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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed July 30, 1987
vs.	)	
DANNY RAY DOUGHMAN,	)	7-152 86-496
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (CR 29513), Theodore H. Miller, Judge.

Defendant appeals from a district court decision which found him guilty of sexual abuse in the second degree and from the court's denial of the defendant's motion for reconsideration and a new trial. **AFFIRMED.**

Luis Herrera, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and David L. Dorff, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

HAYDEN, J.

Defendant, Daniel Doughman, was convicted on January 6, 1986, of sexual abuse in the second degree following a trial to the court. Trial counsel did not file a motion for reconsideration or new trial. Later defendant obtained his present counsel, who filed a motion for reconsideration or for a new trial on February 13, 1986. Defendant alleged two grounds for the motion. Defendant essentially claimed there was not substantial evidence to support the court's findings and there was new evidence, which if presented, could have had a difference in the outcome at trial. The trial court denied the motion, finding the evidence generating a question of guilt to be overwhelming and again concluded the defendant was guilty beyond a reasonable doubt; the court further found the absence of the new evidence at trial did not prejudice defendant such that a new trial was warranted. Defendant claims on appeal the trial court abused its discretion in not granting a new trial based upon the new evidence defendant offered at the hearing on the above motion, and trial counsel was ineffective due to his failure to properly advise defendant of the right to a jury trial and his failure to call certain witnesses at trial. Since defendant does not raise the substantial evidence issue on appeal, we do not address it. We affirm.

I. Newly-discovered evidence. To prevail on a motion for a new trial on the basis of newly-discovered evidence, a defendant must show an inability to have discovered the evidence earlier in an exercise of due diligence. Also, defendant must show the materiality of the new evidence, and the probability the new evidence would change the result if a new trial is granted. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983) (discussing Iowa R. Crim. P. 23(2)(b)(8)); State v. Gilroy, 313 N.W.2d 513, 522 (Iowa 1981) (same). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

In passing on such motions the trial court is granted wide discretion. State v. Compiano, 261 Iowa 509, 515, 154 N.W.2d 845, 848 (1967). For a defendant to be entitled to a new trial as a matter of law, the decision of the trial court to the contrary must be clearly erroneous and the rulings of the trial court must have been so prejudicial as to deprive defendant of a fair, not perfect, trial. Id. at 521, 154 N.W.2d at 851.

In this case defendant could not possibly show an inability to have discovered the evidence earlier in an exercise of due diligence since defendant had discovered the evidence and trial counsel chose not to use it. This evidence consisted of testimony of defendant's mother and his girlfriend ostensibly providing defendant an alibi for the time of the crime. Defendant's own testimony supported a defense of consent. The trial court nonetheless elected to hear this "new" evidence at the hearing on defendant's motion for reconsideration or new trial. After doing so, the court determined the lack of this evidence at trial did "not create a prejudice running in the favor of the Defendant as would provide a basis for a new trial," and denied the motion. We find the trial court did not abuse its broad discretion. The evidence was not "newly-discovered" and election by trial counsel not to use it could reasonably be attributed to a desire to avoid inconsistent defenses.

II. Ineffective assistance of counsel. Generally, issues which are not raised in the trial court, including constitutional issues, cannot be raised on appeal. State v. Atwood, 342 N.W.2d 474, 475 (Iowa 1984); State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981). However, an exception to this general rule of error preservation has been allowed when a claim of ineffective assistance of counsel is made because it is not realistic to expect an attorney to make such a claim against his own actions. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). This exception has also been held to apply where the reporter's

transcript of the trial was not available to defendant's new counsel when moving for a new trial, and the ineffectiveness of trial counsel was not so blatant that defendant could be foreclosed from appealing on the ground that he personally should have raised the incompetency charge before the trial court. State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978).

