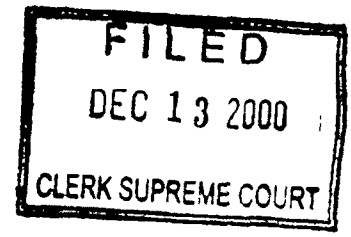
IN THE COURT OF APPEALS OF IOWA

No. 0-467 / 99-1188
Filed December 13, 2000



STANLEY CARTER LIGGINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

Stanley Liggins appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Miller and Hecht, JJ.

HECHT, J.

Stanley Carter Liggins appeals the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings. Nine-year-old Jennifer Lewis was murdered on September 17, 1990. She had been sexually abused, strangled to death, doused with gasoline, and ignited. Her badly burned corpse was found that evening near Jefferson School in Davenport, Iowa. The State charged Liggins with murder in the first degree, willful injury, sexual abuse in the first degree, and kidnapping in the first degree in connection with the homicide. A Scott County jury found Liggins guilty of all charges in February of 1993. In *State v. Liggins*, 524 N.W.2d 181 (Iowa 1994) [*Liggins I*], our supreme court reversed the conviction and remanded the case for a new trial. The court found insufficient evidence in the record to establish territorial jurisdiction on all charges except the murder charge and held the district court erred by admitting evidence Liggins was a cocaine dealer. *Id.* at 189.

Prior to his second trial, Liggins filed a motion for change of venue. The district court granted the motion and moved the trial from Davenport to Dubuque, Iowa. A Dubuque County jury returned a second guilty verdict on the murder charge in July of 1995. The conviction was affirmed on direct appeal. *State v. Liggins*, 557 N.W.2d 263, 270 (Iowa 1996) [*Liggins II*].

Liggins then filed an application for postconviction relief asserting: (1) the State violated his constitutional rights by suppressing certain exculpatory evidence and knowingly allowing witnesses to give false testimony; (2) newly

discovered evidence requires a new trial; and (3) direct appeal counsel was ineffective in failing to challenge venue in Dubuque County. The district court appointed a Special Master to review the files of the prosecution and the defense attorneys to ascertain what information had been produced by the State. The Special Master determined seventy-seven (77) police reports, some of which were generated after the 1995 jury trial, were not in the defense files. Liggins claimed four of these reports (specifically those pertaining to Sarah Bea, Daryl Sheese, Shawn Saunders, and Michael Armstrong) contained exculpatory information and were wrongfully suppressed by the State. The district court found, while the State had suppressed the reports, the reports were not material to the issue of guilt. The district court further concluded Liggins had not presented newly discovered evidence that would justify a new trial, and determined defense counsel was not ineffective for failing to take further measures to challenge venue in Dubuque County. Liggins appeals from the district court's ruling denying postconviction relief.

II. Suppression of Police Reports. Liggins contends the State suppressed several police reports in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963) (holding a defendant's due process rights are violated when the State fails to produce upon request evidence favorable to the accused where the evidence is material as to either guilt or punishment, irrespective of good or bad faith on the part of the prosecution). To the extent appellant presents a constitutional

claim, our review is de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). Liggins must establish three propositions to establish a *Brady* violation: (1) the State suppressed the evidence; (2) the evidence was favorable to him; and (3) the evidence was material to the issue of guilt. *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997).

A. Sarah Bea.[1] Liggins contends a police report of an interview with Sarah Bea conducted on the evening of the murder contained or would have led him to find exculpatory evidence. He claims the State had a duty to produce the report under *Brady*; and if the report had been produced by the State, he would have been able to present to the jury exculpatory information supplied by Bea to police investigators in later interviews and to the court in her testimony during the postconviction proceeding.

The police report of the interview with Bea conducted at 9:45 p.m. on September 17, 1990, documented she claimed:

> she had been driving [past Jefferson School]. She thought right around 9:00 p.m. or so. She observed what she thought was garbage burning in the field behind Jefferson School with a couple other smaller fires in that general area. She thought nothing unusual of it and drove by, said she saw what she thought was a red Camaro also driving by slowly in front of her, westbound, had no idea of the plates or any description of the occupants. She had no further information.

