

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1018 / 09-0610  
Filed February 27, 2013

**JOHN NELL MITCHELL,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Marlita A. Greve,  
Judge.

John Nell Mitchell appeals the ruling denying his application for  
postconviction relief. **AFFIRMED.**

Joel Walker, Davenport, for appellant.

John Nell Mitchell, Anamosa, pro se.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney  
General and Michael J. Walton, Scott County Attorney for appellee State.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.  
Potterfield and Tabor, JJ., take no part.

## EISENHAUER, C.J.

After his March 1999 convictions for second-degree sexual abuse of Amy, John Nell Mitchell appealed.<sup>1</sup> The Iowa Supreme Court reversed his convictions and remanded. *State v. Mitchell*, 633 N.W.2d 295, 297 (Iowa 2001) (*Mitchell I*). Upon retrial, a jury again found him guilty, and the convictions were affirmed on appeal. *State v. Mitchell*, 670 N.W.2d 416, 417 (Iowa 2003) (*Mitchell II*). In 2004, Mitchell filed a pro se application for postconviction relief. In 2009, the postconviction court denied relief. In this appeal, his appellate counsel claims the postconviction court erred in (1) permitting him to represent himself on his application or, at least, failing to appoint standby counsel to help him subpoena witnesses and (2) denying Mitchell's oral motion to continue the postconviction hearing. Mitchell raises several other claims in pro se briefs. We affirm.

### I. Background Facts and Proceedings.

In the August 1998 trial information, Mitchell was charged with six counts involving four children. In March 1999, the trial court granted his motion to sever and separated the counts for three trials: Amy—three counts of second-degree sexual abuse (January 1997 to September 1997), sisters Karen and Susanna—two counts of indecent contact with a child,<sup>2</sup> and K.F.—one count indecent contact with a child.<sup>3</sup> *Mitchell I*, 633 N.W.2d at 297.

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<sup>1</sup> In order to limit confusion, we will use the names used by the Iowa Supreme Court in Mitchell's direct appeals of his convictions.

<sup>2</sup> In his April 1999 trial, Mitchell was represented by attorney Kent Simmons. Mitchell was convicted of one count of indecent contact with a child (Karen) and acquitted on the other count. *Mitchell I*, 633 N.W.2d at 297 n.2.

<sup>3</sup> In April 1999, the State moved to dismiss this charge due to Mitchell being convicted of three class B felonies (Amy) and one count indecent contact with a child (Karen). The court dismissed the case.

During his first trial regarding abuse of Amy, Mitchell was represented by attorney Kent Simmons. “Amy was ten at the time Mitchell began living with her mother, Julie, in 1997.” *Mitchell II*, 670 N.W.2d at 418. David is Julie’s husband and Amy’s father. David and Julie were involved in a dissolution of marriage proceeding. In May 1998, Amy described several instances of abuse by Mitchell in a videotaped interview with a police detective. *Id.*

Prior to trial, Mitchell filed a motion in limine seeking to exclude testimony from Karen and Susanna regarding alleged abuse in the fall of 1997, and they did not testify in the State’s case-in-chief. After Amy testified to Mitchell’s sexual abuse, defense counsel’s cross-examination “accused her of fabricating the allegations to break up [Mitchell’s] relationship with her mother.” *Mitchell I*, 633 N.W.2d at 297. In response, the prosecutor sought and was permitted to introduce testimony of Susanna and Karen. *Id.* Mitchell was convicted on three counts of second-degree sexual abuse. *Id.* at 297-98. On appeal, the Iowa Supreme Court reversed and remanded, ruling, “the testimony of Susanna and Karen was not relevant to prove any legitimate fact other than Mitchell’s propensity to abuse young girls.” *Id.* at 300.

