

IN THE COURT OF APPEALS OF IOWA

No. 7-356 / 06-0763
Filed November 15, 2007

TIMOTHY YOUNG,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Timothy Young appeals following denial of his application for
postconviction relief. **AFFIRMED.**

Mark Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney
General, Harold Denton, County Attorney, and Todd Trip, Assistant County
Attorney, for appellee State.

Heard by Zimmer, P.J., and Eisenhauer, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, P.J.

Timothy Derrell Young appeals following the denial of his application for postconviction relief. He raises two claims of ineffective assistance of appellate counsel. Upon our review, we affirm the decision of the postconviction court.

I. Background Facts and Proceedings.

Young was charged with burglary in the first degree and sexual abuse in the second degree, in violation of Iowa Code sections 713.1, 713.3, 709.1, and 709.3(1) (1997), stemming from allegations that he raped a woman at knife-point after entering her home through a window. The following evidence was presented at his original trial.

On the evening of September 11, 1997, Melissa Frederick put her three young children down for the night and then went to bed in her apartment. She awoke to find a man with a knife lying on top of her. The two struggled and the man cut Frederick's hand with the knife. Frederick stopped struggling after her assailant threatened her by asking if she wanted her sleeping children to be "motherless." He told Frederick that he had seen photographs of her in the possession of her boyfriend, who he knew was being released from prison that day. Then, while pressing a knife against her neck, he ordered Frederick to take off her pants and he raped her.

The sexual assault ended when one of Frederick's children began to cry. At that point, Frederick and her assailant left the bedroom and Frederick tended to her daughter. Meanwhile, the man, whose face was wrapped in gauze, entered the kitchen. After quieting her child, Frederick entered the kitchen to get a towel for her bleeding hand. Frederick could see her attacker with the light

from the stove in her kitchen. She saw he was “darker-skinned” and had a slight mustache and close-cut haircut. She also stated he had a medium, muscular build and was about five-nine.¹

When Frederick entered the kitchen, her assailant asked for her phone number. Frederick angrily rejected his request in a loud voice and told her attacker to get out of her house. The exchange between Frederick and her assailant disturbed one of Frederick’s other children who began to cry. Frederick left the kitchen to attend to her daughter. While comforting her child, she looked back into the kitchen and saw her attacker with his hand on a window. Frederick had no doubt her attacker left through the kitchen window of her apartment. Cedar Rapids Identification Officer Ron Johnson testified that a palm print found inside Frederick’s window matched Young’s known palm print.² The palm print was located in the area where Young would have placed his hand while climbing in or out the window.

The day after the attack, Frederick spoke to her friend Stacey Ament who was dating Young at the time. Frederick and Ament both suspected that Young might have assaulted Frederick. Frederick testified that she had been menstruating during the time of the sexual assault. Ament testified that within four hours of the assault, she had noticed blood near the zipper on the jeans that Young was wearing. Ament also testified that she noticed blood on Young’s penis when they had sex later that day.

¹ This description generally matched Young. At trial, Frederick testified the she did not notice any difference between Young’s size and her attacker’s size.

² Officer Johnson also discovered a knife below the fire escape adjacent to Young’s father’s apartment that matched the description of the one used by Frederick’s assailant.

After a search warrant was executed for Young's residence, a pair of his jeans were seized and sent to the state criminalistics laboratory. The blood, however, was determined not to belong to either Young or Frederick.³

Ament testified that she and Young were in his father's apartment the day after the attack. The apartment was "diagonally across the street" from Frederick's residence. Because Young did not have a home, he sometimes stayed with his father. Frederick testified that she discovered five liquor bottles missing from her apartment following the attack. Ament testified that she had noticed liquor bottles in a grocery sack in the apartment that matched the description of the bottles that had been stolen from Frederick's apartment. Among the stolen liquor bottles was a distinctive "novelty" bottle of Smirnoff's Vodka. Frederick described a missing vodka bottle with an octagon-shaped lid that "you could dump . . . upside down," and Ament reported seeing a vodka bottle "with a kind of oval-shaped top that was hollow."

