PETITIONER'S APPENDIX

8th Circuit Court of Appeals

A. Judgment Denying Certificate of Appealability (Dec. 16, 2020)

Northern District of Iowa

B. Notice of Appeal (Mar. 20, 2020)

C. Judgment Denying Motion for Evidentiary Hearing (Feb. 21, 2020)

D. Judgement Order (Feb. 21, 2020)

Iowa Appellate Courts

E. Post-Conviction Order from Iowa Court of Appeals (Apr. 18, 2018)

F. Direct Appeal Decision Affirming Conviction (Nov. 23, 2011)

Text of Applicable Statute

G. 28 U.S.C. Section 2254

A. Judgment Denying Certificate of Appealability (Dec. 16, 2020)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1602

Robert Mylan Butts

Petitioner - Appellant

v.

William Sperfslage, Warden, Anamosa State Penitentiary

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00108-CJW)

JUDGMENT

Before LOKEN, ERICKSON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 16, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A-1

B. Notice of Appeal (Mar. 20, 2020)

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS

ROBERT BUTTS,	)
	) No. 1:18-CV-00108-CJW-KEM
	)
Petitioner,	)
	) NOTICE OF APPEAL
vs.	)
	)
	) **NO CERTIFICATE OF**
WILLIAM SPERFSLAGE,	) **APPEABILITY**
	)
Respondent.	) **IFP STATUS**

Pursuant to Fed. R. App. Proc. 4 (a) (1) (A), Petitioner files his Notice of Appeal from the Judgment (Docket 18) and Order Denying Petitioner's Request for an Evidentiary Hearing (Docket 17), including this Court's denial for a Certificate of Appealability.

RESPECTFULLY SUBMITTED,

/s/ Rockne Cole

ROCKNE O. COLE
Cole Law Firm, PC
209 E. Washington, Ste. 304
Iowa City, IA 52240
(319)519-2540
(319)359-4009 FAX
rocknecole@gmail.com
Iowa Pin AT1675
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Rockne Cole, hereby certify
that this Notice was served on all Parties of record

via EM-ECF on March 20, 2020.
/s/ Rockne Cole

C. Judgment Denying Motion for Evidentiary Hearing (Feb. 21, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ROBERT BUTTS, Petitioner, vs. WILLIAM SPERFSLAGE, Respondent.	No. 18-CV-108-CJW-KEM **ORDER DENYING MOTION FOR EVIDENTIARY HEARING AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS**

I. INTRODUCTION

This matter is before the Court on initial review and petitioner's motion for an evidentiary hearing. (Doc. 14). For the following reasons, the Court denies petitioner's Motion for an Evidentiary Hearing and dismisses his Petition for Writ of Habeas Corpus because it is barred by the statute-of-limitations.

II. PROCEDURAL HISTORY OF THIS FEDERAL CASE

On October 23, 2018, petitioner filed a pro se petition seeking a writ of habeas corpus under Title 28, United States Code, Section 2254. (Doc. 1). On March 18, 2019, attorney Rockne Cole entered his appearance on behalf of petitioner and requested an extension of time to file a preliminary brief in support of initial review. (Docs. 2 & 3). On March 19, 2019, the Court granted the motion. (Doc. 4). On April 2, 2019, petitioner filed a second unresisted motion for an extension of time to file an initial brief. (Doc. 5). On April 3, 2019, the Court granted the motion. (Doc. 6). On April 22, 2019, petitioner filed his brief. (Doc. 7).

On August 29, 2019, the Court filed an initial review order. (Doc. 8). The Court found that petitioner had exhausted his claims in the Iowa state courts and that this was his first petition under Title 28, United States Code, Section 2254. (*Id.*, at 3). The Court

further found that the only issue on preliminary review was whether the petition was timely under the one-year statute-of-limitations. (*Id.*). Petitioner admitted that his petition was untimely, but argued that equitable tolling should excuse his untimely petition. (Doc. 7-1, at 2-4). Petitioner requested an opportunity to develop the record on his equitable tolling claim. (*Id.*). The Court granted petitioner his request for an opportunity to develop the record. The Court ordered a copy of the pleadings be sent to the Iowa Attorney General's Office. (Doc. 8, at 5). The Court granted petitioner 60 days to file a brief, including any evidentiary support, on the equitable tolling issue and granted respondent 60 days after petitioner filed his brief to file a responsive brief. (*Id.*).

After the Court granted petitioner two extensions of the deadline, on November 18, 2019, petitioner filed a motion for evidentiary hearing instead of a brief or submitting evidence on the equitable tolling issue. (Doc. 14). Petitioner did attach an appendix consisting of a two-page affidavit by petitioner. (Doc. 14-1).

On November 21, 2019, respondent filed a response to petitioner's motion indicating that respondent was treating petitioner's motion as a brief in compliance with the Court's August 29, 2019 order and stating respondent's intent to file its responsive pleading within 60 days. (Doc. 15). On January 13, 2020, respondent filed a timely response to petitioner's pleading. (Doc. 16). Respondent argues equitable tolling is not justified here and that the Court should dismiss petitioner's untimely petition. (*Id.*). Respondent also argues that the Court should deny petitioner's motion for an evidentiary hearing. (*Id.*).

The Court now considers this matter fully briefed. To the extent petitioner failed to file a brief or provide evidentiary support for his equitable tolling claim (beyond his affidavit), the Court finds he forfeited the opportunity to do so by failing to comply with this Court's August 29, 2019 order. The Court granted petitioner multiple extensions of time for briefing in this case. After granting two extensions to brief the equitable tolling

issue, petitioner still did not file a brief, instead filing a motion for an evidentiary hearing. Petitioner did not seek a further extension of time to submit a brief or documentation, or provide an explanation for why he failed to comply with the Court's order. When respondent filed a response indicating that respondent was treating petitioner's motion as his brief in compliance with this Court's order, plaintiff did not respond or protest or ask for more time to brief the issue or submit evidence.

This pattern of dilatory conduct would give the Court grounds to dismiss the petition altogether under Federal Rule of Civil Procedure 41(b). The Federal Rules of Civil Procedure permit dismissal with prejudice "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order." FED. R. CIV. P. 41(b). Nor can petitioner escape responsibility by blaming his attorney, as he has his past attorneys. *See Siems v. City of Minneapolis*, 560 F.3d 824, 827 (8th Cir. 2009) ("[W]e have long held that litigants choose their counsel at their own peril."). Because dismissal is an extreme sanction that should be used sparingly, the Court will not dismiss the petition on this ground, but will instead find that petitioner's failure to comply with this Court's order forfeited any opportunity for him to submit further briefing or documentation in support of his equitable tolling claim.

III. FACTUAL AND PROCEDURAL HISTORY OF THE STATE CASE

On November 11, 2009, petitioner broke into an apartment shared by two sisters and attempted to sexually assault one of them, threatening her with a firearm. *State v. Butts*, No. 11-0069, 2011 WL 5867065, at *1 (Iowa Ct. App. Nov. 23, 2011). Unbeknownst to petitioner, the other sister hid and called 9-1-1. *Id.*, at *2. Police arrived, but not before petitioner had attempted to sexually assault the victim and removed some of her clothing. *Id.*

On October 18, 2010, petitioner was convicted after a jury trial of second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in

a felony, assault with intent to commit sexual abuse, carrying weapons, and possession of burglar's tools. *Id.*, at *7; (Doc. 1, at 1). Petitioner appealed his conviction, but the Court of Appeals affirmed his convictions. *Id.*, at *20. Petitioner did not seek further review. (Doc. 16-1; *State v. Butts*, No. 11-0069, Docket (Iowa Dec. 22. 2011), Criminal Appeal Docket).

On December 19, 2014, petitioner filed a postconviction relief ("PCR") action in state court. (Doc. 16-2; *Butts v. State*, No. PCCV112385, Mot. PCR (Iowa D. Ct. Pottawattamie Cnty. Dec. 19, 2014)). The district court and court of appeals denied relief. *Butts v. State*, No. 16-2023, 2018 WL 1858380, at *1 (Iowa Ct. App. Apr. 18, 2018). On July 16, 2018, the Iowa Supreme Court issued procedendo, after denying further review, ending the case in state court. (Doc. 16-3; *Butts v. State*, No.16-2023, Procedendo (Iowa July 16, 2018), PCR Appeal Docket).

IV. DISCUSSION

A. The One-Year Statute-of-Limitations & Tolling

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), controls when a person in state custody under a state court judgment applies for a writ of habeas corpus in federal court "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. With the enactment of AEDPA, "a state prisoner seeking federal habeas corpus relief [is required] to file his federal petition within a year after his state conviction becomes final." *Payne v. Kemna*, 441 F.3d 570, 571 (8th Cir. 2006). This one-year statute-of-limitations is codified in 28 U.S.C. Section 2244(d)(1) as follows:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or the laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *see also Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (explaining 28 U.S.C. § 2244(d)(1)(A)); *Riddle v. Kemna*, 523 F.3d 850, 855–56 (8th Cir. 2008) (stating that the 90-day filing period for filing certiorari is not applicable and the one-year statute-of-limitation under 28 U.S.C. § 2254 runs from the date procedendo issued if the petitioner's direct appeal does not contain a claim that is reviewable by the Supreme Court); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001) (stating that the running of the statute-of-limitation for purposes of 28 U.S.C. § 2244(d)(1)(A) is triggered by: "[(1)] the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings . . .; or [(2)] . . . the conclusion of all direct criminal appeals in the state system followed by the expiration of the 90 days allotted for filing a petition for [a writ of certiorari]" in the United States Supreme Court) (citing *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998) (original alterations omitted)).

Due to the one-year statute-of-limitation under 28 U.S.C. Section 2244, the petitioner's application for a writ of habeas corpus is only timely if a period of less than one year "tolled" between the date that the grace-period started and the date that the petitioner filed the action. *See Peterson v. Gammon*, 200 F.3d 1202, 1203-04 (8th Cir. 2000). Postconviction relief actions filed before or during the limitation period for habeas

corpus actions are "pending" and the limitation period is tolled during: (1) the time "a properly filed" postconviction relief action is before the district court; (2) the time for filing of a notice of appeal even if the petitioner does not appeal; and (3) the time for the appeal itself. *See Williams v. Bruton*, 299 F.3d 981, 982-84 (8th Cir. 2002) (discussing application of 28 U.S.C. Section 2244(d)(2)); *see also Lawrence v. Florida*, 549 U.S. 327, 332 (2007) ("[28 U.S.C. Section] 2244(d)(2) does not toll the [one-]year limitations period during the pendency of a petition for certiorari."); *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (holding that an application is tolled during the interval "between (1) a lower court's adverse determination, and (2) the prisoner's filing of notice of appeal, provided that the filing of the notice of appeal is timely under state law") (emphasis omitted); *Snow*, 238 F.3d at 1035-36 (concluding that 28 U.S.C. Section 2244(d)(2) does not toll the limitation period for the 90 days during which a petitioner could seek certiorari from a state court's denial of postconviction relief). It is also tolled by the filing of a motion to correct sentence. *Wall v. Kholi*, 562 U.S. 545, 555-56 (2011) (discussing a motion to reduce sentence under Rhode Island's Rule 35 provision).

B. Timeline of Petitioner's Case

To determine when the clock on petitioner's one-year statute-of-limitations started, paused, and stopped, compared to when petitioner took steps to diligently pursue his remedies under Section 2254, it is helpful to construct a timeline of events.

11/23/2011 Iowa Court of Appeals affirms conviction[1]

12/13/2011 Deadline for seeking further review expires; CLOCK STARTS[2]

9/4/2012 Petitioner moves for appointment of state PCR counsel[3]

10/18/2012 State court appoints PCR counsel for plaintiff[4]

12/13/2012 One-year statute-of-limitations expires; CLOCK STOPS

12/19/2014 State PCR petition filed[5]

4/18/18 Iowa Court of Appeals affirms district court's denial of PCR petition[6]

7/16/18 Iowa Supreme Court issues procedendo[7]

10/23/18 Petitioner files Section 2254 petition in federal court[8]

To assess the degree of petitioner's diligence, it is also helpful to calculate the number of days between various events. Between the time the Iowa Court of Appeals affirmed his conviction and petitioner moved for appointment of state PCR counsel, 286 days (or approximately nine and a half months) passed. Between the time the court affirmed his conviction and petitioner filed his state PCR, 1,122 days (approximately 37

---

[1] *State v. Butts*, 2011 WL 5867065, at *1.

[2] Iowa R. App. P. 6.1103(1)(a) (imposing 20-day deadline to seek further review); *Gonzalez*, 565 U.S. at 154 (holding that the deadline for seeking further review expires when deadline passes).

[3] (Doc. 16-4).

[4] (Doc. 14-1, at 1).

[5] (Doc. 16-2).

[6] *Butts v. State*, 2018 WL 1858380, at *1.

[7] (Doc. 16-3).

[8] (Doc. 1).

months, or three years) passed. Not counting the time during which petitioner's state PCR action was pending, another 99 days (or a little more than three months) passed before petitioner filed his Section 2254 petition. In short, even excluding the time during which petitioner's state PCR was pending, a total of 1,201 days (or approximately 40 months, or 3 years and 4 months) passed between the start of the statute-of-limitations clock and the filing of the Section 2254 petition.

The law is clear, however, that the time a state PCR action is pending cannot toll a federal statute-of-limitations period that has already expired. *See, e.g.*, *Jackson v. Ault*, 452 F.3d 734, 735 (8th Cir. 2006) (a statute-of-limitations period cannot be tolled once it expires); *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (per curiam) (statute-of-limitations bar on claims raised for the first time in federal habeas petition after close of one-year period could not be cured by returning to state court to exhaust state remedies that were not time-barred); *accord Harris v. Hutchinson*, 209 F.3d 325, 327–28 (4th Cir. 2000) ("Every circuit court that has construed 28 U.S.C. § 2244(d) has interpreted it in this way."). Thus, from the time the statute-of-limitations clock started on December 13, 2011, and the time petitioner filed his Section 2254 petition in this Court, 2,506 days (or approximately 83 months, or nearly 6 years and 11 months) passed.[9]

In short, petitioner filed his Section 2254 petition in this Court 2,140 days (or approximately 71 months, or nearly 5 years and 11 months) after the statute-of-limitations expired.

