**IN THE COURT OF APPEALS OF IOWA**

No. 1-372 / 09-1841
Filed June 15, 2011

**GLEN E. LONG,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Applicant appeals the dismissal of his application for post conviction relief.

**AFFIRMED.**

Angela Fritz Reyes, Davenport, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Michael Walton, County Attorney, and Scott Grubisich, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

**SACKETT, C.J.**

Applicant, Glen Long, appeals the district court's denial of his application for postconviction relief. Long claims his trial counsel was ineffective for failing to call experts on the issues of cross-racial identification and fingerprint analysis, and failing to request a jury instruction informing the jury they could consider the affect of cross-racial identification on the eyewitness testimony. We affirm the district court's denial.

**I. BACKGROUND AND PROCEEDINGS.** On April 26, 2006, Long was convicted of robbery in the first degree, theft in the first degree, assault while displaying a weapon, and going armed with intent.[1] The conviction was based on allegations he robbed a convenience store with a knife on September 7, 2001.

The evidence produced at trial indicates around 7:30 p.m., while Amy Barton was working at a cash register, an African-American man entered the store, asked for a package of cigarettes, and grabbed a drink from the cooler. The man came behind the counter with a knife demanding money from the cash drawer. According to Barton, the man wore a gray shirt and khaki shorts and did not have facial hair. Barton saw the man for at least a minute or two before he took the money and left the store. Barton followed the man into the parking lot observing him get into a white Chevrolet car. Barton was able to write down the license plate 548 ERI on her hand, and returned to the store to call the police. The police showed Barton a photo array of possible suspects the day following

[1] Judgment and sentence was not imposed on the assault while displaying a weapon charge as it merged with the going armed with intent charge under Iowa Code section 708.2(3) (2001).

the robbery. She immediately identified Long as her assailant, and she identified him at trial.

Another patron of the gas station, Casey McCaffrey, also saw the suspect exit the store, get into a white car, and leave. While McCaffrey thought the suspect had a beard, he also saw the license plate and testified at trial it was "5 something ERI." McCaffrey was not asked to identify anyone in the courtroom during trial.

The police connected the license plate number provided by Barton and McCaffrey to a white Chevrolet owned by Nicole Chisolm. Cheryl Hoyt, Chisolm's neighbor, testified at trial her neighbor did own a white vehicle and the vehicle was not in the driveway on the date in question. She also testified Nicole had an African-American boyfriend who was often with Hoyt and who she had seen driving the white car. At trial, Hoyt was not able to recognize anyone in the courtroom.

The jury returned a verdict of guilty on all charges. Long appealed his conviction to this court and we affirmed his conviction in *State v. Long*, No. 02-0785 (Iowa Ct. App. Feb. 12, 2003). The supreme court took the case on further review and issued an order for the limited purpose of preserving, for postconviction relief, Long's ineffective-assistance-of-counsel claim based on his attorney's failure to call an expert witness to testify on cross-racial identification.

Long filed his application for postconviction relief on November 13, 2003. At the hearing on October 22, 2009, Long introduced through a deposition the testimony of Otto Maclin, a cross-racial identification expert. Maclin testified he

believed expert testimony from a cross-racial identification expert, such as himself, would have been helpful to the jury in their deliberations; but he acknowledged he was not familiar with all the evidence in the case nor could he state that the eyewitnesses in this case identified the wrong person.

Long's criminal trial counsel, Julian Tobey, also testified at the hearing stating he was aware of the cross-racial identification issue and case law, but decided against retaining an expert on the issue. Tobey testified, "There are significant reasons from my point of view tactically that an expert in this case would have actually hurt more than it helped." Tobey further explained his decision and testified,

> The decision was -- unfortunately for Mr. Long, was that there is circumstantial evidence here that is very problematic. It arguably connects him with the offense, and there were factors in the allegations in this case that actually tended to toss his situation outside the most suspect cross-racial identifications. Those include good light at the scene of the offense. They included very close physical proximity. They included her (Barton's) ability to make an identification in a photo array, which I believe was six persons, all of African-American heritage, even though facial hair was different.
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> Also what was probably most devastating to Mr. Long's situation was that there was a nonvictim witness who got a complete license number of a car that he was alleged to have left the scene in. That license plate tracks back to a woman who had been his girlfriend at the time, and so the circumstantial, corroborating evidence was of the sort that had an expert taken the witness stand and asserted an opinion of a misidentification, having been a prosecutor at one time in my life, the first thing I would have done on cross would be to ask how that opinion might be affected by circumstantial evidence that connects the defendant with the offense that has no racial teeter-totter association with it.

