

**THE CHORUS OF LIARS: OPSAHL V. STATE OF
MINNESOTA**

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I. INTRODUCTION

A recanting witness is a liar. Either he lied at trial or he is lying now. When the recanting witness’s new story is joined by others, so that his solo is now a chorus, the judicial system must find the delicate balance between fairness to society and protection of the individual defendant’s rights. When the case is old and the recanting witnesses many, the difficulty of finding that balance is even greater. Such were the circumstances facing the Minnesota Supreme Court when, in 2004, it heard the case of Darby Opsahl, a man convicted in 1992 of a murder that occurred in 1986.¹

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1. See generally *State v. Opsahl*, 677 N.W.2d 414 (Minn. 2004) [hereinafter *Opsahl II*]. By the time he was convicted and sentenced, Opsahl was confined to a wheelchair having been rendered quadriplegic in a car accident in 1990. See *State*

II. HISTORY OF THE *OPSAHL* CASEA. *The Murder and the Murder Investigation*

On October 14, 1986, someone broke into a farmhouse in Lester Prairie and shot Margaret Rehmman.² The murder baffled the authorities for years; weeks after the killing they had no clues as to the motive for the shooting and no real evidence pointing toward any suspect.³ Though the farmhouse door had been forced open, there was no sign of a struggle inside, nothing was taken, and the house had not even been searched.⁴ On the day of his wife's murder, Irvin Rehmman had lunch with her, then went back to work on his son's farm less than a mile away.⁵ When he returned home at about 5:45 that afternoon, his wife of 43 years was dead on the kitchen floor with a .44 caliber gunshot wound to her chest.⁶

The investigation of the murder took a long and winding road to the indictment of Darby Opsahl. A year after the murder, Jeffrey Olson told the Carver County Sheriff's Department that his friend Darby Opsahl might know something about the murder, and that he wanted to talk.⁷ Police met with Opsahl the next day, at which time he told them that he and John Kanninen had committed burglaries in the Lester Prairie area about the time of the murder, and that Kanninen possessed a .44 caliber handgun.⁸ Opsahl told investigators about the burglary of a farmhouse, which, "by his description, matched the Rehmman residence fairly accurately."⁹ Opsahl said that while he stayed in the car and worked on the radio, Kanninen had gone to the front door.¹⁰ Opsahl recalled seeing a woman with "brown hair, wearing red, at the door."¹¹ He also noticed some chickens.¹² While Kanninen was in the house,

v. Opsahl, 513 N.W.2d 249, 252 (Minn. 1994) [hereinafter *Opsahl I*].

2. *Opsahl I*, 513 N.W.2d at 251.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 252.

9. *Id.*

10. *Id.*

11. *Id.* The investigation of the crime scene revealed that Ms. Rehmman was wearing a blue smock over a pink blouse. *Id.*

12. *Id.*

Opsahl heard a shot.¹³ When he got back to the car, Kanninen told Opsahl he shot someone inside and displayed some half-dollar coins he had taken from the house.¹⁴

After this interview, police drove Opsahl and Olson to Lester Prairie.¹⁵ According to the police, Opsahl visibly reacted when he saw the Rehmann farmhouse and stated that it could have been the place he and Kanninen had burglarized.¹⁶

Several months went by. In April, 1988, police confronted Opsahl with the fact that Kanninen could not have burglarized the Rehmann residence because he had been in New Jersey the entire month of October, 1986.¹⁷ Opsahl responded that “if Kanninen had not done it, then he was not involved either.”¹⁸ Some time during the same month Opsahl took and passed a polygraph test.¹⁹

The investigation went dormant again for another year until June, 1989 when investigators took another statement from Opsahl.²⁰ Opsahl “again stated that Kanninen had . . . a .44 caliber handgun,” but made conflicting statements regarding Kanninen’s presence in Minnesota at the time of the murder.²¹ Opsahl also “accompanied investigators to a store where he was shown a lineup of handguns” from which he identified a .44 caliber Magnum “as the kind of weapon Kanninen had during the 1986 burglary.”²²

