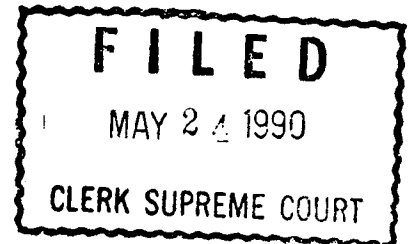


IN THE COURT OF APPEALS OF IOWA

No. 0-66 / 88-406



CHRISTOPHER R. LeGEAR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

LeGear sought postconviction relief to challenge his 1982 conviction for first-degree murder. The district court denied postconviction relief, and LeGear has appealed. He contends he received ineffective assistance of counsel in numerous respects in the criminal trial and the ensuing direct appeal. **AFFIRMED.**

Philip B. Mears of Mears, Zimmermann & Mears, Iowa City, for the appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, E.A. Westfall, County Attorney, and Drew H. Kouris, Assistant County Attorney, for the appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

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Christopher LeGear was convicted of first-degree murder in 1982. The Iowa Supreme Court affirmed the conviction on direct appeal in 1984. State v. LeGear, 346 N.W.2d 21 (Iowa 1984). LeGear later challenged his murder conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and LeGear has appealed.

LeGear challenges the admission into evidence, during his 1982 criminal trial, of a written report and oral statements made by expert psychiatric witnesses who had examined him. He argues this evidence was prejudicial because the witnesses attributed to him various unpleasant character traits and prior bad acts. He argues he received ineffective assistance of counsel in both the criminal trial and the direct appeal because his attorneys failed to object to this evidence or raise appellate issues concerning it.

In addition to these issues, LeGear contends he received ineffective assistance of counsel in several other respects during the criminal trial and the direct appeal. He complains his trial attorney failed to try to suppress a statement he made to the police, failed to depose an important State witness, failed to object to hearsay testimony and to inflammatory evidence, including a picture of the victim and her child, failed to file a pretrial motion to exclude evidence of LeGear's prior criminal

record, failed to request an accomplice instruction, and failed to request an instruction on LeGear's theory that the victim's death was accidental. He also complains the trial attorney presented inconsistent defenses of accidental death and diminished capacity due to drug and alcohol consumption. Finally, he complains that his appellate attorney rendered ineffective assistance by failing to raise on direct appeal any of these issues concerning trial counsel's effectiveness.

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) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

I. Psychiatric Testimony and Admission of Written Report. At trial LeGear introduced evidence from Dr. Robert Mitchell. Dr. Mitchell testified LeGear was not capable of premeditation when he threw the victim from a bridge. On cross-examination, the prosecution was allowed to introduce into evidence, over a defense relevancy

objection, Dr. Mitchell's written report. LeGear claims this report contained prejudicial hearsay and inadmissible evidence of his prior bad acts.

A trial court is vested with broad discretion on issues of the admissibility of expert evidence. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976). We disagree with LeGear's claim that his trial and appellate counsel rendered ineffective assistance with regard to the admissibility of the report.

The hearsay claim fails because LeGear himself acted as the sole informant for the history contained in Dr. Mitchell's report. See Iowa R. Evid. 801(d)(2) (statement not hearsay if offered against the party who made it). The report was also admissible as evidence of factors upon which the experts relied in forming their opinions. See State v. Dvorsky, 322 N.W.2d 62, 64 (Iowa 1982) (the facts upon which an expert opinion is based must be stated in the record). We can find no breach of an essential duty by LeGear's counsel with regard to admissibility of the report.

Even if LeGear's counsel were found to have been ineffective in failing to challenge the admissibility of the report, LeGear has failed to establish actual prejudice in this case. The contents of the report were cumulative to the life history given by LeGear when he took the stand. See State v. Brokaw, 342 N.W.2d 864, 866 (Iowa 1984) (counsel not ineffective for failing to challenge

evidence of unrelated crimes where trial strategy was to be open and candid about defendant's history).

LeGear contends his trial and appellate counsel were also ineffective in failing to challenge various statements from the expert psychiatric witnesses regarding his credibility, the contents of police reports, his personality type, and statements made by LeGear. We will consider each of these arguments in turn.

The testimony regarding LeGear's credibility was not directed toward his credibility at trial, but instead focused upon his lack of candor previously established in the record and how it affected the rendering of expert psychiatric opinions. While expert opinions on the truthfulness of a witness should generally be excluded, State v. Vincik, 398 N.W.2d 788, 796 (Iowa 1987), we can find no error when the issue of credibility relates to the factors upon which experts relied in forming their opinions.

LeGear claims it was an error for Dr. Mitchell and Dr. Lara to testify regarding the contents of police reports. This testimony was elicited as part of the basis for the mental health experts' opinions. We find no merits in LeGear's claim that his counsel were ineffective in failing to challenge the statements.

LeGear argues his counsel were ineffective for allowing the admission of psychiatric testimony regarding his behavior/personality disorder. LeGear sought to

demonstrate he did not have the requisite intent to commit first-degree murder. The State had every right to challenge the validity and grounds for his claim. No error occurred in allowing evidence of LeGear's mental state to establish whether he had the mental capacity to commit first-degree murder. See State v. Wheeler, 403 N.W.2d 58, 63-64 (Iowa App. 1987). LeGear's counsel were not ineffective for failing to challenge the testimony.

LeGear claims his counsel were ineffective in allowing psychiatric experts to testify concerning statements LeGear had made to them. While such evidence is generally inadmissible if incriminating in nature, State v. Craney, 347 N.W.2d 668, 673 (Iowa 1984), cert. denied 469 U.S. 884 (1984), it is not prohibited when the State admits it as rebuttal testimony to refute a defendant's version of the crime. LeGear elicited similar testimony from his witness, Dr. Mead. The presentation of this evidence was a strategic choice not subject to a claim of ineffective assistance of counsel. In sum, we find no basis for LeGear's claims of ineffective assistance with regard to testimony given by the various psychiatric witnesses.

II. Other Claims. LeGear also claims his trial attorney was ineffective in failing to attempt to suppress his statement made to the police. The testimony of Officer Lenker established that LeGear was informed that the police wished to talk to him about the victim's disappearance and death. Officer Lenker further testified LeGear was

informed of his rights and waived them before questioning began. LeGear's trial counsel was not ineffective for failing to file a motion to suppress his statement.

LeGear argues his trial counsel was ineffective for failing to depose the State's key witness, Rex Larrison. LeGear insinuates the State had made promises to Larrison in exchange for his cooperation and that Larrison's testimony could have been impeached had LeGear's attorney known of the deal.

A defense counsel's failure to depose a witness does not necessarily constitute ineffective assistance of counsel. State v. Williams, 341 N.W.2d 748, 752 (Iowa 1983). Larrison testified in a postconviction deposition that he received no promises or assurances of leniency in exchange for his testimony. His impression that he could not be charged if he came forward was reached of his own accord and not through the authorities. The failure to depose Larrison under these circumstances does not render LeGear's counsel ineffective.

LeGear raises a number of other claims alleging ineffective assistance of counsel. We have examined the hearsay nature of the testimony sought from witness Tim Folan, the defense counsel's failure to file a pretrial motion regarding LeGear's criminal record, the failure to request an accomplice instruction, the failure to give an instruction on LeGear's theory of the case, the presentation of alternative defense theories, and the

admission of the victim's photograph. After careful consideration of each of these claims, we find the State's arguments persuasive and correct. LeGear's trial counsel was not ineffective with regard to any of these claims.

AFFIRMED.