

IN THE COURT OF APPEALS OF IOWA

No. 3-1086 / 12-1368
Filed January 9, 2014

CHRISTIAN MUNOZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

An applicant appeals the denial of his postconviction relief application
claiming ineffective assistance of postconviction, appellate, and trial counsel.

AFFIRMED.

Jessica Maffitt of Benzoni Law Office, P.L.C., for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and James Ward, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

MULLINS, J.

Christian Munoz appeals the district court's denial of his application for postconviction relief (PCR) following his conviction for first-degree murder and first-degree robbery. He makes a number of allegations of ineffective assistance of counsel directed at his trial and appellate counsel along with the counsel that represented him at his PCR hearing. He claims his PCR counsel was ineffective when he failed to include in his posthearing brief a claim regarding the ineffectiveness of the appellate counsel for not challenging the denial of his motion for a new trial on direct appeal. He also argues trial counsel should have objected to a number of statements made by witnesses at trial. He claims trial counsel made an inadequate offer of proof at trial on alternative suspects and PCR counsel failed to develop the record for this claim at the PCR hearing. Finally, he claims appellate counsel was ineffective in failing to assert on appeal he was entitled to a new trial because the jury was permitted to convict him of first-degree murder based on the supreme court's decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). For the reasons stated herein, we affirm the district court's denial of Munoz's application for postconviction relief.

I. BACKGROUND FACTS AND PROCEEDINGS.

In June 2006, Munoz was convicted of first-degree murder and first-degree robbery arising out of the May 2005 shooting death of Anthony Anania. Anania's body was found with two gunshot wounds after his vehicle crashed into a tree. Anania had over \$11,000 on him at the time of his death along with a small amount of marijuana. At trial circumstantial evidence was admitted that

showed Munoz shot Anthony during a drug transaction. The case was appealed, and this court affirmed the conviction. See *State v. Munoz*, No. 06-1838, 2009 WL 1913690, at *5 (Iowa Ct. App. July 2, 2009).

Munoz filed an amended and substituted PCR application in October 2011 through counsel. He raised ten different claims of ineffective assistance of counsel. By the time of the PCR hearing in January of 2012, counsel had dropped two of those claims, but Munoz raised two new claims pro se at the hearing. Counsel submitted posthearing briefs, and the district court denied the application after considering all grounds raised in the briefs and the two pro se claims raised by Munoz. The court stated it understood that any remaining issues in the application that were not discussed in the briefs were dropped. Munoz now appeals.

II. SCOPE AND STANDARD OF REVIEW.

While normally appeals from denials of applications for postconviction relief are reviewed for correction of errors at law, when an applicant asserts counsel provided ineffective assistance of counsel in violation of the Sixth Amendment, our review is de novo. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

To prove counsel was ineffective, Munoz must show (1) counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. See *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). Both elements must be proven by a preponderance of the evidence, and we can reject the claim if it fails on either ground. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). We judge

counsel's performance against an objective standard of reasonableness and will not second-guess miscalculated trial strategies and mere mistakes in judgment unless counsel's actions result from a lack of diligence. *Lado*, 804 N.W.2d at 251. To prove prejudice, Munoz must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.*

III. INEFFECTIVENESS OF PCR COUNSEL.

Munoz first alleges his PCR counsel was ineffective in failing include in his PCR posthearing brief the issue of appellate counsel's failure to appeal the trial court's denial of a motion for a new trial. Because the issue was not contained in the posthearing brief, the district court considered the issue dropped and did not address it, though it had been mentioned at the hearing.

We note Munoz's trial counsel filed a combined motion in arrest of judgment and motion for a new trial, following the jury's verdict. Trial counsel also filed an amended motion. The motions raised a number of different issues including: (1) the verdict was contrary to the law and the evidence; (2) the court should not have dismissed a juror; (3) the court should have permitted Munoz a full opportunity to cross-examine the police witnesses about other possible suspects; (4) the defense discovered new evidence; (5) the prosecution intimidated a witness making her essentially unavailable during trial; and (6) the defense discovered new, applicable case law that called his conviction into question, i.e., *Heemstra*, 721 N.W.2d at 549.