Following trial, the jury returned a guilty verdict on both charges. Young appealed and this court affirmed his conviction. *State v. Young*, No. 98-422 (Iowa Ct. App. Feb. 24, 1999). Our supreme court denied Young's application for further review.

Young subsequently filed a pro se postconviction relief application asserting a variety of claims. The district court appointed an attorney to represent him, and his application was amended. In his amended application,

³ Standing in her kitchen following the sexual assault, Frederick was able to see the jeans that her attacker wore. She noted they were a faded blue color with a Levi Silver Tab label above the right pocket. However, the pair sent to the state criminalistics laboratory did not have this same label.

Young claimed that his appellate counsel was ineffective for failing to argue the facts of his case more persuasively and for failing to assert prosecutorial misconduct on appeal. In a pro se brief, Young also asserted that his trial counsel was ineffective for failing to preserve several issues for appeal, and he argued that his sentence was unconstitutional. Following a hearing, the postconviction court rejected all of Young's claims and denied his application for relief in a ruling filed May 1, 2006.

On appeal from the postconviction court's ruling, Young asserts that his appellate counsel was ineffective because he: (1) failed to raise a prosecutorial misconduct claim based on the prosecutor's "serial rapist" statement made during closing arguments and (2) failed to challenge the submission of a uniform jury instruction stating that Young's admissions could be used for any purpose.⁴

II. Scope and Standards of Review.

Ordinarily, we review postconviction relief proceedings for errors of law. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). However, because Young raises a constitutional issue, alleging the denial of his right to effective assistance of counsel, we conduct a de novo review. *Id.*

III. Discussion.

To establish ineffective assistance of counsel, Young must prove: (1) his attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To

⁴ The supreme court denied Young's request for an extension of time to file a pro se brief in an order entered January 10, 2007.

establish breach of duty, Young must overcome the presumption that counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Young may establish prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Young's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). In this case, Young asserts that his appellate counsel was ineffective. Appellate counsel is judged by the same standards as trial counsel. *Cox v. State*, 554 N.W.2d 712, 715 (Iowa Ct. App. 1996).

A. Prosecutorial Misconduct Claim.

Young first claims that his appellate counsel was ineffective for failing to assert on appeal that the trial court committed reversible error by not granting a motion for mistrial after the prosecutor used the term "serial rapist" during the rebuttal phase of his closing argument. Because closing arguments were not reported, the recollections of the lawyers during a hearing after closing arguments and in later proceedings provide the only record of the statement and the circumstances surrounding it.

During closing arguments, Young's counsel apparently made reference to the fact that Young's jeans contained an unidentified blood stain, and suggested that one of Young's friends could have cut his hand and bled on the jeans. In response, the prosecutor mentioned that one possible explanation for the blood on Young's jeans was that Young was a serial rapist and therefore the blood

could have come from another woman. Defense counsel immediately objected to the prosecutor's statement. The trial court sustained defense counsel's objection and instructed the jury to disregard the statement.

Immediately after closing arguments, Young's trial counsel moved for a mistrial based on the prosecutor's comment. The district court denied Young's motion for a mistrial. Young subsequently filed a motion for new trial reasserting his claim of prosecutorial misconduct. That motion was also denied. Young's appellate attorney chose not to challenge the denial of the motion for mistrial on direct appeal. Young now argues this issue should have been pursued because the prosecutor labeled him a "serial rapist" without any evidence to support the claim.