C. Equitable Tolling Considerations

Petitioner asserts that the Court should nevertheless consider his petition timely because the Court ought to equitably toll the statute-of-limitations due to the ineffectiveness of his appellate and state PCR counsel. The one-year statute-of-limitation

[9] Respondent calculates this time period as 2,504 days. (Doc. 16, at 9). The difference is immaterial.

in Section 2244(d) is subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Nevertheless, "a 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.*, at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also Johnson v. Hobbs*, 678 F.3d 607, 610–11 (8th Cir. 2012) (holding that a litigant seeking equitable tolling bears the burden of establishing that (1) he has been diligent in pursuing his rights and (2) some extraordinary circumstance—external to the litigant and not attributable to his actions—prevented him from timely filing). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations and citations omitted).

Equitable tolling is "an exceedingly narrow window of relief." *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001). "[P]ro se status, lack of legal knowledge or legal resources, confusion about or miscalculations of the limitations period, or the failure to recognize the legal ramifications of actions taken in prior postconviction proceedings are inadequate to warrant equitable tolling." *Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004) (quoting and adopting magistrate judge's recommendation); *see also Baker v. Norris*, 321 F.3d 769, 771 (8th Cir. 2003) (limited access to law library did not justify equitable tolling); *Cross-Bey v. Gammon*, 322 F.3d 1012, 1016 (8th Cir. 2003) (lack of understanding of the law does not justify equitable tolling); *Flanders v. Graves*, 299 F.3d 974, 976–77 (8th Cir. 2002) (actual innocence claim was not sufficient to warrant equitable tolling); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.").

Here, petitioner was not diligent. He has made no showing that circumstances beyond his control prevented him from filing a timely petition. First, petitioner allowed

more than nine of his twelve-month statute-of-limitations to expire before even applying for appointment of state PCR counsel. Petitioner could have, but did not, file a state PCR action pro se, which would have stopped the clock and tolled it during the pendency of the state PCR case. Petition was in control of this conduct and cannot blame his dilatory behavior on counsel. *See Gordon v. Arkansas*, 823 F.3d 1188, 1195-96 (8th Cir. 2016) (finding a lack of diligence when a petitioner could make no showing of why he failed to act during a nine-month period); *Nelson v. Norris*, 618 F.3d 886, 892-93 (8th Cir. 2010) (petitioner failed to show due diligence when he failed to take any action for nine months); *see also Palacios v. Stephens*, 723 F.3d 600, 607-08 (5th Cir. 2013) ("[w]eigh[ing] heavily" the petitioner's unexcused seven-month delay in seeking representation when finding a lack of diligence).

Petitioner also could have filed a pro se Section 2254 petition immediately after the Iowa Supreme Court issued its procedendo on July 16, 2018. Instead, petitioner allowed more than three more months to expire without action before finally filing his pro se petition on October 23, 2018. This, too, shows a lack of diligence. *See Evans v. Hobbs*, No. 1:11-CV-1005, 2014 WL 1030254, at *7 (W.D. Ark. March 17, 2014) (finding petitioner was not diligent when he waited three months after limitations ran to file petition). Again, this delay lays squarely on petitioner's shoulders and he cannot blame his attorneys for this period of inaction.

Between petitioner's more than nine-month delay in taking any action to pursue his state PCR remedies and the more than three-month delay between the end of the delayed state PCR proceedings, petitioner wasted well more than a full year. That long period of unexplained inactivity shows a significant lack of diligence. *See Anjulo-Lopez v. United States*, 541 F.3d 814, 818-19 (8th Cir. 2008) (when a petitioner mistakenly believed his attorney had filed a notice of appeal in his case, the petitioner's lack of any activity for a year was insufficiently diligent).

Petitioner argues that equitable tolling applies because his appellate lawyer failed to keep him informed and failed to file a request for further review by the Iowa Supreme Court. (Doc. 14-1, at 1). He asserts that further review decisions usually take six to eight weeks for a decision and, if granted, would take even longer. (*Id.*). Petitioner argues that the Court should therefore assume the Iowa Supreme Court would have granted further review and should toll the statute-of-limitations clock by "the average length of time a case would take if further review were granted." (*Id.*). Petitioner does not state the average length of time cases take when review is granted. Nor does petitioner provide any legal authority for the Court to toll a statute-of-limitations on the basis of speculation that had he sought further review it would have been granted and speculation as to how long that process would have taken.[10]

Petitioner argues that the Court should find equitable tolling here because his state PCR attorney promised, but failed, to file the state PCR action before expiration of the federal statute-of-limitations. (Doc. 14, at 3). Petitioner had no right, however, to appointed counsel for his state PCR action. *See Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (holding that there is no right to counsel beyond direct appeal in a criminal case). In any event, it is well-settled that petitioner cannot anchor his equitable tolling claim on an allegation of ineffective assistance of state PCR counsel. *See, e.g.*, *Sellers v. Burt*, 168 Fed. App'x 132, 133 (8th Cir. 2006) (rejecting petitioner's argument that the statute-of-limitations should be tolled "because his state postconviction attorney failed to communicate with him and did not send his case file"); *United States v. Martin*, 408

[10] The Court also notes that petitioner's argument that the statute-of-limitations should be tolled during the time period his appellate attorney failed to file a petition for further review is irrelevant because the clock was not running during this time period. Thus, even if petitioner's appellate counsel intentionally lied to petitioner about his intent to file a petition for further review, that time period did not count against petitioner. The focus here is what petitioner did to show diligence after he found out his attorney allegedly lied to him about seeking further review.

F.3d 1089, 1093 (8th Cir. 2005) (holding that ineffective assistance of counsel, "where it is due to an attorney's negligence or mistake, has not generally been considered an extraordinary circumstance" that would warrant tolling of the statute-of-limitations); *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally does not warrant equitable tolling."); *Greene v. Washington*, 14 Fed. App'x 736, 737 (8th Cir. 2001) (rejecting equitable tolling argument based on alleged mistake by postconviction attorney). That said, serious attorney misconduct, as opposed to mere negligence, might warrant equitable tolling. *Martin*, 408 F.3d at 1093.

Here, the record does not support a reasonable inference that petitioner's PCR counsel's conduct engaged in serious misconduct. PCR counsel filed a state PCR petition in a timely manner for purposes of petitioner seeking state postconviction relief. Even if petitioner's state PCR counsel falsely represented an intent to file a petition before the federal statute-of-limitation ran, it would not justify equitable tolling. Only a misrepresentation of a fact rises to the level of such serious misconduct as to justify equitable tolling. *See Beery*, 312 F.3d at 951–52 (distinguishing an attorney's false representation that the attorney had filed a petition and an attorney's false representation about the intent to file a petition, and finding equitable tolling may be appropriate in the former but not the latter situations); *see also Muhammad v. United States*, 735 F.3d 812, 815-16 (8th Cir. 2013) (finding equitably tolling inappropriate when the petitioner claimed he mistakenly relied on his attorney's promise that she would file a Section 2255 petition).

Petitioner was not without options to diligently pursue his federal habeas petition while he waited for his appointed state PCR counsel to file petitioner's state-court PCR action. In *Pace*, 544 U.S. at 416, the Supreme Court noted that one option for prisoners unsure whether their state habeas petitions have been or will be timely filed is to file "a 'protective' petition in federal court and [to] ask[ ] the federal court to stay and abey the

federal habeas proceedings until state remedies are exhausted." The Supreme Court has not found that a prisoner's failure to file a protective petition alone shows lack of reasonable diligence, but it is certainly a factor for a court to consider when determining whether to find the extraordinary remedy of equitable tolling appropriate. Here, petitioner claims that he was fully aware of the deadline for filing his federal habeas petition. (Doc. 14-1, at 2). Yet, petitioner took no action to file a pro se protective petition while awaiting his state PCR attorney to file the state PCR petition.

In summary, the Court finds that petitioner was not diligent in pursuing his rights and has failed to identify some extraordinary circumstance out of his control that prevented him from timely filing his Section 2254 petition. Thus, equitable tolling is not appropriate. Petitioner's petition is untimely by years and will be dismissed.

D. Petitioner's Motion for Evidentiary Hearing

Petitioner seeks an evidentiary hearing to develop more evidence about the performance of his appellate and state PCR counsel. (Doc. 14). The Court finds that petitioner has not established good cause for an evidentiary hearing.

In his motion for an evidentiary hearing, petitioner notes that the Court "may direct the parties to expand the record by submitting additional materials relating to the petition." (Doc. 14, at 1 (citing Rule 7 of the Rules Governing Section 2254 Cases)). The Court's August 29, 2019 order provided petitioner an opportunity to expand the record by submitting supplementary evidence in support of his equitable tolling argument. Petitioner chose not to do so.

In his motion, petitioner points out that Rule 8 of the Rules Governing Section 2254 Cases also permits the Court to hold an evidentiary hearing. (Doc. 14, at 2). Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts states in pertinent part: "If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under

Rule 7 to determine whether an evidentiary hearing is warranted." When deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable the habeas petitioner to prove the petition's factual allegations, which, if true, would entitle the petitioner to federal habeas relief on his claims. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). An evidentiary hearing may be held only when the habeas petition "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Sawyer v. Hofbauer*, 299 F.3d 605, 610 (6th Cir. 2002) (quoting *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001)). In short, Rule 8 contemplates an evidentiary hearing to receive evidence on the merits of the underlying claim, not a hearing to receive evidence on equitable tolling.

Regardless, the Court finds an evidentiary hearing unwarranted. Under Section 2254(e)(2), "a habeas court is barred from holding an evidentiary hearing unless the petitioner was diligent in his attempt to develop a factual basis for his claim in the state court proceedings." *Palmer v. Hendricks*, 592 F.3d 386, 392 (3rd Cir. 2010). When a petitioner files his habeas petition too late as here, however, and no tolling theory applies, there is no arguable basis for an evidentiary hearing. In other words, the same reasons that make petitioner ineligible for equitable tolling of the statute-of-limitations period also make petitioner ineligible for an evidentiary hearing under Section 2254(e)(2)(A)(ii). Here, even if everything petitioner alleges about his attorneys is true, the Court finds he has still not acted diligently to pursue his Section 2254 remedies.

Petitioner has also failed to describe why he needs an evidentiary hearing and what evidence he believes he could produce if granted such a hearing. Petitioner only asserts in conclusory manner that there is a "need for an evidentiary hearing of two hours to determine whether attorneys here engaged in mere ineffectiveness of [sic] something more malevolent." (Doc. 14, at 4). Presumably petitioner would call these attorneys as witnesses, but petitioner does not indicate what evidence he believes he would elicit from

them that is not already part of the record. The Court is left to speculate what evidence might emerge from an evidentiary hearing. The Court will not do so.

Thus, the Court denies petitioner's motion for an evidentiary hearing.

V. CERTIFICATE OF APPEALABILITY

Although certificates of appealability are usually issued only when there is "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a court of appeals has jurisdiction to review a district court's rulings on "preliminary procedural issues, such as [a] limitations question," as well. *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (en banc). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Here, the Court finds no basis for issuing a certificate of appealability. If petitioner desires to seek further review of his petition, he may request a certificate of appealability from a Judge of the United States Court of Appeals for the Eighth Circuit. *See Tiedeman v. Benson*, 122 F.3d 518, 520–22 (8th Cir. 1997).

VI. CONCLUSION

For these reasons, petitioner's petition for a writ of habeas corpus (Doc. 1) is **denied** and the Court **dismisses** petitioner's petition with prejudice as untimely. The Court also **denies** petitioner's motion for an evidentiary hearing (Doc. 14). No certificate of appealability will be issued for any of petitioner's claims.

IT IS SO ORDERED this 21st day of February, 2020.

C.J. Williams
United States District Judge
Northern District of Iowa

D. Judgement Order (Feb. 21, 2020)

UNITED STATES DISTRICT COURT

for the

Northern District of Iowa

Robert Mylan Butts
Plaintiff
v.
William Sperfslage
Defendant

Civil Action No. 18-CV-108-CJW

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☑ the plaintiff recover nothing, the action be dismissed.

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge CJ Williams

Date: February 21, 2020

CLERK OF COURT
Robert L. Phelps

Deputy Clerk

Signature of Clerk or Deputy Clerk

E. Post-Conviction Order from Iowa Court of Appeals (Apr. 18, 2018)

918 N.W.2d 502 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

Robert BUTTS, Applicant-Appellant,
v.
STATE of Iowa, Respondent-Appellee.

No. 16-2023
|
Filed April 18, 2018

Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, Judge.

An applicant appeals from the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Attorneys and Law Firms

Marti D. Nerenstone, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, and Sheryl Soich, Assistant Attorney General, for appellee State.

Heard by Vogel, P.J., and Potterfield and Mullins, JJ.

Opinion

VOGEL, Presiding Judge.

*1 **Robert Butts** was convicted of one count each of first-degree burglary, second-degree kidnapping, going armed with intent, assault while participating in a felony, assault with the intent to commit sexual abuse, carrying weapons, and possession of burglar's tools. He filed a postconviction-relief action, asserting his trial counsel was ineffective. The basis for the action was that counsel disclosed a letter **Butts** had composed, failed to object to statements made by the prosecution, failed to move for a mistrial, and failed to object to asserted improper judicial conduct. Additionally, **Butts** claims his appellate counsel was ineffective in failing to seek further review and failing to challenge trial counsel's disclosure of the letter. Finally, **Butts** asserts his kidnapping conviction should be reconsidered in light of our supreme court's ruling in *State v. Robinson*, 859 N.W.2d 464 (Iowa 2015). Agreeing with the postconviction court's ruling, we affirm.

I. Background Facts and Proceedings

The charges **Butts** faced stemmed from allegations that on November 11, 2009, **Butts** broke into an apartment, shared by two sisters, armed with a handgun and a knife. He locked the front door behind him, dragged one sister to a back bedroom at gunpoint and attempted to rape her before being interrupted by police officers.

After a jury found **Butts** guilty, he appealed his convictions raising sufficiency-of-the-evidence claims, evidentiary claims, a search warrant complaint, and a jury instruction challenge. This court affirmed **Butts**'s convictions. *See State v. **Butts***, No. 11–0069, 2011 WL 5867065, at *8-20 (Iowa Ct. App. Nov. 23, 2011). On December 19, 2014, **Butts** filed an application for postconviction relief (PCR), raising various ineffective-assistance-of-counsel claims. After a hearing, the PCR court denied **Butts**'s claims. **Butts** appeals.

