

IN THE COURT OF APPEALS OF IOWA

No. 2-054 / 11-0275
Filed March 14, 2012

RAYMOND E. THOMAS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert Hutchison,
Judge.

Raymond Thomas appeals the district court decision denying his
application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Raymond Thomas appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of appellate and postconviction counsel. Upon our review, we conclude this record does not support a finding that appellate or postconviction counsel were ineffective in failing to raise the issue that the trial court erred in denying Thomas's motion to sever. We therefore affirm the postconviction court's order denying Thomas's application for postconviction relief.

I. Background Facts and Proceedings.

Thomas was arrested for an incident that occurred in the early morning hours of October 30, 2004, at the victim's residence, as well as for his actions later that same day during his arrest. Our November 15, 2007 ruling on Thomas's direct appeal in *State v. Thomas*, No. 06-0582 (Iowa Ct. App. Nov. 15, 2007), contains a factual background regarding the incident, which we reiterate in part:

In July 2004 Thomas first met Richard Hoosman, his younger brother, at a family reunion. Thomas and Hoosman became friends. Thomas began visiting Hoosman's residence, staying there overnight an average of two times a week. Thomas's residence was the YMCA.

In October 2004 Thomas met Katie Ann Hupke, who had recently bought the house next door to Hoosman. Thomas and Hupke had several encounters following their meeting. On Sunday, October 24, Hupke and Thomas had a two-hour conversation on the front steps of her home. During this conversation, Thomas asked Hupke if she had a boyfriend or had ever been married. He also asked her if she had a dog or a burglar alarm. Hupke told Thomas she did not have a dog or an alarm.

During the afternoon of October 29, Mary Lou MacKinnon, who lived across the street from Hoosman and Hupke, observed Thomas come out of his brother's house and go to Hupke's garage where he began twisting the doorknob. According to MacKinnon,

he “spent about five minutes . . . trying to open up the door.” Unsuccessful at opening the locked garage door, Thomas went back over to Hoosman’s house before returning approximately ten minutes later and trying to open Hupke’s door once again. MacKinnon’s son also observed Thomas trying to open the door.

Later that night, Hupke returned to her house after work. She found a note from Thomas taped on her garage door. The note stated:

Katie, I sincerely enjoyed our conversation last! If at all possible, I look forward to delight myself with your presence. If you’re not doing anything tonight, maybe we could go somewhere to play a game or two of pool. If so, call me [next door at Hoosman’s phone number]. Sincerely, Raymond

Hupke did not respond to Thomas’s note, and she went to bed between 9:00 and 10:00 p.m. Because that day had been unseasonably hot, she placed a fan in her bedroom window before turning in for the night.

On this same day, Thomas was next door at his brother’s residence. Hoosman and his girlfriend testified that Thomas wrote Hupke a note and took it next door. Thomas then left Hoosman’s residence. He returned to his brother’s home later that evening. Before Hoosman went to bed, he observed Thomas drinking Hennessy cognac. Thomas was still awake when Hoosman went to bed at 11:30 p.m.

At approximately 4:00 a.m., Hupke awoke and heard noises coming from the direction of her bedroom window. She went to the window to investigate, using the light from her cell phone to try to illuminate the outside. Unable to see anything, she laid back down on her bed. At that point, she heard “clicking” and “rustling” noises and saw a figure outside her window. Thinking it might be neighbor kids out early for Halloween, she yelled, “Get away from my window.” Suddenly her fan came flying through her window and a hooded man lunged through the window. Hupke began screaming loudly as she jumped on top of her bed.

The intruder immediately attacked Hupke, grabbing her arms and forcing them behind her back. The intruder was wearing dark sweatpants and a reddish-orange “sweatshirt hoody,” with the hood covering his head. The intruder put Hupke in a chokehold with his gloved hands and dragged her off the bed.

A neighbor awoke when she heard Hupke scream. The neighbor’s boyfriend went outside to find the source of screaming. However, he was unsuccessful in finding the source of the screams because Hupke was being choked by her attacker and could no longer scream.