Another year went by until April, 1990, when Opsahl spoke with police investigators for a third time, telling them that Olson, who detested Kanninen, had suggested to Opsahl that they blame Kanninen for the Rehmann murder.²³ “Opsahl said that he and Olson both knew that Kanninen had been charged with a capital murder in Florida and was in jail when Opsahl first met with police in 1987.”²⁴

13. *Id.*

14. *Opsahl I*, 513 N.W.2d at 252.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

B. The Trial and the Evidence

In April, 1992, a grand jury indicted Darby Opsahl and Jeffrey Olson for the murder.²⁵ The trial began in October of that year.²⁶ The evidence at trial linking Opsahl to the murder was thin. A shoe print, fingerprints and a palm print were found at the crime scene.²⁷ None of this physical evidence matched Opsahl.²⁸ The murder weapon was never found.²⁹ More importantly, the evidence that did link Opsahl to the crime was circumstantial and far from compelling. First, the prosecutors introduced evidence of Opsahl's statements in which he had described the farmhouse to police, had "apparently" known that a .44 caliber weapon was used, that older half-dollar coins had been taken, and that there were chickens at the farm where the murder had occurred.³⁰ In addition, a number of Opsahl's "friends" testified to conversations they had with Opsahl, or in his presence, in which Opsahl implicated himself in the murder.³¹ Opsahl was convicted of first degree murder—intentionally causing death during a burglary of a dwelling—and was sentenced to life imprisonment.³²

C. Direct Appeal

On appeal, Opsahl challenged the grand jury indictment as having been based in part upon the admission of statements erroneously claiming that Opsahl had failed a lie detector test.³³ This mistake was compounded when the prosecutor refused to allow one of the detectives to testify (in response to a question posed by one of the grand jurors) that Opsahl had taken a lie detector test but the results had been favorable.³⁴ Opsahl argued that the cumulative effect of the prosecutor's actions confirmed the

25. *See id.*

26. *Id.*

27. *Id.* at 251.

28. *Id.* The police were unable to identify whom the shoe print, fingerprints, and palm print belonged to. *Id.*

29. *Id.*

30. *See id.* at 252, 255.

31. *Id.* at 252–53; *Opsahl II*, 677 N.W.2d at 418–19.

32. *Opsahl I*, 513 N.W.2d at 251 n.1.

33. *Id.* at 253. "Results of polygraph tests, as well as evidence that a defendant took, or refused to take such a test, are not admissible in Minnesota in either criminal or civil trials." *Id.* (citations omitted).

34. *Id.*

erroneous impression that Opsahl had failed the lie detector test.³⁵ The court rejected this argument, finding that the prosecutor's admonition to the jury to disregard all evidence regarding polygraph examinations cured any defect.³⁶

Second, the court concluded that statements made by others in the presence of Opsahl, but not testified to at trial, were admissible.³⁷ Several witnesses were allowed to testify as to statements that Olson and Tim Efteland had allegedly made.³⁸ Neither Olson nor Efteland were available to testify at trial.³⁹ The court found that these statements were admissible because the information was elicited by Opsahl's attorney and no objection to the testimony was made at the time.⁴⁰

Third, and most importantly, the court addressed the sufficiency of the evidence.⁴¹ Opsahl argued that "the evidence presented at trial was legally insufficient to convict him because it was entirely circumstantial and based in large measure on statements Opsahl [allegedly] made to investigators and to other individuals."⁴² The statements made to police were somewhat ambiguous; the statements made to others were less so. The court, evaluating the evidence in the light most favorable to the verdict,⁴³ stated:

Opsahl also made numerous admissions to the crime to his friends, including Ross Reinitz, Laura Roberts, Robert Beckman, Richard Rogowski and his former girlfriend, Marina Allan. The jury had an opportunity to hear all the testimony and to evaluate the credibility of the witnesses.

35. *Id.*

36. *See id.* The prosecutor "properly cautioned the jurors on the use of polygraph statements, both at the time the statements were made and at the end of testimony." *Id.* The court also stated that "[t]he prosecutor did not elicit the testimony about the polygraph tests . . ." *Id.*

37. *Id.* at 253-55.

38. *Id.* at 254.

