IN THE COURT OF APPEALS OF IOWA

No. 0-790 / 10-0182
Filed December 22, 2010

MONTRELL DESHONE ANDERSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Applicant appeals the district court order denying his request for postconviction relief. **AFFIRMED.**

Scott A. Hall of Carney & Appleby, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Mansfield, P.J., Danilson, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

I. Background Facts & Proceedings

Montrell Anderson was convicted of first-degree burglary and second-degree sexual abuse, in violation of Iowa Code sections 709.3 and 713.3 (2005). The State alleged that on July 31, 2005, Anderson entered the home of Lynn, with whom he had been having a romantic relationship, uninvited and engaged in sex acts with her against her will.

During the first day of Anderson's criminal trial, on November 2, 2005, Lynn testified Anderson did not have a key to her home and she did not invite him over on July 31, 2005. Lynn stated she "cringed" when she heard Anderson come into her home because he had earlier left a telephone message for her that stated, "Bitch, soon as I see you, I'm going to check you, Bitch. On my life, Bitch, your ass is void when I see you," and she understood that to mean he was going to hurt or kill her.[1] She testified Anderson poked her in the head with his index finger, which was painful to her because she recently had surgery on her neck. She stated Anderson grabbed her throat and put her up against the wall in her bedroom. Lynn stated she believed Anderson was either going to strangle her or paralyze her as "I was supposed to be extremely careful because of my plates being fused into my spine."

Anderson told Lynn to take her pants off so he could put his fingers inside her vagina because he believed he would be able to tell if she had been with another man. Lynn testified she laid down on the bed and complied "[b]ecause I didn't know what he was going to do to me and I was scared that he was going to

[1] Lynn stated the parties had an argument on the evening of July 30, 2005.

hurt me more." After Anderson put his fingers in Lynn's vagina, he stated he needed to do the next test of having sexual intercourse with her to determine if she had been with anyone else. Lynn testified she told him no, but he pulled down his pants and proceeded to have sexual intercourse with her.

On the second day of trial Lynn affirmed, outside the presence of the jury, that everything she had testified to the day before was truthful and accurate. She expressed some concerns to the court that Anderson could be sentenced to sixty years in prison if convicted, and she believed that was too much. The judge warned Lynn she could not mention anything about sentencing. Lynn then testified for the defense, stating Anderson had a key to her home. She also stated she sent Anderson sexually explicit text messages in the early morning hours of July 31, 2005.

Yvonne Weatherly, Lynn's neighbor, testified she telephoned the police over Lynn's objections. Weatherly stated Lynn "was just, like, she was confused, you know, like—well, yeah, it happened but really it didn't happen, like that." She also stated, "she [Lynn] didn't really know if it was really rape or she didn't really know if it was just rough sex because he was mad at her." The State impeached Weatherly with evidence of prior convictions for forgery, and asked if she had been sentenced to fifty years in prison.[2]

Desirai Wright, another neighbor, testified that immediately after the incident Lynn stated she had been raped by Anderson and "as he was raping her he was choking her and pointing at her head like this with his finger." Wright

[2] The State also questioned Weatherly concerning prior convictions for failure to affix a drug tax stamp and sale or manufacturing of a narcotic.

testified she believed Anderson was living at Lynn's home. The State impeached Wright with evidence she had two previous convictions for fifth-degree theft.

Anderson did not testify. The district court denied Anderson's motion for judgment of acquittal. The State made an oral motion in limine asking to prevent Anderson from arguing that the sex acts were consensual because he had presented no evidence of consent. The district court ruled there was no evidence the sex acts were consensual, and determined Anderson could not argue consent. The court went on to state, "you can certainly argue that it wasn't by force or against her will based on circumstantial evidence that you have." Defense counsel argued the court was placing a burden on defendant to come forward with some evidence. The court ordered defense counsel could not use the term "consensual," but could still argue the State had failed to prove it was by force or against the will.