Officer Richard Lindbom conducted the interview of Bea during a house-to-house canvas of the neighborhood and prepared the report. Bea did not testify at either the 1993 or the 1995 trial.

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[1] Bea is also referred to in the record as Sarah Klingsick, Sarah Melinda Howard, Sara Melinda Lewis, Sarah Melinda Shortrig, Sarah Klingseik, and Sarah Melinda Bea.

On September 24, 1996, Bea, who was then living in Des Moines, contacted the Davenport Police Department. She claimed she had information about the Jennifer Lewis murder. An investigating officer conducted a lengthy and detailed interview of Bea on November 6, 1996, in Des Moines. During this interview, Bea reported she had driven to the Walgreen's Store on West Locust Street in Davenport to pick up a prescription just before 9:00 p.m. on the night of the murder. Bea claimed she displayed her Title XIX card and signed her name at the pharmacy and left with the prescription. During the return trip to her home on the evening of September 17, 1990, she claimed to have observed three white males in a small white car ahead of her on the street near Jefferson School. She told the investigator a very thin man wearing a hat exited the white car and stood by what she believed were burning logs. Bea further reported she saw the man return to the white vehicle and drive it wildly toward her car, fish-tailing as it approached. Although she had her two young daughters with her in the car, Bea told the investigator she positioned her car in the roadway such that the approaching white vehicle would collide with the driver's side of her car if its driver attempted to pass by. Bea further claimed to have verbally confronted the other driver about setting her neighborhood on fire and inquired whether he wanted to "throw" (fight).

The police report generated after the interview further disclosed Bea described the other driver's hat as a "brown, winter-looking style hat" that had what she described as a "broken arrow in the headband." Bea claimed the other driver yelled, acted "crazy," and then left the scene by driving into the ditch to get

past her car. Bea also told the investigator she drove nearer to the fire, exited her car, and walked toward what she thought were burning logs. After discovering she had no blanket in the trunk with which to extinguish the fire, she claimed to have pounded on the door of Jefferson School in an effort to alert others. According to Bea, she was unable provoke a response from inside the building and returned to her home where she placed a call to the Davenport Police Department. Bea claimed she reported seeing three white males in the vicinity of the fire near the school that evening and claimed she provided the police her name and address, and the license plate number of the white car during the September 17, 1990, phone call to the police station.

After hearing sirens, she again left her home that evening and drove to the bus station to pick up her ex-husband, Will Howard. Bea claimed to have then returned to the location where she had seen the fire. She further claimed to have spoken to a "detective" who took her to the location where the victim's charred body was found. During the November 6, 1996, interview, Bea told the investigator she withheld her name from the detective during this return visit to the scene on September 17, 1990, but did disclose her residence address. Bea then claimed she returned to her home and spoke to her husband, an employee of a juvenile detention facility, who instructed her not to speak to the police about the incident. Despite her husband's direction she not be further involved in the matter, she claimed to have returned to the scene again the same evening. While at the scene for the third time that evening, she claimed she spoke to law enforcement officers and told them her name was Peggy Ross. Bea said she did

not divulge her real name to the officers on that occasion because she felt physically threatened or intimidated by her husband and hoped the investigating officers would contact her friend, Peggy Ross, who would redirect them. Bea further claimed she did not again contact the authorities about the matter because her husband had cautioned her to think about the risks posed to him and their children if she were to do so.

During the November 6, 1996, interview, Bea also told the investigator a few days after September 17, 1990, she saw a television report about the victim's funeral. She alleged the television report showed a man helping a woman into a limousine; and the man was wearing the same hat she had seen on the driver of the white car on the night of the murder. Bea claimed to have called the County Attorney's office and the offices of Liggins's lawyers during the 1995 trial, but did not receive a return phone call. Bea also disclosed her son, Will Howard, III, was an inmate at the penitentiary in Fort Madison. She admitted asking her son to get a message to Liggins in the penitentiary. A few days later, Liggins called her and asked her to talk to his attorney about the matter.