This case is similar to Kellogg in that defendant's new counsel filed his motion for new trial and neglected to claim ineffectiveness of trial counsel, and is dissimilar, in that defendant's new counsel has not provided a reason for this neglect. However, we need not determine the applicability of the Kellogg exception to these facts since we find the actions of defendant's trial counsel were not deficient and did not result in prejudice to the defendant.

Often the record on direct appeal is insufficient to allow us to consider a claim of ineffective assistance of counsel. We then reserve the claim for a postconviction proceeding so the facts, including an explanation of trial counsel's actions or omissions, may be fully developed. However, if the issue can be fairly resolved without the expense of an additional hearing and appeal, we prefer to resolve it expeditiously. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). The record in this case is adequate to permit resolution of the issue.

Because we are confronted with an alleged violation of defendant's constitutional right to counsel, we make our own independent evaluation of the totality of the circumstances. This amounts to a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). To establish an ineffectiveness claim, defendant must show that counsel failed to perform an essential duty and prejudice resulted. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). Defendant must prove both requirements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). To satisfy the prejudice requirement, defendant must

show that counsel's failure amounted to "a denial of the accused's due process right to a fair trial, fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). This is done by showing that there is a reasonable probability the result at trial would have been different absent trial counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Finally, if it is easier to dispose of an ineffectiveness claim on the lack of sufficient prejudice, that course should be followed. Id. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

With the foregoing principles in mind, we now analyze defendant's ineffectiveness claims.

A. Failure to give proper advice regarding defendant's waiver of his right to a jury trial. Defendant's first ineffectiveness claim is trial counsel gave him improper advice regarding waiver of his right to a jury trial. This claim is based exclusively upon the amount of time trial counsel spent discussing the jury waiver with defendant, which he asserts amounted to only ten to fifteen minutes on the day of trial. After this discussion, defendant signed and filed a written waiver of his right to a jury trial. Defendant also orally affirmed this waiver in the ensuing colloquy with the trial judge.

This ineffectiveness claim fails because of lack of prejudice. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. Defendant claims his jury waiver was not intelligent, meaningful, and knowledgeable as a result of trial counsel's ineffectiveness. We find defendant has not proven prejudice by a preponderance of the evidence, the relevant standard. Sallis, 325 N.W.2d at 122.

The waiver of a jury trial must be a voluntary, knowing, intelligent act, done with awareness of the relevant circumstances and likely consequences. State v. Johnson, 318 N.W.2d 417, 426 (Iowa 1982). Furthermore, a written jury waiver taken in compliance with Iowa Rule of Criminal Procedure 16(1) is prima facie evidence of the requisite voluntariness and intelligence. State v. Lawrence, 344 N.W.2d 227, 230 (Iowa 1984).

Unlike Lawrence, however, in this case defendant not only executed a properly taken written waiver, he also engaged in a protracted colloquy with the trial judge. This discussion, undertaken by the judge to probe the voluntariness of defendant's waiver, proceeded in pertinent part as follows:

> THE COURT: This is, of course, a serious crime. You need every break you can get and you are like the batter that goes to the plate and he says, "I only want one strike." You know, a jury is a big advantage. You are waiving a tremendous advantage. You are giving that up.
>
> When you try to one mind, even though I am open-minded and as a fact finder, I don't think I have any prejudices—certainly not in this case yet—nevertheless, even assuming that I am totally impartial and open-minded and would consider yourself fairly, you must stop to realize that the burden of the State is to convince in your case twelve people.
>
> Now, that is a lot harder to do than to convince one. Can you understand what I am getting at?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So that when you waive your right of trial by jury, this is a very sought-after privilege in this country—right of trial by jury—and it is there to protect you. That is the right that protects you. That isn't anything running in favor of the State.
>
> In some jurisdictions of the world, they try important cases like this to one person or one mind. We think we have a lot better system by avoiding that. The big important issues tried to more than one, then they have to be convinced to the same degree that I do, but you have got twelve people to convince.
>
> That is not you. That is the State. See, you don't have to do anything here. It is the state's burden. You want to give that up?
>
> THE DEFENDANT: Yes.

