

IN THE COURT OF APPEALS OF IOWA

No. 23-0447
Filed March 6, 2024

ZACHARY ALFRED HAYES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cedar County, Joel W. Barrows,
Judge.

An applicant appeals the district court's denial of his application for
postconviction relief concerning his convictions for child endangerment—multiple
acts and neglect of a dependent person. **AFFIRMED.**

Leslie G. Peters of East Street Law Firm, P.L.L.C., Hancock, for appellant.
Brenna Bird, Attorney General, and Martha E. Trout and Scott Brown,
Assistant Attorneys General, for appellee State.

Considered by Bower, C.J., Schumacher, J., and Blane, S.J.* Buller, J.,
takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(2024).

SCHUMACHER, Judge.

Zachary Hayes appeals the district court's denial of his application for postconviction relief (PCR) concerning his convictions for child endangerment—multiple counts (Count I) and neglect of a dependent person (Count II). He alleges ineffective assistance of counsel. Specifically, he argues trial counsel failed to challenge the sufficiency of the evidence regarding the *mens rea* element of Iowa Code section 726.6A (2016) concerning Count I, and that counsel breached an essential duty in failing to request jury instructions on lesser-included offenses.

I. Background Facts and Prior Proceedings

In 2016, Hayes was charged with multiple acts of child endangerment resulting in serious injury and neglect of a dependent person. Following a jury trial, he was convicted on both counts and was sentenced to an indeterminate term of incarceration not to exceed sixty years. On direct appeal,¹ this court affirmed his convictions, summarizing the facts as follows:

The record shows Hayes physically abused his two-month-old child. The medical evidence showed the child had fractured ribs, a detached optic nerve, head trauma, and brain injury. These injuries resulted in permanent medical conditions, including limited cognitive ability, permanent visual impairment, the inability to eat without the assistance of a gastrointestinal tube, and, most likely, the inability to walk.

. . . .
. . . . When viewed in the light most favorable to the State, the evidence showed Hayes failed to seek medical treatment for his child in a timely manner after injuring him by slamming him violently onto a bed. The injuries were severe and obvious. After Hayes injured the child, the child began having seizures and was unable to focus

¹Our prior decision addressed two claims by Hayes: that his counsel provided constitutionally deficient representation in failing to move for judgment of acquittal on the charge of neglect of a dependent person and in failing to challenge a jury instruction, alleging such was violative of his right against self-incrimination. *State v. Hayes*, No. 17-1853, 2019 WL 1056025, at *1–2 (Iowa Ct. App. Mar. 6, 2019).

his eyes. Hayes admitted that, after injuring the child, his immediate reaction was, “Oh fuck. Because I thought I had hurt him.” Nonetheless, Hayes did not seek immediate treatment for the child. Indeed, when the child’s mother discovered the child in distress and sought to take the child to the hospital, Hayes discouraged her from so doing.

Hayes, 2019 WL 1056025, at *1–2.

II. Standard of Review

We review denial of an application for postconviction relief for errors at law, however we review claims of ineffective assistance of counsel de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Ineffective Assistance of Counsel

Hayes makes two claims on appeal regarding ineffective assistance of counsel. First, he asserts that counsel was ineffective for failing to challenge the sufficiency of the evidence with respect to the *mens rea* element of section 726.6A. And second, that “counsel was ineffective for failing to request that the jury be instructed on the applicable lesser-included offenses.” Hayes, for the first time on appeal, also asserts that his PCR counsel was ineffective in failing to pursue the failure of trial counsel to request jury instructions which included the lesser-included offenses.

A claim of ineffective assistance of counsel requires the defendant show “(1) counsel failed to perform an essential duty; and (2) prejudice resulted.” *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To succeed, the defendant must make both showings. *Id.* “Under the first element, we measure counsel’s performance against the standard of a reasonably competent practitioner. In doing so, we start with the presumption that the attorney performed his duties in a

competent manner.” *Id.* at 195–96 (internal citation omitted). “Prejudice exists where the claimant proves by ‘a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* at 196 (quoting *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006)).

