

IN THE COURT OF APPEALS OF IOWA

No. 8-909 / 07-1639
Filed December 17, 2008

RION FRANKE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Rion Franke appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Rees C. Douglas, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew Bockenstaedt, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Rion Franke appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of trial and postconviction counsel. We affirm.

I. Background Facts and Proceedings.

Franke was found guilty of second-degree sexual abuse. On direct appeal, his conviction was affirmed by this court in an unpublished opinion. *State v. Franke*, No. 02-0761 (Iowa Ct. App. Oct. 15, 2003).

Defendant was charged on February 26, 2001 with sexually abusing his step-sister, J.J. J.J. was born April 28, 1989. In late November of 2000, J.J.'s father read a passage from J.J.'s diary dated November 10, 2000. That diary entry stated, "Dear Diary or god / I feel so bad today. / I feel like crying / looking back on my past / How ryan keep feeling / me in areas that / were private. / I'm fat ugly and stupid /" Following J.J.'s father's report of the diary entry, Sioux City Police Detective John Kayl interviewed defendant for approximately forty minutes. In that interview defendant admitted touching J.J. one time under her panties.

At trial J.J. testified that defendant touched her over her panties on more than one occasion at the home of her mother and defendant's father. Defendant testified that he admitted to touching J.J. only because he wanted to get out of the police interview. The jury was instructed that if the State proved defendant performed a sex act on J.J. "during the period of time between March 3, 1996 and the summer of 2000," while J.J. was under twelve years of age, the defendant was guilty of second-degree sexual abuse.

Id. This court preserved for postconviction relief three claims of ineffective assistance of counsel. *Id.*

Franke filed a petition for postconviction relief contending trial counsel was ineffective in (1) failing to move to suppress his confession; (2) failing to object to the admission of J.J.'s diary entry; and (3) failing to properly inform Franke of the advantages of a plea offer. A hearing was held at which Franke and his trial

counsel testified. The court took judicial notice of the complete record from the criminal trial.

The district court issued a decision denying the application for postconviction relief. The court first concluded that Franke's confession was voluntary and therefore, it was not ineffective assistance to fail to file a motion to suppress. The court next concluded that in light of the victim's trial testimony concerning the abuse, even had a proper objection been made to testimony concerning her diary entry, the outcome of the trial would not have been different. Finally, the district court found that trial counsel had informed Franke of any plea offers, discussed potential sentences and the advisability of striking a plea agreement, and that Franke did not indicate interest in a plea agreement. The application for postconviction relief was denied.

Franke appeals, raising only the issues of the voluntariness of his confession and the admissibility of the diary entry.

II. Scope and Standards of Review.

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007). To prove ineffective assistance of counsel, the appellant must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). An applicant's inability to prove either element is fatal. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). There is a presumption the attorney acted competently, and prejudice will not be found unless there is "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998).

III. Ineffective Assistance of Trial Counsel.

A. Confession.

On direct appeal, this court wrote:

The videotaped confession shows that the officer implicitly promised defendant if he confessed, his case would essentially be over, that the officer was only concerned about getting J.J. assistance and helping defendant clear his conscience. Nevertheless, there is not enough information in the record for us to make a determination as to whether defendant's confession, under the totality of the circumstances, was indeed involuntary and whether his counsel was ineffective for failing to seek its suppression. We preserve this issue for postconviction proceedings.

State v. Franke, No. 02-0761 (Iowa Ct. App. Oct. 15, 2003). Franke contends trial counsel was ineffective for failing to request suppression of statements he made to investigators. He claims the record shows the statements were involuntary because they were made in exchange for promises of leniency.

"The test for determining the admissibility of confessions or inculpatory statements is voluntariness." *State v. Munro*, 295 N.W.2d 437, 440 (Iowa 1980). The State has the burden to show by a preponderance of the evidence that an accused's inculpatory statement was voluntary. *State v. Nolan*, 390 N.W.2d 137, 142 (Iowa Ct. App. 1986). Our supreme court has stated that an involuntary confession is inadmissible, "not on the basis of a constitutional principle, but as a matter of the law of evidence." *State v. Quintero*, 480 N.W.2d 50, 52 (Iowa

1992). Involuntary confessions are inadmissible because of their “inherent lack of reliability.” *State v. McCoy*, 692 N.W.2d 6, 28 (Iowa 2005).

The question of voluntariness is a matter of sorting out the impetus for the inculpatory statement. To be admissible the statement must freely emanate from the mind of the speaker. If the statement is not the product of rational intellect and free will, but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible.

State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982) (internal quotations omitted).

The district court found: “Although certain representations were made by Officer Kayl in the interview process, none of them induced Franke’s confession to the extent that this Court can conclude that his free will was overborne.” Upon our de novo review, we agree. Franke testified at his criminal trial and at the postconviction hearing that he made his statements to Detective Kayl because he was angry and wanted to get out of the interview, not because of promises of leniency. There are no indicia of unreliability with respect to Franke’s inculpatory statements. Franke’s trial counsel testified that he had reviewed the tape of the confession and did not believe there were sufficient grounds for suppression.

In *United States v. Kilgore*, 58 F.3d 350 (8th Cir. 1995), the defendant thought he would receive no jail time if he confessed. *Kilgore*, 58 F.3d at 353. The court concluded the defendant’s belief alone did not render the confession involuntary. *Id.* The court stressed that the applicable test was whether the defendant’s “will was overborne and his capacity for self-determination critically impaired.” *Id.*

Franke’s will was not overborne. Franke came to the interview with Detective Kayl voluntarily. He was advised of his *Miranda* rights. He was not

under arrest and was never told he could not leave. Franke was interviewed for less than one hour, and about twenty minutes into the interview, Franke admitted touching J.J. on her vagina one time. He thereafter consistently denied improperly touching her at any other time. Franke freely and voluntarily made his inculpatory statements to the police. Furthermore, Detective Kayl never promised a certain result in exchange for the Franke's confession. We conclude Franke's confession was voluntary and therefore trial counsel breached no duty in failing to move to suppress the confession.

B. Testimony Concerning Diary Entry.

Franke claims his trial counsel was ineffective for failing to object to the introduction of J.J.'s diary entry. The diary entry was read to the jury by J.J.'s father, who reported Franke to police after discovering the entry. Assuming that trial counsel should have objected to the hearsay testimony, we conclude Franke suffered no prejudice. Even if a proper objection had been made concerning the diary excerpt, the outcome of the trial would have been the same.

J.J. testified that Franke touched her over her panties on more than one occasion at the home of her mother and Franke's father. Franke testified that he admitted to touching J.J. only because he wanted to get out of the police interview. The diary excerpt was duplicative of testimony already presented. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("we will not find prejudice if the admitted hearsay is merely cumulative").

IV. Ineffective Assistance of Postconviction Counsel.

Franke contends his postconviction counsel was ineffective in failing to assert that the proper approach to determine the admissibility of his confession

was an “evidentiary” approach noted with approval in *State v. McCoy*, 692 N.W.2d at 28, rather than a totality-of-the-circumstances approach used in federal courts. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973). To prove ineffective assistance of counsel, the appellant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Lane*, 726 N.W.2d at 393. Postconviction counsel was not ineffective as no prejudice resulted. The essential issue involved is whether Franke’s confession was voluntary. Involuntary confessions are unreliable—whether as a matter of evidentiary law or constitutional law. We have already found the confession was voluntary and not unreliable.

In our de novo review we have carefully considered all of appellant’s claims and arguments. Those not specifically addressed in this decision are either covered by our resolution of the arguments addressed specifically or we concluded they are without merit. We affirm the decision of the postconviction court.

AFFIRMED.