Liggins contends the police report pertaining to the Bea interview contains exculpatory information and the State suppressed it in violation of *Brady*. He claims the State's suppression of the report prevented him from presenting Bea's favorable and material testimony to the juries that convicted him. The State argues Liggins failed to prove the report was actually suppressed, and posits the report was neither favorable to him nor material.

We concur with the district court's finding the police report evidencing the Bea interview was not produced by the State until after the 1995 conviction. Notwithstanding the State's reliance upon the prosecutor's "open door policy," we note the police report in question was not found by the Special Master in the defense files. Furthermore, we find it unlikely defense counsel would not have attempted to locate and interview a witness who claimed to have seen a fire near Jefferson School at about 9:00 p.m. on September 17, 1990, and a slow moving red Camaro in the vicinity. The motor vehicle Liggins was driving on the day in question is described as a maroon Peugeot, not a red Camaro, and a witness identifying a car other than Liggins's at the scene could have been potentially exculpatory information. We also adopt as our own the district court's finding there was a chance the police report of the Bea interview might be favorable to Liggins.

We next must determine whether the report was material. To constitute a violation of the *Brady* rule, the suppressed evidence must be material either to the guilt or punishment of the defendant, "not merely potentially or inferentially helpful to the defense." *State v. Hall*, 249 N.W.2d 843, 846 (Iowa 1977). Our analysis on this issue requires a determination of whether "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3384, 87 L. Ed. 2d 481, 494 (1985); *Veal*, 564 N.W.2d at 810. There are stark inconsistencies between the substance of the September 17, 1990, police report and Bea's version of events given to a police officer six

years later. On the night of the murder, Bea reported seeing a red Camaro at the scene; but six years later, she recalled confronting a small white vehicle. The September 17, 1990, police report suggests Bea was unable on the night of the murder to give a description of the occupants of the red Camaro she observed near the fire; but six years later, she gave detailed descriptions of the occupants of the white car and the clothing they wore. The police report of the September 17, 1990, interview indicates Bea could not provide the license plate of the vehicle she observed that evening; but six years later, Bea claimed to have provided the license plate of the white vehicle to a police department representative during a telephone conversation on the night of the murder. Her expressed fear of her husband does not adequately explain the significant inconsistencies between the two versions of her observations the night of the murder.

Finally, the credibility of Bea's recent version of the events of September 17, 1990, is further diminished by her natural motivation to improve conditions for her son inside the penitentiary by providing what she believed to be exculpatory information to Liggins. After careful review of the record, we do not find Bea's testimony sufficiently credible to demonstrate a reasonable probability the result of the murder trials would have been different if the police report of the Bea interview had been disclosed.

B. Daryl Sheese, Shawn Saunders, and Michael Armstrong. On the date of the murder, Liggins was the tenant in a motel room that was part of the Hillside Apartments complex in Rock Island, Illinois. The State called witness Donna

Atkins who testified she "constantly" saw the Peugeot commonly driven by Liggins parked in front of her boyfriend Daryl Sheese's apartment in the Hillside Apartments' parking lot. She further testified she walked past the vehicle in the parking lot on the morning of September 18, 1990, and noticed the strong odor of gasoline emanating from it. She claimed to have looked in the vehicle and saw a gas can sitting on the back seat. Atkins's testimony was controverted in part by Brenda Adams, Liggins's girlfriend at the time of the murder. Adams testified Liggins stayed at her home on the evening of September 17, 1990, and after dropping him at his apartment on the morning of September 18, she used the Peugeot for approximately three hours to go shopping.[2] In September of 1990, Officer Lindbom interviewed Daryl Sheese, Shawn Saunders, and Michael Armstrong concerning their knowledge of Liggins and their observations of his Peugeot in the Hillside Apartments' parking lot during the relevant time period. Liggins contends the resulting police reports were exculpatory because they cast doubt on the veracity of Atkins's crucial testimony.

