IN THE COURT OF APPEALS OF IOWA

No. 6-125 / 05-0326
Filed May 10, 2006

LINCOLN DUANE BELKEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dickinson County, Patrick M. Carr, Judge.

Lincoln Duane Belken appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Michael J. Jacobsma of Klay, Veldhuizen, Binder, De Jong, and Jacobsma, P.L.C., Orange City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Rosalise Olson, County Attorney, and Lonnie B. Saunders, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

EISENHAUER, J.

Lincoln Duane Belken appeals from the district court's denial of his application for postconviction relief. He contends his conviction and sentence for first-degree kidnapping and second-degree sexual abuse should be vacated because he was prejudiced when two trial proceedings were held outside his presence. He also contends his trial attorneys were ineffective in failing to call an alibi witness, failing to seek a mistrial or new trial based on juror misconduct, and failing to seek exclusion of the DNA test results. Finally, Belken contends the cumulative effect of these errors denied him a fair trial. We affirm.

I. Background Facts and Proceedings. On July 3, 1998, a group of women went to Lake Okoboji to celebrate Independence Day. They checked into a motel and prepared to go out for the evening. During this time, alcoholic beverages were consumed.

Eventually, the women left the motel in two cars to go to Arnold's Park, an amusement park. One woman, Tonya, was mistakenly left behind. Tonya was unfamiliar with the area, but decided to walk to Arnold's Park. Sometime between 11:00 and 11:30 p.m., Tonya began walking to locate the amusement park. After approximately fifteen minutes, a young man offered her a ride into town. Tonya accepted the ride.

The man did not take Tonya to the amusement park. Instead, he locked the car doors and drove her to a wooded area near the lake. When Tonya tried to leave, the man produced a gun from the trunk and told her he would kill her if she attempted to leave. Tonya was then raped at gunpoint and left in the woods.

Heath Richter encountered Tonya while she searched for help. He took Tonya to Officer Dan Schaffer, who interviewed Tonya and called an ambulance. DNA evidence was obtained at the hospital.

Tonya described her assailant, his car, and the gun to police investigators. She described the man as approximately twenty-one years old, five feet eight inches in height, light brown hair, clean shaven with a little acne, and wearing gold-framed glasses. The vehicle was described as a white, four-door, mid-1990s model with red interior and automatic door locks. Tonya identified Belken from a photographic array. Testing revealed Belken's DNA matched that of the rapist and the odds of a chance match were one in 431 billion.

Following a jury trial, Belken was found guilty of first-degree kidnapping and second-degree sexual abuse. Belken appealed and his conviction was reversed and remanded by this court on the basis that certain testimony should have been excluded. *State v. Belken*, No. 99-2001 (Iowa Ct. App. Feb. 7, 2001). The State sought further review and the Iowa Supreme Court vacated this court's decision and affirmed Belken's conviction. *State v. Belken*, 633 N.W.2d 786 (Iowa 2001).

On December 10, 2001, Belken filed a pro se petition for postconviction relief. Counsel was appointed to represent him and the petition was amended three times. Trial on the petition was held on February 24, 2004. On February 2, 2005, the district court denied the application and dismissed the petition.

II. Scope and Standard of Review. Generally, an appeal from the denial of a postconviction relief application is reviewed for errors of law. *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999). Where, however, an applicant raises

constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.*

Belken's claims stem from his allegation he was rendered ineffective assistance of counsel. Accordingly, we review his claims de novo. *See Ledezma v. State,* 626 N.W.2d 134, 141 (Iowa 2001).

III. Analysis. Belken contends his trial counsel were ineffective in several respects. He further contends his appellate counsel was ineffective in failing to raise on direct appeal his exclusion from two trial proceedings, thereby failing to preserve the issue for postconviction relief.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal,* 404 N.W.2d 130, 131 (Iowa 1987). Belken has the burden to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Id.* With regard to the first prong, Belken must prove that trial counsel's performance was not within the normal range of competence. *State v. Gant,* 597 N.W.2d 501, 504 (Iowa 1999). In evaluating counsel's performance, we presume counsel acted competently. *Id.* The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus,* 459 N.W.2d 619, 627 (Iowa 1990). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook,* 565 N.W.2d 611, 614 (Iowa 1997).