39. *Id.*

40. *Id.*

41. *Id.* at 255.

42. *Id.*

43. On appeal, where the defendant raises the sufficiency of the evidence to sustain the verdict, the question is subjected to this favorable review. *Id.* The verdict is sustained if, giving the State all benefit of the doubt, there is sufficient evidence that a reasonable juror could find the defendant guilty. *Id.*; *see, e.g.*, *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988). As the court noted in *Opsahl I*, when applying this standard, "[w]e will assume that the jury disbelieved any testimony in conflict with [a guilty verdict]." 513 N.W.2d at 255.

In our review, we must assume the jury believed the state's witnesses and rejected contrary evidence. *Given that assumption [that the jury credited the testimony of all these witnesses],* there was sufficient evidence to convict Opsahl.⁴⁴

III. OPSAHL REDUX

A. *In the Trial Court*

In 2002, a decade after Opsahl's conviction, The Innocence Project of Minnesota⁴⁵ began investigating Opsahl's case. The Project re-interviewed numerous witnesses, chased down unfollowed leads regarding physical evidence, and in general reinvestigated the investigation.

On October 29, 2002, Opsahl petitioned the trial court for post-conviction relief,⁴⁶ claiming that he was entitled to a new trial, or at least to an evidentiary hearing, because the chorus of friends had now recanted their trial testimony.⁴⁷

In addition, Opsahl raised claims of prosecutorial misconduct that were intertwined with the recantations.⁴⁸ The recanting witnesses allegedly provided misleading testimony under pressure from the prosecutor to do so. Reinitz and Rogowski, who were on probation at the time, claimed that the prosecutor threatened to revoke their probation if they did not provide testimony favorable to the State.⁴⁹ Similarly, Roberts claimed that she informed the prosecutor of the unreliability of her memory and was encouraged to "testify without qualification."⁵⁰

The trial court rejected Opsahl's petition for a new trial as well

44. *Id.* at 255 (emphasis added) (citations omitted).

45. The Innocence Project of Minnesota (IPMN) is dedicated to securing the exoneration of persons convicted of crimes they did not in fact commit. It focuses on claims of actual innocence as distinct from legal defenses such as self-defense. Unlike some of its sister organizations in other states, however, the IPMN does not limit its review to cases involving only DNA evidence. Though the *Opsahl* case presented a claim of actual innocence, its procedural posture did not present an opportunity for exoneration (though it could have resulted in a new trial and a not-guilty verdict).

46. *See* MINN. STAT. § 590.04 (2004).

47. *Opsahl II*, 677 N.W.2d at 419.

48. *Id.*

49. *Id.* at 420.

50. *Id.*

as the petition for an evidentiary hearing, finding that the recantations were unreliable and, therefore, insufficient to make the court “reasonably well satisfied that the trial testimony had in fact been false.”⁵¹ As Judge Yost, the original trial judge in the case, summed it up:

[At best, the court is] dealing with a chorus of liars, with the only question being whether the concert was at trial, or is it now, at the motion for a retrial. If it was at trial, then they are perjurers all and if it is now, then they have the unique ability to have their memory sharpen with the passage of time.⁵²

B. In the Minnesota Supreme Court

1. The State of the Evidence

The Minnesota Supreme Court reversed the trial court and remanded the case for an evidentiary hearing.⁵³ This time the supreme court review was governed by a different standard.⁵⁴ On direct appeal the court had reviewed the sufficiency of the evidence in the light most favorable to the verdict; here they reviewed the trial court’s findings regarding the recantations under an abuse of discretion standard.⁵⁵ In this opinion, unlike the 1994 opinion, the court restated the testimony of the “friends” with greater detail and precision. A review of that evidence, as described in the recent decision, is thus worthwhile. As the court described it:

The State’s case relied on statements made by Opsahl to several acquaintances that implicated him in the murder. Ross Reinitz testified that he heard Olson tell Opsahl that they “could always take care of [Opsahl’s neighbor like they] took care of that old bitch by Lester Prairie.” Allen Kroells provided similar testimony. Laura Roberts testified that Opsahl told her that he had hurt someone during a robbery near Winsted, a small town near Lester Prairie. Marina Allen, Opsahl’s former live-in girlfriend, testified that during a fight, Opsahl told her to “shut up or

51. *Id.* at 420, 423. The “reasonably well satisfied” standard comes from *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928).

