IN THE COURT OF APPEALS OF IOWA

No. 1-484 / 10-0233
Filed July 13, 2011

ALFRED LEGGETT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Applicant appeals the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Alfred Leggett, Coralville, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Applicant, Alfred Leggett, appeals the district court's denial of his application for postconviction relief. Leggett claims appellate counsel was ineffective in failing to challenge his waiver of lesser-included offenses and was ineffective for failing to raise the issue of the sufficiency of the evidence on direct appeal. Leggett also claims trial and appellate counsel were ineffective for failing to challenge the admissibility of hearsay statements made by the victim to police on the ground that such statements were unreliable. Leggett asserts trial counsel was ineffective for failing to file a motion to suppress based on the police officers' warrantless entry into his apartment and appellate counsel was ineffective for failing to raise this issue on appeal. In addition, Leggett raises seventeen pro se claims. For the reasons stated below, we affirm the district court's denial.

I. BACKGROUND AND PROCEEDINGS. Leggett appeals the denial of his application for postconviction relief. The facts of the underlying conviction for sexual abuse in the third degree and simple assault are summarized in our court's opinion on the direct appeal. *See State v. Leggett*, No. 04-0444 (Iowa Ct. App. Aug. 17, 2005). Following the appeal, Leggett filed a pro se application for postconviction relief on November 16, 2005. Leggett was appointed counsel and the case proceeded to trial on May 27, 2009.

At the postconviction relief trial, Leggett asserted approximately forty-seven claims including claims of ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and errors by the trial court, our court, and the

supreme court. In its decision dated January 6, 2010, the district court concluded, after a thorough review of the record, Leggett failed to prove trial or appellate counsel failed to perform an essential duty or that he was prejudiced. While it did not analyze each and every one of the asserted claims in its decision, the district court stated it did consider each claim including the claims of prosecutorial misconduct and the claims of error by the district court, court of appeals and supreme court, and found Leggett failed to meet his burden of proof on each claim. The district court stated it was clear Leggett firmly believes he was wrongfully convicted, but his testimony at the postconviction relief trial was conclusory, incomplete or exaggerated.

II. SCOPE OF REVIEW. Our scope of review for postconviction relief cases is typically for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). However when the claim is based on a denial of a constitutional right, such as ineffective assistance of counsel, our review is de novo. *Id*. In claiming his trial or appellate counsel was ineffective, Leggett must prove counsel 1) failed to perform an essential duty, and 2) prejudice resulted. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009). If either element is lacking, the claim will fail. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). To prove counsel breached an essential duty, Leggett must show counsel's performance "was not within the range of normal competency." *Jorgensen*, 785 N.W.2d at 712. To prove prejudice, Leggett must show "there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different." *Id*.

III. LESSER-INCLUDED OFFENSES. Leggett's first claim of error is appellate counsel was ineffective on direct appeal for failing to raise the trial court's failure to submit lesser-included offenses on count one, sexual assault in the third degree. In Leggett's reply brief he also asserts the trial court and trial counsel erred by failing to submit the lesser-included offense instruction over his waiver.

Iowa Rule of Criminal Procedure 2.6(3) states,

> In cases where the public offense charged may include some lesser offense it is the duty of the trial court to instruct the jury, not only as to the public offense charged but as to all lesser offenses of which the accused might be found guilty under the indictment and upon the evidence adduced, even though such instructions have not been requested.

While this rule requires the trial court to give lesser-included offense instructions to the jury even when the instructions are not specifically requested, our case law has provided a defendant can waive the inclusion of such instructions. *State v. Spates*, 779 N.W.2d 770, 773–74 (Iowa 2010). If both the defendant and the prosecution agree, the trial court does not commit error by failing to instruct on the lesser-included offenses. *Id*. at 774. A review of the trial transcript reveals this is precisely what was done in this case.

Defense counsel first alerted the court to his client's wish not to have the jury instructed on the lesser-included offenses. The court provided defense counsel additional time to discuss the issue with his client and to "maybe convince your client that may not be the way to go." Later, when Leggett did not change his mind, the court discussed the issue directly with him urging him to

reconsider.[1] The supreme court has held such an extended colloquy on this issue is not necessary because the right to jury instructions on lesser-included

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[1] The Court: Okay. Now the other thing is I have been advised by Mr. Cohen that you do not want any lesser and included offenses, is that correct? Do you know what I'm talking about?

By Mr. Leggett: Yes, proving guilty of the charge or not guilty.

The Court: Well, I'm going to instruct on Sexual Abuse in the Third Degree, which is a Class C Felony, which is a forcible felony, which means if you're found guilty you go into immediate custody and I have no other choice but to put you in prison for 10 years. Do you understand that?

By Mr. Leggett: Yes, sir.