On December 5, 2001, prior to retrial, a hearing was held on Mitchell’s motion to represent himself and his pro se evidentiary motions. The court conducted a colloquy, and Mitchell stated he had experience at five trials: “I don’t plead to felonies. All felonies go to trial.” The court discussed standby counsel with Mitchell, who repeatedly stated his opposition. The court explained standby counsel could help Mitchell subpoena defense witnesses and Mitchell replied: “I have no trust in attorneys here. None at all.” The court again explained: “[I]f you

request the clerk's office to issue a subpoena, they will issue the subpoena. But the clerk's office isn't in the business of serving subpoenas . . . . And that's one of the things that standby counsel can help you with." Mitchell was unconvinced and stated: "I don't really want one of them." However, at the court's continued urging, Mitchell eventually agreed to accept standby counsel while representing himself during the retrial. Next, Mitchell identified several attorneys he did not want appointed as standby counsel.<sup>4</sup>

Mitchell filed numerous motions requesting depositions/documents from: Dawn Sturms (DHS contract worker—took Amy to Dr. Ozaki); Randy Archer (DHS—Julie's complaints against David); Jo McLaughlin (DHS); Julie (copies of no-contact orders); David (copies of doctor reports and Julie's complaints); Sharon Sldders (DHS—statements made during 1997 juvenile process); Lynn Fitzgerald (juvenile court services); and all witnesses (founded or unfounded DHS reports). The trial court denied his requests, ruling: "Some [information is] in the records of the [DHS] as a consequence of previous child abuse allegations. Such information only can be obtained under the criteria of specific statutes governing the confidentiality of that information." Additionally, much of the information requested has not been shown to be relevant to the facts of the charges, and even if relevant, any probative value is outweighed by the prejudice. Finally, "[t]he court previously granted the State's motion in limine with

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<sup>4</sup> Mitchell objected to: Mr. Simmons ("He's a good attorney. He could have won the case if he wanted to, but he didn't want to. And I don't want him."); Mr. Phelps (represented Julie in prior juvenile action), Mr. Bell (represented children in juvenile action), Mr. DeLange ("withheld evidence from a gun trial where I got five years"); and Mr. Koos ("failed to do any investigation or anything").

respect to much of this evidence, and the court's ruling in that regard remains the law of this case."<sup>5</sup>

At the retrial, Amy testified to specific instances of abuse by Mitchell. An edited videotape of Amy's interview with Detective Venema was played for the jury.<sup>6</sup>

Mitchell called Amy's mother [Julie] as a witness in his case in chief, apparently in an effort to establish that she met with the police detective before his interview with Amy in an effort to slant the evidence against Mitchell or otherwise conspire against him. Mitchell's general defense at trial was that DHS social workers, Scott County law enforcement, and members of Amy's family conspired to bring about his conviction.

*Mitchell II*, 670 N.W.2d at 418-19. After the jury returned guilty verdicts, Mitchell was sentenced to three consecutive sentences. *Id.* at 418.

Mitchell filed a pro se appeal, and counsel was appointed. Mitchell argued the trial court erred in allowing Julie's testimony that Detective Venema interviewed her due to Karen and Susanna's mom filing a complaint alleging Mitchell had sexually abused them. *Id.* at 418-19. Julie testified she told Detective Venema she also had a daughter, Amy, who had been around Mitchell, and maybe he should talk to Amy because all three girls were "acting out the same, throwing fits, tearing things up." *Id.* at 419-20. Mitchell argued Julie's testimony produced indirectly the same evidence of prior bad acts declared inadmissible in *Mitchell I*. *Id.* at 420. The Iowa Supreme Court noted "the record in [*Mitchell I*] did not disclose the existence of a conspiracy theory involving

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<sup>5</sup> At the first trial, the court sustained the State's motion in limine regarding: Amy's sexual activity other than with Mitchell; Amy's April 1997 emergency room visit; DHS's earlier investigation of sexual abuse during Julie and David's dissolution action (testimony of this investigation was allowed in *Mitchell I* only after State's witness "opened the door"); DHS findings or conclusions of founded or unfounded in earlier abuse investigations of David and Mitchell; juvenile records or dispositions; and Amy's commitment for anger issues during the time she lived with Mitchell and Julie.