A. Sufficiency of the Evidence

We turn first to the claim concerning the sufficiency of the evidence. Hayes argues counsel should have challenged the sufficiency of the evidence on whether Hayes *knowingly* inflicted multiple serious injuries on his child. But with respect to this issue, Hayes fails to explain how trial counsel failed to perform an essential duty. Hayes argues that although his conviction on Count II was upheld on direct appeal, which required intent to cause injury, he lacked intent on Count I, child endangerment—multiple counts. But his argument on appeal addresses only the PCR court’s decision to deny him relief, not the performance of his trial counsel. Hayes has not demonstrated that “the attorney’s performance was outside the range of normal competency.” See *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Hayes acknowledges that he presented no evidence to the PCR court concerning this issue. So, without any evidence on this issue to the PCR court or argument as to how counsel breached an essential duty, we consider this argument waived.²

² Although not addressed by Hayes, our review of the record with regard to this issue demonstrates a trial strategy on behalf of counsel. At trial, counsel argued that there was enough evidence for the charge of child endangerment resulting in serious injury but no evidence that his client was responsible for the two separate rib fractures, the injuries relevant in Count I, essentially denying any responsibility

Having found Hayes has not demonstrated counsel breached an essential duty, there is no need for us to address prejudice. But we choose to address this prong—although argument on prejudice is absent from Hayes’s briefing. Hayes “must show that there is a reasonable probability that but for his trial attorney’s unprofessional errors, the resulting conviction and sentence would have been different.” *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). “A reasonable probability is one sufficient to undermine confidence in the outcome.” *Id.* Hayes has not asserted that he suffered prejudice of any kind because of trial counsel’s decision. Further, as the district court noted on this issue:

The Court of Appeals’ discussion regarding the issue applies equally to the knowingly alternative:

. . . Hayes cannot establish prejudice because there was substantial, overwhelming evidence of his guilt and the result of the proceeding would not have been different. . . .

. . . [T]he above-referenced evidence is the same that was used knowingly at trial.

The record reflects substantial, overwhelming evidence as to Count I, including that Hayes “[k]nowingly act[ed] in a manner that create[d] a substantial risk to the child or minor’s physical, mental, or emotional health or safety.” See

for the injuries in Count I, rather than arguing he did not intend to cause the injuries. “Improvident trial strategy or miscalculated tactics’ typically do not constitute ineffective assistance of counsel.” *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (quoting *State v. Oetken*, 613 N.W.2d 679, 683–84 (Iowa 2000)); accord *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999); *State v. Wright*, No. 10-1330, 2011 WL 2041578, at *1 (Iowa Ct. App. May 25, 2011); *Gully v. State*, 658 N.W.2d 114, 120 (Iowa Ct. App. 2002). The question is whether “counsel’s performance fell below the normal range of competency.” *Cromer*, 765 N.W.2d at 8 (quoting *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999)). “When counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy is unsuccessful.” *State v. Losee*, 354 N.W.2d 239, 243 (Iowa 1984).

Iowa Code § 726.6(1)(a). Hayes, a man over six feet tall and weighing over three hundred pounds, acknowledged he had been aggressive with his two-month-old baby. Hayes admitted to law enforcement that prior to July 23, 2016, he may have been too forceful with the child and that he may have caused the rib fractures. And contained in the trial record is Hayes's admission that he threw the child on the bed on July 23 because he resented having to care for the child more than the mother of the child, that he "just had enough," and he had become "fucking tired of it." He admitted his actions were "pretty forceful." Also in the record is medical testimony that the baby had multiple rib fractures in various stages of healing. On this record, we conclude Hayes is unable to demonstrate prejudice concerning his claim on the mens rea element as to Count I.

B. Jury Instructions on Lesser-Included Offenses

Hayes claims counsel was ineffective for failing to request jury instructions on the applicable lesser-included offenses. He also alleges PCR counsel was ineffective for failing to raise the issue. Evident from his claim, this issue was not raised or decided by the district court in its ruling on his application for postconviction relief, and the State contests that error was preserved. "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)).

Hayes initially raised the issue of jury instructions on lesser-included offenses in his pro se application, but the issue was not included in his amended application and the district court did not rule on it. "The claim or issue raised does

not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it.” *Id.* at 863 (quoting *Senecaut*, 641 N.W.2d at 540). Here, the court neither considered nor addressed the jury-instruction claim. As such, we have nothing to review.

C. Ineffective Assistance of PCR Counsel

Finally, Hayes claims his PCR counsel was ineffective in failing to raise the claim that his trial counsel did not request jury instructions on lesser-included offenses. But this claim was raised for the first time on appeal, and the record is inadequate to allow us to decide this new claim on appeal. See *Goode v. State*, 920 N.W.2d 520, 526 (Iowa 2018) (declining to address new claim of ineffective assistance of PCR counsel raised for the first time on appeal). We decline to address Hayes’s claim of ineffective assistance of PCR counsel.

AFFIRMED.