Inside her home, Hupke thought that the attacker was going to make her pass out and feared he would then try to kill her. The

attacker told her, "This is what you get for living alone." Upon hearing his voice and this comment, Hupke "thought, 'My God, this guy knows me.' I'm like, 'I know this voice. I mean, it's got to be. It's Raymond.'" Once Hupke realized she knew her attacker, she made a concerted effort not to look at his face, so that he wouldn't "have a clue I knew who it was."

Thomas forced Hupke out of her bedroom and onto her living room couch. As he smothered her face in a pillow, Hupke struggled in an effort to breathe. Thomas then forced Hupke into her kitchen and down the steps into her basement, where he pushed her face down onto the carpeted floor. Thomas straddled Hupke as she sobbed hysterically. Thomas demanded that Hupke "knock it off or else."

Thomas yanked down Hupke's pajama bottoms and underwear. Hupke tried to compose herself and pled with Thomas to wear a condom if he was going to rape her. Thomas indicated that he was wearing a condom. Thomas pulled down his own pants and began "humping" Hupke. As he leaned over her, Hupke "could feel his penis kind of touching [her] lower back upper buttocks region." Thomas then pulled Hupke's pants back up and dragged her back upstairs in a chokehold.

Upstairs, Thomas demanded to know where Hupke's purse and money were located. Thomas then forced Hupke back downstairs, again shoving her face-down on the floor. Thomas used duct tape he brought with him to restrain Hupke's hands behind her back. He then forced his victim back up to her bedroom, where he tossed her onto her bed and closed the bedroom window and blind. Eventually, Thomas forced Hupke back to the basement and taped her feet together. As Thomas went upstairs he threatened Hupke saying, "Don't move. Don't say anything. You know I can snap [your] neck." Hupke noticed Thomas's size and his "strong build" as he walked up the stairs toward the glow of the kitchen light.

Hupke could hear Thomas walking through the upstairs rooms and opening cabinets, as she struggled to free her taped hands. Thomas eventually came back downstairs and told Hupke he was going to duct tape her mouth shut. Trying to divert Thomas and realizing he had a "crush" on her, Hupke asked for a glass of water. Thomas brought her a glass of water and then struck up a conversation with his victim. He asked Hupke if she had ever been married before. Hupke immediately remembered that Thomas had asked her the same question a few days earlier.

Thomas went back upstairs, but came running down the stairs when the lights in the house went off and an alarm sounded somewhere in the distance. Thomas asked Hupke if she had gotten an alarm. Hupke told him she had not. Thomas stated, "Plans are going to change now." Trying to calm Thomas down,

Hupke told him, "There's nothing different here. The lights may be off everywhere." Thomas ran upstairs and came back down with a scarf, which he tied around Hupke's eyes. Thomas then went upstairs, and Hupke heard him leave the house through the back door.

Hupke was eventually able to make her way upstairs, where she cut the duct tape from her hands, feet, and head. She went to her bedroom to retrieve her cell phone, but it was gone. She noticed that her bedroom, which had been in disarray following her attack, had been cleaned up. Hupke looked out her window and saw Thomas, in the orange-reddish sweatshirt, coming toward her. Hupke ran to her dark living room to get her keys, but they were also gone. As she searched for her keys around her couch she found a silver fold-up knife that did not belong to her.

Hupke ran and barricaded her doors. She then grabbed two butcher knives from her kitchen and locked herself in her windowless bathroom to wait for sunrise. After waiting half an hour without hearing anything, Hupke went to her garage to use a spare ignition key to drive away. However, her garage door would not open without power. Fearing Thomas might still be outside her house or next door at Hoosman's, she decided to make a dash for the neighbor's house across the street. Once she reached her neighbor's house, the neighbor tried to console Hupke in the dark while they waited for the police.

When the police arrived, Hupke told them she was "pretty damn sure" that her attacker was Thomas. An investigation revealed that Hupke's cell phone, keys, ID badge, a coin jar full of change, and a clay bowl she made as a little girl were missing from her house. The screen from her bedroom window was also missing.

