IN THE COURT OF APPEALS OF IOWA

No. 0-056 / 09-0310
Filed April 21, 2010

JAMES DEAN LAMPMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Michael J. Moon, Judge.

Applicant appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Jon M. Kinnamon and Jerald W. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins and Virginia Barchman, Assistant Attorney Generals, and Randall J. Tilton, County Attorney, for appellee State.

Heard by Sackett, C.J., and Doyle and Mansfield, JJ.

DOYLE, J.

James Lampman appeals following the district court's denial of his application for postconviction relief. He asserts the court erred in denying relief on his claims of newly-discovered evidence based on a witness's post-trial recantation and ineffective assistance of counsel. Because we find no merit to any of his claims, we affirm the district court.

I. Background Facts and Proceedings.

Lampman was charged with one count of sexual abuse in the third degree against a child who was thirteen years old, in violation of Iowa Code section 709.4(2)(b) (2003), and three counts of sexual abuse in the second degree against a child who was eleven years old, in violation of section 709.3(2). Both children testified at his jury trial.

The older child, S.B., testified that on May 24, 2003, a Saturday night, she spent the night at the house of her best friend B.C. B.C.'s mother left for about an hour to go to the store. While B.C.'s mother was gone, S.B. alleged Lampman sexually abused her and B.C. She testified about the details of the abuse at trial.

S.B. told her social worker, Holly Barnhart, about the abuse two days after it occurred. Barnhart took S.B. and her mother to the police station where S.B. was interviewed by Deputy Randal Cowles. After talking to S.B., Cowles went to B.C.'s house. B.C.'s mother woke B.C. up and, without telling her what S.B. had reported, Cowles asked her what happened the night S.B. stayed at her house. B.C.'s story "[p]retty much" matched the story S.B. had told Cowles.

B.C. was interviewed at a child protection center and deposed by defense counsel. She also testified at trial. Aside from some minor inconsistencies, her story was the same each time. Her testimony at trial describing the abuse was also consistent with S.B.'s testimony, although B.C. alleged that Lampman had also sexually abused her on prior occasions, beginning "when I was about nine. But I don't remember the date."

Dr. Kathleen Opdebeeck examined S.B. and found evidence of recent injuries that were "consistent with penetration by an adult male penis." Dr. Opdebeeck also examined B.C., but did not find any signs of recent injury.

The police officers investigating the case sent the sexual assault kit Dr. Opdebeeck collected from S.B., as well as the pajamas and underwear S.B. was wearing the night of the assault, to the Iowa Department of Criminal Investigations (DCI) laboratory for analysis. The DCI's laboratory receipt for that evidence and its subsequent laboratory report were admitted into evidence at trial with no objection from the defense. The report indicated no seminal fluid or DNA foreign to S.B. was found on any of the items submitted for analysis.

Lampman testified at trial that on May 24, 2003, he was in the basement of B.C.'s house "watching a dirty movie; and I was masturbating." While doing so, he saw B.C. and S.B. sitting on the basement stairs watching him. He testified that he told them to go upstairs and nothing more happened. He denied having ever sexually abused either B.C. or S.B.

The jury returned a verdict finding Lampman guilty of sexual abuse in the third degree against S.B. and sexual abuse in the second degree against B.C. for

the events that occurred on May 24. The jury found him not guilty as to the two other counts of sexual abuse in the second degree against B.C., which were alleged to have occurred "[o]n an occasion separate from that alleged in any other count, between the dates of May 1, 2001, and June 1, 2003."

Lampman filed a motion for new trial, claiming the verdicts were inconsistent. The district court denied the motion, and Lampman was sentenced to two consecutive sentences totaling thirty-five years in prison.

Lampman appealed, challenging only the imposition of consecutive sentences. We affirmed. *State v. Lampman*, No. 04-1955 (Iowa Ct. App. Jan. 19, 2006). He then filed an application for postconviction relief in March 2007, raising various ineffective-assistance-of-counsel claims. A hearing on Lampman's application was held in April 2008. One month later, Lampman filed an application to reopen the case and receive additional testimony. He alleged that following the postconviction hearing in April, B.C. contacted members of his family and told them she had lied at Lampman's criminal trial.