52. *Opsahl II*, 677 N.W.2d at 427.

53. *Id.* at 425.

54. *Id.* at 421.

55. *Id.*

I'm going to shoot you like I did that little old lady." Richard Rogowski testified that at a Fourth of July party in 1988, Opsahl admitted to him that he burglarized a house where someone was shot. Dean Johnson testified that Opsahl told him that he had shot and killed a woman during a burglary. According to Robert Beckman, Opsahl told him that Olson shot a woman in the head with a .44 caliber handgun. Cory Telthoester testified that Olson told him that he and Opsahl burglarized the home and that Opsahl shot an older woman in the house while Olson was on his way out the window of the house. The State presented no physical evidence linking Opsahl to the murder

Opsahl testified in his own defense but called no other witnesses. He denied that he was involved in the murder . . . or that he ever told anyone that he had committed a murder Opsahl denied making any admissions to Rogowski at a Fourth of July party in 1988, claiming instead that he attended a fireworks display in Minneapolis.⁵⁶

In his petition for post-conviction relief, Opsahl submitted the following recantation evidence. Rogowski, in an affidavit, claimed that he made up the entire story and never even attended a Fourth of July party with Opsahl.⁵⁷ Reinitz swore that he had told prosecutors that he did not hear the exchange between Opsahl and Olson clearly, "and that he was unsure of who made the original comment about the murder."⁵⁸ He also swore in his affidavit that "at the time of the conversation, he knew of the murder investigation and assumed that the two were joking."⁵⁹ Similarly, in her affidavit, Roberts stated that she used large amounts of drugs at the time of the event and that her memory was suspect.⁶⁰ William O'Keefe, a private investigator, interviewed Dean Johnson, who, though he did not recant his prior testimony, nonetheless implied "that he had lied on the stand when he testified that he had just opened his first beer of the night when Opsahl made his incriminating statements."⁶¹ Similarly, Morrie Beaulier, the

56. *Id.* at 418–19.

57. *Id.* at 419.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 419–20.

attorney who represented Opsahl in 1998, swore that “Marina Allen completely recanted her testimony to him, claiming that she fabricated her testimony out of anger at Opsahl, who had been an abusive boyfriend.”⁶²

2. *The Standard of Review*

In reviewing the post-conviction proceedings, the Minnesota Supreme Court will affirm that ruling absent an abuse of discretion.⁶³ In determining whether to grant a new trial based upon witness recantations, Minnesota follows the three-prong test articulated in *Larrison v. United States*.⁶⁴ To receive a new trial, the petitioner must establish all three of the following prongs by a fair preponderance of the evidence: (1) the court must be reasonably well satisfied that the testimony in question was false; (2) that without that testimony the jury *might have reached a different verdict*; and (3) that the petitioner was surprised and/or did not know of the falsity until after trial.⁶⁵ In Minnesota, the third prong is not a condition precedent for granting a new trial, but merely a factor to be considered.⁶⁶

Though the standard for granting a new trial is governed by *Larrison*, the showing required to receive an evidentiary hearing is set by statute that imposes a much lower burden.⁶⁷ Minnesota Statutes section 590.04, subdivision 1 requires the post-conviction court to hold an evidentiary hearing “unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.”⁶⁸ Thus, though the petitioner must allege facts—not mere conclusions,⁶⁹ that if proven, would entitle him to a new trial, the post-conviction court is required to resolve all doubts in favor of granting the evidentiary hearing⁷⁰ and must do so when material facts are in dispute.⁷¹ In circumstantial evidence cases, such as Opsahl’s, evidentiary hearings are deemed

62. *Id.* at 420.

63. *Id.* at 422.

64. 24 F.2d 82 (7th Cir. 1928).

65. *Opsahl II*, 677 N.W.2d at 423.

66. *Id.* (citing *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002)).

67. *Id.* (citing *Ferguson*, 645 N.W.2d at 446).