The Court: And also I could submit a lesser and included offense of Assault with Intent to Commit Sexual Abuse and, since there has been no injury in this matter alleged or proven, that would be an aggravated misdemeanor, which would be up to two years and you would be eligible for immediate probation. Do you understand that?

By Mr. Leggett: Yes, sir.

The Court: And also I'm going to submit Assault on the second count. You understand that?

By Mr. Leggett: Yes.

The Court: Okay. So you want to—I guess what I'm asking you is, you talked this over with counsel?

By Mr. Leggett: Yes. Yes. He made clear to me on the stand what he's saying, yes.

The Court: In other words, you'll be found either guilty or not guilty.

By Mr. Leggett: Either found guilty or not guilty.

The Court: In street terms you're taking a roll of the dice on the Class C Felony.

By Mr. Leggett: I'm not rolling the dice. I'm not guilty.

The Court: If you believe you're not guilty, you're putting your fate in the hands of that jury. Do you understand that?

By Mr. Leggett: Yes.

The Court: Okay. Do you have any questions about that at all?

By Mr. Leggett: No, sir, your Honor.

The Court: I'm here to tell you I think you ought to have a lesser included offense. You have the right to waive that, and apparently that's what you're doing, is that right?

By Mr. Leggett: Yes.

The Court: You're entitled to do that.

By Mr. Leggett: Yes.

The Court: Did Mr. Cohen tell you to do it?

By Mr. Leggett: No, he did not.

The Court: Okay. Just submit it on one then.

By Mr. Cohen: I just would like the record to reflect that I gave Mr. Leggett my advice that I thought it was preferable to give jury instructions on all the lesser offenses, and this truly is his very own choice.

offenses is not fundamental, and thus, it is not necessary for the record show the defendant "personally, knowingly, intelligently, and voluntarily waived lesser-included jury instructions." *State v. Wallace*, 475 N.W.2d 197, 198–202 (Iowa 1991). Despite the fact such an extended discussion was not necessary, the exchange does make it clear Leggett unequivocally waived his right have jury instructions submitted on the lesser-included offenses.

Despite this waiver, Leggett urges us here to find the trial court erred by honoring his decision. He wants us to conclude when a trial court is faced with a situation where the defendant wants to waive the lesser-included offenses and the defense counsel is advising against such a waiver, that the trial court must side with defense counsel and give the instructions. He asserts this rule is sound because counsel, not the defendant, is entrusted with the duty and obligation to make the decision about lesser-included offenses. Leggett provides no support for such a proposition and we find our case law supports the opposite conclusion. In *Wallace*, 475 N.W.2d at 198, the defendant attempted to waive all lesser-included offenses, but after an extended colloquy, similar to the case at hand, the court refused to accept the waiver and gave the instructions. The supreme court, after finding the waiver need not be knowing and intelligent, concluded it was a reversible error not to honor the defendant's waiver. *Id*. at 202. In fact the supreme court even forecasted this very case when it said, "Had Wallace had his way and then been convicted of the higher offense, no doubt his appeal would be based on the failure to give lesser-included offenses." *Id*. The supreme court

concluded under that hypothetical their holding would have been the same: "there was an effective waiver." *Id*. In this case, we agree.

Both counsel and the court advised Leggett that it was a mistake to not give the lesser-included offenses. Leggett refused to heed such advice and chose an all or nothing trial approach. Unfortunately, this approach did not work and Leggett was convicted on the charged offense. Leggett cannot claim the trial court erred, or trial or appellate counsel was ineffective for failing to honor his choice. We find no error by the trial court in not submitting the lesser-included offenses, and we find trial and appellate counsel were not ineffective for failing to raise the issue at trial or on appeal as there was a valid waiver.

IV. SUFFICIENCY OF THE EVIDENCE. Leggett next claims appellate counsel was ineffective for failing to raise the issue that there was insufficient evidence from which a jury could have concluded he committed a sex act against the will of the victim. Because counsel does not have a duty to raise a meritless issue, we address whether there was sufficient evidence to support the jury verdict. *Jorgensen*, 785 N.W.2d at 712.

A jury's verdict is binding on appeal unless there is an absence of substantial evidence. *State v. Tapia*, 751 N.W.2d 405, 406 (Iowa Ct. App. 2008). "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id*. Our review of sufficiency of the evidence claims are review for errors at law and we view the evidence in the light most favorable to the State, including any legitimate inferences that can fairly be deduced from the record. *Id*.

We conclude there was sufficient evidence to support a finding of guilt beyond a reasonable doubt. The police officers testified at trial that they were on patrol on the night in question and heard a female screaming for help and to be let go. The police were able to locate the screams coming from a ground floor apartment. The officers looked into the window into a lit room and saw a naked man on top of the screaming woman, holding her arms above her head. The man was moving his lower body in a fashion that it appeared to the officers he was having sex with the woman. After the officers gained entry into the apartment, they testified the woman stated she had been raped by Mr. Leggett. After his arrest, Mr. Leggett stated he was having sex with his girlfriend.