Daryl Sheese was a resident of Hillside Apartments at the time of the murder. When shown a photo of the maroon Peugeot, Sheese informed the officer he did not recall seeing the vehicle on September 18, 1990, but did recall seeing a brown Mustang in the parking lot. The district court found the police report pertaining to the Sheese interview was suppressed and it might have been useful to the defense to counter Atkins's testimony. We agree with this finding.

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[2] In her 1993 testimony, Adams testified she smelled nothing unusual when she rode in the vehicle on September 17 and 18 of 1990. In her 1995 testimony, however, she testified she smelled gasoline fumes when she drove the car on September 18, 1990.

Liggins contends the report of Sheese's statement proves Atkins was mistaken in her identification of the Peugeot; and she really saw a brown Mustang in the parking lot instead of a maroon Peugeot. However, we adopt as our own the district court's determination the police report on the Sheese interview was not material. On September 18, 1990, Sheese was an alcoholic who was moving out of his apartment and into an alcohol treatment facility. Even if we were to credit his ability to perceive and recall notwithstanding his history of alcohol abuse, we believe his statement he "did not remember" seeing the Peugeot on September 18, 1990, and his recollection of seeing the brown Mustang on occasion at the Hillside Apartments were not so compelling as to generate a reasonable probability the outcome of the proceeding would have been different but for suppression of the police report.

Officer Lindbom also interviewed Shawn Saunders, another resident of the Hillside Apartments, in September of 1990. The resulting police report disclosed Saunders owned a brown Mustang that was commonly parked in the Hillside Apartments' parking lot, but it never had a gas can in it. Saunders had seen the Peugeot and Liggins in the vicinity of the apartments in the past. We concur with the district court's findings the Saunders report was suppressed and at least somewhat favorable to the defense because it corroborates Sheese's statement a brown Mustang was present from time to time in the Hillside Apartments' parking lot. We cannot conclude, however, the Saunders report was material. The report does not address the subject of whether the Peugeot was present in the Hillside Apartments' lot on September 18, 1990, as Atkins claimed. Thus, the

report does not substantially discredit Atkins's testimony the Peugeot was in the lot on September 18, 1990. Accordingly, we find no reasonable probability a different outcome would have resulted if the Saunders report had been produced.

Michael Armstrong was also a resident of the Hillside Apartments in September of 1990. Officer Lindbom prepared a police report evidencing Armstrong could not say whether he had ever seen the Peugeot. The witness did acknowledge he had used a brown Mustang owned by Saunders, but denied having a gas can in the vehicle. The police report prepared after the interview with Armstrong was suppressed and might have been favorable to Liggins. However, we conclude the report was not material. The fact Armstrong could not be sure whether he had seen the Peugeot before does not substantially refute the testimony of Atkins who claims to have seen the vehicle in the parking lot on September 18, 1990. There is no reasonable probability the outcome would have been different if the Armstrong report had been produced by the State.

C. Funeral Videotape. At the time of her murder, Jennifer Lewis lived with her mother, Sherri Glenn, and her stepfather, Joseph Glenn. In both murder trials, Liggins presented to the jury the theory Joseph Glenn was Jennifer's murderer. The factual predicate for this theory included testimony from Roberta Kadera who stated she drove past Jefferson School at about 9:00 p.m. on September 17, 1990. She observed a fire on the ground at that location and saw a man with long hair running toward the nearby woods. Kadera specifically testified the man in question was wearing a black leather jacket with "silver studs and fringes." Patricia Rhoads, a former neighbor of the Glenns, testified Glenn

wore a "black leather jacket all the time." Rhoads described the jacket as having "silver buttons or silver punch things and . . . tassels." Sherri Glenn testified her husband once owned such a coat, but had pawned it prior to September 17, 1990. Glenn testified in the murder trial he did not own or have access to a leather jacket *with metallic decoration* in September of 1990.