In his claim in this case, Munoz does not indicate which of these six claims appellate counsel should have pursued on appeal and, by extension, PCR counsel should have included in the PCR posthearing brief. He simply asserts PCR counsel should have made the claim appellate counsel was ineffective in failing to appeal the court's denial of the motion for a new trial. We note appellate counsel did appeal at least two of the issues addressed in the motion for a new trial. See *Munoz*, 2009 WL 1913690, at *1 (noting the issues Munoz claimed on appeal were the trial court erred in dismissing a juror and erred in finding the verdict was not contrary to the law and the evidence). Appellate counsel was deposed in the PCR proceeding. She testified that while she did not specifically remember doing so, her practice is to review a motion for a new trial and she would have pursued those issues on appeal that she thought had merit. If the issue was not pursued on appeal, appellate counsel asserted she believed the issue had no merit.

Counsel has no duty to raise an issue that has no merit. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). Where the merit of an issue is unclear, the test we employ is whether a "normally competent attorney would have concluded that the question . . . was not worth raising." *Id.* Miscalculations and mistakes in judgment do not normally rise to the level of ineffective assistance of counsel. *Id.* However, in order to determine whether appellate counsel acted competently in rejecting an issue, we must know what that issue was. Munoz must articulate what issue in the new trial motion his appellate and PCR counsel should have argued. Without Munoz articulating the particular claim, we cannot determine

whether his appellate and PCR counsel were ineffective in failing to raise it at various points in this case. We find Munoz has waived his claim on this issue. See Iowa R. App. P. 6.903(2)(g)(3). We refuse “to assume a partisan role and undertake the appellant’s research and advocacy” for him. *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974).

IV. INEFFECTIVENESS OF TRIAL COUNSEL.

Next, Munoz asserts his trial counsel was ineffective in failing to make a number of evidentiary objections and failing to make an adequate offer of proof on alternative suspects who may have committed the crime. On a number of these claims, he also faults his PCR counsel for failing to make an adequate record of trial counsel’s ineffectiveness at the PCR hearing, leading to the PCR court’s denial of these claims. We will take each claim in turn.

A. Testimony of Martha Arambul. Martha Arambul was Munoz’s girlfriend at the time of the commission of the crime. She testified to being in Munoz’s presence the day of the incident and in the days that followed until they were both arrested. She was deposed prior to trial and testified to seeing a white car pull up behind Munoz’s parked vehicle, while she was in the passenger seat. Munoz and an unidentified male, who was sitting in the back seat, exited the vehicle. Martha testified at the deposition she then heard two gun shots. Evidence admitted at trial showed the victim was driving a white car immediately before his death.

The State called Martha as a witness at trial, but when questioned about what she heard after Munoz exited the vehicle, Martha said she could not

remember. The State sought to refresh Martha's memory by showing her a copy of her deposition transcript. Munoz's attorney objected, asserting the State was attempting to improperly impeach its own witness. The objection was overruled by the court, and the State showed Martha her deposition. Martha stated it refreshed her memory but "not all the way." The State then read from the deposition where Martha answered affirmatively to the question, "Did you hear gunshots from outside of the van—or the car at the car wash."

At the PCR hearing, Munoz asserted counsel should have objected to the State's use of hearsay evidence and its improper impeachment of its own witness. Munoz claims counsel should also have requested a limiting instruction on the proper use of this information. In considering this claim, the district court stated the State had not called Martha as a witness just to impeach her, but instead she was an important witness who spent the majority of the day of the murder with Munoz. Thus, Munoz's reliance on *State v. Turecek*, 456 N.W.2d 219, 224 (Iowa 1990), was misplaced.

Turecek holds that "the State is not entitled under rule [5.607] to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible." 465 N.W.2d at 225. Munoz claims the State intimidated Martha prior to her testimony, which resulted in her lack of memory at trial. When she was unable to remember, Munoz claims the State then used that opportunity to introduce her deposition testimony regarding the gunshots. In support of his claim, he points to Martha's affidavit, which was submitted with the new trial motion, in which she

claims she was repeatedly told by the State if she lied at trial she would be prosecuted for perjury. She stated she believed the State wanted her to change her testimony from her deposition “so that they could convict Christian Munoz.”

We agree with the district court’s disposition of this claim. From our review of the record it is clear Martha was not called to testify at trial just so she could be impeached by the State. The State asked for Martha to testify consistent with, not contrary to, her deposition testimony regarding the gunshots she heard while in Munoz’s vehicle. The State used the deposition testimony to refresh her memory, and defense counsel objected to this line of questioning. The court overruled the objection and permitted the deposition testimony to be read into evidence.

