A P P E N D I X A

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 7, 2022
Certiorari to the Court of Appeals, 2018CA619 District Court, Boulder County, 2005CR467	
Petitioner: Andrew Mark Lamar, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2022SC456
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 7, 2022.
JUSTICE BERKENKOTTER does not participate.

A P P E N D I X B

18CA0619 Peo v Lamar 05-12-2022

COLORADO COURT OF APPEALS DATE FILED: May 12, 2022

Court of Appeals No. 18CA0619
Boulder County District Court No. 05CR467
Honorable Judith L. LaBuda, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Andrew Mark Lamar,

Defendant-Appellant.

ORDERS AFFIRMED

Division VI
Opinion by JUDGE HARRIS
Navarro and Casebolt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced May 12, 2022

Philip J. Weiser, Attorney General, Patrick A. Withers, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Andrew Mark Lamar, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 Following a jury trial at which he represented himself, Andrew Mark Lamar was found guilty of sexual assault. His conviction and sentence were ultimately affirmed on direct appeal. *See People v. Lamar*, (Colo. App. 13CA0469, Nov. 19, 2015) (not published pursuant to C.A.R. 35(f)) (explaining procedural history and affirming sentence).

¶ 2 Lamar then filed a series of pro se motions under Crim. P. 35(c). He argued that he was incompetent at the time he waived his right to counsel and proceeded pro se at trial and, therefore, he was entitled to a retrospective competency hearing; the court committed various trial errors; and his appellate counsel was ineffective for failing to raise the trial errors on direct appeal. In three separate orders, the postconviction court summarily denied his claims.

¶ 3 On appeal, Lamar contends that the district court erred by denying his direct appeal claims without a hearing.[1]

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[1] Initially, Lamar also appealed the denial of his competency claim, including his request for a retrospective competency evaluation and hearing. But on August 9, 2021, while the appeal was pending, Lamar moved in this court to withdraw his third issue on appeal — the claim that he was incompetent during the proceedings and entitled to a retrospective competency hearing (addressed on pages 20-33 of his opening brief). Lamar explained that he was

¶ 4 We review the summary denial of a Rule 35(c) motion de novo. *See People v. Lopez*, 2015 COA 45, ¶ 68. Though our reasoning differs in certain respects from that of the postconviction court, *see, e.g.*, *People v. Ortega*, 266 P.3d 424, 426 (Colo. App. 2011) (appellate court may affirm postconviction court's ruling on any ground supported by the record), we agree with the court's conclusion that Lamar's claims fail as a matter of law.[2]

I. Direct Appeal Claims

¶ 5 After Lamar's appointed appellate counsel submitted an opening brief, Lamar moved to fire her, strike her "frivolous" brief, and proceed pro se. The motion was referred to the Chief Judge of this court; she permitted appellate counsel to withdraw but denied Lamar's request to strike the brief or to file a pro se brief.

"abandon[ing]" the issue "due to lack of substantial merit" and "conced[ing] the issue to the People." Based on Lamar's concession, we do not address any claim related to competency.

[2] Because we resolve Lamar's appeal based on settled law, we deny his motion requesting publication of this opinion. *See* C.A.R. 35(e) ("No court of appeals opinion shall be designated for official publication unless it satisfies [certain] standards," none of which are applicable here.).

¶ 6 Lamar contends that he is entitled to postconviction relief because the Chief Judge infringed on his due process right to represent himself on appeal. Setting aside the fact that there is no constitutional right to self-representation on direct appeal in a criminal case, *Martinez v. Ct. of App.*, 528 U.S. 152, 161-63 (2000), which means Lamar's claim is not cognizable under Rule 35(c), the only "relief" he could be granted is an opportunity to submit his purportedly meritorious issues to the appellate court. That is effectively what he has done in these proceedings, through his claim that appellate counsel was ineffective for failing to raise certain issues on appeal.[3] Because we now address and reject each of the issues that Lamar says should have been raised, the Chief Judge's denial of Lamar's request to raise the issues in a pro se brief on direct appeal could not possibly have prejudiced him.

