's own contradictory actions demonstrate why we do not consider his notarized affidavits to be inherently reliable. For example, after providing statements to police about Bobo's involvement in the shooting, James signed an affidavit stating that he never spoke to police

about Bobo. Later, after testifying before the grand jury about Bobo's involvement in the shooting, James signed another affidavit, stating that he never provided the police with information about Bobo.

Bobo suggests, however, that it was improper for the district court to focus on James's credibility. This argument ignores that the fifth *Ferguson* factor explicitly instructs the court to examine "the overall credibility and character of the declarant." *Id.* While Bobo cites federal case law to support his position, those cases do not support Bobo's argument. Rather, the cases instruct courts to consider the declarant's trustworthiness, just as the district court did here. *See, e.g., United States v. Atkins*, 558 F.2d 133, 135 (3d Cir. 1977) ("Rule 804(b)(3) directs the court to the trustworthiness of the declarant . . .").

Reversing course, Bobo argues that James's "overall credibility and character" supports the admissibility of his hearsay statements. Because James previously implicated someone else in a different drive-by shooting before admitting to that crime, Bobo suggests that James's decision to provide the truth in the end bolsters James's *overall* credibility and character. The fact that James presented conflicting testimony in another case does not bolster James's overall credibility in this case such that we can conclude that the district court abused its discretion.

Moreover, Bobo is mistaken in contending that Rule 804(b)(3) requires corroboration that the declarant made the hearsay statement, not that the facts contained in the statement are true. Minnesota law requires corroboration of the contents of a hearsay statement. *See Ferguson*, 826 N.W.2d at 813 (describing one factor as "whether other

evidence corroborates the *facts* in the hearsay statement” (emphasis added)). Therefore, the fact that it is James’s own voice in the recordings of the jail calls and the private investigator could have testified that it was James who signed the affidavit is simply not relevant to the Rule 804(b)(3) analysis.

Finally, Bobo contends that because the State’s case against him “was not built on any physical evidence or eyewitnesses,” less corroboration of James’s hearsay statements is required to admit them. We rejected this very argument in *Ferguson*: “even if we agreed with [the petitioner] that the evidence supporting his convictions was weak, that would not preclude [the declarant] from fabricating a recantation.” *Id.* at 815. Thus, even if the evidence at trial that contradicts James’s affidavit is weak, Bobo is not excused from carrying his burden to show that the hearsay statement is sufficiently trustworthy. *See id.* Here, the corroborating evidence that exists is not sufficient to carry that burden.

Ultimately, we conclude that the district court did not abuse its discretion when it determined that James’s affidavit and recordings of the jail calls were not admissible under Rule 804(b)(3).⁶

⁶ Bobo also raised a due process argument, claiming that he has a constitutional right to present James’s confession to a jury because he “only is required to present evidence having an inherent tendency of linking the alternative perpetrator to the offense.” But, as Bobo himself concedes, “[w]hen seeking to admit evidence related to a third-party perpetrator, the defendant must comply with procedural and evidentiary rules.” Therefore, Bobo is not entitled to a new trial because James’s affidavit and the recorded jail calls are inadmissible hearsay.

II.

Having concluded that the district court properly excluded the recordings of the jail calls and James's affidavit as inadmissible hearsay, we now consider whether the district court abused its discretion when it denied Bobo's request for a new trial based on the evidence that was admitted. 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." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).⁷

Minnesota Statutes § 590.01, subd. 4 (2020), requires that petitions for postconviction relief be filed within 2 years of the later of conviction, sentencing, or the disposition of a petitioner's direct appeal. More than 10 years have passed since the final disposition of Bobo's direct appeal. *See Bobo I*, 770 N.W.2d 129 (Minn. 2009). But the newly discovered evidence exception applies if the defendant presents evidence that (1) is "newly discovered," (2) "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition," (3) "is not cumulative to evidence presented at trial," (4) "is not for impeachment purposes," and (5) "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." *Id.*, subd. 4(b)(2).

⁷ The district court concluded that Bobo was not entitled to a new trial under the newly discovered evidence standard from *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). The court should have applied the test from Minn. Stat. § 590.01, subd. 4(b)(2). *See Onyelobi v. State*, 966 N.W.2d 235, 237 n.3 (Minn. 2021). But the error here is harmless because even under the stricter statutory standard, as we explain, Bobo is not entitled to relief. *See Roby v. State*, 808 N.W.2d 20, 27 n.6 (Minn. 2011).

In this case, the district court determined that the only admissible and potentially “newly discovered” evidence is James’s testimony during the postconviction evidentiary hearing that he was at Slaughter’s mother’s house with Bobo sometime after 10 p.m. on the night of the shooting, and Bobo was still at the house when James left.⁸ But this evidence necessarily fails the newly discovered evidence standard under the statute because testimony “cannot be unknown when the petitioner was admittedly present at the time of the events the witness purports to describe.” *Onyelobi v. State*, 966 N.W.2d 235, 238 (Minn. 2021). Here, according to James, Bobo was with him at the time. Accordingly, the testimony is not newly discovered under the statute. Because the district court correctly concluded that James’s testimony during the postconviction evidentiary hearing was not “newly discovered,” it was not an abuse of discretion to deny Bobo’s request for a new trial.

CONCLUSION

For the foregoing reasons, we affirm the district court’s denial of Bobo’s fifth petition for postconviction relief.

Affirmed.

⁸ The only other significant testimony from the evidentiary hearing is James’s reiteration that Bobo is innocent. James testified during the jury trial that Bobo is innocent. James also testified during the evidentiary hearing on Bobo’s third and fourth postconviction petitions that Bobo is innocent. As noted by the district court, this evidence is not “newly discovered” and therefore does not qualify under the statutory exception.