Munoz makes several statements that Martha’s deposition testimony was “favorable” to him and the State’s actions in intimidating her prevented her from testifying in support of him. We fail to understand how Martha’s testimony at the deposition or at trial could be construed as favorable to Munoz. If there was favorable information in the deposition that was not thoroughly vetted on direct examination at trial, Munoz could have cross-examined Martha to bring this information to the jury. No such cross-examination occurred, and Munoz’s brief does not call to our attention any portions of the deposition testimony he claims were favorable.

We agree with the district court that trial counsel did not breach any duty by not making a second objection or requesting a limiting instruction when Martha’s deposition testimony was read into the record. The deposition

testimony was properly admitted into evidence as non-hearsay under Iowa Rule of Evidence 5.801(d)(1)(A)—a prior sworn statement by a witness that is inconsistent with the declarant’s testimony.

While our case law has not previously addressed this issue, we hold here that a witness’s lack of memory at trial qualifies as an inconsistent statement under rule 5.801(d)(1)(A) where a witness previously remembered and related the events in prior testimony under oath. See *United State v. Gajo*, 290 F.3d 922, 930–91 (7th Cir. 2002) (finding a witness’s lack of memory qualifies as an inconsistent statement under Rule 801(d)(1)(A) for the admission of his grand jury testimony); *United States v. Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983) (“[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.”); *United States v. Distler*, 671 F.2d 954, 958 (6th Cir. 1981) (“We think it clear that, for purposes of this rule, partial or vague recollection is inconsistent with total or definite recollection. Thus, when a witness remembers events incompletely, or with some equivocation at trial, it is not improper to admit a prior statement that otherwise complies with the limitations of Rule 801(d)(1), if that prior statement indicates that at an earlier time the witness remembered the events about which he testifies with more certainty or in more detail.”); *United States v. Marchand*, 564 F.2d 983, 999 (2d Cir. 1977) (“[I]f a witness has testified to such facts before a grand jury and forgets or denies them at trial, his grand jury testimony or any fair representation of it falls squarely within Rule 801(d)(1)(A).”);

Martha testified at trial, was subject to cross-examination, and made the prior statement under oath at a deposition in this proceeding. At trial she stated she could not remember hearing two loud noises while she waited in the parking lot of the car wash for Munoz to return to the vehicle. This testimony was inconsistent with her deposition testimony where she agreed she heard gunshots from outside the vehicle while she was in the car wash parking lot. Because the deposition testimony is not hearsay under rule 5.801(d)(1)(A), trial counsel had no duty to object to its admission nor did he need to request a limiting instruction. Counsel has no duty to raise an issue that has no merit. *Graves*, 668 N.W.2d at 881.

We also reject Munoz's claim his PCR counsel failed to properly investigate this claim or develop the record regarding the reasons for Martha's "unavailability." There is no indication in the record or in the briefs what more investigation or development on this claim could have revealed.

B. Testimony of Aricka Brown. Next, Munoz claims his trial counsel rendered ineffective assistance by failing to object to the testimony of Aricka Brown, the victim's girlfriend, wherein she stated she did not initially tell the truth about the victim purchasing drugs from Munoz "because I was scared for myself and my family because it's a gang." Munoz claims Aricka's reference to him being involved in a gang was extremely prejudicial and his attorney should have objected, moved to strike the comment, or requested a mistrial. In support of his claim, he cites *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995), wherein our supreme court stated evidence of gang membership "is inherently prejudicial."

One of Munoz's attorneys testified in a deposition, which was admitted into evidence at the PCR proceeding, that they did not object to the testimony because they did not want to bring further attention to the statement and they believed their effective cross-examination rendered Aricka not credible. They also did not want to appear as though they were concealing things from the jury.

It was a strategic decision by defense counsel not to object or draw further attention to the isolated statement regarding gang membership. We will not second-guess this trial strategy, nor does the record support the conclusion that the failure to object was due to a lack of diligence on counsel's part. *Lado*, 804 N.W.2d at 251. We agree with the district court that Munoz has failed to prove counsel was ineffective on this claim.

C. Testimony of Anthony Mitchell. Munoz claims his counsel should have objected to the hearsay testimony of another witness, Anthony Mitchell, a friend of the victim who was with him immediately before the murder. Munoz claims Mitchell testified the victim purchased, or was going to purchase, a large amount of marijuana from Munoz and owed Munoz a large debt. Munoz claims this is the only evidence offered at trial regarding a motive for the killing and was based solely on what the victim told Mitchell. Because Munoz claims the testimony was based on hearsay, he claims counsel should have, but failed to, object to its admission.