During closing argument the prosecutor stated that under one theory for first-degree burglary, the State needed to show Anderson remained in the home after his right, license, or privilege to be there had expired. The prosecutor stated:

> But the other thing is which hasn't been so much as even rebutted here, is under 4, the alternative for 4, all we would have to prove for element 4 is either the first part or the second. The defendant remained there after his right, license, or privilege to be there had expired. And [Lynn] has never said anything to the contrary that she said all along, she told him to leave, stop it, I don't want to do this, no, leave.

Defense counsel moved for a mistrial on the ground that when the prosecutor said the evidence on this issue had not even been rebutted, the State

was attempting to place the burden on the defense. The prosecutor stated "I place no burden on the defense, I'm just commenting on the evidence in this particular case." The district court denied the motion for a mistrial.

The jury returned verdicts on November 8, 2005, finding Anderson guilty of first-degree burglary and second-degree sexual abuse. In a letter dated November 12, 2005, Lynn recanted much of her previous testimony. She also wrote an undated letter that stated she told the prosecutor she wanted to tell the truth, and "he threaten me with perjury and going to jail."[3]

Anderson filed post-trial motions pointing out that the victim had recanted. Lynn testified at a post-trial hearing that she did not tell the truth on the first day of the trial. She stated she had been threatened with perjury when she testified on the second day. The district court denied the motions, finding Lynn's written statement was not credible, and her testimony at the hearing was incredible and untruthful. Anderson was sentenced to a term of imprisonment not to exceed twenty-five years on each count, to be served concurrently.

Anderson appealed, claiming his convictions should be overturned because Lynn recanted her testimony. The Iowa Court of Appeals affirmed his convictions, noting the trial court was in the best position to assess the victim's credibility. *See State v. Anderson*, No. 06-1212 (Iowa Ct. App. Mar. 14, 2007).

[3] This letter is file stamped November 14, 2005. It is not dated, but appears to have been written after the verdict because Lynn states she felt the police "used me to put him away for years for something he didn't do."

Anderson filed an application for postconviction relief.[4] During the postconviction hearing, the State questioned Anderson extensively about the contents of the pre-sentence investigation (PSI) report and his criminal history. At one point the court commented, "Just so you know, none of this really has anything to do with the post-conviction relief action." The State also asked the court to take judicial notice of the file in a different criminal case involving Anderson. The court stated it would take judicial notice of the case, but stated, "I think it really went to the State's looking into what your purpose, or motive, or intent of filing this post-conviction relief action was. And again, the Court's not really interested in that."

In his postconviction action, Anderson raised the following claims of ineffective assistance of counsel: (1) trial counsel failed to object when the prosecutor mentioned Lynn was in fear of being paralyzed; (2) trial counsel failed to object to the prosecutor's intimidation of Lynn; (3) trial counsel failed to object to improper impeachment of Weatherly; (4) trial counsel failed to object to the prosecutor's misstatement regarding Weatherly's criminal history; (5) trial counsel failed to object to the prosecutor's statement that Anderson had been asked to leave Lynn's house; (6) appellate counsel failed to raise the issue that the court improperly ruled on the State's motion in limine precluding him from arguing the sex acts were consensual; (7) appellate counsel failed to raise the issue that the court erroneously overruled his objection that the State was attempting to shift the burden of proof; and (8) appellate counsel failed to raise

[4] Anderson filed a pro se application for postconviction relief on September 4, 2007. An amended application was filed on July 31, 2008, that further specified his grounds for relief.

the other issues set forth in his application for postconviction relief. After considering and discussing each of these grounds, the district court denied Anderson's application for postconviction relief. Anderson now appeals.

II. Standard of Review

Postconviction proceedings are law actions ordinarily reviewed for the correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). Claims of ineffective assistance of counsel, however, are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume that representation by counsel is competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

III. Ineffective Assistance of Trial Counsel

A. Anderson contends he received ineffective assistance of trial counsel due to counsel's failure to object or move for a mistrial when Lynn was threatened with perjury if she recanted her testimony. Lynn wrote a letter dated November 12, 2005, recanting much of her testimony from the first day of trial. In the undated letter she stated, "I tried to get up on the stand, I told the prosecutor I was getting up to tell the truth, and he threaten me with perjury and going to jail." At the hearing on post-trial motions, on December 9, 2005, Lynn testified that on the second day of trial, she had been threatened by the county attorney with

perjury if she changed her testimony. She stated she wanted to change her testimony, but was afraid to do so.