After considering the context of the prosecutor's remark, the postconviction court concluded the remark was not intended to brand Young. The court stated, "the prosecutor's comment was made in response to Mr. Young's conclusions about the blood stains found on Mr. Young's jeans. The State argued other conclusions could be drawn and used serial rapist as an example but noted the evidence did *not* support such a conclusion."⁵ The trial court reinforced the fact that such a conclusion was unsubstantiated when it granted defense counsel's objection and instructed the jury to disregard the prosecutor's comment. The postconviction court ultimately concluded that the

⁵ In response to the defendant's motion for mistrial, the prosecutor argued that the context of his remarks to the jury was neither explanation offered regarding the blood stain would be an appropriate conclusion for the jury to reach. It does not appear that Young's trial counsel disputed the prosecutor's explanation. During argument regarding Young's motion for new trial, counsel stated, "I will obviously stipulate that Mr. Dillard in no way said, 'Find him guilty because he is a serial rapist.'"

prosecutor's statement was not prejudicial to such a degree that it deprived the defendant of a fair trial and went on to reject Young's claim of ineffective assistance of counsel.

At Young's postconviction trial, his appellate counsel testified that it was not his practice to raise every arguable claim because weaker arguments tend to take attention away from the best arguments and generally weaken the appeal. Appellate counsel also noted that while claims of prosecutorial misconduct are frequently raised on appeal, they are not often successful. In this case, Young's counsel chose to focus his appellate argument on an evidentiary issue dealing with the exclusion of DNA evidence. Selecting assignments of error to assert as grounds for reversal is a professional judgment call which we are reluctant to second guess. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998); *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). Waiving issues on appeal is within appellate counsel's reasonable tactical decision, as appellate counsel may be better served by reducing the number of issues raised on appeal to the strongest claims. *Stringer v. State*, 522 N.W.2d 797, 799 (Iowa 1994); *Cuevas*, 415 N.W.2d at 633.

Given the context of the challenged remark, the trial court's curative actions, the broad discretion that trial courts enjoy in ruling on motions for mistrial,⁶ and the deference given to appellate counsel's strategy, we do not believe Young's appellate counsel provided ineffective assistance by failing to

⁶ We recognize that the trial court is best equipped to determine what effect, if any, the comment at issue here had on the jury. *State v. Jones*, 511 N.W.2d 400, 408 (Iowa Ct. App. 1993).

include the denial of Young's motion for mistrial as a claim on direct appeal. Like the postconviction court, we reject this assignment of error.

B. Improper Jury Instruction Claim.

Young next claims that appellate counsel was ineffective for failing to challenge the submission of a jury instruction regarding admissions. Young did not testify at his trial; however, Stacey Ament testified regarding several statements Young made to her. Young argues that none of the statements recounted by Ament were confessions or acknowledgments of guilt. We agree. The State also acknowledges that no witness testified that Young admitted committing the crimes with which he was charged.

Jury Instruction No. 19 stated: "Evidence has been offered to show Timothy Derrell Young made statements at an earlier time and place while not under oath. These statements are called admissions. You may consider an admission for any purpose." The instruction was modeled after a uniform instruction. See II Iowa Uniform Jury Instruction 200.44. Trial counsel objected to Instruction No. 19, stating, "We feel that the admissions more properly would be introduced if [Young] had made some admissions of actually committing the crime, not just making any particular statement to be allowed into evidence." The trial court denied the objection and submitted the instruction to the jury. Young's appellate counsel did not raise this issue on direct appeal. He chose instead to focus on the issue he found most compelling – the exclusion of a DNA sample.

Young argues appellate counsel should have challenged the instruction on direct appeal because it is not supported by the record, is misleading, gave undue prominence to certain evidence, and deprived him of a fair trial. He also

argues the jury should have been made aware that the term “admission” as used in Instruction No. 19, does “not comport with the plain meaning of the term.”

In response, the State argues that appellate counsel's failure to challenge the jury instruction on direct appeal finds support in *State v. Tejada*, 677 N.W.2d 744 (Iowa 2004). In *Tejada*, the trial court submitted an instruction identical to Jury Instruction No. 19. *Tejada* claimed that trial counsel was ineffective for not objecting to submission of the instruction because *Tejada* had not made any statements. He claimed that the instruction was “inherently confusing and may have wrongly led the jurors to believe he made an admission.” *Tejada*, 677 N.W.2d at 754. The supreme court rejected the defendant's claim, however, finding that he could not establish that the superfluous jury instruction resulted in prejudice against him. The court stated, “The jury, as the arbiter of the facts, should have disregarded the court's suggestion that the prosecution had offered evidence to show *Tejada* had made an admission, and we think that such is the inevitable conclusion to be drawn about the jury in this case.” *Id.* at 755.