A second hearing was held in October 2008. B.C., who was now seventeen years old, testified that much of her testimony at Lampman's trial was untrue. She stated the night S.B. stayed at her house in May 2003, S.B. came into B.C.'s room "and told me everything, but I didn't really think anything of it . . . because she says stuff like that all the time for a lot of people." Later in the hearing, B.C. testified S.B. called her the Sunday after their sleep-over

> and she was really worried. She said that they, her and Jimmy, did stuff and that she was worried about what was going to happen and, you know, is she going to get in trouble. You know, are they going to believe her . . . and I had told her that I will go ahead and

> go in on it with her so that, you know, whatever happens we're still friends . . . .

At one point in her testimony, B.C. stated she saw Lampman "do certain things to S.B. the night she stayed . . . but I believe that she forced it. Well, . . . brought it upon herself." B.C. contradicted that statement later in her testimony, stating,

> Um, I never saw him do anything to her. He never did anything to me. All I had to go on was that she told me that . . . night that her and Jimmy did stuff, but I never went further as to what.

According to B.C., she and S.B. did not "talk much about details because after that conversation she hung up, she had to go . . . and we couldn't talk after that because we were told by the courts not to talk to each other." B.C. could not explain why the stories they told the police and at trial were so similar. But she testified "I knew what to say" regarding the details of the abuse because "I was molested by my . . . mom's boyfriend" from "the age of seven to the age of nine."

Following the hearing, the district court entered a detailed ruling denying all of Lampman's claims. Lampman appeals.

II. Discussion.

A. Recantation.

"Ordinarily, our review of postconviction relief proceedings is for errors of law." *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa Ct. App. 1990). "We will not disturb the trial court's denial of postconviction relief if the trial court's findings of fact in support of its judgment are supported by substantial evidence and are justified as a matter of law." *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994).

Postconviction relief proceedings are not a "means for relitigating claims that were or should have been properly presented at trial or on direct appeal." *Id.* Any claim that was not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is a sufficient reason for not properly raising it previously. *Id.* Evidence that is newly discovered may satisfy the sufficient-reason requirement for not raising an issue on direct appeal. *Id.*

> In order to prevail on such a claim, an applicant must show:
>
> (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) its admission would likely change the result if a new trial were granted.

Id. The disputed issue here is whether admission of B.C.'s recantation testimony would likely change the result if Lampman was granted a new trial. The district court concluded it would not. We agree.

A witness's recantation of testimony "is looked upon with utmost suspicion." *State v. Compiano*, 261 Iowa 509, 516, 154 N.W.2d 845, 849 (1967). The "postconviction court is not required to believe the recantation, and has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result." *Adcock*, 528 N.W.2d at 647. "That determination will not be disturbed upon appeal unless it is reasonably clear that such discretion was abused." *State v. Frank*, 298 N.W.2d 324, 328 (Iowa 1980).

The district court found B.C.'s recantation testimony was not credible for the following reasons:

> First, she is now a troubled seventeen-year-old girl, who, by her own admission, has a history of self-abuse, at least one suicide attempt, years of counseling and many months of out-of-home treatment in a juvenile facility. She and her mother now live in a home . . . which directly adjoins the property of the applicant's sister, Dawn . . . and her son, Kolby. The witness stated that she and Kolby have "always been close," and they have a "relationship" now.
>
> Additional insight into [B.C.'s] reasons to recant was given by applicant's witness Elaine Sprain . . . . Sprain testified that she was at the apartment of her son, Brooke, in August 2008, in the company of her son and other young persons. On that occasion, [B.C.] . . . came to the door of Brooke's apartment and Sprain stated that she voiced objection to allowing [B.C.] entrance to the apartment. At that time, according to Sprain, she was informed that [B.C.] was now "OK" due to the fact that she had "confessed" that she had lied about Lampman at his trial. With that assurance, [B.C.] was admitted to the group of young people present. Further, according to Sprain, [B.C.] spent the afternoon describing to the company how she had "fabricated" her testimony for Lampman's trial in 2004. According to Sprain, [B.C.] stated to the company that she had conspired with [S.B.] and they had written their story out in a notebook.
>
> [B.C.'s] testimony on October 23, 2008, directly contradicts that version of the fabrication of any testimony. In fact, [B.C.] testified that [S.B.] had phoned her on the Sunday afternoon following the events alleged—Sunday, May 25, 2003. . . .
>
> . . . .
>
> According to [B.C.'s] October 23 testimony, she and [S.B.] did not talk much about details and they "never said anything, spoke anything again."
>
> In accepting [B.C.'s] current version of the events of that May evening in 2003, the court is being asked to conclude that two young mentally challenged girls, one of whom had no indication of prior sexual contact, concocted a fabricated story to incriminate this applicant.