The State points out there is no evidence during the trial that Lynn was threatened with perjury. Lynn did not testify at the time of the trial that the county attorney had threatened her with perjury charges. On the second day of trial Lynn was questioned outside the presence of the jury, and she stated she affirmed everything she had testified to the day before as being truthful and accurate. She also expressed concern that Anderson was potentially facing sixty years in prison.

All of the evidence that Lynn was threatened by the county attorney arose after the verdicts on November 8, 2005. Lynn's letter recanting her testimony from the first day of trial is dated November 12, 2005. Her other undated letter, stating she had been threatened with perjury and going to jail, was apparently written after the verdict because Lynn states she felt she had been "used to put him away for years."

Because there was no evidence during the trial that Lynn had been threatened by the county attorney, trial counsel had no reason to object or move for a mistrial. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (noting defense counsel has no duty to make a meritless motion). We affirm the district court's decision denying Anderson's claim of ineffective assistance of counsel on this issue.

B. Anderson claims he received ineffective assistance due to trial counsel's failure to object when the prosecution employed improper methods of

impeachment to discredit the testimony of Weatherly. The prosecutor asked Weatherly whether she had been sentenced to fifty years in prison after pleading guilty to multiple charges of forgery. Weatherly had pled guilty to nine counts of forgery, and the maximum sentence for each count of this class "D" felony is a term of imprisonment not to exceed five years. *See* Iowa Code §§ 715A.2(2)(a), 902.9(5). Anderson asserts defense counsel should have objected because the prosecutor misstated the length of Weatherly's sentence.

Iowa Rule of Evidence 5.609(*a*) permits the impeachment of a witness by evidence of a "crime punishable by death or imprisonment in excess of one year," if the probative value of the evidence outweighs its prejudicial effect, or evidence of a crime involving "dishonesty or false statement, regardless of punishment." *State v. Parker*, 747 N.W.2d 196, 206 (Iowa 2008). Weatherly's forgery convictions involved dishonesty or false statement, and so could properly be used for impeachment under rule 5.609. *See State v. Latham*, 366 N.W.2d 181, 184 (Iowa 1985) (noting robbery, which encompassed "stealing in an elemental sense," involved dishonesty (citation omitted)); *State v. Miller*, 229 N.W.2d 762, 769 (Iowa 1975) (finding offenses involving "deceit, fraud, cheating, or stealing" reflect on honesty and integrity (citation omitted)).

We first note the incorrect information about the length of Weatherly's sentence was found in the court records.[5] The prosecutor apparently repeated the incorrect information he had received. Additionally, the question about the length of Weatherly's sentence was irrelevant. Weatherly answered she went to

[5] Anderson's appellate brief acknowledges that the prosecutor's erroneous question was likely due to a typographical error in the online court records, which indicated at one point that Weatherly had been sentenced to a term of "50 year(s)."

prison for ninety days and then was released on probation. The jury was instructed that "statements, arguments, questions and comments by the lawyers" were not evidence. Therefore, although the question contained a factual misstatement, Anderson has not shown he was prejudiced by counsel's failure to object to the question.

Weatherly was also questioned about whether she had been convicted of sale or manufacture of a controlled substance and failure to affix a drug tax stamp. Anderson asserts defense counsel should have objected because the drug-related convictions did not involve crimes of dishonesty. Generally, drug possession convictions have little bearing on veracity. *Parker*, 747 N.W.2d at 208. In this case, however, Weatherly had already been impeached by evidence of her nine convictions for forgery, a crime involving dishonesty, and evidence of two additional drug-related convictions would have had little impact on the jurors' assessment of her credibility. We conclude Anderson was not prejudiced by trial counsel's failure to object on this ground. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (noting that in order to prove prejudice, an applicant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different).