Hoosman allowed the responding police officers to search his next-door residence. The police discovered a reddish-orange sweatshirt in the front closet. In the garage, behind a chest freezer, the police discovered the missing window from Hupke's bedroom, with its mesh screen cut and damaged. Hoosman later discovered a used condom on his living room couch, which he turned over to the police. Subsequent DNA testing revealed Thomas's sperm and DNA on both the inside and the outside of the used condom.

After the police left, Hoosman left several messages for Thomas at the YMCA. When Thomas called back, Hoosman told him "the police are looking for you" and Thomas replied, "Yeah, I know." Hoosman told Thomas about the window screen found in the garage, stating, "They got you cold," to which Thomas replied, "Yeah, I figured that." Thomas commented the "Hennessy had him." He told Hoosman that he wanted to "get out of here."

Two detectives went to Thomas's fourth floor room at the YMCA. They observed a loaded dolly cart in the hallway and found

Thomas in the process of moving out. The officers and Thomas went into his room where he confessed that he had committed the burglary and explained that he did it because he was "angry and frustrated with the world." As the detectives went to pat-down and handcuff Thomas, he charged them and a fight began. Thomas escaped his room and tried to trap the detectives inside by wedging the luggage dolly handle against the door of his room. Thomas then ran down the hall toward the arriving elevator. After the officers broke free out of his room, they chased him down the hall yelling "stop."

Two YMCA employees exited the elevator and tackled Thomas. Another fight ensued. The two detectives arrived at the elevator and joined in the effort to subdue Thomas. Both officers tumbled into the elevator with Thomas as the fight continued. Although pepper mace was used on Thomas, he could not be restrained. It was not until another four officers arrived on the fourth floor that the officers were able to get Thomas under control. It eventually required three sets of handcuffs to contain him. All four of the men who initially fought with Thomas were injured by him. One of the YMCA employees was evacuated by ambulance due to a blow to his head.

After Thomas was taken to jail he contacted Hoosman. In an effort to explain the used condom recovered at his brother's house, he asked his brother to tell police officers that a hooker had been over at his place that night. Also while in jail, Thomas discussed the charges against him with a cellmate, commenting that "he was drinking, and he can never drink again."

Thomas was charged with kidnapping in the second degree, in violation of Iowa Code sections 710.1 and 710.3 (2003); burglary in the first degree, in violation of sections 713.1 and 713.3; robbery in the first degree, in violation of sections 711.1 and 711.2; assault with intent to commit sexual abuse, in violation of section 709.11; two counts of assault on a peace officer, in violation of section 708.3A(3); and two counts of assault causing bodily injury, in violation of sections 708.1 and 708.2. In February 2006, the jury convicted Thomas of third-degree kidnapping, first-degree burglary, second-degree robbery, assault with intent to commit sexual abuse causing bodily injury, and two counts of assault on a peace

officer. He was sentenced to a term of imprisonment not to exceed thirty-five years.¹

Thomas's conviction was affirmed on direct appeal. On September 8, 2008, Thomas filed an application for postconviction relief, alleging ineffective assistance of trial and appellate counsel. Following a hearing on November 8, 2008, the district court denied Thomas's application. Thomas now appeals.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.907; *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Those claims concerning alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Merits.

On August 30, 2005, prior to Thomas's criminal trial, trial counsel moved to sever Counts I-IV that involved Katie Hupke (kidnapping; burglary; robbery; assault with intent to commit sexual abuse) from Counts V-VIII that involved Des Moines police officers (assault on a police officer; assault causing bodily injury).

¹ The offense of assault with intent to commit sexual abuse causing bodily injury merged into the first-degree burglary conviction, and Thomas was sentenced for the latter. The sentences for the third-degree kidnapping conviction and the second-degree robbery conviction were ordered to run concurrent with each other and concurrent with the first-degree burglary conviction. The sentences for the two counts of assault on a police officer were ordered to run concurrent with each other and concurrent with the sentences for the other convictions.