The court then engaged in a detailed analysis of B.C. and S.B.'s testimony at Lampman's criminal trial, following which it stated, "The internal consistencies between the two girls' accounts of these events is especially striking given [B.C.'s] present statement that the girls never talked about details."

Finally, the court found B.C.'s supposed reason for fabricating the story she told at trial suspect, stating:

> There is no discussing by [B.C.] of what would have been a more reasonable method to maintain this friendship with [S.B.]: simply be supporting and compassionate to the young girl who had been the recipient of Lampman's sexual advances. [B.C.] simply does not discuss the only rational response to [S.B.'s] disclosure to her. Nor does she explain why this friendship necessitated [B.C.] fabricating a detailed and elaborate tale incriminating Lampman.
>
> Nor does [B.C.] suggest that she could also have been supportive of her friend by simply agreeing to say she witnessed Lampman's sexual abuse of [S.B.].
>
> Of additional note to the court is [B.C.'s] obvious hatred for her former friend, [S.B.]. [B.C.] has now formed an alliance, a friendship with Lampman's sister, Dawn Tripp, and a "relationship" with her son.

We find no abuse of discretion here. As the district court recognized, "it is extremely difficult to give much credibility to one who takes the stand and testifies that he previously lied under oath." *Adcock*, 528 N.W.2d at 648. There are "sufficient discrepancies, unusual departures and changes of testimony" in the story B.C. told at the postconviction hearing from which the trial court could conclude her testimony at the time of trial, and not at the hearing, was the true statement of the events that transpired. *Compiano*, 261 Iowa at 521-22, 154 N.W.2d at 852; *see also Frank*, 298 N.W.2d at 329 (stating a person convicted of a crime should not be granted a new trial unless the court is satisfied the testimony of a material witness was false or mistaken). We therefore affirm the district court on this issue.

B. Ineffective Assistance of Counsel.

Lampman next raises a number of ineffective-assistance-of-counsel claims, all of which were denied by the district court. We conduct a de novo

review of such claims. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to establish his trial counsel was ineffective, Lampman must show both that his attorney failed in an essential duty and that the failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

To prove the first prong, Lampman must show the attorney's performance fell outside the normal range of competency. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). "The second prong—prejudice—exists 'when it is reasonably probable that the result of the proceeding would have been different.'" *Id.* (citations omitted). We may resolve the claim on either prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

1. Omission of Intent in Jury Instruction. Lampman claims his trial counsel was ineffective for not objecting to the marshalling instructions for second- and third-degree sexual abuse because those instructions did not include any element of intent. We find no merit to this claim. *See Dudley*, 766 N.W.2d at 620 ("[C]ounsel has no duty to raise an issue that has no merit.").

In *Lamphere v. State*, 348 N.W.2d 212, 217 (Iowa 1984), a marshalling instruction similar to that given here, absent inclusion of intent, was found erroneous.[1] However, the court found the error was not reversible because the elements included in the marshalling instruction made it quite unlikely that a jury would find an accused who forced a victim to engage in a sex act would not have acted knowingly and intentionally in perpetrating such an act. *Lamphere*, 348

[1] The marshalling instructions in both *Lamphere* and the present case were based on uniform jury instructions devoid of any element of intent.

N.W.2d at 217; *see also State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983) (stating the facial appeal of an argument that an essential element was omitted from a marshalling instruction "is diminished in those situations where practical considerations make it unlikely that the inclusion" of that element "would have produced any difference in the verdict of the jury").