C. Anderson claims he received ineffective assistance because trial counsel did not object when the State misstated Weatherly's criminal record by alleging she had been convicted of theft. In closing arguments the prosecutor stated of Weatherly and Wright, "both of them have felony convictions," "both of them have theft convictions," "[t]hey're felons and thieves, for lack of better

words."[6] As noted above, Weatherly had convictions for forgery, sale or manufacture of a controlled substance, and failure to affix a drug tax stamp. There was no evidence she had been convicted of theft.

We determine Anderson was not prejudiced by trial counsel's failure to object to the prosecutor's statement that Weatherly had been convicted of theft. The use of the word "theft" instead of "forgery" is immaterial in this instance. As the district court noted in ruling on Anderson's postconviction application, "[t]rial counsel was not ineffective for failing to object to this subtle difference in verbiage during closing argument, nor did this result in prejudice to Anderson." Anderson has not shown the result of the trial would have been different if trial counsel had objected when the prosecutor failed to correctly state Weatherly had been convicted of forgery, instead of using the word "theft." *See id.* at 143-44 ("[A]n applicant must meet 'the burden of showing that the decision reached would reasonably likely have been different absent the errors.'" (citation omitted)).

D. Anderson argues he received ineffective assistance because trial counsel failed to object when the prosecutor referred during closing arguments to evidence not in the record. The prosecutor stated Lynn had repeatedly told Anderson to leave her home, and this evidence showed Anderson remained in the home after his right, license, or privilege had expired. Anderson asserts there is no actual evidence in the record that Lynn asked him to leave.

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[6] During cross-examination Wright admitted she had been previously convicted of fifth-degree theft on two separate occasions.

On the first day of trial Lynn testified Anderson just walked into her home, and she was "pissed off" her roommate had left the door unlocked. She stated Anderson had not been invited over and was not welcome at that time. When Anderson was poking Lynn in the head she told him to stop. She also told him no before he engaged in sexual intercourse with her. Lynn was questioned, "Did you ever tell him to stop during that period of time?" and she replied, "At first I told him to, and then I just became numb and just laid there."

The district court determined, Lynn "clearly told the [defendant] to stop on numerous occasions, whether she used the word 'leave' or not." We agree with the district court's conclusion that whether or not Lynn actually used the word "leave," Anderson's conduct of hitting, poking, choking her, in addition to the sexual abuse, and her response of telling him to stop, indicates that Anderson remained in the residence after his right, license, or privilege to be there had expired. *See* Iowa Code § 713.1 (defining offense of burglary).

Anderson has not shown he received ineffective assistance due to trial counsel's failure to object to the prosecutor's statements during closing argument. Even if counsel breached an essential duty by failing to object, Anderson has not shown he was prejudiced by counsel's performance. Lynn had also testified Anderson had just walked into the home, when he was not invited and was not welcome. Anderson has not shown the result of the trial would reasonably likely have been different if trial counsel had objected when the prosecutor stated during closing arguments that Lynn told Anderson to leave. *See Ledezma*, 626 N.W.2d at 143-44.

IV. Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel are considered under the same two-prong test as other claims of ineffective assistance of counsel. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). Generally, we are reluctant to second-guess an appellate attorney's selection of issues to raise on appeal. *Id.*

A. Anderson contends he received ineffective assistance because appellate counsel did not claim in the direct appeal that the district court erred by ruling on the State's motion in limine that he could not argue that the sex acts were consensual. He asserts the district court erred by finding there was no evidence of consent in the record. Anderson also contends the court made a false legal distinction between the word "consent" and the argument that the sex acts did not occur against the will or by force. He states that by saying the sex acts were not against the will or by force, this is the same as saying there was consent, and so he should have been able to argue there was consent.