II. Standard of Review

"Generally, an appeal from a denial of an application for postconviction relief is reviewed for correction of errors at law." *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012) (citation omitted). "However, when the applicant asserts claims of a constitutional nature, our review is de novo. Thus, we review claims of ineffective assistance of counsel de novo." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). "[W]e give weight to the lower court's findings concerning witness credibility." *Id.*

III. Kidnapping Reconsideration

Butts claims his kidnapping conviction should be reconsidered because the facts closely mirror those in *Robinson*, 859 N.W.2d at 465–67, in which our supreme court found there was insufficient evidence to uphold the kidnapping charge. Although the question of whether his acts constituted kidnapping was resolved in **Butts**'s direct appeal, he claims it should be reconsidered because the *Robinson* decision postdated his direct appeal. We begin with a more detailed explanation of the undisputed facts

E. Post-Conviction Order from Iowa Court of Appeals (Apr. 18, 2018)

808 N.W.2d 756 (Table)
(The Court's decision is referenced in a "Decisions Without Published Opinions" table in the North Western Reporter.)
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff–Appellee,
v.
Robert Mylan **BUTTS**,
Defendant–Appellant.

No. 11–0069.
|
Nov. 23, 2011.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady (motion to suppress) and James S. Heckerman (trial), Judges.
The defendant appeals from judgment and sentences imposed upon his convictions for second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in a felony, assault with intent to commit sexual abuse, carrying weapons, and possession of burglar's tools. AFFIRMED.

Attorneys and Law Firms

Keith E. Uhl, Des Moines, and John S. Berry of Berry Law Firm, Lincoln, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon J. Jacobmeier, Assistant County Attorney, for appellee.

Heard by DANILSON, P.J., and TABOR and MULLINS, JJ.

Opinion

DANILSON, P.J.

*1 **Robert** Mylan **Butts** appeals his convictions challenging the sufficiency of the evidence of confinement or removal to support a second-degree kidnapping charge. He also asserts a search warrant was unconstitutionally overbroad; the trial court abused its discretion in admitting evidence; there was insufficient evidence of specific intent to sustain several of the convictions; and the trial court erred in instructing the jury. Because the convictions were supported by substantial evidence; the search warrant was not overbroad; the district court did not abuse its discretion in admitting the redacted 911 recording or the stipulation of items found upon execution of a search warrant; and because the jury instructions on the defendant's defenses were not prejudicial, we affirm.

I. Background Facts and Proceedings.
At about 11:00 p.m. on November 11, 2009, Jennifer walked her boyfriend out of the apartment she shared with her sister Regina. After saying good night to him, Jennifer returned to the apartment and turned the deadbolt. She spoke with Regina for a few minutes and then went to her bedroom, which was past Regina's bedroom and at the far end of the hall.

Regina was lying on the couch watching television, but was startled when she looked up to see a stranger, later identified as the defendant, **Robert Butts**, coming through the locked door into her apartment. **Butts** shut the door behind him and locked the deadbolt. He was wearing plastic gloves and a grey hooded sweatshirt, with the hood pulled tight around his face. He was holding a gun. The intruder walked to Regina, held the gun near her at eye level, and asked if anyone else was there. Regina loudly told the intruder no one else was at home, hoping to alert her sister to his presence. As Regina talked with **Butts**, she saw Jennifer creep down the hallway and quickly disappear.

Jennifer had gone into the hallway because she heard a noise. She saw a man in a hooded sweatshirt standing near Regina. Regina looked terrified. The man told Regina, "You're going to f* * *ing cooperate right now." Jennifer was able to get into the bathroom closet and call 911, whispering to the dispatcher.

Regina said the intruder "told me that I'm—that I am going to do what he wants. He didn't want to hurt me but he will if I scream ." As Regina attempted to "buy time" by asking **Butts** questions, he grabbed her by the back of the arm, pulled her from the couch, and forced her to walk down the hallway while pointing a gun at her. **Butts** took Regina to the farthest bedroom and pushed the door shut behind him. The door closed but an item on the floor prevented it from shutting and latching entirely.

Butts sat Regina on the bed and stood directly in front of

her. She pleaded with him: "You don't have to do this; you can't do this, this is rape. You can leave now and I won't say anything. I don't even know who you are." He responded by asking Regina if she had a boyfriend and if she was still a virgin. He ordered Regina to undress. When she refused, he put the gun in the back waistband of his pants and started coming toward her. She panicked, asking **Butts** if he had a condom; he said he did and motioned toward his back pocket. Regina continued to resist his demands that she disrobe. **Butts** forcibly removed Regina's sweater and tank top. He held her and unfastened her bra and pulled it off her. Regina pulled her knees up, but **Butts** straightened out her legs and unbuttoned, unclasped, and unzipped her pants.

*2 At the 911 dispatcher's direction, Jennifer had crept to the front door to unlock it so officers could enter the apartment. Jennifer was able to peek into the bedroom and saw a shirtless Regina lying on the bed with the defendant standing over her. Jennifer could hear her sister pleading repeatedly, "You don't have to do this. I'm not going to tell anybody. Please don't do this."

Regina heard a knock at the door:

> Q. And what happened? A. [**Butts**]—he froze for a split second and he told me just to ignore it; they'll go away. If you scream, I'm going to hurt you.
>
> Q. Okay. What happened then? A. The defendant and I both heard footsteps like—like running for the steps out in the hallway and he turned his back to me and went towards the bedroom door and we both heard the front door unlock and people coming in so he was getting ready to open the bedroom door when I jumped off the bed and I grabbed him by the back of his hoodie. I pulled the gun out from behind his pants and kind of shifted him off balance into the hallway and then the cops were there and they said "get down on the ground," "drop the weapon" and so I dropped it and I hit the floor, both knees, just started crying hysterically.

Police officers took **Butts** into custody, but he was combative and not cooperative. He refused to comply with commands to be still and not talk, he resisted the officers and kept insisting "nothing happened, I wasn't going to hurt her." In addition to the gun Regina had taken from **Butts**, officers found **Butts** was carrying a knife and lock-picking equipment. As he was being led to a patrol car, **Butts**' continued noncompliance with directives to "keep walking, stop moving, stop turning" went unheeded and resulted in the officer sweeping **Butts**' legs from under him and then using a taser. While **Butts** was on the ground, the officer noticed **Butts** had removed one of the gloves he was wearing and had the other partially off. In the opinion of responding officers John Huey, Dana Schott, and Joseph Hothersall, who were first on the scene and placed **Butts** in custody, **Butts** did not appear to be intoxicated or drunk.

Butts provided false names and social security numbers to police officers. At the time he was booked into the jail several hours after his arrest,[1] officers did not know his identity. Officers ultimately learned **Butts**' identity when he was required to give his name to make a telephone call. With his name provided, the officers were able to determine **Butts**' local address[2] and located his vehicle parked in front of the apartment building next to Regina's. The officers learned **Butts**' apartment was in the same complex as the sisters' apartment.

Officers obtained search warrants for **Butts**' apartment and vehicle. Upon execution of the search warrants, law enforcement seized, among other things, a stun gun; a rifle; a pistol; knives; ammunition; a backpack containing a camera, condoms, socks wrapped in plastic, and hair dye; a night vision scope; other monitoring equipment; and computers and digital storage/memory devices. An additional warrant was obtained to search the contents of the computer and digital storage devices, which were discovered to contain videos on picking locks, as well as pornography, including simulated rape scenes.

*3 **Butts** was charged with second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in a felony, intimidation with a dangerous weapon, assault with intent to commit sexual abuse, carrying weapons, possession of burglar's tools, and obstruction of prosecution.[3]

Butts filed notice he intended to raise defenses of insanity, diminished responsibility, and intoxication.

Butts moved to suppress items seized when police executed a search warrant of his apartment, complaining it was not supported by probable cause, was overbroad, and did not state an adequate nexus to the apartment. After a hearing, the district court denied the motion to suppress concluding:

> **Butts** had been arrested less than eight hours before the Application for Search Warrant was presented to Judge Eveloff. He had been arrested inside an apartment in another building in the same apartment complex. **Butts** had in his possession a firearm, a knife, latex gloves, and a lock picking kit. He was shoeless. A Deputy County Attorney had been consulted before the Warrant Application was presented. Officers were instructed to look for evidence pertaining to the offenses for which **Butts** had been arrested and also for

> evidence which might pertain to potential defenses to those charges. There was probable cause to issue a warrant to search **Butts**' apartment on November 12, 2009. A person of reasonable prudence would believe that evidence of a crime might be located there in **Butts**' apartment.
>
> ....
>
> **Butts** is charged with burglary, weapons offenses, assaultive conduct, offenses of a sexual nature, obstruction of prosecution, and kidnapping. The warrant contained a lengthy list of items to be searched for. The number and breadth of the charges is great. The items listed are clearly related to the offenses charged-lock picks, lock pick instructions, containers and/or boxes which would store lock picks, receipts for lock picks, and latex gloves. Because **Butts** was allegedly engaged in a Burglary when he was arrested, stolen items would be related to the offenses charged. Items that would show mental status or competence or the ability to form specific intent would be relevant. Pornography may be relevant to an element or defense related to the charges brought. The warrant is sufficiently specific regarding the items to be searched for and is not overly broad with regard to the items to be search for.
>
> ....
>
> In this case, given the nature of the charges filed, the location of the break-in, and the location of **Butts**' apartment, it is reasonable to expect to find evidence pertaining to the crimes being investigated inside **Butts**' apartment. When this information is viewed in a common-sense manner, including all reasonable inferences that support a finding of probable cause, sufficient nexus was demonstrated in the Application for Search Warrant between **Butts**' apartment and the items to be seized.

Butts moved in limine to have the recording of the 911 call redacted from twenty-six minutes to fourteen minutes. He claimed the final twelve minutes, during which Jennifer was crying and sobbing hysterically, were unduly prejudicial. The court ruled the recording was admissible but should be redacted to omit "the screaming and yelling."

***4 Butts** also moved in limine to have "the graphic depictions of simulated rape" contained in his computer equipment deemed inadmissible as irrelevant and prejudicial. The State responded:

> The fact that he was somebody that was into rape pornography is certainly relevant to somebody that would head across the apartment complex and then commit this rape.
>
> They've raised not only insanity in this case but they've also raised intoxication and diminished responsibility. Those do not shift the burden. .... I still have to prove his specific intent, that he acted on it there that evening. So it is our intention to address these issues. We believe it squarely goes toward his intent.
>
> Additionally found on that-the computer were several videos about lock picking. I mean, he picked the lock into these girls' apartment. He was found with lock picks on him at the time. And so the contents of his computer, you know, we believe are ... definitely probative. We have no intention of playing those. I don't think that's necessary or appropriate.

The prosecutor offered to enter into a stipulation of the contents of the computer. **Butts** acknowledged his psychiatrist's report mentions pornography and agreed to discuss a stipulation with the State. The court reserved ruling to allow the parties to discuss a possible stipulation.

Trial was held October 12 through 18, 2010. The State presented the testimony of Jennifer, the arresting officers, and other detectives and identification technicians. A redacted fourteen-minute version of the 911 call was played during Jennifer's testimony. Each of the responding officers testified **Butts** did not appear intoxicated.

Thomas Payne, the business acquaintance who spent much of November 11, 2009, with **Butts**, testified about their activities that day, including drinks at dinner and then at a bar afterward. Payne stated **Butts** did not seem depressed. He stated **Butts** dropped him off at his hotel around 10 p.m., at which time **Butts** did not appear intoxicated and he "did not have any reservations about riding in the car with him or him driving."

On cross-examination, Payne testified his and **Butts**' work involved data bases for "the intel community," law enforcement, and the Department of Defense. He described **Butts** was an "[e]xceptional" employee who was involved in "classified work."

The following stipulation was read into evidence:

> Come now the State of Iowa and **Robert** M. **Butts** by and through counsel and hereby stipulate to the following facts:

1) Various computers, hard drives and electronic media storage devices were seized from the defendant's apartment pursuant to a search warrant executed on November 12, 2009.

2) These items were forensically examined by federal authorities on March 2, 2010.

3) Located on the hard drive of one of the computers were numerous pornographic pictures and videos. Many of the videos depicted simulated rape scenes.

4) These simulated rape videos appear to be placed on the hard drive from January 7th, 2007 to October 29, 2009.

*5 5) There is no evidence to suggest that any of these videos were accessed or viewed after October 29, 2009.

6) Located on a memory card, SD card, were three Adobe portable document format or PDF files pertaining to lock picking. These files were placed on the SD card on November 30th, 2008 and are listed as follows. A: Secrets of lock picking. B: Ted the tool, MIT guide to lock picking. C: Mini lock picking manual.

The stipulation was a court exhibit only; it did not go to the jury.

Regina then testified. When asked about **Butts**' demeanor, Regina testified he did not seem drunk or asleep, noting he was "very aware of his surroundings. His eyes weren't glazed over. He wasn't stuttering. He wasn't blinking excessively. He was focused on me the entire time."

Just prior to resting, the State read a stipulation as to the measurements inside the sisters' apartment.

Following the State's case in chief, the defense moved for directed verdict, which was granted as to the obstruction of prosecution charge.

The defense then called **Butts**' mother, Jeanette **Butts**, who testified **Butts** had been a sleepwalker as a child; it was "his life dream to serve his country and to be as good an officer as he could be"; he became "a lot more quiet" upon his return from his 2005 deployment; **Butts** was not happy with his 2006 assignment in intelligence and cyber warfare; and his civilian career was very stressful.

The defendant's wife testified that as his twenty-year military career went on, **Butts** "was drinking more, sleeping less, angry more ." When asked if he had sleepwalking incidents during the marriage, she stated:

A. More like talking.

Q. Talking? A. Yeah. He'd wake me up in the middle of the night and say something, some nonsense and then get mad and leave.