68. *Id.* (quoting MINN. STAT. § 590.04, subd. 1 (2004)).

69. *Id.* (citing *Ferguson*, 645 N.W.2d at 446).

70. *Id.* (citing *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002)).

71. *Id.* (citing *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995)).

particularly important.⁷²

3. *The Supreme Court's Decision*

As stated above, the trial court denied Opsahl's petition without holding an evidentiary hearing,⁷³ thereby implicitly finding the petitioner had presented no facts that could conceivably entitle him to relief.⁷⁴ Stated in another fashion, the trial court found that the petition and the supporting affidavits conclusively showed that Opsahl was not entitled to a new trial; therefore, no hearing was necessary.

In arriving at its decision, the trial court found that the facts presented could never meet the standard for a new trial—the court was not now and would never be “well satisfied” that the testimony of the recanting witnesses was false.⁷⁵ “Based on [his own personal] recollection of the trial, the [judge] concluded that Marina Allen's recantation was not reliable” and “that Reinitz and Roberts had a better recollection of events at trial than [twelve years later] at the post-conviction stage.”⁷⁶ “With respect to Johnson, the court noted that he did not change the substance of his testimony.”⁷⁷ The trial court simply ignored the affidavit of Rogowski.⁷⁸

Because the trial court had not been reasonably well satisfied that the recanting testimony was false, it did not have to consider the second prong of the *Larrison* test.⁷⁹ Notwithstanding that fact, however, the trial court had evaluated the second prong of the *Larrison* test, concluding that the jury would not have reached a different verdict even if the recanted testimony had never been admitted.⁸⁰

On review, the Minnesota Supreme Court made a number of important findings. First, the court found that the allegations in Opsahl's petition and the supporting affidavits easily met the minimal standard for an evidentiary hearing under Minnesota Statutes section 590.04, subdivision 1.⁸¹ The factual allegations in

72. *Id.* (citing *Ferguson*, 645 N.W.2d at 446).

73. *Id.* at 417.

74. *See id.* at 423.

75. *See id.*

76. *Id.*

77. *Id.* at 420.

78. *See id.*

79. *See id.* at 423–24.

80. *Id.* at 423.

81. *See id.* at 424.

the post-conviction pleadings were such that the trial court, as a matter of law, could not have found that Opsahl was not even entitled to a hearing. After all, the factual allegations raised the possibility that the court, after a hearing, could be “reasonably well satisfied” that the prior testimony had indeed been false. By concluding that the recantations were unreliable without first evaluating the credibility of the witnesses at an evidentiary hearing, the post-conviction court misapplied Minnesota Statutes section 590.04 and abused its discretion.

The trial court had improperly leapfrogged over the evidentiary hearing requirement to address the ultimate issue and, in so doing, had glossed over the relevant evidentiary standard. When addressing whether an evidentiary hearing should occur, the trial court must give the benefit of the doubt to the new factual allegations regarding the recanting witnesses. An evidentiary hearing may only be avoided if the petition and the affidavits “conclusively show” that the petitioner is entitled to no relief or, in other words, that even assuming the accuracy of the petition and the affidavits, there is conclusive proof that the court could never be reasonably well satisfied that the original testimony of the recanting witnesses had been false.⁸² The district court had impermissibly made a credibility determination based upon its recollection of how those witnesses appeared at the trial ten years earlier rather than evaluating the credibility of their new story at the time of the hearing. The supreme court mandated the trial court evaluate that credibility at a full-blown evidentiary hearing.⁸³

The supreme court got it right on this issue. When evaluating a petition to determine whether an evidentiary hearing should occur, the trial court is required to assume that the evidence could be credible.⁸⁴ In this case, the trial court did not assume the credibility of the evidence in deciding whether a hearing was warranted; instead, it expressly made a credibility determination and found a hearing unnecessary.⁸⁵

Turning to the second prong of the *Larrison* test, the supreme court held “that the district court abused its discretion by concluding that the jury would not have reached a different result

82. *See id.*

83. *Id.* at 425.

84. *See id.* at 423–24.

