IN THE COURT OF APPEALS OF IOWA

No. 2-427 / 11-0995
Filed July 25, 2012

SHON LAREESE GRAVES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Shon Graves appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Shon L. Graves, Fort Madison, pro se.

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

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Shon Graves appeals from the district court's denial of his application for postconviction relief. He claims postconviction counsel was ineffective for failing to call any witnesses at the hearing on his application. In a pro se brief, he additionally claims trial and appellate counsel were ineffective in multiple respects. We affirm.

I. Background Facts and Proceedings.

Shon Graves shot and killed a man who stole money from him. He was charged by trial information with first-degree murder. A jury found him guilty, and he was sentenced to life in prison without parole.

Graves appealed his conviction, claiming the district court erred in allowing several witnesses to testify about statements made by children who had witnessed the shooting. *State v. Graves*, No. 02-2092, 2004 WL 239857, at *2 (Iowa Ct. App. 2004). This court rejected that claim, finding that even if the statements were erroneously admitted under the excited-utterance exception to the hearsay rule, Graves was not prejudiced because the record contained overwhelming evidence of his guilt. *Id.* Along the same lines, we found substantial evidence supported the murder conviction. *Id.* at *3. Finally, we denied five ineffective-assistance claims and preserved four others for possible postconviction proceedings. *Id.*

Graves filed a pro se application for postconviction relief on December 15, 2004, raising nine claims of ineffective assistance of counsel. He subsequently amended his application in a fifty-two page pro se filing. The application was amended three more times by Graves and once by court-appointed counsel.

Graves's final pro se amended application identified eleven ineffective-assistance-of-counsel claims, four of which were those preserved in his direct appeal. The application filed by counsel raised three additional claims.

Following a hearing, the district court denied all of the claims. This appeal followed.

II. Scope and Standards of Review.

We normally review postconviction proceedings for error at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel, we conduct a de novo review. *Id.*

To prevail on his ineffective-assistance claims, Graves must prove by a preponderance of evidence that counsel failed to perform an essential duty and prejudice resulted. *Id.* at 158. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* at 159.

III. Discussion.

A. Postconviction Counsel's Failure to Call Witnesses.

At a pretrial conference, Graves's attorney indicated to the district court that she intended to call witnesses at the approaching hearing on the postconviction application. Her position, however, had changed by the time the hearing arrived. The following discussion occurred between the court, counsel, and Graves at the beginning of the hearing:

> MS. REYES [POSTCONVICTION COUNSEL]: Mr. Graves, Pat Zamora, your local trial attorney, is here. Do you want us to call her as a witness or do you want me to have her sequestered for now and if the county attorney is going to call her, then have me

cross-examine her or would you like to begin with your questioning at this point?

MR. GRAVES: I did not call her for a witness, so no.

MS. REYES: At this time I would ask that the witness be sequestered from the testimony. We have our own case to present, which I believe is—other than testimony from Mr. Graves and our legal documents, that's it.

. . . .

MS. REYES: . . . I have my amended application. I have my legal arguments. I believe that . . . there is not much testimony that needs to be solicited per my application. . . .

Now, with Mr. Graves, he had submitted two [applications] of his own and he had some issues and some things that he wanted to talk about. . . .

. . . .

Now, I believe that the Court of Appeals left open four issues of ineffective assistance of counsel, which I believe that the county attorney will be addressing with Ms. Zamora.

Shon, can you hear me?

MR. GRAVES: Yes, ma'am.

MS. REYES: How do you want to proceed with this as far as—do you want me to question you?

MR. GRAVES: I would just like you to have all my issues read into the record. . . .

After some extended discussion about which amendments to the application were at issue, the court asked postconviction counsel,

Are you eliciting testimony from Mr. Graves?

MS. REYES: No, not at this point.

THE COURT: Let me know when you want to do that and I will swear him in.

MS. REYES: I don't know that we are going to need to do that at this time.

Shon, other than what we have in the record, at this point are you going to want to testify today?

MR. GRAVES: I don't know. If you need to ask me a question, I will testify, but other than what's in the record, I am fine by that.

MS. REYES: And everything you put into your application and my application, do you think we have everything covered legally—all the legal arguments you wanted to make?

MR. GRAVES: Yes, ma'am.

MS. REYES: Your Honor, I believe that our legal issues for the Court to consider contained in our applications for

> postconviction relief are themselves legal issues that don't need to solicit testimony. . . .
>
> THE COURT: Does the Petitioner rest then?
>
> MS. REYES: Shon, can you hear me?
>
> MR. GRAVES: Yes, ma'am.
>
> MS. REYES: Okay. We are going to rest, is that okay?
>
> MR. GRAVES: If you covered everything you need to cover, yes, it is alright with me.