Q. I'm sorry? A. And then he'd get mad and leave. You know, I—when I didn't understand what he was talking about, he'd get—

Q. Leave where? A. Leave the—you know, leave the room.

Q. All right. And you think he was asleep during those times? A. I have no idea. I don't know.

She related that on New Year's Eve 2004 after drinking, **Butts** chased his one son and shot him with a paint ball gun and then choked his other son until she poked him in the hand with a hat pin. **Butts** claimed not to remember much of the incident the following day. She offered it was not unusual for **Butts**—a career military man interested in history, the intelligence field, and gun collecting—to possess guns, night scopes, and the other items found in his apartment.

Psychiatrist Daniel Wilson testified he had determined **Butts** "suffers from several neuropsychiatric illnesses," including Gulf War Syndrome, Post–Traumatic Stress Disorder (PTSD), childhood closed-head injuries, anxiety, intoxication, and disassociation due to sleepwalking. Dr. Wilson opined **Butts** "was dissociated[1] and asleep at the time of these events. He was also under a great deal of secondary stress which predisposed him to that dissociation." He stated **Butts** did not have the requisite ability to form any type of criminal intent.

*6 On cross-examination Dr. Wilson stated,

I have opinions about a variety of factors, all of which led to a dissociative state as he was somnambulistic as was facilitated by having drunk too much and the other toxic factors in—that probably affected his brain, all of which were made worse by the anxiety and difficulties and mood disorder that lowered the threshold for dissociation, yes.

The prosecutor engaged in the following dialogue with Dr. Wilson:

Q.... I understand what you're saying. There's a variety of things that came together in a synergy and led him to sleepwalk.

I want it to be very clear though that your statement is that at the time of the events in the apartment on

Littlejohn Circle of November 11th, 2009, he was sleepwalking. Is that your opinion? A. That is your opinion.

Q. I'm asking you. Is that your opinion? A. I have testified what my opinion is and I've just said and I'll say it again. It does not reduce to that single point. That is a crucial point but that-I have never reduced my diagnosis in this case to Sleepwalking Disorder, period.

....

Q. Okay. Then there's the dissociative state apparently of somnambulism, sleepwalking and my understanding is that's your interpretation or your opinion as to what he ended up in. I understand there's a variety of causes but he ultimately was sleepwalking at the time this event took place. A. Well, when you say ultimately, it's as if you're throwing away a number of other clinical factors which I'm unwilling to do. And if you wish to keep asking me about it, you can continue to ask me about it. But I think I've testified to the range and depth of his symptoms rather fulsomely.

....

THE COURT: Okay. Doctor, I'm sorry, and I'm not-I have no interest in the outcome of this case one way or the other. But it's a real simple question. Was he sleepwalking or was he not sleepwalking? THE WITNESS: Yes, I've testified that he was sleepwalking but it is not reduced to that.

Later still, Dr. Wilson stated: "I believe, as I've testified, that he has a sleepwalking disorder, potentiated by substance abuse, potentiated by encephalopathy possibly and potentiated by the general stress and depressive circumstances he found himself in."

Dr. Wilson was asked about his Axis I diagnosis, "Rule-out Paraphilia."[5] He acknowledged he was aware **Butts** was hypersexual at this time, masturbating often and viewing simulated rape pornography on his computer. Dr. Wilson testified he did not diagnose **Butts** with a sexual disorder; rather he attributed these symptoms to a mood disorder and PTSD.

Q. You're aware in Iowa that temporary insanity caused by voluntary intoxication is not a defense to criminal activity? A. Yeah. I don't believe that I've testified that he was primarily intoxicated and I—I wasn't aware that in Iowa law but—but I don't see that as a salient factor here.

Q. But you did testify that his dissociation and sleepwalking were likely facilitated by drinking? A. Yes.

*7 **Butts** testified in his own defense at trial, discussing his military service and accompanying accolades in great detail. **Butts** was asked about the "really disturbing pornography" on his computer, about which he attempted to explain:

Well, there's a long story to that. But, first of all, I won't deny the fact that I watched pornography, you know. I did. And like I told my son in that very personal letter that you heard an excerpt from,....

But, anyway, as part of my duties—I can't talk about a lot of them. As part of my duties in my last assignment in the Army there's a lot of that stuff, video files—not just pornography but video files that are a fairly important piece of—of how we do cyber warfare.

He stated he retired from the military in 2008 and began working for a military contractor. **Butts** testified he "poured [him]self into it to win work." The "work was challenging and exciting but every time we won more work, it meant more work for me and my office ." He continued, "they wouldn't increase us .... [a]nd by the summer of 2009 I was thinking about killing myself." He testified he was experiencing more and more "combat-related memory stuff" and consequently he was "self-medicating" with alcohol, pornography, and masturbation.

Butts testified that on November 11, 2009, he went out with a fellow business employee and had several drinks—one at dinner and six to eight shots of Irish Whiskey after dinner. He then dropped off his companion and went to a "strip joint" where he had one or two more beers. **Butts** then returned to his apartment and poured himself a half a glass of scotch: he was numb and depressed. He testified he has no further memory of that evening until he was standing in a hallway with lights in his face about a half hour to an hour later. His attorney asked him, "[Y]ou had to do a lot of gearing up. You had a holster, a gun. You had to put a magazine in. You had a knife; you had these lock picks. Do you remember doing any of those things?" **Butts** responded, "No, not at all. Imagine my own disappointment."

The defense's objection to the proposed jury instruction concerning **Butts**' insanity defense (Instruction No. 46) was overruled. The defense had proffered a proposed limiting instruction about pornography, but withdrew it. Defense counsel stated he had conferred with **Butts** and "we agreed that we do not want the instruction." The court offered to provide a more generic limiting instruction, which **Butts** rejected.

The jury convicted **Butts** of second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in a felony, assault with intent to commit sexual abuse, carrying weapons, and possession of burglar's tools.

Butts now appeals, contending (1) there is insufficient evidence of confinement or removal to sustain the kidnapping conviction; (2) the search warrant was unconstitutionally overbroad; (3) the trial court abused its discretion in admitting evidence; (4) there was insufficient evidence of specific intent to sustain six of the seven convictions; and (5) the trial court erred in instructing the jury that temporary insanity as a result of intoxication is not a defense.

II. There Was Sufficient Evidence of Confinement or Removal.

***8** A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so ... accompanied by ... [t]he intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.

Iowa Code § 710.1(3) (2009). **Butts** claims the State failed to prove a necessary element of kidnapping—confinement or removal of the victim.

In evaluating a sufficiency-of-the-evidence claim, our review is for the correction of errors at law. *State v. Hennings,* 791 N.W .2d 828, 832 (Iowa 2010). We review the record in a light most favorable to the State, including all legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *Id.* at 832–33. The jury's verdict is binding upon us if there is substantial evidence in the record to sustain it. *Id.* "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Jorgensen,* 758 N.W.2d 830, 834 (Iowa 2008).

In *State v. Rich,* 305 N.W.2d 739, 742–45 (Iowa 1981), our supreme court reviewed other states' interpretations of kidnapping statutes and principles of construction and concluded:

> [O]ur legislature, in enacting 710.1, intended the terms "confines" and "removes" to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse. Although no minimum period of confinement or distance of removal is required for a conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.

Rich, 305 N.W.2d at 745 (noting while "movement of the victim the short distance from the mall into the restroom in and of itself was not sufficient confinement or removal within the meaning of section 710.1," "his actions indicate that he sought the seclusion ... as a means of avoiding detection"; and "binding of the victim's hands behind her back was not necessary to the commission of the sexual abuse and is not a normal incident of that offense"); *see also State v. Griffin,* 564 N.W.2d 370, 373 (Iowa 1997) ("[B]y ordering [the victim] to take off her clothes prior to the sexual assault, [the defendant] was able to keep her confined to the motel room prior to the assault, lowering his chances of detection and increasing the risk of harm to [the victim]."); *State v. Hardin,* 359 N.W.2d 185, 190 (Iowa 1984) ("From the evidence introduced at trial the jury could have found beyond a reasonable doubt that defendant assaulted the victim in her car, then dragged her out of the car and forced her into his residence where his actions would be less detectable and where he might batter her at will. In the house the risk of detection would be less likely, the risk of harm to the victim more likely.").

***9 Butts** argues any confinement and removal here was merely incidental to the attempted sexual assault.[6] We conclude, however, there was substantial evidence from which a rational jury could find, as they were instructed, that the period of confinement or distance of removal exceeded what is normally incidental to the commission of sexual abuse and increased the risk of harm to the victim and lessened the risk of detection. *See State v. Misner,* 410 N.W.2d 216, 222 (Iowa 1987) (delineating standards by which a jury could determine whether evidence demonstrated a confinement or removal sufficient to support a charge of kidnapping); *see also State v. Davis,* 584 N.W.2d 913, 916–17 (Iowa Ct.App.1998) (noting that "[s]ecluding the victim lessens the risk of detection and further increases the risk of harm to the victim").

Butts entered the victim's apartment and then

re-deadbolted the front door. The jury could infer that because the police could hear the television when they were at the door, **Butts** did too when he broke in and chose to secrete her to a different room. **Butts** asked Regina if there was anyone else there. Then, armed with a gun, which he pointed at Regina, he forced her from the front room to the farthest room down the hall. He attempted to shut the door to the room. He forcibly disrobed her. When there was a knock on the door, **Butts** told Regina if she screamed, he would hurt her. **Butts'** actions lessened the risk that persons might be able to hear any disturbance within, and increased the danger of harm to the victim. **Butts'** actions exceeded that which would have been necessary to sexually abuse the victim, and the court therefore properly submitted the offence of kidnapping to the jury.

Butts points out the confinement lasted only about fourteen minutes, but no minimum period of time is required, and the duration was cut short only because a 911 call was made and law enforcement officers arrived. The nature of the threat to Regina was substantial. The fact the victim was rescued does not alter the nature of the confinement. *See State v. Tyron,* 431 N.W.2d 11, 15 (Iowa Ct.App.1988) ("The fact that the victim was adroitly able to abort defendant's scheme [by convincing him to untie her and not to kill her] does not alter the underlying nature of the confinement ."). Sufficient evidence of independent removal and confinement was presented.

III. The Search Warrant Was Not Unconstitutionally Broad.

Butts next challenges the trial court's conclusion the search warrant was not overbroad. Because **Butts** challenges the validity of the search warrant on constitutional grounds, our standard of review is de novo. *State v. Thomas,* 540 N.W.2d 658, 661 (Iowa 1995).

Both the United States and Iowa Constitutions require the warrant and affidavits particularly describe what is to be searched and what is to be seized. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The warrant applicant must show "a nexus between the criminal activity, the things to be seized and the place to be searched." *Thomas,* 540 N.W.2d at 663. The required nexus "can be found by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items." *State v. Groff,* 323 N.W.2d 204, 212 (Iowa 1982).

> ***10** If, based on the showing that has been made in the application, a warrant is overbroad in the sense that it permits places to be searched or items to be seized for which probable cause has not been shown, it is nevertheless valid as to all places and items described in the warrant for which probable cause has been shown. *United States v. Brown,* 984 F.2d 1074, 1077 (10th Cir.), *cert. denied,* 510 U.S. 873, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Blakeney,* 942 F.2d 1001, 1027 (6th Cir.), *cert. denied,* 502 U.S. 1008, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991).

State v. Randle, 555 N.W.2d 666, 671 (Iowa 1996).

> A description is sufficiently particular when it enables the searcher reasonably to ascertain and identify the things to be seized. When a warrant affiant has probable cause but cannot give an exact description of the materials to be seized, a warrant will generally be upheld if the description is as specific as the circumstances and the nature of the activity under investigation permit.

State v. Todd, 468 N.W.2d 462, 467 (Iowa 1991) (citations omitted).

The affidavit in support of the search warrant here sets out the particulars of the events of November 11, 2009. Officers received information that **Butts** had picked a lock, carried two weapons, and assaulted a young woman. The crime was interrupted because the victim's sister was hiding, called 911, related to police that **Butts** had taken the victim to the back bedroom, and police arrived and arrested **Butts**, who refused to provide any information as to his identity. During the booking process, **Butts** provided his name. Subsequently, an officer located a vehicle registered to **Butts** outside a building in the same apartment complex as the victim. The officer also spoke to a resident of the building who stated **Butts** resided there, lived alone, and related only that he was a "business man." The affiant stated "I believe there is relevant evidence stored inside ... pertaining to this investigation."

The search warrant application described the property to be searched, including various specified types of financial documents; paper, tickets, and schedules relating to interstate travel; addresses and telephone books; indicia of occupancy; computer software; firearms and ammunition; lock picks and lock pick information; latex gloves and clothing.

Butts takes issue with the fact Detective Ray Robinson used language from other search warrants as examples in preparing his application in this case. Because **Butts** was accused of committing numerous offenses involving attempted sexual assault, lock-picking equipment, two weapons, and gloves, officers could reasonably believe

items related to this and similar crimes might be found in his residence. We agree with the district court and the State that the significant number of items listed is more reflective of the nature of the crimes than it is the inadequacy of the warrant.

> The issuing judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," probable cause exists. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983); *accord State v. Hennon,* 314 N.W.2d 405, 407 (Iowa 1982). In doing so, the judge may rely on "reasonable, common sense inferences" from the information presented. *See* [*State v. Green,* 540 N.W.2d 649, 655 (Iowa 1995)].

***11** *State v. Gogg,* 561 N.W.2d 360, 363 (Iowa 1997).

Butts also emphasizes Detective Robinson was less than certain about the relevance of some of the items requested in the application. However, Detective Robinson's answers at the motion to suppress hearing are irrelevant in evaluating the validity of the warrant. *See id.* (noting in reviewing the warrant for probable cause "we are 'limited to consideration of only that information, reduced to writing, which was actually presented to the [judge] at the time the application for warrant was made' " (citation omitted)).

Upon our de novo review, we conclude the description of the items to be searched is "as specific as the circumstances and the nature of the activity under investigation permit." *Todd,* 468 N.W.2d at 467.

Our supreme court has summarized the applicable law in *Randle,* 555 N.W.2d at 671:

> Both the Iowa and United States Constitutions, as well as the Iowa Code, require that the warrant and affidavits particularly describe what is to be searched and what is to be seized. U.S. Const. amend. IV; Iowa Const. art. I, § 8; Iowa Code § 808.3 [(2009)]. The resolution of this issue turns on the probable cause issue discussed above. Iowa cases require a "nexus between criminal activity, *the things to be seized and the place to be searched.*" *[State v.] Weir,* 414 N.W.2d [327,] 330 [(Iowa 1987)] (emphasis added). The required nexus "can be found by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items." *State v. Groff,* 323 N.W.2d 204, 212 (Iowa 1982).