85. *Id.*

without the recanted testimony.”⁸⁶ The supreme court specifically found that the second prong of the *Larrison* test was met without the need for further proceedings.⁸⁷ The court has held that if the trial court is “reasonably well satisfied” that the recanted testimony was false, then as a matter of law, it might have made a difference, thereby warranting a new trial.⁸⁸

Applying this standard to the facts of the case, the supreme court had little difficulty finding an abuse of the trial court’s discretion:

The petition and affidavits challenge the truth or believability of five out of seven witnesses who testified that they heard Opsahl make incriminating statements. These recantations are particularly significant because there was no physical evidence linking Opsahl to the murder. Because Opsahl’s petition calls into question such a significant part of the state’s circumstantial case, we conclude that the postconviction court abused its discretion by concluding that the jury would have reached the same result without the recanted testimony.⁸⁹

In short, if the trial court were to find after an evidentiary hearing that the recanting were witnesses credible, Opsahl would receive a wholly new trial.

The supreme court also addressed the merits of Opsahl’s claims of prosecutorial misconduct that were rejected by the trial court.⁹⁰ Threatening to revoke the probation of a witness in order to secure favorable testimony clearly constitutes prosecutorial misconduct.⁹¹ The remedy for that misconduct is a new trial unless the misconduct was harmless beyond a reasonable doubt, which is, in turn, defined as only occurring “if the verdict rendered was surely unattributable to the error.”⁹² Here again, the supreme court reversed the trial court’s decision as to its rejection of the evidentiary hearing.⁹³ Since the post-conviction petition and affidavits stated facts that, if proven, would constitute prosecutorial misconduct, it was incumbent upon the trial court to at least hold

86. *Id.* at 424.

87. *See id.*

88. Ferguson, 645 N.W.2d at 444–45.

89. *Opsahl II*, 677 N.W.2d at 424.

90. *Id.*

91. *See* MINN. RULES OF PROF’L CONDUCT R. 3.8 cmt. 8.4(c), (d) (2002).

92. *State v. Hunt*, 615 N.W.2d 294, 301–02 (Minn. 2000).

93. *Opsahl II*, 677 N.W.2d at 424–25.

the evidentiary hearing to make factual findings as to the witness' credibility.⁹⁴ As the court stated, "when a petitioner presents sworn statements that some of the testimony used to convict him was falsified and the product of improper coercion by the prosecution, such allegations [require]...a postconviction evidentiary hearing."⁹⁵ Given the standard on this issue, if the trial court determined that the witnesses were credible, then Opsahl would be entitled to a new trial.

Finally, the majority opinion addressed the State's alternative argument, that the lapse of time between Opsahl's conviction and the filing of his post-conviction petition was so great as to preclude him from receiving relief.⁹⁶ The trial court did not reach this argument.⁹⁷ Accordingly, the supreme court remanded the case for the evidentiary hearing and directed the trial court that if it determined that Opsahl was otherwise entitled to a new trial, it "shall address the state's alternative argument that the ten year lapse in time... should preclude him from receiving relief."⁹⁸

Justice Gilbert dissented.⁹⁹ He took issue with that part of the opinion remanding the case for an evidentiary hearing based on the alleged recanted testimony of five trial witnesses.¹⁰⁰ Justice Gilbert offered three reasons for his dissent. First, because the recanted testimony was presented by affidavit, a form of evidence provided for in Minn. Stat. section 590.04, subdivision 3, he argued that Opsahl had in effect already received an evidentiary hearing.¹⁰¹ Opsahl's election to provide evidence in the form of affidavits meant that he had enjoyed his one bite at the apple. Justice Gilbert's dissent on this point is not without some support in the record. The trial court, in its order, made detailed findings of fact and conclusions of law—thirty-nine pages in all.¹⁰² As Justice Gilbert noted, Judge Yost, the judge who presided over the original trial in 1992, was uniquely well-situated to assess witness credibility—with or without personal appearances by those witnesses.¹⁰³

94. *Id.* at 424.

95. *Id.* at 425.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 426.