The district court denied the motion, finding the events that transpired at the YMCA during the officers' struggle to arrest Thomas would be relevant to the charges against Thomas in regard to Hupke. On December 30, 2005, at the hearing on the motion to sever, the following colloquy took place:

STATE: As you know, Judge, Counts 1, 2, 3, and 4 refer to 411 activity—alleged criminal behavior on the part of Mr. Thomas at Katie Hupke's house. And the remaining Counts 5, 6, 7, and 8 refer to the police officers' arrest of the defendant at the YMCA.

And, Judge, I don't disagree with the defense counsel that it's two separate crime scenes. And, in essence, it's one victim for the first four counts and then actually four victims for the next four counts. And so as a means to make the case move more efficiently, we're fine with litigating those remaining four counts, 5, 6, 7, and 8, at some other time.

It was just that the evidence of his arrest is probative. It involves a struggle and behavior of the defendant in the hallway and moving down toward the elevator of the YMCA, which are indicative of flight—or at least the State should be allowed to argue flight and some resistance, on the part of the defendant, when the police officers indicate to him that he's going to have to be taken into custody.

It's probative evidence and would still come in if you had never had to sign a trial information regarding the assaults on those police officers or the YMCA employees. The fact that he struggles with them, or fights with them, or makes statements at the time of his arrest is all probative to the case.

And so that's why we offered to sever them, not bring up the facts of the charges against the two police officers and the two YMCA residents, but yet have them testify as to what the defendant did upon the officers confronting him at the Y.

THE COURT: Well, I've reviewed the minutes of testimony and I recall reviewing some depositions, I believe, and initially ruling—or denying [the motion to sever]. And I find the State's argument compelling and supported by the law.

I think even if these—the remaining counts that deal with the activities at the YMCA were deleted as criminal charges, what went on at the YMCA would be relevant with regard to the remaining counts, and so therefore, I am going to deny the motion to sever.

On appeal, Thomas argues (1) his appellate counsel was ineffective in failing to raise the issue that the trial court erred in denying the motion to sever

and (2) his postconviction counsel was ineffective in failing to argue appellate counsel was ineffective in failing to raise the issue that the trial court erred in denying the motion to sever.

A. *Ineffective Assistance of Counsel.* To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam*, 745 N.W.2d at 721. We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *De Voss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143. A reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722. To establish prejudice, the defendant must "state the specific ways in which counsel's performance was inadequate and how competent representation would have changed the

outcome.” *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000) (quoting *Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999)).

B. Severance or Joinder of Charges. Iowa Rule of Criminal Procedure 2.6(1) permits multiple charges arising from the same or multiple occurrences constituting parts of a “common scheme or plan” to be prosecuted in a single trial unless the trial court determines otherwise for good cause shown. A “common scheme or plan” requires more than the commission of two similar crimes by a single person. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa Ct. App. 1994). In short, the offenses must be the products of a single or continuing motive. *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000). Factors indicating a common scheme or continuing motive include intent, modus operandi, and temporal and geographic proximity of the crimes. *Id.*

Thomas asserts Counts I-IV should have been severed from Counts V-VIII because “Counts I-IV were only concerned with events relating to Hupke,” whereas “Counts V-VIII concern events relating to the Des Moines police officers.” The State argues the district court properly allowed Counts I-IV relating to Hupke “to be tried with the charges that flowed from Thomas’s efforts to flee.” The State points out Thomas assaulted the officers and YMCA staff “[t]o avoid apprehension and prosecution for the crimes he committed against Hupke.”

We agree with the State the Des Moines police officers’ and YMCA staff’s encounter with Thomas; Thomas’s confession; the officers’ attempt to arrest Thomas; Thomas’s flight; the officers’ and YMCA staff’s attempt to catch Thomas; and the resulting charges of assault on a peace officer and assault causing bodily injury, stem from the events that occurred earlier that morning at

Hupke's residence. Shortly after the incident at Hupke's residence, officers searched Hoosman's residence next door, where they discovered the reddish-orange sweatshirt Hupke had described Thomas as wearing, as well as the missing window screen from Hupke's bedroom. After the officers left his residence, Hoosman called Thomas at the YMCA and told him "the police are looking for you," to which Thomas replied, "Yeah, I know." Hoosman told Thomas the officers had discovered Hupke's window screen, stating, "They got you cold," to which Thomas replied, "Yeah, I figured that." Thomas then told Hoosman that he wanted to "get out of here." Shortly thereafter, two police officers arrived at Thomas's room at the YMCA. They observed Thomas in the process of moving out. Thomas confessed he had committed the burglary. As the officers went to pat-down and handcuff Thomas, he charged them and a fight began, which resulted in injuries inflicted by Thomas upon two officers and two YMCA employees.