Here, the application and warrant specifically refer to firearms, ammunition, any records pertaining to the firearms, lock picks, lock picking instructions, and latex gloves. All of these items have a nexus to the crime allegedly committed. The issuing magistrate could have inferred **Butts**' residence was the likely location for associated items that were connected to, or similar in nature to, the items in **Butts**' possession at the time he was arrested at the scene, and as attested to in the affidavit supporting the application. We would agree the financial records sought and evidence of travel have no nexus to the crime allegedly committed except to verify the true identity of **Butts**. The affidavit provides in part, "At the time the officers first made contact with the suspect, he refused to provide any information relating to his identity."

Although his identity was later provided during the booking process, verification from other sources was reasonable. A search to aid in determining the true identity of a perpetrator was approved in *Blakeney,* 942 F.2d.2d at 1027. In *Blakeney* the court stated,

> We do not conclude, however, that the other items listed lacked the requisite particularity. For example, the paragraph authorizing the seizure of "indicia of occupancy, residency, and/or ownership of the premises" gave specific examples of the types of documents that satisfied this general authorization. The magistrate knew that location to be searched was listed under a false name based on utilities records.... Consequently any document or other object that would tend to provide the true identity of the owners or occupants of the premises where evidence of a robbery is located would be relevant in determining the perpetrators of the robbery. Likewise travel documents, motel records, telephone records, maps and false identification would also aid in the identification of the perpetrators of the robbery. The specific examples of indicia of identity, records of travel to the location of the robbery, and instruments used to perpetrate the robbery detailed in the warrant were as limited as practicable under the circumstances.

***12** 942 F.2d at 1027. Although the facts in this case do not suggest the property to be searched was listed in a false name as in *Blakeney,* law enforcement officers in this case similarly could be compelled to verify the identity of the perpetrator due to his refusal to identify himself.

The warrant sufficiently described the items sought with particularity and was not constitutionally overbroad.

IV. The Trial Court Did Not Abuse Its Discretion in Its Evidentiary Rulings.

A. Standard of Review. We review a district court's evidentiary rulings regarding the admission of evidence of an abuse of discretion. *State v. Paredes,* 775 N.W.2d 554, 560 (Iowa 2009); see *also State v. Cox,* 781 N.W.2d 757, 760 (Iowa 2010) (reviewing district court's ruling regarding admission of prior bad acts evidence for abuse of discretion). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.' " *State v. Rodriquez,* 636 N.W.2d 234, 239 (Iowa 2001) (citation omitted).

B. Redacted 911 Call. Jennifer testified she called 911; she was present in the apartment while **Butts** was there; and she had to unlock the door to allow the officers to enter the apartment. Emergency calls to 911 have been deemed properly admitted into evidence. *See generally State v. Augustine,* 458 N.W.2d 859, 860–61 (Iowa Ct.App.1990) (allowing the admission of a 911 tape into evidence). On appeal, **Butts** challenges only the final minute of that redacted recording, contending "the sounds of the hysterical cries and sobs were too prejudicial for the jury to hear."

The court ordered the final ten minutes of the recording excised and stopped the in-court version at the point the police arrived and Jennifer was safely out of the apartment. **Butts** contends the trial court abused its discretion in failing to further redact the 911 call. We find no abuse of discretion as the trial court tailored the 911 recording, omitting all but a few seconds of the caller's emotional release. We cannot agree the trial court abused its discretion or **Butts** was unduly prejudiced.

C. Stipulation of Evidence Relating to Pornography Depicting Simulated Rape. As noted above, **Butts** moved in limine objecting to the admission of pornographic videos found during the search of his computers and digital storage devises. The district court asked: "Aren't you contesting what his intent was?" The defense admitted they were, that the videos might be material but because the videos hadn't been accessed the night in question, their probative value was lessened. Counsel noted there were twenty computer files and he did not know which the State intended to show the jury and asked the State specify which videos it intended to show the jury. The prosecutor responded he had "no intention of showing any pictures or playing any videos for the jury in this case." The court reserved ruling on that objection, and the parties subsequently entered into a stipulation as to the evidence found during the search.

***13** On appeal, **Butts** argues "the district court abrogated its duty to rule on the admissibility of the adult pornography evidence and implicitly forced the defendant to accept the stipulation." During the hearing, the court stated:

> All right. It will be the ruling of the Court then that the—the parties engage some type of stipulation to be sent to the Court with respect to the existence of this material and the jury can be advised with respect to that. If there's not an agreement between the parties, the parties are directed to submit the same to the Court and the Court will make the final determination with respect to the content of that stipulation. Short of there being a stipulation, the Court will—will allow showing of a very limited portion of one of these to—to—so that the—the jury can decide with respect to—or be made aware of—I guess what I'm trying to avoid here is that—that we're—the content of the stipulation that you're trying to avoid rape and whatever, if—if you can't come up with precise language, then I suggest that we pick out one of those, show a very short portion of that and the jury can decide whether or not what they're simulating and—but I'm hopeful that you folks will be able to come up with some type of resolution.

We acknowledge that in hindsight the district court should have avoided commenting upon what he perceived might be his ruling. However, we find no basis to conclude the district court abrogated its duty or forced **Butts** to accept the terms of the stipulation. The prosecutor had already conveyed that the State did not plan to show any pictures or play any videos for the jury before the court's comments. As observed by **Butts**, after the State offered to forego presenting the pictures and videos and to cooperate with defense counsel in formulating a jointly agreed upon stipulation, a stipulation was reached, and the court never ultimately ruled upon the motion.

Butts also contends the evidence was irrelevant and unfairly prejudicial, focusing his complaint on the fact he had not accessed the pornographic files since October 29, 2009, about two weeks before the crimes.

Relevant evidence is evidence having "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Unfair prejudice is an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, or emotional one." *State v. Cromer,* 765 N.W.2d 1, 9 (Iowa 2009).

Generally, evidence of an accused's other "crimes, wrongs, or acts" is inadmissible to prove the accused's propensity to behave in a certain manner. *See* Iowa R.

Evid. 5.404(*b*) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."). However, such evidence is generally admissible for purposes other than proving propensity; for instance, such evidence may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.; see, e.g., State v. Elston,* 735 N.W.2d 196, 200 (Iowa 2007) (concluding pornographic images of young girls had great probative value on the question of whether defendant touched minor "for the purpose of arousing or satisfying the sexual desires of either [himself or the child]"). Other states have ruled similar evidence found in the possession of the defendant is relevant for the purpose of showing intent. *See State v. Rossignol,* 215 P.3d 538, 545 (Idaho Ct.App.2009) (concluding pornography shown to victim corroborated victim's story and incest stories found at defendant's house were relevant to the intent element of the crimes defendant was charged with and to show his motive and plan to engage in sexual acts with his daughter); *State v. Ramsey,* 124 P.3d 756, 767–68 (Ariz.Ct.App.2005) ("We agree with the state that the pornographic material was relevant to Ramsey's 'intent and motive to have a sexual relationship with [A.].' ")

***14** The trial court concluded **Butts**' possession of pornography depicting simulated rape and lock picking equipment was relevant and probative of his intent when he broke into the sisters' apartment and forced Regina to disrobe. We note the evidence could also be found probative of motive, preparation, and absence of mistake or accident. *See* Iowa R. Evid. 5.404(*b*). The trial court did not abuse its discretion in concluding the materials were relevant.

We also do not find the evidence unfairly prejudicial. First, the prejudicial effect of the evidence was blunted in that the jury did not view any pornography; rather the jury received a rather sanitized statement. Further, the topic of pornography was raised in Dr. Wilson's report and was the subject of **Butts**' defense. In fact, **Butts**' attorney acknowledged,

> I do have to admit that Dr. Wilson did examine Mr. **Butts** on issues of pornography and masturbation and those things and they're mentioned in the report. I don't have any problem with that because it's done in a very subdued clinical way.

We also do not believe a passage of two weeks since **Butts** viewed the materials was so significant a passage of time as to render the information irrelevant. The fact **Butts** had not viewed the simulated rape scenes immediately before the crimes does not destroy their relevance; rather, it goes to the weight of the evidence. *See State v. Casady,* 491 N.W.2d 782, 785 (Iowa 1992) (stating a claim of remoteness generally goes to weight rather than admissibility). Here, the jury was instructed the stipulation was evidence, but also that they were entitled to determine the weight and value it deserved.

Further, **Butts** specifically rejected a limiting instruction on the subject of pornography, deciding it was "perhaps a red flag" for the jury. When informed of this tactical decision, the trial court offered to make the limiting instruction more neutral, referring to "any person in possession of pornography" rather than to the defendant. To the extent a cautionary instruction would have minimized any danger of the jury misusing the evidence of pornography, **Butts** declined to have the jury so instructed.

V. There Was Sufficient Evidence of Specific Intent to Sustain the Convictions.

Butts next contends the court erred in not dismissing all counts because the State failed to prove he had specific intent to commit the charged offenses. He relies upon the opinions of Dr. Wilson, who testified **Butts** was dissociated and sleepwalking, suffered from diminished responsibility, and lacked the requisite ability to form specific intent.

We first note all but one of **Butts**' convictions required a finding of specific intent: carrying weapons is a general intent crime. *See State v. Krana,* 246 N.W.2d 293, 295 (Iowa 1976) (noting, however, that the defendant "must be aware of the presence of the gun"). **Butts**' claim of diminished responsibility is not a defense to this general intent crime. *See Anfinson v. State,* 758 N.W.2d 496, 502–03 (Iowa 2008). We will discuss **Butts**' general awareness later.

***15** The State bears the burden of proving specific intent, and the jury was so instructed. "Intent is 'seldom capable of direct proof' ... and 'a trier or fact may infer intent from the normal consequences of one's actions.' " *State v. Evans,* 671 N.W.2d 720, 724–25 (Iowa 2003) (citation omitted). "[A defendant] will generally not admit later to having the intention which the crime requires ... his thoughts must be gathered from his words (if any) and actions in light of surrounding circumstances." *State v. Radeke,* 444 N.W.2d 476, 478–79 (Iowa 1989) (quoting W. LaFave & A. Scott, *Handbook on Criminal Law,* § 3.5(f), at 226 (2nd ed.1986)).

To convict **Butts** of second-degree kidnapping, the State was required to establish he had the specific intent to inflict serious injury on Regina or subject her to sexual abuse. The evidence at trial established **Butts** picked the lock to enter the sisters' apartment and, while wearing gloves, was armed with a knife and a gun. He asked Regina sexual questions, threatened to harm her if she screamed, and pulled her clothes off. The jury could reasonably infer he specifically intended to subject her to sexual abuse.

To convict **Butts** of first-degree burglary, the jury was instructed the State was required to prove he formed the specific intent to commit an assault. In addition to the fact **Butts** carried two weapons into the apartment, he told Regina he would hurt her if she failed to comply with his demands or if she screamed. He pointed the gun at her; grabbed her; forced her into the bedroom; and forcibly removed her sweater, tank top and bra. This constitutes substantial evidence from which the jury could find **Butts** entered the sisters' apartment with the specific intent to commit assault.

To convict **Butts** of going armed with intent, the jury was instructed the State was required to establish he had the specific intent to use a weapon against another person. The evidence shows **Butts**—wearing plastic gloves—was armed with a knife and a loaded gun, which he pointed at Regina. The jury was free to infer the normal consequence of these actions was an intent to use the weapons against another person. *See Evans,* 671 N.W.2d at 725. Moreover, **Butts** had the gun pointing at Regina as he forced her from the couch in the living room to move into the bedroom.

To convict **Butts** of assault with intent to commit sexual abuse, the State had to demonstrate **Butts** assaulted Regina with the specific intent to commit a sex act by force or against her will. It has been said that in evaluating evidence of intent to commit sexual abuse, the following supported such a finding:

> a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a drive to engage in sexual activity....

Casady, 491 N.W.2d at 787. **Butts** asked the victim if she had sex with her boyfriend, forced her into a bedroom, and told her to disrobe; when she refused, he forcibly disrobed her. These actions demonstrated his specific intent to commit a sex act.

***16** To convict **Butts** of assault, the jury was instructed the State must prove he

> did an act which was intended to cause pain or injury or result in physical contact which was insulting offense or placed [the victim] in fear of an immediate physical contact which would be painful, injurious, insulting or offensive to her.

See Iowa Code § 708.1(1), (2). Both alternatives on which the jury received instructions are specific intent crimes. *State v. Fountain,* 786 N.W.2d 260, 265 (Iowa 2010). We have already found substantial evidence supported the crime of assault with the intent to commit sexual abuse and **Butts** pointed a gun at Regina, so further discussion is unnecessary.

Finally, to prove **Butts** committed an assault while participating in a felony, the State had to prove **Butts** guilty of assault while participating in the crime of burglary. Assault and burglary are specific intent crimes, which we have already discussed. **Butts**' actions also support the conviction of the general intent crime of carrying weapons as he carried a loaded gun in the city limits, voluntarily with full awareness, and not by accident or mistake.

Notwithstanding the State's evidence, **Butts** argues the evidence of specific intent was contradicted by the testimony of his expert witness, Dr. Wilson, who offered opinions that **Butts** was insane and did not have the ability to form specific intent. Dr. Wilson diagnosed **Butts** with a combination of Gulf War Syndrome, PTSD, anxiety, depression, childhood closed-head injuries, and alcohol abuse, as well as disassociation caused by sleepwalking during the commission of the crimes. Dr. Wilson's diagnoses were vigorously challenged by the State and many of the foundations of his findings were found to be erroneous. **Butts** had no previous diagnosis of these conditions and had specifically denied mental illness and a history of sleepwalking on numerous documents.

The jury was free to believe all, some, or none of a witness's testimony. *State v. Forsyth,* 547 N.W.2d 833, 836 (Iowa Ct.App.1996). The jury as finder of fact was free to give Dr. Wilson's testimony such weight as they thought it should receive. *See State v. Shanahan,* 712 N.W.2d 121, 135 (Iowa 2006) (stating a finder of fact is free to believe or disbelieve the testimony of witnesses as it so chooses); *Waddell v. Peet's Feeds, Inc.,* 266 N.W.2d 29, 32 (Iowa 1978) ("The fact finder is not obliged to accept expert testimony, even if it is uncontradicted, although testimony should not be arbitrarily and capriciously rejected."). The very function of a finder of fact is to sort out the evidence presented and place credibility where it belongs. *Shanahan,* 712 N.W.2d at 135.