102. *Id.*

103. *Id.*

But is this the correct view of the statutory provision of an evidentiary hearing? According to Minnesota Statutes section 590.04, a hearing on the petition “shall be in open court,” the court may order the petitioner to be present at the hearing, and in the discretion of the court “it may receive evidence in the form of affidavit, deposition, or oral testimony.”¹⁰⁴ In this case, Opsahl was not afforded an evidentiary hearing.¹⁰⁵ The affidavits filed in support of the petition were not intended to be in lieu of evidence that Opsahl’s attorneys would have presented had an evidentiary hearing been granted. The court did not agree to an evidentiary hearing with some evidence to be submitted in the form of affidavits; rather, it read the affidavits and based on its own recollection determined that no further evidentiary hearing was necessary.¹⁰⁶

Second, Justice Gilbert opined that the majority erred because the allegations, even if true, did not attack the “overwhelming amount of inculpatory (nonrecanted) evidence supporting the guilty verdict.”¹⁰⁷ In this regard, Justice Gilbert’s dissent misses the mark. The standard is not whether the recantations attack all of the inculpatory evidence, but whether the recanted testimony was significant enough that, without it, a jury might not have reached the same result.¹⁰⁸ Nor can one agree with Justice Gilbert’s weighing of the evidence. In this case, there was no physical evidence linking Opsahl to the crime or the crime scene.¹⁰⁹ The unrecanted evidence, like the recanted evidence, was not only entirely circumstantial, it was virtually all based on statements attributed to Opsahl himself.¹¹⁰ Five of the seven witnesses who provided that evidence later recanted.¹¹¹ In that circumstance, it is hard to see how the recantation, if believable, might not have led the jury to reach a different result.

Justice Gilbert’s opinion also points out that on direct appeal in 1994, the supreme court had already found that the evidence

104. MINN. STAT. § 590.04, subds. 2, 3 (2002).

105. *Opsahl II*, 677 N.W.2d at 425.

106. *Id.*

107. *Id.* at 426 (Gilbert, J., dissenting).

108. *Opsahl II*, 677 N.W.2d at 423 (relying on the three-prong test established in *Larrison v. U.S.*, 24 F.2d 82, 87–88).

109. *Id.* at 419.

110. *See id.* at 424.

111. *Id.*

was more than sufficient to sustain the conviction.¹¹² But this observation offers little justification given the procedural posture of the case. On direct appeal, the standard of review considers the evidence in the light most favorable to the verdict.¹¹³ Viewed from that perspective in 1994, the evidence was sufficient, the court itself placing great weight on the witness statements that were later recanted.¹¹⁴ In 2004, Justice Gilbert wrote “[t]he alleged recanted testimony in this case was not pivotal to appellant’s conviction.”¹¹⁵ The mere fact that on direct review the whole of the evidence was sufficient to sustain the verdict provides little insight into the question whether, without much of that evidence, the jury might have reached a different result.

Finally, Justice Gilbert found the trial court’s thirty-nine pages of findings of fact and its assessment of credibility to be persuasive.¹¹⁶ The trial court, in his view, clearly assessed the credibility of the witnesses by comparing the inherent credibility of the affidavit testimony against his own memory of the credibility of the witnesses as they appeared at trial.¹¹⁷ In the end, Justice Gilbert also pointed out the inherent unfairness to the State if this case were to be ordered for retrial.¹¹⁸ In such a situation, the Court noted, that “[t]he murder took place 17 years ago and the trial took place 11 years ago. Two material witnesses who testified at trial have since died and two others apparently cannot be located. Prejudice to the state may be a legitimate problem in this case should the postconviction court determine on remand that a new trial would otherwise be warranted.”¹¹⁹

IV. CONCLUSION: THE LEGACY OF *OPSAHL*

When considering the long-term meaning of *Opsahl*, two lines of inquiry are pertinent. First, is *Opsahl* precedential? Second, if a new trial is warranted, what can, will, or should the result be?

112. *Id.* at 426 (Gilbert, J., dissenting).

113. *Id.*

114. *See Opsahl I*, 513 N.W.2d at 255.

115. *Opsahl II*, 677 N.W.2d at 426 (Gilbert, J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.* at 427.