Tobey also testified he knew there were usable latent prints found at the crime scene that did not belong to Long and were not identifiable in the State computer database. However, he said the fact fingerprints were found at the

crime scene that did not belong to Long was not unusual considering the public nature of the store.

The district court ultimately denied Long's application finding Tobey's decision not to call a cross-racial identification expert was a reasonable legal tactical choice. It also found Maclin's testimony failed to provide a specific conclusion or opinion that convinced the court his testimony would have made a difference in the outcome of the trial. The district court concluded there was no evidence a fingerprint expert would have made a difference in the outcome of the trial as no fingerprint evidence was used against Long.[2]

**II. INEFFECTIVE ASSISTANCE OF COUNSEL.** Because ineffective-assistance-of-counsel claims are based on a defendant's rights under the Sixth Amendment to the United States Constitution, our review is de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). In order to succeed on a claim of ineffective assistance of counsel, Long must prove: (1) counsel failed to perform an essential duty, and (2) he suffered prejudice as a result. *King v. State*, ___ N.W.2d ___, ___ (Iowa 2011). We presume counsel is competent and the applicant bears the burden to establish inadequate representation. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

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[2] Long also claimed counsel was ineffective for introducing into evidence his work paystubs, which listed his address as the address of Nicole Chisolm, Long's alleged girlfriend and owner of the white Chevy vehicle used in the crime. While counsel acknowledged introducing this evidence was a mistake, the district court found Long suffered no prejudice as the evidence of his guilt was overwhelming. This issue is not raised on appeal and will not be addressed.

But "strategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments." *Id*. To establish prejudice, Long must also demonstrate, but for counsel's unprofessional errors, the results of the trial would have been different. *Lyman*, 776 N.W.2d at 878.

**A. Expert Testimony.** Long's first claim is counsel failed to render effective assistance of counsel when he failed to call experts on cross-racial identification and fingerprint analysis. From our review of the record, we agree with the district court trial counsel's strategic decision not to call a cross-racial identification expert in this case was reasonable. In addition, we find Long has not suffered any prejudice from counsel's decision not to present a fingerprint expert.

Counsel testified at length regarding his knowledge and understanding of the issues surrounding cross-racial identification. At the time of Long's trial, counsel was aware of and considered the application of the rule announced in *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999), where the New Jersey Supreme Court held under certain circumstances, a jury instruction on cross-racial identification may be required. This is the very case Long seeks for us to apply on appeal to find his counsel ineffective. However, *Cromedy* addresses the requirement of giving a jury instruction on cross-racial identification not the calling of an expert. *Id*. In addition, the required jury instruction is only to be

given in certain cases where the eyewitness's identification is not corroborated by other evidence.[3] *Id*.

Counsel in Long's case knew of the *Cromedy* case, considered it, and decided calling an expert on this issue would hurt Long's defense because there was corroborating evidence supporting Barton's cross-racial identification—the license plate. As counsel testified, "any witness who took the stand to offer this testimony to a jury would be devastated on cross-examination by the circumstantial evidence that was supportive as opposed to injurious of identification." "[S]trategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Ledezema*, 626 N.W.2d at 143. We find trial counsel made a thorough investigation of the law and the facts of Long's case and made a reasonable strategic decision not to call a cross-racial identification expert due to the corroborating evidence in the case.

In addition Long suffered no prejudice as a result of counsel's failure to call a fingerprint expert. Long's argument is essentially if his counsel had retained an expert to testify that the fingerprints found at the scene were not his, he would have been acquitted. This argument ignores the fact acknowledged by trial counsel and the district court that the convenience store is a public place and one would expect to find fingerprints other than Long's. The fact there were

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[3] While Iowa has not officially adopted *Cromedy*, our supreme court has held the district court, in its discretion, can admit expert testimony on the reliability of eyewitness identifications "[w]hen an eye witness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1998).

fingerprints belonging to people other than Long does not create a substantial likelihood the outcome of the trial would have been different. *See King*, ___ N.W.2d at ___ (holding the likelihood of a different result "must be substantial, not just conceivable"). We need not address whether counsel breached an essential duty by failing to call a fingerprint expert as Long has failed to demonstrate prejudice on this issue. *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010) (holding an ineffective-assistance-of-counsel claim will fail if either element is lacking).

**B. Jury Instruction.** In addition to claiming trial counsel should have called an expert on cross-racial identification, Long's brief also asserts counsel should have requested a jury instruction allowing the jury to consider the issue of cross-racial identification. This issue was not raised in the district court nor did the court rule on the issue. We will not address issues raised for the first time on appeal. *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009).

**AFFIRMED.**