<sup>6</sup> The unedited videotape is part of the record.

Amy's mother." The court ruled the conspiracy inferences Mitchell sought to establish in his direct examination of Julie "opened the door . . . . Thus, the State was entitled to rebut this conspiracy theory with evidence of the actual facts that caused Amy's mother to meet with the police before the police interviewed Amy." *Id.* at 422.

Second, Mitchell argued his sentence was unconstitutionally vindictive in violation of due process. *Id.* at 422. The court found no "actual vindictiveness" and affirmed his convictions. *Id.* at 425.

In 2004, Mitchell filed a pro se application for postconviction relief.<sup>7</sup> Mitchell sought court-appointed representation, and numerous attorneys were appointed. In July 2007, the court granted Mitchell's request to vacate the appointment of attorney Jack Dusthimer and to represent himself on his application. At Mitchell's request, the State provided the "entries regarding [Julie's] plea of guilty." The court denied Mitchell's motion seeking to take depositions of various attorneys and police officers, ruling:

The County Attorney resists these motions based on the fact that all the witnesses have already given depositions in this case, and [Mitchell] simply does not like the answers, so he is wasting time by taking these depositions again. The court finds [Mitchell] has given no compelling reason why any new depositions should be taken in this case.

Hearing was set for December 2008. On November 24, Mitchell sought to postpone the hearing. The court denied his request, noting the case had been on file since 2004. On the day before the December hearing, Mitchell renewed

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<sup>7</sup> Mitchell checked boxes to allege "his conviction or sentence was in violation of the constitution and laws, there exists evidence of material facts, not previously presented and heard requiring vacation of the conviction or sentence, and the conviction or sentence is subject to collateral attack."

his request for a continuance, stating he would be obtaining information regarding witness Sharon Sidders. The court continued the hearing to March 11, 2009.

On February 26, 2009, Mitchell filed six separate “motions to call witness” for Dr. Ozaki (child sexual assault specialist); Dawn Sturms (DHS contract counselor); Judge John G. Mullen (juvenile court); and attorneys Jack E. Dusthimer (postconviction), Kent A. Simmons (first trial), and Dennis D. Hendrickson (appellate). On March 2, 2009, the court directed the Scott County Clerk of Court to issue the requested subpoenas.

Also on March 2, the clerk sent a letter to Mitchell telling him the clerk’s office had delivered four subpoenas to the Scott County Sheriff’s Department and Mitchell should contact the department regarding directions for service and fees. Additionally, the clerk’s letter to Mitchell enclosed the subpoenas for Dawn Sturms (Muscatine County) and Dennis Hendrickson (Polk County) and informed Mitchell he needed to make arrangements for service with those counties.

Attorney Dusthimer was the only witness who appeared at the March 11 postconviction hearing, and he was questioned by Mitchell about being present at a juvenile hearing. Dusthimer testified:

I don’t have any recollection at all in any fashion regarding anything that you are suggesting that I did back in the early 90’s. I asked you—while I was your postconviction attorney; I asked you multiple times to provide me with any documentation as to why you thought I had a conflict of interest. I never received that from you.

During the hearing, Mitchell made an oral motion to continue the hearing. The State resisted, and the court denied his motion, ruling:

You asked for a continuance to get the witnesses here. I'm going to deny that. The reason for my denial is this case has been on file since 2004. It's over two inches thick at this point. You've had notice for quite some time that we have a hearing today. You didn't apply for subpoenas until barely over a week ago.

You had time to get witnesses here. This is your opportunity to present evidence.

Subsequently, the postconviction court denied Mitchell's application for relief, and this appeal followed. We assume error is preserved on the appellate issues.