THE COURT: You do? How much have you talked about this to your counsel?

THE DEFENDANT: Just a little bit.

THE COURT: You just talked about it in the last few minutes, didn't you, and you are making this decision after having talked about it in two or three minutes?

THE DEFENDANT: Yes.

[The court then recessed for ten to fifteen minutes to allow defendant and trial counsel time to think again about waiving a jury trial. It is this time that defendant now claims was the sole occasion wherein he received advice regarding the waiver from trial counsel. When court reconvened, the judge continued his questioning.]

THE COURT: How do you feel about it now, Danny?

THE DEFENDANT: I am still going to leave it the same.

THE COURT: You still want to go ahead and waive the jury?

THE DEFENDANT: Yes.

THE COURT: All right. Okay. Let the record show that the Defendant appears to be an intelligent looking young man. He is well represented and he voluntarily waives the jury, so we will now proceed without them.

To rebut the prima facie evidence of voluntariness created by his written waiver and the evidence of his oral affirmations of that waiver, defendant relies on the amount of time trial counsel spent advising him on this issue. He provides no evidence responding to trial counsel's assertion in the record he and defendant discussed whether they wanted a jury or nonjury trial for thirty minutes the Wednesday prior to trial. Nor does defendant provide evidence showing the allegedly insufficient time for advice impaired him to intelligently waive his right to a jury trial. Instead he asks we so find as a matter of law. This we decline to do.

We find defendant voluntarily and intelligently waived his right to a jury trial. Accordingly, he was not prejudiced. Defendant's ineffectiveness claim on this basis is denied.

B. Failure to call witnesses. Defendant's second ineffectiveness claim is trial counsel failed to call witnesses whose testimony could have provided a possible alibi for him. Specifically, trial counsel failed to call defendant's mother and his girlfriend.

The testimony of defendant's girlfriend placed defendant at home at 11:45 p.m. on the night of the crime. Testimony of his mother placed him there forty-five minutes later, at 12:30 a.m. At trial the victim testified she arrived in town around or just after midnight, having returned from visiting her mother in Kirksville, Missouri. After stopping to use a pay phone to inform her mother of her safe arrival, she discovered her van would not start. She stated defendant helped her push it into a parking space, offered her a ride home, and thereafter sexually assaulted her. Defendant testified after he helped push her van, they smoked some marijuana, and then engaged in consensual intercourse. On appeal, he claims the sexual assault, if one occurred, must have been perpetrated by someone else after he left and before 1:15 a.m., when the police were notified. It is for the purpose of establishing his whereabouts at that time defendant believes trial counsel should have called his mother and girlfriend as witnesses. Defendant asserts failure of trial counsel to do so constitutes ineffective assistance since introduction of their testimony could have changed the result at trial.

However, failure of trial counsel to call alibi witnesses does not constitute ineffective assistance where they do not account for his activities during the time of the alleged assault. Lamphere v. State, 348 N.W.2d 212, 216-17 (Iowa 1984) (citing Thomas v. Estelle, 588 F.2d 170, 171 (5th Cir. 1979)). Nor

does the failure to call witnesses constitute ineffective assistance where their testimony would not be helpful to defendant. Kellogg v. State, 288 N.W.2d 561, 565 (Iowa 1980).

In this case, the victim positively identified defendant as her assailant. His defense to this identification was her alleged consent. Testimony providing an alibi for the time after the incident in dispute does not account for his activities at the time of the alleged assault nor is it particularly helpful. The issue at trial was not where defendant was at the time of the alleged assault but whether the act he was engaged in with the victim was performed with her consent. The strategic decision by trial counsel to abstain from introducing evidence irrelevant to the issue of consent does not indicate incompetence merely because it backfired. See State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). Reviewing the totality of the circumstances, we find the strategic decision of trial counsel to not call defendant's mother and his girlfriend as witnesses to be within the range of normal competence.

AFFIRMED.