The jury's rejection of Dr. Wilson's testimony was neither arbitrary nor capricious. The mental defense presented by **Butts**, especially in light of the somnambulism component, could properly be rejected as unconvincing. Given **Butts**' behavior of loading a gun; donning a hooded shirt, a knife, a gun and holster, a lock-picking kit, and latex gloves; then proceeding to an neighboring apartment; picking the lock; entering that apartment; relocking the deadbolt; speaking with and threatening the young woman; forcing her to another room; and forcibly disrobing her; the jury could find it difficult to believe he was unaware of his actions and did not intend the consequences of those actions. Through his words and deeds, the jury could conclude **Butts** had the specific intent required for each of the charges upon which he was convicted. The jury was under no obligation to accept the defense expert's opinion to the contrary.

VI. The Trial Court Did Not Err in Instructing the Jury.

***17 Butts**' final complaint concerns a portion of jury Instruction No. 46 submitted by the court on the subject of the insanity defense, which reads:

> The Defendant claims he is not criminally accountable for his conduct by reason of insanity. A person is presumed sane and responsible for his acts.
>
> Not every kind or degree of mental disease or mental disorder will excuse a criminal act. "Insane" or "insanity" means such a diseased or deranged condition of the mind as to make a person either incapable of knowing or understanding the nature and quality of his act(s), or incapable of distinguishing right and wrong in relation to the act(s).
>
> A person is "sane" if, at the time he committed the criminal act, he had sufficient mental capacity to know and understand the nature and quality of the act and had sufficient mental capacity and reason to distinguish right from wrong as to the particular act.
>
> To know and understand the nature and quality of one's acts means a person is mentally aware of the particular act(s) being done and the ordinary and probable consequences of them.
>
> Concerning the mental capacity of the defendant to distinguish between right and wrong, you are not interested in his knowledge of moral judgments, as such, or the rightness or wrongness of things in general. Rather, you must determine the defendant's knowledge of wrongness so far as the act(s) charged is/are concerned. This means mental capacity to know the act(s) was/were wrong when he committed them.
>
> *Temporary insanity which arises from voluntary intoxication is not a defense. This is true even though the defendant's temporary state of mind may meet the requirements of legal insanity.*
>
> The defendant must prove by a "preponderance of the evidence" that he was insane at the time of the commission of the crime.
>
> Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.
>
> Insanity need not exist for any specific length of time. (Emphasis added.)

Butts argued the "instruction generally is word for word out of the stock instruction except for the fourth paragraph from the bottom" concerning temporary insanity, which did not accurately state the current law of Iowa, "nor do I think the facts of this case support this particular instruction."

On appeal, **Butts** contends the instruction was erroneous because "[t]he State adduced no independent, objective evidence of **Butt's** intoxication." With this aspect of his argument we point out **Butts** testified he self-medicated with alcohol; he drank several drinks on November 11, 2009; he stated "I probably was" drunk; and his psychiatrist opined **Butts** was in "a dissociative state as he was somnambulistic *as was facilitated by having drunk too much* and the other toxic factors somnambulant state." Thus, there was evidence of voluntary intoxication.

***18** We review challenges to jury instructions for correction of errors at law. *State v. Hanes,* 790 N.W.2d 545, 548 (Iowa 2010). "Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence." *State v. Spates,* 779 N.W.2d 770, 775 (Iowa 2010). "Errors in jury instructions are presumed prejudicial unless 'the record affirmatively establishes there was no prejudice.' " *State v. Murray,* 796 N.W.2d 907, 908 (Iowa 2011) (quoting *Hanes,* 790 N.W.2d at 551). We do not consider an erroneous jury instruction in isolation, but look at the jury instructions as a whole. *Id.*

The challenged part of the instruction reads: "Temporary

insanity which arises from voluntary intoxication is not a defense. This is true even though the defendant's temporary state of mind may meet the requirements of legal insanity." The statement is a direct quote from a legal treatise cited by our supreme court in *State v. Booth,* 169 N.W.2d 869, 873 (Iowa 1969). *See State v. Broughton,* 425 N.W.2d 48, 49 (Iowa 1988) ("Intoxication of course, is not a complete defense to a crime; it is relevant, however, 'in proving the person's specific intent ... or in proving any element of the public offense ....' " (citing Iowa Code § 701.5)). *But see State v. Marin,* 788 N.W.2d 833, 836 (Iowa 2010) ("We have never decided if a defendant can use involuntary intoxication as a complete defense to his or her criminal liability.").

Butts argues "the *Booth* language does not belong in Iowa's model insanity defense instruction." He asserts the language used was "incomplete" and "highly misleading" in part because it did not incorporate the modifier "wholly" as used the phrase in *Booth.* In *Booth* the court stated, "Defendant's affirmative defense of insanity depends wholly upon his state of voluntary intoxication at the time of the alleged offense." 169 N.W.2d at 873. It is apparent in *Booth* our supreme court used the modifier "wholly" because the facts in that case did not otherwise support an insanity instruction, although there was some evidence the defendant had a mental disorder. Ultimately, our supreme court affirmed the trial court's refusal to instruct the jury on insanity as a defense based upon voluntary intoxication. *Id.* at 874. Further, we observe the supreme court did not use the word "wholly" in its decision in *Broughton,* where it again stated "[i]ntoxication ... is not a complete defense." 425 N.W.2d at 49.

Here the court placed language of intoxication within the insanity defense. The Uniform Instructions, however, do not do so. Rather, intoxication as a defense is addressed in a separate instruction, Iowa Uniform Instruction No. 200.14. The jury in this case received the uniform instruction pertaining to intoxication in Instruction No. 48, which correctly states that "even if a person is under the influence of an intoxicant, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged...." The jury was also instructed in Instruction No. 47 (Iowa Uniform Instruction No. 200.13) that the State must prove "the defendant acted with specific intent" and the "lack of mental capacity to form specific intent is known as 'diminished responsibility.' "

***19** "[A] trial court is not required to instruct in the language of requested instructions so long as the topic is covered by the court's own instructions." *State v. Doss,* 355 N.W.2d 874, 881 (Iowa 1984). "When a single jury instruction is challenged, it will not be judged in isolation but rather in context with other instructions relating to the criminal charge." *State v. Stallings,* 541 N.W.2d 855, 857 (Iowa 1995); *see Murray,* 796 N . W.2d at 908. If the jury has not been misled when the instructions are considered as a whole, there is no reversible error. *Hanes,* 790 N.W.2d at 551 ("Our analysis of prejudice is also influenced by an evaluation of whether a jury instruction could reasonably have misled or misdirected the jury.").

Here, the trial court's statement that "temporary insanity that arises from a voluntary intoxication is not a defense," is, an incomplete statement of the law only as it relates to the "defense" of intoxication. In that regard, we decline to consider Instruction No. 46 in isolation, but rather in conjunction with Instruction No. 48, which further illuminates or qualifies "[i]ntoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent." Thus, when the instructions are considered as a whole, the jury was properly instructed on the "defense" of intoxication. However, **Butts** does not complain the jury was improperly instructed on the "defense" of intoxication, rather his complaint pertains to the insanity instruction.

We also conclude Instruction No. 46, the insanity instruction, properly instructed the jury **Butts** could not avail himself to the defense of insanity if **Butts**' mental condition was caused by voluntary intoxication. *Booth,* 169 N.W.2d at 873; *see also State v. Hall,* 214 N.W.2d 205, 207 (Iowa 1974) (approving trial court's rejection of insanity instruction for voluntary ingestion of drugs, finding no distinction between intoxication by alcohol or drugs).

We reject **Butts**' contention "the challenged language allowed the jury to find **Butts** not insane if it determined voluntary intoxication played any part in rendering him" insane. The instruction only provides temporary insanity that "arises from voluntary intoxication" is not a defense. The instruction does not say insanity arising from any other cause is negated or nullified if intoxication or ingestion of alcohol acted in concert with any other cause, or if there is any evidence of intoxication or ingestion of alcohol. We note **Butts** does not argue he was prevented from making such arguments in his summation.

We also conclude no additional burden was placed upon **Butts**, as he alleges, to prove his insanity was not due to voluntary intoxication. In any case where there is sufficient evidence to instruct on both the defenses of insanity and intoxication, the defendant would face the

same burden to prove by a preponderance of the evidence he was insane at the time of the commission of the offense, and the cause of the defendant's insanity was not due to intoxication.

*20 Finally, there was substantial evidence to support giving the intoxication instruction although the evidence of intoxication was contradictory. Moreover, we know of no authority, nor has **Butts** cited any, that requires the State to present "independent, objective evidence of **Butts**' intoxication" before the court must instruct on the issue. "It is well settled that the court must instruct on all material issues so the jury understands the matters which they are to decide." *State v. Jenkins,* 412 N.W.2d 174, 176–77 (Iowa 1987) (approving the court's instruction on the defense of intoxication although defendant did not request the instruction and further claimed it permitted the jury to disregard the defendant's primary defense of insanity).

We conclude the jury was not misled, but rather could clearly understand the law in respect to both the defense of insanity and voluntary intoxication when the instructions are read as a whole.

AFFIRMED.

All Citations

808 N.W.2d 756 (Table), 2011 WL 5867065

Footnotes

1 **Butts** was taken to the hospital before booking, but did not give his name at the emergency room.

2 **Butts**' primary home was in South Dakota, but he worked in Omaha and had an apartment in Council Bluffs, Iowa.

3 Prior to trial, the State dismissed the charge of intimidation with a dangerous weapon.

4 Dr. Wilson stated dissociative "is a psychiatric term or neurologic term for when the conscious part of the brain is shut off from the unconscious part of the brain."

5 Paraphilia is defined as "[a]ny of a group of psychosexual disorders characterized by sexual fantasies, feelings, or activities involving an object, a nonconsenting partner such as a child, or pain or humiliation." *American Heritage College Dictionary* 1009 (4th ed.2004).

6 We decline to address the State's request that this court hold the "incidental rule" is applicable only to cases involving first-degree kidnapping. *See State v. McGrew,* 515 N.W.2d 36, 39 (Iowa 1994) ("The rationale behind the 'incidental rule' arises from our recognition that confinement of a victim, against the victim's will, is frequently an attendant circumstance in the commission of many other crimes, notably robbery and sexual abuse.").

End of Document

F. Direct Appeal Decision Affirming Conviction (Nov. 23, 2011)

808 N.W.2d 756 (Table)
(The Court's decision is referenced in a "Decisions Without Published Opinions" table in the North Western Reporter.)
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff–Appellee,
v.
Robert Mylan **BUTTS**,
Defendant–Appellant.

No. 11–0069.
|
Nov. 23, 2011.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady (motion to suppress) and James S. Heckerman (trial), Judges.
The defendant appeals from judgment and sentences imposed upon his convictions for second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in a felony, assault with intent to commit sexual abuse, carrying weapons, and possession of burglar's tools. AFFIRMED.

Attorneys and Law Firms

Keith E. Uhl, Des Moines, and John S. Berry of Berry Law Firm, Lincoln, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon J. Jacobmeier, Assistant County Attorney, for appellee.

Heard by DANILSON, P.J., and TABOR and MULLINS, JJ.

Opinion

DANILSON, P.J.

*1 **Robert** Mylan **Butts** appeals his convictions challenging the sufficiency of the evidence of confinement or removal to support a second-degree kidnapping charge. He also asserts a search warrant was unconstitutionally overbroad; the trial court abused its discretion in admitting evidence; there was insufficient evidence of specific intent to sustain several of the convictions; and the trial court erred in instructing the jury. Because the convictions were supported by substantial evidence; the search warrant was not overbroad; the district court did not abuse its discretion in admitting the redacted 911 recording or the stipulation of items found upon execution of a search warrant; and because the jury instructions on the defendant's defenses were not prejudicial, we affirm.

I. Background Facts and Proceedings.
At about 11:00 p.m. on November 11, 2009, Jennifer walked her boyfriend out of the apartment she shared with her sister Regina. After saying good night to him, Jennifer returned to the apartment and turned the deadbolt. She spoke with Regina for a few minutes and then went to her bedroom, which was past Regina's bedroom and at the far end of the hall.

Regina was lying on the couch watching television, but was startled when she looked up to see a stranger, later identified as the defendant, **Robert Butts**, coming through the locked door into her apartment. **Butts** shut the door behind him and locked the deadbolt. He was wearing plastic gloves and a grey hooded sweatshirt, with the hood pulled tight around his face. He was holding a gun. The intruder walked to Regina, held the gun near her at eye level, and asked if anyone else was there. Regina loudly told the intruder no one else was at home, hoping to alert her sister to his presence. As Regina talked with **Butts**, she saw Jennifer creep down the hallway and quickly disappear.

Jennifer had gone into the hallway because she heard a noise. She saw a man in a hooded sweatshirt standing near Regina. Regina looked terrified. The man told Regina, "You're going to f* * *ing cooperate right now." Jennifer was able to get into the bathroom closet and call 911, whispering to the dispatcher.

Regina said the intruder "told me that I'm—that I am going to do what he wants. He didn't want to hurt me but he will if I scream ." As Regina attempted to "buy time" by asking **Butts** questions, he grabbed her by the back of the arm, pulled her from the couch, and forced her to walk down the hallway while pointing a gun at her. **Butts** took Regina to the farthest bedroom and pushed the door shut behind him. The door closed but an item on the floor prevented it from shutting and latching entirely.

Butts sat Regina on the bed and stood directly in front of

presented to the jury.

At approximately 11:00p.m. on November 11, 2009, **Butts** picked the deadbolt lock of the sisters' apartment. He entered and locked the door behind him. He found one of the sisters watching television, but he was unaware the second sister was in her own room. **Butts** was wearing plastic gloves and a hooded sweatshirt but he was not wearing shoes. He pointed a gun at the first sister's head and asked whether anyone else was in the apartment. She loudly told **Butts** no one else was at home, hoping her sister would hear her and call the police. **Butts** then grabbed the back of her arm and pulled her from the couch at gunpoint, dragged her down the hallway, and pushed her into a bedroom. He attempted to close the bedroom door, but something prevented the door from fully closing. He ordered the woman to undress, but she refused. He then forcibly removed her sweater, tank top, and bra before unbuttoning and unzipping her pants.