A. Defendant's absence at trial proceedings. Belken first contends his trial counsel were ineffective in failing to raise a denial of a fair trial when two

matters were taken up by the court outside his presence. This claim was not made on direct appeal. We have long adhered to the general principle that postconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Therefore, a claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error. *Id.* Ineffective assistance of appellate counsel may provide sufficient reason. *Id.* Belken claims his appellate counsel was ineffective in failing to bring this claim before our court on direct appeal.

While the jury was deliberating at approximately noon on November 17, 1999, the court administrator informed the prosecutor and the court that he had received a phone call from a man named Robinson who advised that a woman on the jury named Emily was telling people that Belken was not guilty. The court decided to call Robinson and make inquiry about his allegations.

The call was placed in chambers. The trial transcript states the call was made in the presence of the court, counsel, the defendant, and the court administrator. Robinson informed the court that Emily "was telling quite a few people that this gentleman is not guilty." He had learned this from Emily's boyfriend two days before.

Following the phone call, discussion was had. Again, the trial transcript notes the discussion took place in the presence of the court, counsel, the defendant, and the court administrator. The prosecutor requested that Emily be

questioned and if it was discovered that she formulated an opinion before hearing all of the evidence and final arguments, she would be discharged and an alternate juror would take her place. Belken's trial counsel resisted, stating that such actions could cause a mistrial. The court responded, "I don't think it's a mistrial at this point and I don't intend to do anything further with it."

Later in the afternoon, juror Paula Yasat sent a note to the court which read:

> 1. How much of my decision should be based on the other jurors?
> I have reasonable doubt about
> The DNA
> Klooster's work
> Time frame for the attack to occur
> 2. I now feel I am on the witness stand a a [sic] few of the juror [sic] are cross examining me.

At 1:45 p.m., a hearing was held on the matter. Again, the trial transcript states the court, counsel and defendant were present. The court stated its intention to reply, "I cannot answer your questions directly, period. You should reexamine Instruction Number 8 and Instruction Number 36." A discussion was held and the court ultimately sent its proposed response to juror Yasat.

Belken claims he was not present during the Robinson telephone call or either discussion, despite his presence being recorded in the trial transcript. Jail and phone records tend to show he was not present. Belken's trial attorney does not recall the events in question, but his usual practice is to have defendants present at such proceedings. He also believes the presiding judge would not have proceeded without the defendant's presence.

A criminal defendant has a constitutional and statutory right to be personally present at every stage of trial. *State v. Wise*, 472 N.W.2d 278, 279

(Iowa 1991). This right to be personally present extends to conversations between the judge, the attorneys, and the jurors concerning the jurors' ability to be impartial. *Id.* Prejudice is presumed if a defendant is absent from such a conversation. *Id.* However, this presumption of prejudice can be rebutted and will not always necessitate a reversal. *Id.* The presumption of prejudice can be rebutted under a harmless-error analysis. *State v. Atwood*, 602 N.W.2d 775, 781 (Iowa 1999).

Assuming arguendo that Belken was not present during the events in question, we conclude Belken's absence from the Robinson telephone call and discussion was harmless error. In *State v. Wise*, 472 N.W.2d at 278, a juror recognized a witness during her testimony and realized she had been married to his nephew. The juror reported this to the court attendant and spoke with the court and counsel outside the defendant's presence regarding the situation. *Wise*, 472 N.W.2d at 278-79. The juror stated he did not believe his objectivity as a juror would be impaired by this fact, and counsel did not object to the juror's continued service. *Id.* at 279. The conversation ended and trial resumed. *Id.* In upholding the defendant's conviction, our supreme court held the presumption of prejudice arising from the juror's questioning in his absence was rebutted. *Id.* Here, something much more innocuous occurred; a conversation was held outside Belken's presence regarding a juror telling third parties Belken was not guilty. Following the discussion, the trial court decided not to take the matter further and did not even question the juror. As the postconviction court noted, Belken's presence would not have aided the procedure or advanced its fairness in any way.