Leggett draws our attention to the fact that the victim in this case later recanted her statements and testified at trial for the defense that no sex act took place and that she was not offended by the contact. When evidence is contradictory, credibility determinations are for the jury to make. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). The jury was free to evaluate the victim's trial testimony compared to the information she told the police immediately after the incident. The victim's recantation does not make the officer's testimony insubstantial. We find there was sufficient evidence from which the jury could conclude Leggett committed sexual abuse in the third degree. As a result, appellate counsel did not render ineffective assistance by failing to raise this issue on direct appeal.

V. HEARSAY STATEMENTS. Leggett next claims trial and appellate counsel were ineffective for failing to object to the police officers' testimony

relaying what the victim said at the scene. While Leggett acknowledges his trial counsel did object to the testimony on the basis it did not fall within the excited utterance exception to hearsay, which the trial court overruled, Leggett believes counsel should have also asserted the statements were not reliable based on the victim's recantation. Leggett believes if his counsel would have alerted the court to the recantation in the motion in limine, the statements would have been excluded as more prejudicial than probative under Iowa Rule of Evidence 5.403. Leggett likens his case to *State v. Cromer*, 765 N.W.2d 1, 8–9 (Iowa 2009) where the supreme court found the recorded admissions of the accused inadmissible in part because of the coercion used to obtain the admissions. Leggett believes the victim's in court testimony established the officers used coercion to force her to implicate Leggett in a crime when no such crime occurred. The victim testified at trial she wrote what the police told her to write because the police told her if she did they would let Leggett out of jail the next morning.

We find Leggett's analogy to *Cromer* misplaced and find the statements were properly admitted. First, *Cromer* deals with the admissibility of admissions made by the accused. 765 N.W.2d at 8 ("coercion used to obtain an admission from an accused is . . . relevant to the balancing of the probative value and the prejudicial effect under Iowa Rule of Evidence 5.403). Secondly, the coercion analyzed in *Cromer* is that of the victim of the crime against the accused, not the police against the victim. *Id*. Finally, even with the knowledge of the victim's later recantation, the statements were properly admitted under the excited utterance exception to hearsay. *See* Iowa R. Evid. 5.803(2). The officers

testified the victim was hysterically crying and shaking following the incident, and there was very little time between the incident and the statements. The fact the statements were made in response to police questioning does not disqualify them from being excited utterances. *See State v. Harper*, 770 N.W.2d 316, 319–20 (Iowa 2009).

We find the statements made by the victim to the police were properly admitted at trial and neither trial nor appellate counsel breached an essential duty by failing to specifically assert the statements were not reliable in light of the victim's later recantation.

VI. MOTION TO SUPPRESS. Leggett also claims trial counsel rendered ineffective assistance by failing to file a motion to suppress Leggett's and the victim's statements following a warrantless entry into Leggett's home. Leggett also asserts appellate counsel as ineffective for failing to raise this issue on direct appeal. The district court found this claim was raised by Leggett in his pro se brief on direct appeal, and our court found such claim had no merit. *State v. Leggett*, No. 04-0444 (Iowa Ct. App. Aug. 17, 2005). Leggett attempts to get around this argument by asserting the two claims were different. On direct appeal the claim was characterized as counsel "did not establish that 'police officers didn't have a search warrant.'" Here Leggett asserts counsel was ineffective for failing to file a motion to suppress the statements when they entered Leggett's home without a search warrant in violation of the Fourth Amendment. We fail to see Leggett's distinction. Because this issue was already raised and disposed of by our court on direct appeal, we will not address

it further. *See Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998) (stating postconviction relief is not to be used to relitigate issues that were presented on direct appeal).

VII. PRO SE CLAIMS. In Leggett's pro se brief he lists seventeen claims. Six of these claims are entirely unsupported by any argument or authority and as such are deemed waived.[2] *See* Iowa R. App. P. 6.903(2)(*g*)(3). Two of these claims were raised and disposed of on direct appeal and as such will not again be addressed.[3] *Osborn*, 573 N.W.2d at 920. Seven of these claims were raised by Leggett's postconviction relief appellate counsel and addressed above.[4] Only two issues were supported by some argument, not

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[2] These claims include: 1) "Is trial counsel in error by not arguing whether State meet[sic] the burden of proving that defendant waived his Miranda Rights are[sic] was a confession made by the defendant at the investigation?"; 2) "Trial counsel error by not filing a Motion to Quash the trial information?"; 3) "Is trial counsel in error by not entering an affidavit into evidence that was made by the complaining witness Leona Manning?"; 4) "Trial counsel erred by not filing a Motion to Dismiss the sexual abuse and simple assault?"; 5) "Did trial counsel error by not calling the complaining witness to take depositions before trial or to request that depositions be taken before trial?"; and 6) "Trial counsel erred by calling a witness Leona to the stand as a defense witness and then impeaching her credibility by cross-examining her about a statement that was never entered into evidence as an exhibit?"