Liggins contends Joseph Glenn's testimony about the jacket was false; and the State knew it was false when the testimony was offered. In support of his contention, Liggins proffered a videotape of Jennifer Lewis's funeral. The videotape was broadcast by a Rock Island, Illinois, television station in September of 1990, and a copy was in the possession of the State but not produced to the defense. Liggins's counsel obtained a copy of the tape after his client was convicted in the second trial.

The district court found the tape was not suppressed by the State because it was broadcast by a Rock Island, Illinois, television station. The *Brady* rule applies when evidence discovered after trial "had been known to the prosecution but unknown to the defense." *Mark v. State,* 568 N.W.2d 820, 823 (Iowa App. 1997) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349 (1976)). The videotape of a broadcast on a local television station is not evidence that was known only to the prosecution. Such "evidence" was seen by many people in the Rock Island area and was equally accessible to the prosecution and the defense. Furthermore, after careful review of the tape, we do not find a reasonable probability the result of the proceeding would have been different had the evidence been produced. Glenn testified he was not in

possession of a leather coat with metallic decoration in September of 1990. We do not detect metallic decoration on the jacket worn by Glenn on the tape. Thus, we find no error in the district court's ruling on this issue.

III. Claimed Use of False Testimony. Liggins contends the State knowingly presented false testimony through Donna Atkins, Officer Donald Schaeffer, and Christina Olson, thus denying him a fair trial. To the extent appellant presents a constitutional claim, our review is de novo. *Finnel*, 515 N.W.2d at 43. Liggins raised this claim in his application for postconviction relief. The district court did not make findings on this issue in its original order. Liggins then filed a 179(b) motion requesting the court to make specific findings as to whether "prosecutors or police knew Atkins was giving false testimony and whether Detective Schaeffer gave false testimony to bolster her credibility." In its ruling on the 179(b) motion, the district court found no proof the testimony of Atkins and Schaeffer was false.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood the false testimony could have affected the judgment of the jury. *State v. Frazier*, 559 N.W.2d 34, 42 (Iowa App. 1996). This rule applies in situations where evidence is discovered after trial that the prosecution's case included perjured testimony of which the prosecution was aware or should have been aware. *State v. Todden*, 364 N.W.2d 195, 198 (Iowa 1985). In order to prevail on this ground, a defendant must prove: (1) the prosecution either introduced or failed to correct false testimony; (2) the false or perjured testimony was given at trial; (3) the

prosecution knew the perjured testimony was false; (4) the testimony was "material"; and (5) the defendant has not waived the claim by failing to raise it at trial if he had reason to know of the falsity of the subject testimony. *Jones v. State,* 479 N.W.2d 265, 275 (Iowa 1991). We agree with the district court's findings the record does not show the testimony of Atkins and Schaeffer was false. In addition, we find no indication in the record the prosecution knew the testimony was false when it was procured. We find no error in the district court's determination of this claim.

Liggins also asserts the State knowingly used false testimony of Christina Olson. The district court made no specific finding as to this issue in its order denying postconviction relief and Liggens failed to raise it in his 179(b) motion. A rule 179(b) motion is essential to the preservation of error when the district court fails to resolve an issue, claim, defense, or legal theory properly submitted for adjudication. *Starling v. State,* 328 N.W.2d 338, 341 (Iowa App. 1982). Liggens's failure to obtain a ruling from the district court on his claim the State knowingly presented the false testimony of Christina Olsen precludes us from considering it on appeal.