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[3] To the extent Lamar reasserts his claims of trial error, those claims are barred as successive. *See* Crim. P. 35(c)(3)(VII). On the other hand, his claim that appellate counsel was ineffective for failing to raise these same trial errors on appeal is not successive. *Cf. People v. Clouse*, 74 P.3d 336, 340-41 (Colo. App. 2002) (ineffective assistance of postconviction counsel claims could not have been brought in a prior proceeding and are therefore not successive).

¶ 7 To prevail on a claim of ineffective assistance of counsel, the defendant has the burden to establish that "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Therefore, when a defendant contends that his appellate counsel was ineffective, he must show that "counsel failed . . . to present the case effectively by overlooking a meritorious argument that was more likely to succeed than the argument presented." *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007). In other words, the defendant "must show a reasonable probability that, but for counsel's errors, [he] would have prevailed on the appeal." *People v. Long*, 126 P.3d 284, 286 (Colo. App. 2005); *see also People v. Valdez*, 789 P.2d 406, 410 (Colo. 1990) (to establish prejudice, a defendant must demonstrate the existence of meritorious grounds for reversal).

¶ 8 Whether an argument is likely to succeed on appeal is a legal issue that we review de novo. *See Trujillo*, 169 P.3d at 239 (reviewing the defendant's appellate issues de novo). And when a postconviction claim presents a pure legal issue, the claim may be

denied without an evidentiary hearing. *See People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005).

¶ 9 In particular, a defendant raising an ineffective assistance of appellate counsel claim is not entitled to an evidentiary hearing because he must demonstrate that, *based on the trial court record*, counsel could have raised meritorious arguments on appeal. *See* 15 Robert J. Dieter, *Colorado Practice Series: Criminal Practice and Procedure* § 22.27, Westlaw (2d ed. database updated Oct. 2021) ("It is an elementary principle of appellate practice that claims of error" must be based on the trial court record.); *see also* C.A.R. 10(a) (record on appeal consists of all documents filed in the trial court case as of the date of the notice of appeal and all transcripts designated by counsel). Thus, to evaluate Lamar's ineffective assistance of appellate counsel claim, we review each of his appellate contentions as though he had raised them on direct appeal; in doing so, we may rely only on the trial court record.

(1) The court did not abuse its discretion by declaring a mistrial.

¶ 10 Double jeopardy principles do not bar a retrial if the trial court declares a mistrial because the jury is deadlocked. *People v. Richardson*, 184 P.3d 755, 760 (Colo. 2008). Lamar contends that

the trial court erred by declaring a mistrial during his first trial, because it failed to definitively determine that the jury was in fact deadlocked.

¶ 11 After five hours of deliberation, the jury sent a note indicating the jurors were split and appeared unable to reach a unanimous verdict. The court then recalled and polled the jurors, who all indicated their firm belief that no amount of further discussion would be helpful.

¶ 12 The court considered the appropriate factors in determining that the jury had deadlocked. It acknowledged defense counsel's objection to a mistrial and agreed that five hours of deliberations was not inordinately long, but it noted that, on the other hand, there was only one count and only one contested issue — consent. *See People v. Rivers*, 70 P.3d 531, 534-35 (Colo. App. 2002) (listing the factors a court should consider when deciding if the jury has deadlocked).

¶ 13 Given the jury's collective agreement that unanimity was not possible, and the single contested issue, the court did not abuse its broad discretion by declaring a mistrial without further questioning the jury on the specific point of disagreement. *See People v. Urrutia*,

893 P.2d 1338, 1344 (Colo. App. 1994) (if a court is certain the jury is deadlocked, further questioning is not necessary). And because the court properly declared a mistrial, a retrial did not violate Lamar's Double Jeopardy rights.

(2) The evidence was sufficient to support the conviction.