We likewise conclude any error in the discussions regarding the Yasat note was harmless beyond a reasonable doubt. In answering the questions posed by juror Yasat, the court referred to the instructions already before the jury. A communication with the jury, made outside the defendant's presence, is harmless beyond a reasonable doubt when it contains information substantially the same as that contained in the jury instructions. *State v. McKee*, 312 N.W.2d 907, 915 (Iowa 1981). Furthermore, there is no indication that had Belken been present, the court would have done anything differently. Under these circumstances, our supreme court has found any error to be harmless. *State v. Dreesen*, 305 N.W.2d 438, 440-41 (Iowa 1981).

Belken cites to the case of *State v. Griffin*, 323 N.W.2d 198 (Iowa 1982), in support of his argument. In *Griffin*, the jury sent a note to the court asking for help with the definitions of "physical injury" and "assault." *Griffin*, 323 N.W.2d at 199. The court, outside of the presence of the defendant or counsel, instructed the jury to define the terms from the language given in the instructions. *Id.* The Iowa Supreme Court held this was reversible error because the jurors were asking for instruction on a point of law arising in the cause. *Id.* at 200. We conclude *Griffin* is distinguishable from the case at bar. The court here did not fail to instruct a jury confused about the given legal definitions of the alleged crime, but rather referred a juror confused about how to make her decision to the instructions addressing that issue. Belken also cites to *State v. Meyers*, 426 N.W.2d 614, 616-617 (Iowa 1988), in which our supreme court held it was error for the trial court to respond to a jury's request for evidence without counsel and

the defendant present. Again, the case before us is distinguishable. As noted by the court in *State v. Williams*, 341 N.W.2d 748, 751-52 (Iowa 1983):

> Even if defendant was not present, the error was harmless beyond a reasonable doubt. The communication was not an instruction on the law and had no bearing on the evidence the jurors were to consider. What the court said was not improper; its innocuous response properly told the jurors they should review the instructions and their verdict must be unanimous. In similar cases, we have found no prejudice.

We conclude appellate counsel were not ineffective in failing to appeal on the grounds Belken was not present during trial proceedings because Belken was not prejudiced by this error.

B. Failure to call an alibi witness. Belken next contends his trial counsel were ineffective in failing to call A.L. as an alibi witness.

At trial, Belken's wife, Jennifer, testified that at the time the rape was committed, Belken was with her watching fireworks on the lake. They were engaged to be married. They then traveled, along with Belken's then-eight-year-old cousin A.L. to Belken's parents' home before returning to her house. However, Jennifer was unable to recall the specific times these events occurred. Other relatives testified that Belken was with them on their boat sometime shortly before midnight, and that they found Belken at his parents' home when they arrived between 12:10 and 12:25 a.m. Testimony revealed that Belken left his parents' home to take Jennifer home between 12:30 and 1:00 a.m. Jennifer's mother testified she arrived home at approximately 1:20 a.m. and Belken's father testified he returned to the family home at approximately 1:30 a.m.

At the postconviction hearing, A.L. testified he was with Belken and Jennifer on the night in question. He testified he left the boat with Belken and

Jennifer, they stopped at a restroom, and then immediately returned to Belken's parent's home. A.L. was able to specifically recall that upon returning to Belken's parents' home, Belken entered the shower and A.L. began watching the movie "Pet Cemetery" on television. Records show "Pet Cemetery" began at 12:00 a.m., the approximate time the rape occurred. Evidence provided at the hearing further shows Belken's trial attorneys were aware of A.L.'s potential testimony. Belken contends A.L.'s testimony was necessary at trial to provide independent corroboration of his whereabouts at the time the crime was committed, specifically from the time Belken left the boat to the time relatives arrived at the house. Belken claims his trial attorneys' failure to call A.L. as an alibi witness prejudiced him.