IV. Newly Discovered Evidence. We apply an abuse of discretion standard when reviewing the district court's ruling on a motion for new trial based on newly-discovered evidence. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). Such motions are granted if the evidence in question (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and

(4) probably would change the result if a new trial were granted. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996). "[B]y definition, newly discovered evidence refers to evidence which existed at the time of the trial proceeding." *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa App. 1997). Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence. *Id.* (citing 58 Am Jur.2d *New Trial* § 423, at 398 (1989)). An exception to the *Grissom* rule applies in extraordinary cases when an utter failure of justice will unequivocally result if the new evidence is not considered or where it is no longer just or equitable to enforce the prior judgment. *Grissom,* 572 N.W.2d at 185. Motions for new trial "are not favored and should be closely scrutinized and sparingly granted." *State v. Weaver*, 554 N.W.2d 240, 245 (Iowa 1996). Claims of recantation are viewed "with utmost suspicion." *State v. McGhee*, 280 N.W.2d 436, 442 (Iowa 1979).

A. Alleged Recantations of Frank Reising, Jr. Reising, a convicted felon, testified in both trials that when he was Liggins's cellmate in the Scott County jail in 1992, Liggins admitted killing Jennifer Lewis. In the trial of the postconviction proceeding, Liggins offered testimony of Scott Tyler and Ronald Stoner who claimed to have been in a jail cellblock with Reising in 1998. Tyler and Stoner testified Reising admitted his prior testimony against Liggins was untrue. In testimony presented in this postconviction proceeding, Reising denied making the recantation attributed to him by Tyler and Stoner.

The evidence of Reising's alleged recantation was clearly not discovered until after the judgment in this case, and the State makes no claim the testimony

could have been discovered earlier through the exercise of due diligence. The district court found the testimony of Tyler and Stoner did not justify a new trial because (1) it was untrue; (2) it had only impeachment value; and (3) it did not, because of its unreliability and lack of credibility, generate a probability the outcome of the trial would have been different if it had been presented to the jury. Tyler has been convicted of five felonies involving dishonesty and was found by the district court to be a "con-man." Evidence was presented tending to prove when he left the courtroom after testifying in the postconviction proceeding Tyler averred, "We're going to get Bill Davis [the prosecutor]."

Stoner has a felony record as well and was described by the district court as "the type of person that would be very susceptible to statements or schemes of Scott Tyler, especially after being locked in the same cell with him for 120 days." We concur with the district court's findings this new evidence from Tyler and Stoner is not sufficiently reliable or credible to generate a probability the outcome of the trial would have been different if the new evidence had been presented to the jury. We find no abuse of discretion on this record in the district court's ruling on the motion for new trial with respect to the testimony of Tyler and Stoner.

B. Alleged Recantation of Antonio Holmes. Holmes also testified against Liggins in both trials. He claimed to have seen Jennifer Lewis purchasing gum at a liquor store near her home at about 6:30 p.m. on the evening of the murder. Holmes also testified he saw Liggins standing outside the liquor store on that occasion. No witness saw Jennifer alive after she left the liquor store. *Liggins I*,

524 N.W.2d at 187. Holmes's identification of Liggins was called into question by his admission he was under the influence of alcohol when he picked Liggins's photo from an array on September 21, 1990; and by the fact he returned to the police department September 22, 1990, to inform authorities he could not be sure he had seen Liggins outside the liquor store on September 17.

At the trial of this postconviction proceeding, Liggins presented the testimony of Jerry L. Miles, who had been convicted of second-degree murder in 1980 and delivery of illegal drugs in 1994. Miles testified he and Holmes were members of a Muslim group while they were incarcerated in a state penal institution. He stated Holmes made an admission to the group to the effect he did not see Jennifer Lewis at the liquor store as he had testified during Liggins's trials. Miles also testified Holmes told the group the Scott County prosecutor had promised him a reduced sentence if he testified against Liggins again, and had threatened him with a perjury charge if he recanted his prior testimony. Holmes testified at the trial in this postconviction proceeding and denied the allegations made by Miles. Holmes denied membership in the prison Muslim group and reaffirmed his testimony he saw Liggins outside the liquor store on the evening Jennifer Lewis was murdered.