119. *Id.*

A. *Is Opsahl Precedential?*

Has the *Opsahl* decision changed or clarified the law in any significant respect, or is it merely a decision that applies well-settled law to a unique factual setting? On the one hand, *Opsahl* has not changed the standards for receiving a new trial. The supreme court reaffirmed its adherence to *Larrison*.¹²⁰ This, in itself, is no small matter. The majority of federal circuits (including the 8th Circuit) do not adhere to *Larrison*, but require a higher level of proof in order to obtain a new trial.¹²¹ In those jurisdictions it is not enough to show that the jury *might* have reached a different result; instead, one must show that the absence of the testimony would *probably* have led to an acquittal.¹²² The court's reaffirmation of *Larrison* maintains the more lenient standard.

Secondly, *Opsahl* makes it clear that in applying that standard to a circumstantial evidence case, the recantation of any significant testimony will almost surely meet the "might-have-made-a-difference" standard.

Finally, the majority opinion seems to have adopted a bright-line test for obtaining an evidentiary hearing under Minnesota Statutes section 590.04, subdivision 3. It seems clear now that the evidentiary hearing required by this statute means the taking of live testimony. While the trial court may have felt that it had held an evidentiary hearing by considering the affidavits and assessing its own recollection, the supreme court disagreed. When witness credibility is at stake, the court must observe the witnesses live, if possible. In a circumstantial evidence case involving the recantation of testimony, such a hearing is hardly controversial.

B. *What Happens Next?*

If the trial court had found that a new trial was warranted (it did not) because it was reasonably well-satisfied that the testimony

120. *Id.* at 422.

121. *U.S. v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) ("Today we join several other circuits in rejecting *Larrison*." (citing *U.S. v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir.1997); *U.S. v. Provost*, 969 F.2d 617, 622 (8th Cir.1992); *U.S. v. Krasny*, 607 F.2d 840, 844-45 (9th Cir.1979); *U.S. v. Stofsky*, 527 F.2d 237, 246 (2d Cir.1975)).

122. *Id.* at 593 ("[A] defendant is not entitled to a retrial on the basis of newly discovered evidence unless he can show that 'a new trial would *probably* produce an acquittal.'" (citing and adopting *Thompson v. U.S.*, 188 F.2d 652, 653 (D.C.Cir. 1951))).

was false, the question is, what would have become of Darby Opsahl? Setting aside the legal niceties of this issue, it appears that a few policy observations are possible.

First, despite the involvement of The Innocence Project, Opsahl's case is not an exoneration case. Absent clear scientific or objectively verifiable evidence, Darby Opsahl could not have been exonerated in the sense of being declared innocent and freed from prison. He might have received a new trial and prevailed, or the prosecution decided that it could not have re-tried the case for lack of evidence given the passage of time; but it seems unlikely that either the court or the prosecution would have declared Opsahl an innocent man.

This observation leads to a discussion of the least satisfying aspect of *Opsahl*. The supreme court directed the trial court to weigh the prejudice to the State occasioned by the passage of time against Opsahl's entitlement to an "otherwise . . . warranted" new trial.¹²³ If Opsahl was otherwise entitled to a new trial it is because the trial court was reasonably well satisfied that the recanted testimony was false and that, if it had not been admitted the first time, a jury might have found Opsahl not guilty.

This is the delicate balance described above. The individual defendant has a right to a true presumption of innocence.¹²⁴ If a jury "might have" acquitted him but for tainted evidence, the presumption leans toward a new trial. Yet, in this case the recanting witnesses are friends of the defendant, many with their own axes to grind against the prosecution. This is why the credibility determination is critical. The State will truly be prejudiced by having to prosecute a crime that is eighteen years old. The State and the victims have interests at stake as well. These interests and prejudices are significant in striking the delicate balance.

In the final analysis, the supreme court left this decision to the trial court because the case presented by the chorus of liars is so intractable, particularly in an appellate review. One pictures the justices holding their noses as they review the recantation evidence and holding their breath as they awaited the decision below.

123. *Opsahl II*, 677 N.W.2d at 427.

124. *State v. Wagner*, 637 N.W.2d 330, 338 (Minn. Ct. App. 2001) ("It is elementary fundamental justice that the only presumption in criminal law is the presumption of innocence.").