At the postconviction hearing, A.L.'s mother testified that he told Belken's attorneys his story in her presence and that he seemed sure of the events. However, Belken's trial attorneys testified that A.L. was questioned outside his mother's presence and that he appeared nervous and jittery, and "the more we pressed him on it, the more he vacillated." They were concerned A.L. would not hold up well under cross-examination. When asked, A.L. stated he was not comfortable talking about the events of the evening. The attorneys were also concerned that A.L.'s testimony might appear to the jury to be concocted, as he was not asked to recall the events of July 3 until six weeks afterward and could not recall details about how far along the movie was when he began watching. He also couldn't remember what he had watched on television the night before or after.

We conclude trial counsel were not ineffective in failing to call A.L. as an alibi witness. Belken's wife testified as to Belken's whereabouts between the time they left the boat and arrived at his parents' home. Other relatives testified to a similar timeline of events. Belken's attorneys were concerned A.L. would not be a good witness, and that the jury might believe he was lying. The attorneys' decision not to call A.L. was a strategical choice. Trial tactics or strategies, even if improvident, miscalculated or mistaken, typically do not amount to ineffective assistance of counsel. *See State v. Oetken,* 613 N.W.2d 679, 683-84 (Iowa 2000). Accordingly, counsel did not fail to perform an essential duty by not calling A.L. as a witness.

C. Improper juror communication. Belken contends his attorneys were ineffective in failing to move for a mistrial or new trial based on the information received from Robinson regarding a juror, Emily, who was telling her boyfriend Belken was not guilty.

It is well established that the jury is to be above suspicion, and that any practice which brings its proceedings under suspicion is to be prohibited. *State v. Carey*, 165 N.W.2d 27, 29 (Iowa 1969). Conduct by an outsider, improperly influencing a juror, can be grounds for a new trial. *State v. Piper*, 663 N.W.2d 894, 910 (Iowa 2003). However, Belken here complains of conduct by a juror, not by a third party. His situation is therefore distinguishable from those of the cases to which he cites. He cannot show that any conduct by an outsider influenced the jury's decision-making.

Furthermore, Belken's attorney testified that he did not ask for a mistrial because the juror appeared to believe Belken was innocent. As stated above,

this was trial strategy and not ineffective assistance of counsel. Any complaint about the communication post-verdict was procedurally barred. *See State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991) (holding a defendant cannot complain in a post-verdict motion of a ground not urged during trial).

We find counsel were not ineffective in failing to bring a motion for mistrial or new trial on this ground.

D. Juror discussion of defendant's other criminal charge. Belken also contends counsel should have made a motion for mistrial or new trial because during deliberations, the jurors discussed the fact Belken was charged with other crimes. At the postconviction hearing, juror Yasat testified that during deliberations comments were made to the effect that "if he has done this once, he has done it before." She also overheard the word "assault." She stated news coverage of the case was also discussed. In her deposition, she testified she overheard a male juror say Belken had prior charges, but did not recall whether the nature of the other charges was discussed. Belken contends that his trial counsel should have questioned the jurors, discovered the alleged misconduct, and made a motion for new trial.

The mere receipt of information outside the record does not require new trial. *Piper*, 663 N.W.2d at 910. There must be "a reasonable probability that the misconduct did in fact influence the jury in its deliberations." *Id.* Moreover, an assessment of the risk of improper influence rests on "objective facts as to what actually occurred in or out of the jury room," not on speculation about what might have happened. *Id.*

At the hearing, nine other juror depositions were offered into evidence. The other jurors testified they either did not recall the events alleged by juror Yasat, or they denied they occurred. As the district court concluded, the credible evidence in the record suggests that the jury did not consider any prior charges against Belken during their deliberations. Accordingly, the trial attorneys were not ineffective in failing to discover the alleged misconduct and, in turn, make a motion for new trial.