¶ 14 A person commits sexual assault if he knowingly causes a person to submit to sexual penetration "against the victim's will." § 18-3-402(1)(a), C.R.S. 2021. Lamar contends that the prosecution failed to prove he caused the victim to submit against her will — i.e., that the victim did not consent.

¶ 15 The victim testified at trial that Lamar forced her to receive and perform oral sex and vaginal intercourse. She explained that she did not physically resist Lamar because she was "very shocked" and afraid, but she repeatedly told him that she did not want to have sex with him and pleaded with him to stop. From this evidence, the jury could rationally have found beyond a reasonable doubt that Lamar caused the victim to submit to sexual penetration against her will.

¶ 16 The prosecution did not have to prove that the victim physically resisted. Her testimony that she was afraid to physically

resist was sufficient to establish a lack of consent. *See People v. Braley*, 879 P.2d 410, 416 (Colo. App. 1993) (submission induced by fear does not constitute consent).

¶ 17 Lamar notes that some of the evidence was conflicting, but "evidence is not rendered insufficient by conflicting accounts as to what happened." *People v. Moya*, 899 P.2d 212, 218-19 (Colo. App. 1994). Even in Lamar's version of events, the victim said "no" to sex at some point. But, as he explained to the jury, he "kind of pushed . . . the boundaries in terms of, you know, that no," because "no sometimes means yes, or you know, there's cajoling." While he testified that the victim ultimately did consent, the jury was not obligated to credit his account. *See People v. McIntier*, 134 P.3d 467, 471 (Colo. App. 2005) (the jury resolves any "conflicts, testimonial inconsistencies, and disputes in the evidence").

(3) The trial court did not abuse its discretion by declining to re-appoint counsel.

¶ 18 After the first trial, the court granted Lamar's request for new counsel. But several months later, Lamar sought to replace that lawyer, too. The court denied the request, and so in July 2006, Lamar decided to proceed pro se. By August, however, he had

backtracked. At his request, the court reappointed counsel, Lamar's third.

¶ 19 In December 2006, dissatisfied with his third lawyer, Lamar again elected to proceed pro se. A month later, he again changed his mind. He contacted his third lawyer, who declined reappointment due to a conflict.

¶ 20 In the meantime, the court agreed to appoint advisory counsel, Lamar's fourth lawyer, but within a few weeks Lamar had fired him. At a hearing in February 2007, after the court determined that it could not reappoint the third lawyer, Lamar asked for a fifth lawyer. The court denied that request. Consequently, in April 2007, Lamar proceeded to trial pro se with no advisory counsel.

¶ 21 Lamar contends that the court abused its discretion by declining to reappoint counsel in February 2007.

¶ 22 "Once a defendant validly waives his right to counsel, he has no unconditional right to withdraw the waiver." *People v. Wilson*, 397 P.3d 1090, 1095-96 (Colo. App. 2011), *aff'd*, 2015 CO 37. A waiver is valid if the defendant is competent and he waives the right voluntarily, knowingly, and intelligently. *People v. Davis*, 2015 CO 36M, ¶ 15.

¶ 23 Based on Lamar's concession in this appeal, we conclude that his competency was not in question at the time he waived his right to counsel. And, on direct appeal, a division of this court determined that Lamar's waiver was voluntary, knowing, and intelligent. *See People v. Lamar*, slip op. at 9-11 (Colo. App. No. 07CA0985, Sept. 24, 2009) (not published pursuant to C.A.R. 35(e)). Therefore, the decision whether to allow Lamar to withdraw his second waiver of his right to counsel and appoint a fifth lawyer for Lamar was firmly within the court's discretion. *People v. Woods*, 931 P.2d 530, 535 (Colo. App. 1996).

¶ 24 The court was under no duty to allow Lamar to withdraw his waiver simply because he, once again, realized the difficulties inherent in self-representation. *Id.* The fact that the court was willing to ask the third lawyer about the possibility of his reappointment, which it was under no obligation to do, does not mean that, once the lawyer declined, the court was required to grant Lamar's request and appoint yet another lawyer.