Here, in order to find Lampman guilty of second- and third-degree sexual abuse, the marshalling instructions required the jury to find Lampman performed sex acts with B.C. and S.B. when they were under the ages of twelve and fourteen respectively. The fighting issue was whether Lampman committed the alleged sex acts.[2] *See Blackford*, 335 N.W.2d at 178. Like the courts in *Lamphere* and *Blackford*, we conclude it is quite unlikely that a jury would find Lampman performed the sex act but did not act knowingly and intentionally in so doing. *See Lamphere*, 348 N.W.2d at 217; *Blackford*, 335 N.W.2d at 178 ("'In the context of sexual abuse prosecution the act itself is one which is seldom if ever done unintentionally.'" (citation omitted)). We also note the jury was correctly instructed as to the requisite general intent in an instruction following the marshalling instructions. *See State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984) (finding no prejudice occurred due to marshalling instruction error where jury was correctly informed of missing element in a separate instruction and that

[2] We find Lampman's argument regarding his lack of motive to sexually abuse the children vis-à-vis his admission at trial that they caught him masturbating to be confusing and unpersuasive. The State did not allege Lampman sexually abused the children by masturbating in front of them. Instead, it alleged Lampman engaged in prohibited *sexual contact* with them, which Lampman denied. *See* Iowa Code §§ 709.1(3) (defining "sexual abuse" as any "sex act" between persons when one of the participants is a child), 702.17 (defining "sex act" to mean "any sexual contact" between two or more persons by hand to genital contact, mouth to genital contact, or genital to genital contact).

element was not a fighting issue in the case). We therefore deny this assignment of error.

2. Laboratory Report and Receipt. Lampman next claims his trial counsel was ineffective for failing to object to admission of the laboratory report and attached laboratory receipt as an exhibit at trial. He first argues admission of the exhibit was improper because the report and receipt referred to Lampman as the "suspect" and S.B. as the "victim." We reject this argument because Lampman has failed to show any prejudice resulted from the use of those terms in the challenged exhibit.

Other jurisdictions that have addressed the use of the term "victim" have not found such references prejudicial. *See State v. Nomura*, 903 P.2d 718, 722 (Haw. Ct. App. 1995) (finding use of term "victim" in jury instructions did not prejudice defendant); *State v. Wigg*, 889 A.2d 233, 236-38 (Vt. 2005) (finding a detective's use of "victim" was synonymous with "complainant" and harmless error). Similarly, in this case, the terms "victim" and "suspect" in the laboratory report and receipt were used as synonymous with the terms "complainant" and "defendant." Moreover, although the word "victim" appeared in some of the jury instructions, it was not used gratuitously at trial by the prosecutor, court, or defense counsel. The record provides no basis for concluding the jury was diverted from their fact-finding mission by the occasional references to the term. Finally, we observe the laboratory report was actually favorable evidence for Lampman as it found no physical evidence connecting him to the crime.

Lampman next argues his trial counsel should have objected to admission of the laboratory receipt as part of the laboratory report. He analogizes the receipt to an evidence tag, which our courts have held should not be submitted to juries. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005) ("We have long held it is error for the district court to allow the prosecution to submit evidence to the jury with statements written on attached evidence tags.").

Lampman contends the laboratory receipt "constituted rank hearsay" that provided a "'neat' condensation" of the State's whole case against him. *See State v. Branch*, 222 N.W.2d 423, 427 (Iowa 1974). The receipt did list the type of crime alleged, the date of the crime, and the location of the crime. However, in light of the evidence properly admitted at trial, this summary information would have had little, if any, effect. *See Martin*, 704 N.W.2d at 670 n.3; *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (stating no prejudice exists if erroneously admitted hearsay is merely cumulative of other admissible evidence). Such a consideration is proper here given that we are analyzing the issue under an ineffective-assistance-of-counsel rubric. *See Martin*, 704 N.W.2d at 669-70; *cf. Branch*, 222 N.W.2d at 427. Lampman has not shown a reasonable probability that the outcome would have changed had the laboratory receipt not been submitted to the jury. *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Martin*, 704 N.W.2d at 670.

3. Lesser-Included Offenses. Lampman claims his trial counsel was ineffective for failing to request jury instructions on the lesser-included offenses of "assault and battery" to the crimes of second- and third-degree sexual abuse.