## **II. Scope and Standards of Review.**

Because there is no constitutional right to counsel in postconviction cases, we review the appointment of counsel for an abuse of discretion. *Wise v. State*, 708 N.W.2d 66, 69 (Iowa 2006). "The decision to grant or deny a motion for a continuance . . . lies within the broad discretion of the trial court, and will not be reversed on appeal unless an injustice has resulted." *State v. Leutfaimany*, 585 N.W.2d 200, 209 (Iowa 1998). To the extent Mitchell's pro se claims urge constitutional issues, we review de novo. *See Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). We review claims regarding admission of evidence for abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001).

## **III. Pro Se Representation.**

Mitchell argues the district court should have denied his motion to represent himself in this postconviction action, or in the alternative, should have appointed standby counsel to assist him.

Granted his wish in the postconviction action, we will not allow Mitchell to complain. *See State v. Walker*, 236 N.W.2d 292, 295 (Iowa 1975) (stating a lay person who "fails to utilize professional assistance should be ready to take the



consequences”). Over the course of the 2004 postconviction case, numerous attorneys were appointed to represent Mitchell. After these appointments and after the matter had been pending for three years, in July 2007, the court granted Mitchell’s application to represent himself. Mitchell did not request standby counsel. Under these circumstances, we find no abuse of discretion in the postconviction court’s granting of Mitchell’s motion to proceed without an attorney. We likewise find no abuse of discretion in the court’s failure to appoint standby counsel when Mitchell did not request standby counsel and Mitchell had strenuously objected to standby counsel prior to his retrial.

#### **IV. Oral Motion to Continue Postconviction Hearing.**

Mitchell argues the court abused its discretion in failing to grant his oral motion for a continuance after only one witness appeared at the postconviction hearing.

Continuances are only appropriate when the reason for more time is not the result of a party’s own fault or negligence. Iowa R. Civ. P. 1.911(1). On December 22, 2008, the December postconviction hearing was postponed upon Mitchell’s *second* request, and the court reset the matter for March 11, 2009. Despite having knowledge of the March 11 trial date since December 22, Mitchell did not take action to secure witnesses until February 26, 2009. We conclude this timeline shows the district court appropriately exercised its discretion in denying a continuance. Mitchell was dilatory and negligent in attempting to support his case with witnesses, and he cannot now complain of a self-inflicted wound.

## V. Pro Se Brief Claims.

Mitchell makes broad allegations regarding suppressed exculpatory evidence, false evidence, a conspiracy between the prosecution and attorney Kent Simmons, and a failure to present evidence, all in regard to his March 1999 first trial concerning Amy. Mitchell also makes allegations regarding his April 1999 trial concerning Karen and Susanna. Claims regarding errors in the 1999 trials are irrelevant to his postconviction action based on his convictions after retrial for abuse of Amy.

Mitchell also asserts the following errors during his second trial: (1) evidence was suppressed of the “full videotaped interviews of all the witnesses,” depriving him of a fair trial; (2) the trial court did not allow him to present evidence to show Amy was actually abused by her father; (3) the trial court did not allow him to present evidence of an “unfounded” DHS conclusion; (4) granting the State’s motion in limine; (5) juror misconduct occurred; (6) barring questioning of prospective jurors on the subject of race; and (7) allowing his interview statement to an officer into evidence. We conclude Mitchell has failed to demonstrate cause for his failure to present these contentions in his direct appeal following retrial. Consequently, they are waived. See Iowa Code § 822.8 (2007).

Next, Mitchell’s brief quotes the testimony quoted by the Iowa Supreme Court in *Mitchell II*, 670 N.W.2d at 419-420, and he argues the trial court erred in admitting this evidence. We conclude this claim was raised and decided in his direct appeal following retrial. Consequently, he cannot raise it here. See

*Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998) (ruling “postconviction relief is not a means for relitigating claims that were . . . presented on direct appeal”).

Finally, we have reviewed all issues raised by Mitchell, and those not specifically addressed are deemed to be without merit.

**AFFIRMED.**