*2 During this time, the second sister crept into the bathroom and called police. When the police arrived, the second sister opened the front door, and the police entered the bedroom. As **Butts** turned to face the bedroom door the first sister grabbed him by the back of his sweatshirt and took the gun, which he had placed in his back waistband. A combative and uncooperative **Butts** was then taken into custody.

By comparing the facts of this case to those in *Robinson*, **Butts** argues he should not have been convicted of second-degree kidnapping. He asserts *Robinson* changed the framework for analyzing kidnapping cases when it dismissed Robinson's kidnapping charges for insufficient evidence, because the "confinement or removal" of the victim was incidental to the underlying sexual abuse charge and not an independent crime. *See* 859 N.W.2d at 467–83. We disagree.

Referencing its holding in *State v. Rich*, 305 N.W.2d 739, 741–42 (Iowa 1981), our supreme court, in *Robinson*, held sufficient evidence supports a kidnapping conviction when "the defendant's confinement of the victim *substantially* increased the risk of harm, *significantly* lessened the risk of detection, or *significantly* facilitated escape of the perpetrator." 859 N.W.2d at 481 (emphasis in original). The *Robinson* court noted many of the cases upholding kidnapping convictions feature the use of a weapon such as a gun or knife. *Id.* at 477–78 (citing *State v. Griffin*, 564 N.W.2d 370, 372–73 (Iowa 1997) (beating and sexually assaulting victim with a bottle); *State v. McGrew*, 515 N.W.2d 36, 39–40 (Iowa 1994) (possessing a knife and gun with him during attack); *State v. Hatter*, 414 N.W.2d 333, 338 (Iowa 1987) (forcing victim into defendant's car at knifepoint); *State v. Knupp*, 310 N.W.2d 179, 181 (Iowa 1981) (cutting through victim's clothing with a knife)). The *Robinson* court concluded "this heinous concept underlies the *Rich* tripartite test with its attendant intensifiers." *Id.* at 482. Therefore, *Robinson* merely clarified an existing rule by relying on the three-factor test outlined in *Rich*.

Here, **Butts** locked the front door and forcibly led the first sister away from the front living area and into a bedroom at gunpoint. On two occasions, **Butts** threatened to hurt the first sister if she screamed. Once taken into custody, police also located a knife on **Butts**. Although the act of locking the door and leading the young woman to another room is similar to *Robinson*, this case diverges from *Robinson* due to the presence of two weapons—the knife, and the gun drawn and pointed at the victim while forcing her to a back bedroom—whereas *Robinson* did not feature a weapon. Consistent with the conclusion that the weapons substantially increased the risk of harm, the evidence, under a totality of the circumstances test, therefore supported kidnapping, and **Butts** is not entitled to reconsideration of that conviction. *See id.* at 479.

IV. Ineffective Assistance of Counsel

Butts next asserts his trial counsel was ineffective by disclosing a letter **Butts** had composed, first to his own expert and then to the State. "In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Both elements must be proven by a preponderance of the evidence. However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma*, 626 N.W.2d at 142 (citations omitted).

A. Attorney-Client Privilege

*3 **Butts** claims his trial counsel violated the attorney-client privilege by disclosing a letter to his medical expert and to the State without **Butts**'s consent.[1] The lengthy letter, written by **Butts**, detailed events and personal struggles in his life leading up to the events of November 11, 2009. **Butts**'s trial counsel turned the letter

over to an expert in forensic psychiatry prior to an evaluation in preparation for his diminished capacity defense. Eventually, the letter was disclosed to the State.[2] The State asserts **Butts**'s trial counsel breached no duty because **Butts** consented to the disclosure to his expert. Further, **Butts** can show no prejudice because the prosecution would have learned of the evidence after the expert witness evaluated **Butts**'s mental health and testified to the reasons for his diminished capacity, and the State gained similar information on a search of **Butts**'s computer hard drive.

Butts asserts no rule requires disclosure of this letter and, even if disclosure is allowed, his trial counsel did not have his consent; however, the record contradicts **Butts**'s assertion. On the first page of the letter **Butts** wrote, "I don't know if this long (I suspect it will be long) 'essay' will be a good thing to give a psychiatrist or not. Maybe it would be best to let him or her make these discoveries independently. I will let you decide that." (emphasis in original). During **Butts**'s redirect examination at his criminal trial, his trial counsel asked him about his understanding of the purpose and procedure regarding the letter:

> Q. Now reviewing the letter that you wrote to me, 30 pages, I think we've established that it was written December the 12, 2009? A. Which—the one to you?
>
> Q. The 30—the long one. A. Yes.
>
> Q. Do you remember when I was first hired in November that there was a concern by your family about your mental health? A. Yeah, I would think so.
>
> Q. And do you remember that I assured them that I would—I would get you evaluated? A. I don't know what you assured them but you told me that you had told them you were going to explore that, yes.
>
> Q. All right. And you remember me telling you in December to start writing this now while you remember it— A. Yes.
>
> Q. —so we could use it and present it to whoever did the evaluation? A. Yes.
>
> Q. And I've reminded you that this is part of the material that I sent to Dr. Wilson so he could do his evaluation? A. I had forgotten that, but yes.
>
> Q. All right. Just to clarify that. A. Yes.
>
> Q. And that as part of the discovery process— A. Absolutely.
>
> Q. —I provided a copy to the county attorney so he knew all the materials that [the expert] reviewed to come up with his diagnosis? A. I fully understand, yes.

We conclude **Butts**'s trial counsel did not breach an essential duty when he disclosed the letter because **Butts** gave his attorney the authority to do so.

However, even if we assume that trial counsel breached an essential duty by disclosing the letter, **Butts** cannot demonstrate he was prejudiced by counsel's action. The State was already aware of highly sensitive, if not much more damaging, information contained on **Butts**'s computer. In an effort to shore up his diminished capacity defense, **Butts**'s expert testified as to very personal details in **Butts**'s life leading up to these charges. He also testified he knew **Butts** had accessed various disturbing websites, as noted in the minutes of evidence. Therefore, **Butts** cannot demonstrate any prejudice resulted from counsel's disclosure of the letter when essentially the same, if not more damaging, information was contained elsewhere in the record. *See State v. Trudo*, 253 N.W.2d 101, 108 (Iowa 1977) (stating "ordinarily, a defendant may not claim prejudice where the same evidence is otherwise supplied by the defendant or is made overwhelmingly clear in the record.").

***4** In addition, given the strength of the evidence against him, **Butts** cannot show prejudice. **Butts** pursued intoxication and diminished capacity defenses by claiming he had absolutely no memory of the acts he was accused of committing. On cross-examination, the State questioned **Butts** as to his intent on the night in question, leading up to and immediately following the criminal activity:

> Q. You also understand that there's a big difference between legally impaired to drive and intoxicated as a legal defense to crimes? A. I do understand the difference, yes.
>
> Q. Okay. And you would agree that when you left the Razzle Dazzle—actually, let's back that up. When you arrived at the Razzle Dazzle, you intended to have a conversation with someone? A. Correct.
>
> Q. And you actually had a conversation? A. And I don't remember the details of it, but yes. As far as I know, yeah.
>
> Q. And you intended to buy a drink? A. Yeah.
>
> Q. And you did buy a drink? A. Correct.
>
> Q. And then you intended to leave? A. Sure, yeah.

Q. And you did leave? A. And I left, yes.

Q. And then you intended to drive to your apartment? A. Yep.

Q. And you did drive to your apartment? A. Right.

Q. So we know that at least around the hours of 10:15-ish I believe was your testimony— A. Probably, yes.

Q.—that you're intending things and doing what you intend? A. Oh, yeah. And I've already testified, you know, beyond that point when I remember things and I certainly intended things.

Q. Okay. And then when you came to in the apartment? A. In the apartment?

Q. In the [sisters'] apartment, I'm sorry, thank you. In the girls' apartment when you came to and they're leading you out into the parking lot, I believe I heard you testify that you intended to take the gloves off of your—you noticed you had gloves on your hands? A. I noticed I had something on my hands and it was—my hands were sweating so I took off what I had.

Q. So you intended to take the gloves off of your hands? A. Yes, uh-huh.

Q. And you did take the gloves off of your hands; right? A. Uh-huh.

Q. And that is within minutes of this incident? A. I don't recall but maybe it is. If that's the testimony, sure.

Q. Okay. So you were intending and following through on your intent up to—I mean minutes before—I'm sorry, I need to—I need to go further. You got to your apartment? A. Uh-huh.

Q. You intended to get out of your car? A. Yes.

Q. And you did get out of your car? A. Yes.

Q. You intended to enter your apartment? A. Yes.

Q. And you did enter your apartment? A. Yes.

Q. You intended to pour yourself a scotch? A. Correct.

Q. And you did pour yourself a scotch? A. Yeah.

Q. You intended to drink that scotch? A. And I drank that scotch.

Q. And you drank that scotch; correct? A. Yes.

....

Q. And we know that as I believe [trial counsel] asked you that you are in custody around 11:27? A. Okay, uh-huh.

Q. Do you recall that? A. Yes, I remember that.

Q. Okay. So we know that at about around 11:30 you're getting marched out of the apartment? A. Uh-huh.

Q. Correct? And that's the point where you intend to take off the gloves and you do take off the gloves? A. I took off the gloves at that time, yes.

Additionally, **Butts** arrived at the apartment carrying a loaded hand gun, knife, gloves, and lock-picking equipment. He was wearing a hooded sweatshirt with the hood pulled over his head, obscuring most of his face, and he was not wearing shoes. Once he arrived at the apartment, he picked the lock, entered, locked the deadbolt behind him, threatened the first sister at gunpoint, forced her to another room, and disrobed her. With all of the uncontroverted facts presented, **Butts** is unable to show that his counsel's disclosure of the letter to the expert or the State prejudiced him so as to undermine confidence in the outcome. *See Strickland*, 466 U.S. at 694.

***5** Adding another layer to his claim, **Butts** also alleges his counsel's performance was so deficient as to cause structural error by the negligent handling of the letter. *See Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011). Structural error occurs:

> (1) [when] counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants.

Id. **Butts** claims he was denied meaningful representation in this case, asserting his trial counsel was "lax and irresponsible" and his "failures were pervasive." We disagree. The trial lasted just over one week, and the record reveals counsel placed the State's case against meaningful adversarial testing. His counsel secured a noted forensic mental health expert, who provided the basis of a diminished capacity defense by testifying at length as to the possible reasons **Butts** had no memory of

his conduct. His counsel cross-examined witnesses to the extent **Butts** did not have any additional questions to ask, and he lodged objections after inappropriate statements from the State. Ultimately, it was up to the jury to believe all, some, or none of a witness's testimony. *See State v. Forsyth*, 547 N.W.2d 833, 836 (Iowa Ct. App. 1996). We do not find on this record a lack of representation such that **Butts** can now claim his trial counsel was so deficient as to cause a structural error in the proceedings.

Finally, **Butts** asserts his appellate counsel was ineffective because he did not pursue the issue of the trial counsel's disclosure of the letter on appeal, and the appellate counsel failed to file an application for further review with our supreme court. We judge ineffective-assistance-of-appellate-counsel claims against the same two-pronged test used for ineffective-assistance-of-trial-counsel claims. *Ledezma*, 626 N.W.2d at 141. Because **Butts** was not prejudiced by trial counsel's alleged disclosure of the letter, he cannot show he was prejudiced by appellate counsel's failure to pursue the issue of disclosure of the letter.

Further, **Butts** claims that his appellate counsel's failure to seek further review prohibited him from seeking federal habeas corpus relief, but he does not assert that his application for further review would ultimately be successful at our supreme court. *See* Iowa R. App. P. 6.1103(1)(b). Federal courts may grant habeas corpus relief only when an applicant demonstrates his state court conviction "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2012). Upon our review, we conclude **Butts** has not demonstrated any ground or prejudice that entitles him to relief. **Butts** does not assert any claim adjudicated on the merits in state court resulted in a decision that was contrary to, or involved an unreasonable application of, federal law. Therefore, **Butts** has not shown he was prejudiced by appellate counsel.

B. Prosecutorial Misconduct

***6 Butts** next asserts his trial counsel was ineffective when counsel did not object to certain statements made by the prosecution and when counsel failed to move for a mistrial after the district court overruled his objection to one of the prosecutor's statements. Whether trial counsel failed to perform an essential duty is determined by comparing counsel's work "against the standard of a reasonably competent practitioner, with the presumption that the attorney performed his duties in a competent manner." *State v. Stallings*, 658 N.W.2d 106, 109 (Iowa 2003). To prove prejudice resulted, "the defendant must show that, but for counsel's error, there is a reasonable probability that the results of the trial would have been different." *Id.*

In order to determine whether counsel was ineffective in failing to object to prosecutorial misconduct, we must first determine whether prosecutorial misconduct occurred. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). To do so, the court considers the following factors:

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instruction or other curative measures; and (5) the extent to which the defense invited the misconduct.

Id.; *see also State v. Schlitter*, 881 N.W.2d 380, 394 (Iowa 2016) (making a distinction between prosecutorial misconduct and prosecutorial error and noting the *Graves* multifactor test for prosecutorial misconduct "easily translate[s] to an evaluation of prosecutorial error."). Prejudice is the deciding factor, not the misconduct itself. *Graves*, 668 N.W.2d at 869.

First, **Butts** contends the prosecution's reference to John Hinckley was improper. During cross-examination of the medical expert, the prosecution stated:

> Q. When did—let me ask you this. Are you familiar—You belong to the American Psychiatry or—I'm sorry, the American Psychiatric Association? A. Yes, I do.
>
> Q. All right. And you're aware, of course, that they have a position statement on the insanity defense? A. Yes.
>
> Q. And that they've had that since 1982? A. I believe so, something like that.
>
> Q. And that was as a direct result of the Hinckley verdict after the shooting of Ronald Reagan? A. I don't recall the circumstances under which it was formulated. The timing would suggest that.
>
> Q. Well, I mean it's—the Hinckley verdict is treated fairly substantially in here because there was a fairly big public outcry against psychiatrists after he was acquitted on the grounds of insanity; isn't that true? A. I mean, you can characterize the outcry as you wish. I recall that there was quite a vivid public debate.