Whether or not there was direct, affirmative evidence in the record that would support a finding the sex acts were consensual, we find Anderson was not prejudiced by appellate counsel's failure to raise this issue on appeal. Anderson's trial counsel was permitted to argue the State had not shown the sex acts were by done by force or against the will of Lynn. *See* Iowa Code § 709.1(1) (defining offense of sexual abuse). According to Anderson's own argument, this is the same as saying there was consent. As the district court noted, "the trial court did not substantially limit the ability of trial counsel to fully

discuss the facts and circumstances of this case, including the prior relationship of the parties." Anderson cannot show he suffered harm as a result of the court's ruling. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (noting a defendant must show that counsel's unreasonable errors had an actual adverse impact on his case).

B. Anderson asserts he received ineffective assistance because appellate counsel did not argue that the district court erred in denying his motion for a mistrial. Defense counsel moved for a mistrial on the ground that when the prosecutor said the evidence on whether Anderson had been asked to leave had not been rebutted, the State was attempting to place the burden on the defense. He claims that due to the prosecutor's statement during closing arguments the jury received the impression he was required to present evidence that he had the right to be in the home.

The record shows the jury was clearly informed the State had the burden of proof. The jury instructions state, "The plea of not guilty is a complete denial of the charge and places the burden on the State to prove guilt beyond a reasonable doubt." The district court denied the motion for mistrial, stating "I find that the comments were within the parameters, it was consistent in the context of the argument concerning the evidence and the instructions." Defense counsel subsequently argued extensively that the State had the burden of proof.

We conclude Anderson has not shown he received ineffective assistance due to appellate counsel's failure to raise this issue on appeal. *See Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987) (noting competent and experienced

attorneys raise only the strongest issues on appeal). Anderson has not shown the district court erred in ruling on the motion for mistrial. For this reason, even if the issue had been raised on appeal Anderson has not shown there is a reasonable probability his conviction would have been reversed based on the court's ruling. Anderson has not shown he was prejudiced by the court's ruling.

V. Postconviction Proceeding

Anderson claims the district court erred by not applying the Iowa Rules of Evidence during the postconviction hearing. He points out that under section 822.7, in postconviction proceedings "[a]ll rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties." *See Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998). In particular, he asserts rule 5.404, regarding evidence of prior bad acts, and rule 5.609, regarding impeachment by prior convictions, should have been applied. Anderson claims the State was improperly permitted to question him extensively during the postconviction hearing about his criminal history and convictions for other crimes.

The State asked the court to take judicial notice of the PSI report, postconviction counsel did not object, and the court agreed to take notice of the report. Counsel objected, however, on the grounds that the rules of evidence should be applied and Anderson should only be questioned about impeachable offenses.[7] The court overruled his objections. Additionally, the State asked the

[7] On appeal, Anderson claims the procedural defects in this case were severe enough to violate his due process rights. *See Mitchell v. Johnson*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992). Anderson did not raise his constitutional claims before the district court, however, and we conclude he has not preserved this issue for our review. *See State v.*

court to take judicial notice of a different criminal case involving Anderson. Postconviction counsel objected on the ground of relevance, and the court overruled the objection.

Under rule 5.103(*a*), "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." We consider whether the rights of the complaining party have been injuriously affected, or there has been a miscarriage of justice. *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). When an error in an evidentiary ruling is harmless, there is no basis for relief on appeal. *Parker*, 747 N.W.2d at 209. We presume prejudice unless the record affirmatively establishes otherwise. *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006).

The record affirmatively establishes in this case that there was no prejudice to Anderson based on the court's rulings denying his objections to the admission of evidence at the postconviction hearing. The record shows the court stated it was not really interested in Anderson's prior criminal history or the other court file. Furthermore, the postconviction ruling did not mention Anderson's criminal history or the other criminal case.

After reviewing each of the issues by Anderson on appeal, we affirm the decision of the district court denying his application for postconviction relief.

AFFIRMED.

Webb, 516 N.W.2d 824, 828 (Iowa 1994) (noting we do not consider issues raised for the first time on appeal, even those of a constitutional dimension).