¶ 25 Lamar's third attorney had been appointed just a few months earlier, when the court allowed Lamar to withdraw his first waiver of his right to counsel. When the third lawyer was appointed, the

court explicitly warned Lamar that if he reported a conflict with new counsel, the court would presume he was attempting to manipulate the system.

¶ 26 Viewed in this context, Lamar's request seems "more akin to a calculated effort to forestall the trial than to a legitimate request for legal assistance." *People v. Lucero*, 200 Colo. 335, 341, 615 P.2d 660, 664 (1980). Accordingly, the court did not abuse its discretion by rejecting Lamar's request to withdraw his waiver and declining to appoint another lawyer.

(4) The court did not abuse its discretion by excluding a recording of the victim's hospital interview.

¶ 27 During his cross-examination of the victim, Lamar asked the court to admit the victim's prior recorded interview because he was "having difficulty" cross-examining her and his questioning was not going as planned. The court denied the request.

¶ 28 A witness's prior statements are admissible for any purpose if they are inconsistent with the witness's trial testimony. *See* § 16-10-201(1), C.R.S. 2021. But at trial, Lamar did not tell the court that he intended to use any particular part of the recording as prior inconsistent statements. He simply asked the court to admit the

entire interview so that he could have the benefit of certain statements that he was unable to elicit from the victim on cross-examination.

¶ 29 On appeal, he says the recorded interview was admissible to show the victim's "various states of mind" and that she gave "mixed messages" about her willingness to have sex with him. But he offers no authority for that assertion, and, unless it constitutes a prior inconsistent statement, a witness's prior out-of-court statement is generally inadmissible. *See* CRE 802.

(5) The court did not abuse its discretion by excluding a defense witness's hearsay testimony.

¶ 30 Lamar contends that a defense witness should have been permitted to testify about a conversation he had with Lamar shortly after the sexual assault. According to Lamar, his statements to the witness would have established that he believed the sexual penetration was consensual.

¶ 31 The statements were not admissible: they were not admissions of a party *opponent*, because they were Lamar's own statements, *see* CRE 801(d)(1); they were not present sense impressions, because they were not "a spontaneous statement" by Lamar

describing an event while he was perceiving it, *see* CRE 803(1); and they were not statements about a then-existing mental or emotional condition, because they were statements of belief used to prove the fact believed, which are expressly excluded from the hearsay exception, *see* CRE 803(3).

(6) Lamar is not entitled to a new trial based on juror misconduct.

¶ 32 On the second day of Lamar's cross-examination of the victim, the prosecutor approached the bench and informed the court that he thought "a juror [was] nodding off" and that "all the other jurors are noticing it." The court immediately took a short recess, after which Lamar continued his cross-examination.

¶ 33 Lamar contends that he is entitled to a new trial because the trial court failed to intervene when informed of a sleeping juror. To make matters worse, he says, neither the prosecutor nor the court told him about the juror (an assertion we will assume is true), so he had no opportunity to suggest any remedial action.

¶ 34 As a general rule, juror inattentiveness or sleeping does not warrant a new trial absent a showing of prejudice — i.e., that the defendant did not receive a fair trial. *See People v. Herrera*, 1 P.3d 234, 240 (Colo. App. 1999); *see also United States v. McKeighan*,

685 F.3d 956, 973 (10th Cir. 2012) ("[A] court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle a sleeping juror.") (citation omitted).

¶ 35 In evaluating potential prejudice, a court may consider (1) whether the record establishes the juror was actually asleep; (2) whether the sleeping juror missed large or particularly critical portions of the trial; and (3) whether the court knew about the sleeping juror, and if so, what action it took. *McKeighan*, 685 F.3d at 974.