While **Butts** claims the Hinckley reference declares the

insanity defense was improper and undesirable, the record reflects the prosecution was questioning the expert on a variety of topics, including his compensation, membership to certain associations, and familiarity with the history of the insanity defense, as possible impeachment evidence. We find the reference does not rise to the level of misconduct, and moreover, given the reference was intended to supplement testimony and its limited reference, we find it unlikely any prejudice resulted following this line of questioning.

Next, **Butts** asserts the prosecution's use of the term "serial rapist" improperly influenced the jury, and his trial counsel was ineffective in failing to move for a mistrial following the judge overruling his objection. The State asserts it asked the question following **Butts**'s testimony in which he claimed the police investigation was excessive. The prosecutor used the term after he "heard [trial counsel] asking a lot of questions about how the police basically, ... dug into [**Butts**'s] entire life." **Butts** thought the police investigation was extreme, yet, the prosecutor explained, **Butts** was "arrested for a pretty serious crime," he did not have a criminal background, and had extensive military intelligence training. These factors, the prosecutor asserted, provided the police with a basis for their extensive investigation into the crimes and to rule out the possibility that **Butts** was a "serial rapist" who was associated with other, similar crimes. Because the term supplemented the prosecutor's line of questioning, we find the statement does not rise to the level of misconduct. We also find **Butts** has failed to establish the statement resulted in prejudice because the statement was isolated to this line of questioning, and the prosecutor used a curative measure to clarify he was not accusing **Butts** of being a "serial rapist."

*7 Despite trial counsel's objection, **Butts** asserts his counsel should have moved for a mistrial. As part of the PCR proceeding, trial counsel stated:

> Q. Okay. So my question would be why didn't you move for a mistrial after he injected the idea that there was a serial rapist? A. The judge overruled my objection.
>
> Q. That's why you wouldn't have moved for— A. End of story, isn't it? I mean, am I missing something?
>
> Q. Okay. A. The judge says that's a proper question. What makes you think—I say this rhetorically. I don't see any grounds for a mistrial. The judge was on his side.

Trial counsel objected, was overruled, and did not see any reason to make a motion for a mistrial. Because we conclude the prosecution's initial question did not amount to misconduct and **Butts** was not prejudiced by the question's isolated reference and the curative measures taken, **Butts** has not shown that he was prejudiced by trial counsel's failure to move for mistrial.

Butts also claims the prosecution made multiple improper references and statements during its closing argument. In this context we note, during closing arguments, counsel is entitled to some latitude when analyzing the evidence admitted during the trial. *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). Counsel is allowed to draw conclusions and argue permissible inferences that may be reasonably derived from the evidence. *Id.* However, the prosecutor is not allowed to make inflammatory or prejudicial statements regarding a defendant in a criminal action. *Graves*, 668 N.W.2d at 874.

During closing arguments, **Butts** contends the prosecutor inferred **Butts** was lying, told the jury to place themselves in the position of the two sisters, referenced O.J. Simpson, and mentioned the movie *No Country for Old Men*,[3] all of which are instances of misconduct. The prosecution remarked on **Butts**'s defense, stating:

> If you find that the only—if you actually find he slipped into sleepwalking—and I will submit to you that this defense is an incredible one—but if you actually believe he slipped into sleepwalking, you also have to find that it would have happened in the absence of the alcohol.

In determining whether a prosecutor's remarks were proper, *Graves* recommends asking:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Where the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? And (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Id. at 874–75. Based on the unrefuted testimony of the sisters, as well as **Butts**'s detailed testimony of the events preceding and immediately following the incident, the jury could legitimately infer that **Butts** was not telling the truth when he claimed to have absolutely no memory of the incident. Further, there is no evidence in the record that the prosecutor conveyed his personal opinion of a witness's credibility. Finally, the prosecutor did not use the words "lie" or "liar" to frame **Butts**'s version of the evening; instead, he used "incredible" when describing the defense. This does not rise to the level of

inflammatory language required to be misconduct. *See State v. Carey*, 709 N.W.2d 547, 557–58 (Iowa 2006) (citations omitted) (providing examples of prosecutorial statements that are and are not misconduct).

***8 Butts** next claims the prosecutor improperly asked jurors to place themselves in the position of the victim. *State v. Musser*, 721 N.W.2d 734, 754–55 (Iowa 2006) (stating a prosecutor is not "allowed to instruct the jury to place themselves in the position of the victim" (internal quotations and citations omitted)). During closing arguments, the prosecutor argued:

> ... Can you imagine the terror that those 13 to 14 minutes put into the heart of those girls. So while asleep, [he] points that gun right at her face. She's sitting on the couch terrified, trying to buy time, says she's bantering back and forth.
>
> ....
>
> ... Imagine the terror as [the sister] is sitting in that closet—standing there trying to whisper to 911 while this man is trying to sexually assault her sister. And she's just praying that the police get there on time. You hear her, oh, god.
>
> ....
>
> Can you imagine the bravery that it took for [first sister] as he's heading out into the hallway for him to grab—for her to grab him by the hood, yank that gun out of the holster in the back of his pants and shove him out into the hallway saying I've got the gun; I've got the gun.

We conclude the prosecutor did not ask the jury to place themselves in the victim's position. Instead, the language recounted the testimony given by the sisters, including both the actions taken and the fear they both expressed in their testimony.

Also during closing arguments, the prosecution mentioned the O.J. Simpson trial, stating:

> You heard in this case from the State's witnesses. Obviously we just listened again to some clips from the—from the 911 tape. But you heard from [the first sister] and I want to remind you—I know we've been together almost a week. I mean, we're not O.J. Simpson trialing here where we take a year to try a case. But in a week a lot happens. And I want to remind you kind of what the evidence was in this case. Because as much as the defense would like to have this case be all about Mr. **Butts**'s 20 years of honorable service to the U.S. Army, that's not what this case is about. This case is about 15 minutes in an apartment in Council Bluffs, Iowa.

Considering the *Graves* factors, the reference to the O.J. Simpson trial was isolated to closing statements and had little significance given it referenced the timing and speed of the trial. The prosecutor did not compare **Butts** or the facts of the case to the O.J. Simpson trial. Thus, the statement does not rise to the level of misconduct.

Finally, the prosecutor referenced the movie *No Country for Old Men* after the defense asked the jury:

> Have you ever in your experience as adults, ever heard of a major crime being committed by somebody in their socks, okay. Now you ask yourself, he goes home, takes off his shoes, his sports coat, his shirt. He's in his socks, pants and white T-shirt and he leaves in that state. Has anybody ever in the name of crime ever gone out in your socks?

The prosecution followed by stating:

> Why was he wearing no shoes. I don't know if any of you ever saw the movie *No Country for Old Men* but there's a hit man in that movie that every time he goes to go into a place to take care of his business he kicks off his shoes and he walks in and he takes care of business. Okay. Why is that? Shoes leave shoe impressions; socks don't. Do I have any evidence that was his reasoning? I just know he was in socks. That's all I can tell you. But if he wants a theory as far as why he would not be wearing shoes, I'll give you a theory. His theory is that it's pretty easy to peel off a pair of socks and get rid of them.
>
> ***9** Your shoes leave treadwear. They leave shoe wear impressions. You can tell size of feet. You get blood on where you are—there's a lot of reasons why you might not want to be wearing a pair of shoes when you are going to do something bad in someone's apartment. So if you want a reason, there's a reason.

The reference to the movie was isolated to closing arguments and was in direct response to defense counsel's attempt to weaken the State's case by posing a scenario for the jury to consider—whether they have heard of anyone committing a crime without shoes. Therefore, no misconduct occurred. Because none of the prosecution's statements rose to the level of prosecutorial misconduct and **Butts** cannot demonstrate any statement resulted in prejudice, we find counsel was not ineffective in failing to object or make a motion for mistrial.

V. Judicial Conduct

Butts's next claim is that the trial was tainted because the judge was impatient and exerted undue pressure throughout direct and cross-examination of witnesses to meet his self-imposed time restrictions. The State contends **Butts** has failed to preserve error on this claim because (1) he did not raise it on direct appeal and (2) he raised the issue through an ineffective-assistance-of-counsel claim at PCR but does not continue to assert counsel's ineffectiveness on appeal from the PCR denial; arguing rather, that the court conducted itself improperly, resulting in a denial of his due process right to a fair trial. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). Ineffective-assistance-of-counsel claims operate as an exception to the error preservation rules. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). We conclude **Butts** has failed to preserve error on whether the trial court acted improperly because trial counsel failed to object at the time of trial and, despite raising the issue of counsel's ineffectiveness in failing to object to the court's conduct on PCR, he does not continue to advance counsel's ineffectiveness on appeal from the PCR.

Even if we assume that **Butts** preserved error on the issue, we conclude the trial court did not act improperly. **Butts** asserts the court acted unfittingly by inappropriately speeding up the proceedings and cutting off questioning that impacted the ultimate verdict. "The presiding judge is not restricted to the functions of a mere umpire or a referee in a contest between opposing parties or counsel. A trial court has the duty to control and conduct its court in an orderly, dignified and proper manner." *State v. Houston*, 439 N.W.2d 173, 177 (Iowa 1989). To that end, a court may act "to require that the proceedings move forward without undue delay." *Id.* (citing *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980)).

After jury selection, the judge addressed the jury and notified them of the ideal trial schedule for the week. The judge "indicated when we started this this morning, we're—we would really, really like to try to get this done this week but it's really going to be—it's going to be a push to get it done." The judge explained that Mondays are court service days and that, for a variety of reasons, the case would not restart until the following Tuesday, if need be. Despite advising the jury of potential time restrictions, the judge indicated there was a possibility of having arguments and deliberations on the following Tuesday.

*10 **Butts** asserts the language the judge used during direct and cross-examination shows the judge was pressuring the attorneys on time and, ultimately, was impatient with the pace of the proceedings. However, a majority of instances **Butts** cites regarding the judge's comments occurred during the testimonies of **Butts**'s wife and former coworker immediately prior to afternoon recess, and the judge explicitly stated the questioning could continue if need be:

> THE COURT: [to the prosecutor], I didn't intend by our conversation we took last recess to suggest that I'm trying to make you or [defense counsel] finish up with this witness.
>
> STATE: And I'm almost done here.
>
> THE COURT: All I'm trying to say is I'm taking a break at noon and at 1 o'clock I'm starting with [the expert] and we're going to stop at noon.
>
> STATE: I understand and I'm almost done anyway, Your Honor.
>
> THE COURT: All right.

After trial counsel introduced the concept of lock picking through redirect examination of **Butts**'s wife, the prosecution wished to cross-examine her on that topic, stating:

> DEFENSE COUNSEL: That's all the questions.
>
> STATE: Well, lock picking is something new so just very briefly on that.
>
> THE COURT: Again, I don't care. I'm not telling you, you have to be done with her at noon. I'm simply saying we're taking a break at noon.
>
> STATE: I understand. At noon.

It is evident this line of questioning could have continued after the break. However, once finished with the examination of **Butts**'s wife, his trial counsel quickly called **Butts**'s former coworker to testify before the noon recess. **Butts** claims both attorneys rushed the examination of this witness; however, as the judge indicated, witness examination did not need to end at noon and could have resumed after the recess and after the expert who could only testify that particular day.

Furthermore, trial counsel believed he presented all of the

evidence necessary to provide a proper defense. In response to a deposition question during the PCR action regarding whether counsel wished any additional evidence was presented, trial counsel answered:

> A. No. Nothing. No. Everything that I wanted to present was presented. Every question that I wanted to ask was asked and answered. Any idea about we had to be done or the jury had to finish is incorrect.

Moreover, trial counsel testified that **Butts** was engaged in the trial by taking notes and **Butts** did not request that trial counsel ask any additional or follow-up questions after examining any witnesses. Because the judge did not improperly influence the pace of the trial proceedings and because the record shows **Butts** and his trial counsel presented all of the evidence they wished to present, there is no indication that the judge's conduct was improper or that **Butts** was prejudiced. Therefore, **Butts**'s trial counsel was not ineffective in failing to object to the judge's conduct during trial.

VI. Cumulative Error

Finally, **Butts** contends the cumulative error of his ineffective-assistance claims as asserted above should entitle him to a new trial. "Iowa recognizes the cumulative effect of ineffective-assistance-of-counsel claims when analyzing prejudice under *Strickland*." *State v. Clay*, 824 N.W.2d 488, 501 (Iowa 2012). If a claimant raises multiple claims of ineffective assistance of counsel, the cumulative prejudice from those individual claims should be properly assessed under the prejudice prong of *Strickland*. *Id.* If the court only considered the prejudice prong, "the court can only dismiss the postconviction claim if the alleged errors, cumulatively, do not amount to *Strickland* prejudice." *Id.* at 501–02. Here, we do not find the cumulative effect of **Butts**'s attorney's actions or inactions rise to the level of *Strickland* prejudice.

VII. Conclusion

***11** As we conclude the district court properly denied **Butts**'s ineffective-assistance-of-counsel claims against both his trial and appellate counsel and because we do not find any structural error in the trial record, cumulative error, or entitlement to kidnapping reconsideration, we affirm the district court's denial of **Butts**'s application for postconviction relief.

AFFIRMED.

All Citations

918 N.W.2d 502 (Table), 2018 WL 1858380

Footnotes

1 The letter was not admitted into evidence at trial.

2 In a deposition for this matter, **Butts**'s trial counsel did not remember how the trial prosecutor obtained the letter.

3 *No Country for Old Men* (Paramount Vantage 2007).

End of Document

Text of Applicable Statute

G. 28 U.S.C. Section 2254

28 U.S.C. Section 2254

(a)
The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)
(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
(A)
the applicant has exhausted the remedies available in the courts of the State; or
(B)
(i)
there is an absence of available State corrective process; or
(ii)
circumstances exist that render such process ineffective to protect the rights of the applicant.
(2)
An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3)
A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c)
An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1)

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2)

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A)the claim relies on—

(i)

a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii)

a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)

the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f)

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State

official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g)

A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h)

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i)

The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.