

IN THE COURT OF APPEALS OF IOWA

No. 0-666 / 09-1388
Filed November 24, 2010

MARLIN H. JACKSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

Marlin Jackson appeals from the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney
General, Michael Walton, County Attorney, and Robert E. Weinberg, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

EISENHAUER, J.

Marlin Jackson appeals from the district court's denial of his application for postconviction relief. He contends his counsel was ineffective in failing to call additional alibi witness and in failing to cross-examine one of the State's witnesses. We review his claim de novo. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Jackson was charged with two counts of first-degree robbery stemming from an incident on the night of December 18, 2004, when two women were robbed by two men in a parking lot in Davenport. The men approached and demanded the women hand over their purses. One of the men was holding a gun. One of the women heard the gunman referred to as "Weep" or "Weeps" by the other robber. Both women gave the responding police officers descriptions of their assailants.

In investigating the crime, one of the officers saw a man in the area matching a description of one of the gunman. That man, Michael Fair, initially ran from the officer but upon being apprehended, stated he had just come from a neighboring business, Gus' Mini-Mart and Game Room. To investigate Fair's claim, the officer went to the business where he learned the store's owner, Gus Sullivan, was dating Fair's mother. Sullivan also informed the officer that just prior to the time of the robbery, two men had been in his store. One of those men went by the nickname of "Weeps." Sullivan did not know the real name of the man known as Weeps, but provided the officer a picture of him, as he regularly took photographs of his customers to hang on the wall. The photograph

was shown to the two victims, who identified the man pictured as the gunman. Jackson was later identified as the man in the photograph.

Maryann Burton, Jackson's fiancée and the mother of his child, testified at Jackson's trial in his defense. She stated she saw Jackson on the afternoon of December 18, 2004, in Jacksonville, Illinois, where he stayed until December 21. Jackson's mother, Anita Jackson, testified he was living with her at the time of the robberies, and on the morning of December 18, Jackson told her he was going to Jacksonville to pick up Burton. Finally, Jackson testified he was in Jacksonville at the time of the robbery and denied any involvement. Jackson also testified his nickname is "Weeper."

The jury found Jackson guilty of two counts of second-degree robbery. He appealed, but his counsel withdrew and his appeal was dismissed over Jackson's objection. On October 19, 2007, Jackson filed a petition for postconviction relief, alleging in part that his trial counsel was ineffective in failing to call additional alibi witnesses. He also alleged counsel was ineffective in failing to cross-examine Sullivan. Following a hearing, the district court denied the petition.

To prevail on a claim of ineffective assistance of counsel, Jackson must show his attorney's performance fell outside the normal range of competency, and the deficient performance so prejudiced his case as to give rise to a reasonable probability that, but for counsel's alleged errors, the outcome of the proceedings would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). There is a strong presumption counsel performed competently, and

the claimant has the burden to prove that counsel was ineffective. *Id.* An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Jackson contends his counsel was ineffective in failing to call additional alibi witnesses who he claims can place him in Jacksonville, Illinois on the day of the robbery. One of these witnesses—Ida Burton, the sister of Jackson’s fiancée—testified at the postconviction hearing that Jackson arrived at a family gathering on December 18, 2004, and stayed at her home for approximately thirty days.

Jackson has failed to demonstrate he was prejudiced by counsel’s failure to call additional alibi witnesses. Their testimony was merely cumulative to the testimony of Maryann Burton and Anita Jackson. See *Schrier v. State*, 347 N.W.2d 657, 664 (Iowa 1984) (stating “the withholding of cumulative testimony is not a sufficient showing of prejudice”). Given the strength of the evidence against Jackson, including identification by the victims of the robbery, counsel’s failure to present the cumulative evidence did not render counsel ineffective.

In arguing his counsel was ineffective in failing to call additional alibi witnesses, Jackson also suggests counsel was ineffective in failing to adequately investigate his alibi. This issue was not presented or addressed by the district court and therefore not preserved for our review. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). However, even if we consider Jackson’s claim his counsel could have obtained cellular phone records, credit card records, or photographs that would have established he was in the Springfield area at the time of the

robbery, there is no basis to grant Jackson relief. There is no proof such evidence existed and was discoverable at the time of trial; it is merely conjecture by Jackson. Without knowing if such evidence exists, Jackson cannot show a reasonable probability the result would have been different if counsel had investigated such evidence.

Jackson also contends counsel was ineffective in failing to cross-examine Sullivan. Trial counsel at the post-conviction hearing could not remember why he did not cross-examine Sullivan. Jackson claims cross-examination would have elicited testimony regarding Sullivan's criminal record and exposed his possible bias given his relationship with Fair's mother when Fair was a possible perpetrator of the robbery. Jackson failed to establish Sullivan's convictions were admissible pursuant to Iowa Rules of Evidence 5.906(1) and (2). Furthermore, any prior criminal convictions or bias on Sullivan's part does not overcome the evidence against Jackson. One of the robbery victims heard the gunman referred to by the name "Weep" or "Weeps" and Jackson goes by the nickname of "Weeper." He matches the description of the gunman given by the victims immediately following the robbery. Both victims identified Jackson from a photograph on the night of the robbery. We cannot find Jackson was prejudiced by counsel's failure to cross-examine Sullivan.

Because Jackson has failed to establish the prejudice prong of the ineffective assistance of counsel test on his claims, we affirm the district court's denial of his petition for postconviction relief.

AFFIRMED.