The district court rejected this claim, finding Munoz failed to demonstrate counsel's failure to object to this testimony resulted in prejudice sufficient to undermine confidence in the outcome of the trial. Mitchell testified to his

observation of the victim giving Munoz approximately \$3000 a few months before the killing and his observation of the victim taking a large sum of money from underneath his dresser the day of the killing.

The State asserts the statements made by Mitchell were admissible even if they were hearsay under the statement-against-interest and present-sense-impression exceptions. Irrespective of the statements' admissibility under an exception to the hearsay rule, we agree with the district court that Munoz has failed to prove he was prejudiced by the admission of these statements.

Mitchell testified to his personal observations of the previous interaction between the victim and Munoz, and to his observations of the victim counting out money the day of the killing. Other witnesses, including Martha and Aricka, testified that the victim and Munoz had prior interactions involving the exchange of money and/or drugs. It was also undisputed at trial that the victim had a large amount of cash on him when he was killed. This evidence, even without the alleged hearsay testimony, provided support for a possible motive, and Munoz has not proved a reasonable probability the outcome of the case would have been different without the statements by Mitchell. *See id.* (stating to establish prejudice a claimant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

D. Offer of Proof on Alternative Suspects. Next, Munoz claims his trial counsel was ineffective in not making an adequate offer of proof regarding other people who may have committed the murder. He claims the trial court found counsel "did not offer sufficient evidence implicating Baccam or Sanchez."

Munoz does not indicate where in the record the trial court determined insufficient evidence had been offered on this subject or what evidence was found to be inadmissible as a result of the court's ruling. Nor is there any such ruling contained in the appendix. The trial transcript in this case is over 1000 pages long, and we will not sift blindly through the trial record to locate the alleged offending ruling. It is appellant's duty to provide not only citations to authority that support his contentions but also references to the pertinent parts of the record. See Iowa R. App. P. 6.903(2)(g)(3). He has failed to comply with the appellate rules in this case, and we find this issue waived.

Munoz also faults PCR counsel for failing to "introduce additional evidence that trial counsel could have introduced, but did not." Again, there is no indication what "additional evidence" Munoz thinks could have been, or should have been, introduced by either trial or PCR counsel. Munoz appears to be blindly asserting any attorney who fails to locate evidence to exonerate him of this murder is ineffective. He has not carried his burden to prove what additional evidence should have been introduced but was not. We reject Munoz's attempt to have us find trial and PCR counsel ineffective for failing to find and offer evidence that may not even exist.

V. INEFFECTIVENESS OF APPELLATE COUNSEL.

Finally, Munoz claims his appellate counsel was ineffective in not pursuing a claim on direct appeal that he is entitled to a new trial based on the supreme court's ruling in *Heemstra*, 721 N.W.2d at 549. The argument was asserted by trial counsel for the first time in the motion for a new trial because the *Heemstra*

decision was issued by the supreme court after the jury had rendered its verdict but prior to Munoz's sentencing. The district court rejected the new trial motion stating, in part, the jury instruction permitting willful injury to be used as the predicate felony for felony murder was not objected to at trial. Appellate counsel did not assert the claim on direct appeal.

The ineffectiveness of appellate counsel on this issue was alleged in the PCR application but was not briefed in the posthearing brief by PCR counsel. The PCR court therefore did not decide the issue, stating, "The court understands that any remaining issues in Munoz's amended and substituted application that were not discussed by the parties in their briefs have been dropped." Because the PCR court did not address this claim and there was no postruling motion seeking a decision from the court on this issue, we find the issue has not been preserved for our review. *See Lamasters*, 821 N.W.2d at 864 (stating an issue will be preserved only "if the court's ruling indicates the court *considered* the issue and necessarily ruled on it" (emphasis added)).

VI. CONCLUSION.

In conclusion, we find Munoz waived his claim that his PCR counsel was ineffective in failing to brief the ineffectiveness of appellate counsel for not challenging the court's denial of the new trial motion. Munoz failed to prove he received ineffective assistance of counsel when trial counsel failed to object to a number of statements made by witnesses at trial. We reject his claim that trial counsel made an inadequate offer of proof at trial on alternative suspects and PCR counsel failed to develop the record for this claim at the PCR hearing.

Finally, Munoz has failed to preserve error on his claim appellate counsel was ineffective in failing to assert on appeal he was entitled to a new trial based on the *Heemstra* decision.

AFFIRMED.