¶ 36 Here, the record does not reflect that the juror was actually asleep. The prosecutor reported that he observed him "nodding off," suggesting he was not yet asleep. *See People v. Hayes*, 923 P.2d 221, 229 (Colo. App. 1995) (where the record did "not reflect that the juror actually fell asleep, but merely that she was once admonished by the judge for having trouble keeping her eyes open," defendant was not entitled to new trial). Thus, Lamar's contention that the juror could have been asleep for a long period of time is entirely speculative.

¶ 37 Also, the court *did* intervene. Immediately after the prosecutor raised the issue, the court announced a short recess, giving the jurors an opportunity to take a break. *Cf. People v. Evans*, 710 P.2d 1167, 1168 (Colo. App. 1985) (suggesting that one appropriate judicial response to a sleeping juror is to recess the trial); *Commonwealth v. Dancy*, 912 N.E.2d 525, 532 (Mass. App. Ct. 2009) ("If the sleeping is observed at the outset or when the juror is beginning to 'nod off,' it is likely that a break or a stretch will suffice.").

¶ 38 Lamar argues that if he had been told about the juror, he could have suggested that the court take other remedial action. While it might have been better practice for the court to notify Lamar of the prosecutor's observation, the question is not whether some other reasonable action could have been taken; the question is only whether the action taken by the court was reasonable under the circumstances. Because it was, the court did not abuse its discretion. *See Herrera*, 1 P.3d at 240.

(7) The court did not err by rejecting Lamar's jury instructions on the affirmative defenses of consent and mistake of fact.

¶ 39 "[A] trial court is not required to give the jury an instruction defining an affirmative defense if proof of the elements of the charged offense necessarily requires disproof of the issue raised by the affirmative defense." *People v. Bush*, 948 P.2d 16, 18 (Colo. App. 1997). Under these circumstances, "refusal of an affirmative defense instruction does not constitute error so long as the defendant is allowed to introduce evidence supporting the issue which is embodied in the affirmative defense." *Id.*

¶ 40 An instruction on the affirmative defense of consent would have been unnecessary here because, to convict Lamar, the prosecution had to prove that he caused the victim to engage in sexual contact without her consent. § 18-3-402(1)(a); *People v. Cruz*, 923 P.2d 311, 312 (Colo. App. 1996).

¶ 41 The issue of consent was squarely before the jury throughout the trial. Lamar testified, and argued during opening and closing, that the victim had consented to sexual contact. *See Cruz*, 923 P.2d at 312 (no instructional error because the "jury could not have failed to consider the issue of consent"). By convicting Lamar of sexual assault, the jury necessarily disbelieved that testimony and

found that the prosecution proved, beyond a reasonable doubt, that she did not consent.

¶ 42 The same reasoning applies to Lamar's mistake of fact defense. To find Lamar guilty, the jury had to find that he *knowingly* caused the victim to submit against her will. § 18-3-402(1)(a). A person acts "knowingly" with respect to conduct or to the relevant circumstance when he is aware that his conduct is of such nature or that such circumstance exists. § 18-1-501(6), C.R.S. 2021.

¶ 43 So the jury necessarily rejected Lamar's testimony that he reasonably, but mistakenly, believed she had consented. *See Bush*, 948 P.2d at 18-19 (jury's verdict implicitly rejected defendant's mistaken belief of fact defense).

¶ 44 In sum, because none of Lamar's appellate arguments would have prevailed, he cannot establish deficient performance or prejudice based on appellate counsel's failure to raise them on direct appeal. *See Trujillo*, 169 P.3d at 239.

II. Conclusion

¶ 45 The orders are affirmed.

JUDGE NAVARRO and JUDGE CASEBOLT concur.

A P P E N D I X C

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 2, 202
Boulder County 2005CR467	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Andrew Mark Lamar.	Court of Appeals Case Number: 2018CA619
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:

Andrew Mark Lamar, Defendant-Appellant,

is **DENIED**.

Issuance of the Mandate is stayed until: July 1, 2022

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: June 2, 2022

BY THE COURT:
Navarro, J.
Harris, J.
Casebolt*, J.