One of Graves's trial attorneys was then questioned by the State and cross-examined by postconviction counsel and Graves himself. No other testimony was offered by Graves or his counsel.

As is clear from the foregoing, Graves was an active participant in this postconviction proceeding. He filed multiple amendments to his application, numerous motions, and an interlocutory appeal of an adverse ruling on one of those motions, all while represented by court-appointed counsel. The State accordingly argues Graves cannot now complain about postconviction counsel's failure to call witnesses on his behalf, as he acquiesced in that decision. We agree. *See Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991) ("Applicant cannot deliberately act so as to invite error and then object because the court has accepted the invitation."); *see also State v. Hutchison*, 341 N.W.2d 33, 42 (Iowa 1983) (determining defendant could not claim standby counsel was ineffective for failing to object to jury instructions when defendant, who had elected to proceed pro se, stated he had no objections).

We further find Graves has failed to establish any prejudice resulted from the lack of testimony at the hearing. His request that we presume prejudice occurred under these circumstances is denied, as counsel was not "either totally absent, or prevented from assisting the accused during a critical stage of the

proceeding." *United States v. Cronic*, 466 U.S. 648, 659–60 n.26 (1984) (stating that "[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt"); *cf. Lado v. State*, 804 N.W.2d 248, 252–53 (Iowa 2011) (finding presumption of prejudice appropriate where postconviction applicant was "constructively without counsel" by virtue of counsel's failure to seek a continuance to prevent automatic dismissal of application).

B. Pro Se Claims.

The first pro se issue raised by Graves relates to the trial information, which he contends was defective because it lacked "sufficient elements to sustain a conviction under section 707.2, and . . . any factual particulars which would put the defendant on notice and cause of the accusation against him." (Emphasis removed.) We find no merit to this contention. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (stating counsel has no duty to pursue a meritless issue).

The trial information charging Graves with first-degree murder read as follows: "The said MARK [SHON] LAREESE GRAVES on or about the 14th day of August A.D., 2001 in the County of Scott, and State of Iowa: Did commit Murder 1st Degree in violation of Section 707.2 as defined in the Code of Iowa." This, along with the detailed minutes of testimony accompanying the trial information, was sufficient to apprise Graves of the crime charged. *See State v. Grice*, 515 N.W.2d 20, 23 (Iowa 1994) ("Since the adoption of the short form indictment, Iowa courts consider both the indictment or information and the

minutes filed when determining the adequacy of the allegations to apprise the accused of the crime charged."); *State v. McConnell*, 178 N.W.2d 386, 388 (Iowa 1970) (stating a trial information is sufficient "if it uses the name given to the offense by statute or by stating so much of the definition of the offense . . . as is sufficient to give the court and the accused notice of what offense is intended to be charged"). Contrary to Graves's arguments otherwise, an information generally does not need to detail the manner in which the offense was committed. *Grice*, 515 N.W.2d at 22.

Graves next claims his trial and appellate counsel were ineffective for failing to challenge the admission of the children's hearsay statements on confrontation grounds under *Crawford v. Washington*, 541 U.S. 36, 59 (2004). *Crawford* was decided on March 8, 2004, one month after Graves's conviction was affirmed by this court on direct appeal and while his petition for further review was pending with the Iowa Supreme Court. Because our supreme court has held that *Crawford* "cannot apply retroactively to support a claim for ineffective assistance of counsel," we deny this claim as well. *State v. Williams*, 695 N.W.2d 23, 29 (Iowa 2005) (noting counsel need not be clairvoyant).

This brings us to Graves's final issue, which alleges three instances of prosecutorial misconduct.[1] Though not styled in the same manner, the substance of each of these instances was addressed and rejected in the direct appeal. *See Graves*, No. 02-2092, 2004 WL 239857, at *4–5. "Issues that have

[1] Those instances include (1) asking a defense witness, "When was the last time you visited [Graves] in jail?"; (2) improperly commenting on Graves's failure to testify in the questioning of a detective that investigated the shooting; and (3) failing to disclose that Graves told the detective to shoot him when he was arrested.

been raised, litigated, and adjudicated on direct appeal cannot be relitigated in a postconviction proceeding." *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986); *accord Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009). And even assuming Graves's attempt to resurrect these claims under the guise of prosecutorial misconduct is proper, we find he has failed to establish any prejudice resulted from the claimed misconduct given the overwhelming evidence against him. *See State v. Graves*, 668 N.W.2d 860, 883 (Iowa 2003) (noting a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support).

For the foregoing reasons, we affirm the district court's denial of Graves's application for postconviction relief.

AFFIRMED.