Examining these facts as a whole, we conclude the charges against Thomas were part of a continuing incident with a common scheme or continuing motive. See *id.* at 688-89. The record reflects the officers' presence at the YMCA to arrest Thomas, and the involvement by the YMCA employees, stemmed from the events that brought the officers to Hupke's residence hours earlier. The charges were part of a continuing incident with a common scheme or continuing motive to commit the first crime and avoid detection and arrest. One court has upheld joinder in similar circumstances, describing the premise as "joinder of two crimes when one crime is a circumstance of the arrest on the other crime." *Williams v. State*, 589 S.E.2d 563, 565 (Ga. 2003) (concluding a

disorderly conduct charge stemming from defendant's obstructive behavior when arrested was properly joined with murder charge). Although our supreme court has not adopted this exact principle, if the arrest and initial criminal conduct are relatively close in time, the acts could reasonably be considered to be part of a continuing incident. See *State v. Lam*, 391 N.W.2d 245, 250 (Iowa 1986) (concluding the rule of joinder contemplates events occurring within a close time frame). In *Lam*, our supreme court observed that Iowa Rule of Criminal Procedure 6(1), now rule 2.6(1), is similar to Federal Rule of Criminal Procedure 8(a) and is to be given a "fairly liberal" application by courts, similar to the definition accorded to the federal rule. *Id.* (citing *State v. Quinones*, 516 F.2d 1309, 1312 (1st Cir. 1975) (concluding joinder of an unrelated escape charge to several substantive offenses arising out of a crime spree was proper).

C. *Good Cause*. Thomas further argues that, in the event we conclude the charges *were* part of the same transaction or constituted parts of a common scheme or plan, we "may find that the district court abused its discretion for not severing the charges for good cause as allowed by rule 2.6(1)." In support of this part of his claim, Thomas contends he "clearly suffered prejudice from the joinder of the charges . . . that far outweighed the State's interest in judicial economy." See *Oetken*, 613 N.W.2d at 688; *Delaney*, 526 N.W.2d at 175.

We disagree. Here, the jury was presented with evidence which it could reason sufficiently linked defendant to both crimes. *Oetken*, 613 N.W.2d at 689. The evidence Thomas committed kidnapping, burglary, robbery, and assault was relevant to show he had a motive for resisting arrest and assaulting an officer and YMCA staff when the officers approached him later that day. And the

evidence Thomas attempted to avoid his arrest was correspondingly relevant to show he had guilty knowledge of the kidnapping, burglary, robbery, and assault.

In addition, the jury was admonished to consider Thomas's guilt or innocence on each count separately.² See *id.* We presume the jury follows the instructions, minimizing any possible prejudice. *Id.* Under these facts, Thomas cannot show he was unfairly prejudiced by a joint trial. See *State v. Elston*, 735 N.W.2d 196, 199-200 (Iowa 2007); *Delaney*, 526 N.W.2d at 175.

IV. Conclusion.

This record does not support a finding that appellate or postconviction counsel were ineffective in failing to raise the issue that the trial court erred in denying the motion to sever. We therefore affirm the postconviction court's order denying Thomas's application for postconviction relief.

AFFIRMED.

² As the district court instructed the jury:
The defendant has been charged with six (6) counts. This is just a method for bringing each of the charges to trial. If you find the defendant innocent or guilty on any one of the six (6) counts, you may not conclude guilt or innocence on the others. The defendant's innocence or guilt must be determined separately on each count.