We believe the jurors in Young's case were in a similar position. They were instructed that the State had to prove its case by proof beyond a reasonable doubt and were told the presumption of innocence remained with Young throughout the trial. The instructions made clear that the jury was to decide the facts of the case. There is no indication that the jurors failed to base their verdict on the evidence and were instead moved to convict Young because of Instruction No. 19. See *Tejada*, 677 N.W.2d at 755 (instructions must be considered as a whole). Although Young's appellate counsel might reasonably have chosen to challenge Instruction No. 19, we do not believe he breached a

duty by choosing to concentrate on another issue in prosecuting Young's direct appeal. Accordingly, we reject this assignment of error.

IV. Conclusion.

We have considered all of Young's claims, whether or not specifically discussed. Finding them all to be without merit, the decision of the postconviction court is affirmed.

AFFIRMED.

Eisenhauer, J., concurs; Schechtman, S.J., concurs specially.

SCHECHTMAN, S.J. (concurring specially)

I have some difficulty with the trial court's submission of the instruction referencing admissions. I have similar difficulty with the wording of the instruction itself, and likely inferences drawn therefrom.

Unlike Uniform Civil Jury Instruction 100.15, its subject criminal counterpart does not require the jury to "find an admission was made"; its threshold is merely that "evidence *has been offered* to show the Defendant made statements" (emphasis added). Suppose, for argument, that a witness testifies that on a certain day and place, the defendant made a statement with some inculpatory content; further suppose that other exculpatory evidence reflected that the defendant was in another state at the time and place; this instruction would direct the jury to treat the alleged statement as an admission,⁷ because *it was offered*; and "to consider it for any other purpose," notwithstanding the alibi.

An admission, absent a definition in the instructions, has a lay meaning of "a voluntary acknowledgement of truth; a concession." American Heritage College Dictionary 17 (3d ed. 1993).

State v. Tejada, 677 N.W.2d 744, 754-55 (Iowa 2004), addressed this instruction. Tejada had not made any out-of-court statements. *Tejada*, 677 N.W.2d at 754. His ineffective assistance of counsel claim was denied as he failed to prove that any prejudice resulted from his counsel's failure to object to its submission. *Id.* at 755.

⁷ Iowa Rule of Evidence 5.801(d)(2) characterizes any statement by a party as an "admission."

Tejada is factually distinguishable as there were statements made by this defendant; some were made to the victim during the assault; others were made to his girlfriend after the assault. Some were contradicted by other evidence.⁸

This instruction dangerously infers that all statements, offered as uttered by the defendant, implies, or arguably directs, their truth. This impeaches, surely shakes, any contrary exculpatory evidence offered to rebut its content.

But the failure of appellate counsel to allege error relating to trial counsel's failure to object to the instruction was not prejudicial as it would not have produced any difference in the result. *Id.* at 755. The evidence against the defendant included victim identification, a latent print on the entry window, blood on his penis (victim was menstruating), seizure of liquor bottles at his home missing from the victim's kitchen, proximity of residences, knowledge of victim and site of the assault, and other inculpatory evidence.

The defendant has failed to prove that prejudice resulted from appellate counsel's choice to concentrate on other alleged errors in prosecuting the direct appeal, rather than this instruction.

I concur in the result.

⁸ The victim testified that the assailant told her, during the sexual assault, that he had seen pictures of her that her boyfriend, who had been confined in prison, had previously shown the assailant. Yet, the victim's boyfriend denied knowing the defendant, though the boyfriend did have two photographs of her.