We believe this claim is controlled by our supreme court's decisions in *State v. Anderson*, 636 N.W.2d 26 (Iowa 2001) and *State v. Constable*, 505 N.W.2d 473 (Iowa 1993). Those decisions reasoned that where, as here, force or consent is not an issue, any lesser-included offenses based on assault are excluded. *Anderson*, 636 N.W.2d at 38 (rejecting claim that assault is a lesser-included offense of sexual abuse in the third degree); *Constable*, 505 N.W.2d at 477 (rejecting claim that assault is a lesser-included offense of sexual abuse in the second degree). This is because our legislature "recognized that an adult may have contact with a child which that child may not recognize as inappropriate; a sex act with a child may not necessarily occur by force or against the child's will." *Constable*, 505 N.W.2d at 476. Lampman's attempt to distinguish these cases is not convincing.

4. Constitutionality of Iowa Code Section 901.8. Lampman's next claim concerns our state's consecutive sentencing statute—Iowa Code section 901.8. That statute provides in relevant part: "If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence." Iowa Code § 901.8.

Citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), Lampman argues section 901.8 violates his right to procedural and substantive due process because a judge, rather than a jury, is allowed to determine whether consecutive sentences should be imposed pursuant to grounds unknown to the defendant. Our supreme court dismissed a

similar argument under the federal constitution in *State v. Jacobs*, 644 N.W.2d 695, 698-99 (Iowa 2001) (finding *Apprendi* had no application to section 901.8 because the "imposition of consecutive sentences did not depend on the finding of a statutorily prescribed fact"). More recently, in *Oregon v. Ice*, ___ U.S. ___, ___, 129 S. Ct. 711, 714, 172 L. Ed. 2d 517, ___ (2009), the United States Supreme Court observed, "It is undisputed that States may" "entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently."

In light of those cases, Lampman advances his challenge to the statute under the Iowa Constitution, but offers no principled reason why a different result should be reached under our state constitution. *See State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J. specially concurring) ("[W]e generally decline to consider an independent state constitutional standard based upon a mere citation to the applicable state constitutional provision."). Nor is such a reason apparent to us. *See State v. Criswell*, 242 N.W.2d 259, 261 (Iowa 1976) (finding no constitutional infirmity in our consecutive sentencing statute).

5. Inconsistent Verdicts. In his fifth ineffective-assistance-of-counsel claim, Lampman asserts the jury's verdict acquitting him of two counts of second-degree sexual abuse of B.C. was inconsistent with its verdict finding him guilty of one count of second-degree sexual abuse of her. However, as the State points out, "inconsistent verdicts on multiple counts in the same trial do not ordinarily taint the validity of a verdict of guilt." *State v. Fintel*, 689 N.W.2d 95, 100 (Iowa 2004); *see also State v. Hernandez*, 538 N.W.2d 884, 889 (Iowa Ct. App. 1995)

("[T]he most desirable course of action to follow when confronted with inconsistent verdicts is to simply insulate the verdict from review.").

"If jury verdicts are to be examined for inconsistency, the test to be applied is whether the verdict is so logically and legally inconsistent as to be irreconcilable within the context of the case." *Fintel*, 689 N.W.2d at 101. Lampman's claim fails under that test. The State alleged Lampman sexually abused B.C. on May 24, 2003, and on two other separate occasions between the dates of May 1, 2001, and June 1, 2003. The jury was instructed accordingly. We find no inconsistency in its resulting verdict.

6. Cumulative Error. Lampman finally claims the cumulative effect of his counsel's alleged errors was so prejudicial to him that he was denied a fair trial. Because we have found no errors in connection with any of the issues raised by Lampman, we reject this claim. *See State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

III. Conclusion.

For the foregoing reasons, we affirm the district court's judgment denying Lampman's application for postconviction relief.

IV. Postscript.

The parties' 613 page appendix contains at least 314 pages of transcript. Although the name of each witness was inserted at the top of the page where the witness's testimony began, the names of the witnesses were not inserted at the top of *each* page where the witnesses' testimony appeared. This violation of Iowa Rule of Appellate Procedure 6.905(7)(*c*) may seem trivial, but having a

witness's name inserted at the top of each page makes our job navigating an appendix much easier. Parties' compliance with the rules helps this court achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1). We do note that the parties, although not required by the rules, did indicate in the table of contents whether the witnesses' testimony was direct, cross, redirect or recross, the page number where each started, and the identity of the examiner. Without discouraging the practice, we suggest such indications would be more helpful if placed at the top of each page of testimony.

AFFIRMED.