E. Failure to exclude DNA evidence. Belken contends his trial attorneys were ineffective in failing to seek exclusion of the DNA test results based upon a defective non-testimonial identification order. He argues suppression of the test results was warranted because the contents of the application did not comply with the requirements of Iowa Code section 801.5 (1997).

Section 801.5 states in regard to an application for non-testimonial identification order:

> The application shall:
> 1. Describe the felony offense that is being investigated;
> 2. Name or describe with particularity the person to be detained for the desired nontestimonial identification procedure;
> 3. State the time when and place where the applicant requests that the nontestimonial identification procedure be conducted; and
> 4. Be supported by one or more affidavits setting forth the facts and circumstances showing that the basis for issuance of an order under this chapter exist. If an affidavit is based in whole or in part on hearsay, the affiant shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as is practicable, the means by which the information was obtained.

Belken contends the fourth requirement was not met because the affidavit is based on hearsay and there was no disclosure of the particular facts bearing on the informant’s reliability or the means by which the information was obtained.

The application stated that the victim's description of the assailant matches Belken's physical characteristics, the gun the victim described matches one obtained in a search of Belken's residence, and the victim's description of the assailant's vehicle matches a vehicle registered to Belken. These facts were listed under a section of the affidavit entitled "Facts personally known by the affiant." Belken complains that the affidavit does not mention to whom the victim gave the descriptions.

Under a section entitled "Facts personally known by other law enforcement officers," the affidavit states the victim identified Belken as her assailant. Belken complains this section is double hearsay because the affiant is reciting information heard from the victim by other officers. Again, the affidavit does not set forth the means by which the information was obtained. Belken argues further that there are no facts bearing on the reliability of the informant.

Finally, under the final section of the affidavit entitled "Information given to law enforcement officers by the victim or other witnesses who are disinterested persons," it states, "The victim had semen present in her vagina when she arrived at the Dickinson County Memorial Hospital . . . and samples of that semen were obtained by medical personnel." This section further states, "This information is considered reliable because the persons furnishing it are citizen-informants who have no apparent reason to falsify the information." Belken complains the affiant failed to reference or attach any medical records to verify or confirm the information, that the victim is not identified, nor was it described how the information was obtained.

A non-testimonial identification order issued pursuant to Iowa chapter 810 must be constitutionally reasonable. *Bousman v. Iowa Dist. Court*, 630 N.W.2d 789, 801 (Iowa 2001). This requirement means that the order must be supported by reasonable grounds to suspect that the subject of the order committed the crime under investigation. *Id.* Probable cause to believe that the subject of the order actually committed the crime is not necessary. *Id.*

We conclude Belken's attorneys did not err in failing to seek to exclude the DNA test results based upon the allegedly defective non-testimonial identification order. The facts stated under the first section were facts personally known to the affiant. The facts stated under the second and third section of the affidavit were supplied by the victim, law enforcement personnel, and medical personnel. These citizen-informants, although unnamed, are considered reliable. *See State v. Niehaus,* 452 N.W.2d 184, 189 (Iowa 1990) (holding that there is a rebuttable presumption that "information imparted by a citizen informant is generally reliable."). Based upon these facts, reasonable grounds exist to suspect Belken committed the crime and the non-testimonial identification order was not defective.

F. Cumulative error. Finally, Belken contends the cumulative effect of the alleged errors of counsel resulted in a denial of his right to effective assistance of counsel.

Combined errors of trial or appellate counsel may constitute ineffective assistance of counsel violating a defendant's Sixth Amendment right. *Wycoff v. State*, 382 N.W.2d 462, 473 (Iowa 1986). We view the totality of the circumstances to determine whether counsel's representation was "within the

range of normal competency." *Id.* Applying this test we find Belken's trial and appellate counsels' performance was within the normal range. In addition, we can find no prejudice to Belken because of the overwhelming evidence of guilt provided by the DNA evidence.

Because trial and appellate counsel provided effective assistance, the district court properly denied Belken's application for postconviction relief and we affirm.

AFFIRMED.