[3] These claims include: 1) Is trial counsel in error by not filing a motion of discovery for newly discovered evidence obtained from the complaining witness?; and 2) "The trial court erred in failing to merge the simple assault in to the sexual abuse in the third degree conviction."

[4] These claims include: 1) "Is trial counsel in error by not arguing whether trial court found defendant guilty beyond a reasonable doubt, proof beyond a reasonable doubt?"; 2) "Is trial counsel in error by not arguing whether the trial court showed the jury sufficient evidence of force and demonstrated the act as against the victim's will?"; 3) "Is trial counsel in error by not arguing failure of the trial court to submit the lesser included offenses of assault and battery and assault with intent to commit rape and simple assault?"; 4) "Is trial counsel in error by not arguing whether police officers erred in making a warrantless force entry of the premises and a unreasonable search and seizure, invasion of privacy?"; 5) "Is trial counsel in error by not arguing that the evidence wasn't sufficient to support the district courts finding that the defendant committed an assault and therefore was guilty of sexual abuse in the third degree are[sic] simple assault?"; 6) "Trial counsel erred by not arguing or concluding that

raised on direct appeal, and not already addressed above. These two issue include 1) whether trial counsel was ineffective in failing to make an adequate offer of proof to support his attempt to admit into evidence a ruling from an unrelated case, which found Officer Batcheller not credible; and 2) whether trial counsel erred by not arguing the State failed to corroborate the testimony of the victim.

The first issue was initially addressed by our court on direct appeal. *State v. Leggett*, No. 04-0444 (Iowa Ct. App. Aug. 17, 2005). Our court found trial counsel failed to properly preserve error with an adequate offer of proof when trial counsel attempted to impeach Officer Batcheller's testimony with a ruling from an unrelated case finding Batcheller "certainly not credible." *Id.* Because of the lack of error preservation, Leggett raised this issue through an ineffective assistance of counsel claim. *Id*. Our court ruled Leggett could not show he was prejudiced with respect to the charge of sexual abuse in the third degree. *Id*. This was because there was testimony from the other officer on scene to support the sexual abuse conviction, and therefore, there was not a reasonable probability of a different outcome had counsel been able to impugn Officer Batcheller's credibility. *Id.* Our court preserved the issue with respect to the simple assault conviction for postconviction relief because Officer Batcheller offered the only evidence to support this conviction. *Id*. Thus, we were unable to

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appellant was prejudiced by the admissions of the hearsay testimony and confessions and statements of Officer Batcheller and Officer Miller and the complaining witness Leona Manning."; and 7) "Is trial counsel in error by not filing a motion to suppress the illegal seizure and search and the confessions, statements and the affidavits that was never entered into evidence?"

perform a prejudice analysis without knowing whether Officer Batcheller would have been impeached. *Id.* Trial counsel laid the proper foundation for the admission of the prior ruling, but did not ask Officer Batcheller whether he told the truth in the prior case. *Id*.

Leggett reasserts this claim on postconviction relief, however, at the postconviction trial, Leggett did not offer any evidence from either trial counsel or Officer Batcheller to allow the court to answer the question it could not answer on direct appeal: whether Officer Batcheller would have testified he told the truth in the prior unrelated case. The postconviction relief court denied this claim as Leggett failed to offer any evidence on this issue. We agree.

In the second pro se issue, Leggett asserts trial counsel erred by failing to assert the State failed to offer any evidence to corroborate the testimony of the victim. First, we note at trial the victim testified for the defense and recanted her prior statements to police accusing Leggett of sexual abuse, so it is unclear what testimony of the victim Leggett claims was not corroborated. Secondly, our courts have abandoned the rule that testimony of sexual assault victims requires corroboration. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). Finally, even if corroboration of the victim's testimony was required, the testimony of the police officers provides more than sufficient corroboration. Leggett's claim that counsel was ineffective for failing to assert the victim's testimony was not sufficiently corroborated is denied.

VIII. CONCLUSION. In conclusion, we find Leggett's claim the trial court erred, or counsel was ineffective, for failing to honor his choice not to

submit lesser-included offense jury instructions is without merit. There was sufficient evidence to support a finding of guilt beyond a reasonable doubt, and therefore appellate counsel as not ineffective in failing to raise this issue on direct appeal. We find neither trial nor appellate counsel breached an essential duty by failing to specifically assert the victim's statements to police were not reliable in light of the victim's later recantation and the issue of counsel's failure to file a motion to suppress based on the police officers' warrantless entry into his apartment was already raised and rejected on direct appeal. In addition, we reject Leggett's seventeen pro se claims.

AFFIRMED.