This evidence was clearly discovered after the verdict. The district court found Miles's testimony was not credible, and Miles was motivated in his testimony by dislike of the prosecutor. We concur. We find no abuse of discretion in the district court's finding the alleged recantation of Holmes would not have changed the result of the murder trial.

C. Testimony of Sarah Bea. For the reasons stated above in our discussion of the suppression issue in section II(A), we believe the testimony of Sarah Bea would not change the result of the murder trial. Accordingly, we find no abuse of discretion in the district court's ruling on this issue.

D. Statements of Joseph Glenn. On April 7, 1999, while apparently under the influence of alcohol, Glenn entered the garage of his neighbor, Arnold Pappas. Pappas asked Glenn to leave because of his belligerent and obnoxious behavior. Glenn later stood in the street ranting and raving and screaming threats against Pappas and his children. Pappas recounted Glenn's harangue as follows: "You punk ass motherfuckers don't mean nothing to me. I killed my daughter and you punks don't mean shit to me, I can kill you too." Pappas testified Glenn then stopped "for a minute" and then rephrased the threat as follows: "They killed my daughter and you guys don't mean nothing to me, I can kill you too." Pappas's testimony was corroborated by Lori Gomez who lived in the same neighborhood.

As noted above, acts or events occurring after trial do not generally qualify as newly discovered evidence. Liggins contends, however, Glenn's admission he killed his daughter makes this an extraordinary case in which an "utter failure of justice will unequivocally result" if the new evidence is not considered. *Grissom*, 572 N.W.2d at 185. After careful review of the record, however, we concur with the district court's finding Glenn's statements would probably not have changed the result if a new trial were granted. Made by the declarant in an obvious state of anger and inebriation, the statements are not sufficiently credible

or compelling to lead us to conclude the district court abused its discretion in ruling on this issue.

V. Ineffective Assistance of Counsel. When a postconviction relief action implicates constitutional issues, our consideration is in the nature of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). Both trial and appellate counsel are entitled to a heavy presumption of competence. *Osborn v. State*, 573 N.W.2d 917 (Iowa 1998).

To prevail, appellant must prove by a preponderance of the evidence his counsel failed in an essential duty and prejudice resulted. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Westeen*, 591 N.W.2d at 211. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Carrillo*, 597 N.W.2d 497, 500 (Iowa 1999). In resolving an ineffective assistance of counsel claim, the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (quoting *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981)). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*,

466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The defendant must show performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process the Sixth Amendment envisions. *Id.*

The district court granted Liggins's motion to change venue and moved the second trial from Davenport to Dubuque. Liggins claims his trial counsel was ineffective for failing to object to venue in Dubuque because Dubuque is a known "hotbed for racial hatred." Liggins claims the issue is critical in his case because he is an African-American defendant charged with the murder of a Caucasian girl. However, trial counsel indicated on the record the trial court was "meticulous in its granting of challenges . . . whenever there was a hint that racial attitudes or bias" had surfaced during voir dire. The only jurors who appeared to be affected by such attitudes or bias were excused. There is no merit to Liggins's claim because the district court exercised caution to insure a fair and unbiased jury at the second trial. Trial counsel cannot be considered incompetent for failing to raise an issue that has no merit. *Fenske v. State,* 592 N.W.2d 333, 339 (Iowa 1999). Having found no duty of trial counsel to object to venue in Dubuque County, we likewise find appellate counsel was not ineffective for failing to raise the issue on direct appeal.

VI. Conclusion. There is no reasonable probability the result of the trial would have been different if the evidence suppressed by the State had been produced. We find no merit in Liggins's assertion the State knowingly offered false testimony in derogation of his right to a fair trial. The district court did not

abuse its discretion in rejecting Liggins's claim new evidence requires a third trial in this case. In addition, we conclude Liggins's failed to prove ineffective assistance of counsel. We have considered all of the other contentions raised by Liggins in this appeal and conclude they are not preserved for review or are without merit.

AFFIRMED.