

**IN THE COURT OF APPEALS OF IOWA**

No. 3-055 / 12-0437  
Filed February 27, 2013

**DEREK JOSEPH HIGGINS,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Jasper County, Brad McCall,  
Judge.

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

Thomas Hurd of Lipman Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant  
Attorney General, and Michael K. Jacobsen, County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

**DOYLE, J.**

Derek Higgins appeals from the district court's denial of his application for postconviction relief (PCR). He claims his trial counsel and postconviction counsel were ineffective. We affirm.

In 2010, a jury found Higgins guilty of attempt to commit murder, willful injury causing serious injury against one victim, and domestic abuse assault while using or displaying a dangerous weapon against a second victim. Higgins appealed the domestic abuse assault conviction, and we summarized the facts in our decision as follows:

Shawna Severini, Higgins, and their daughter lived in a house belonging to Severini in Ira, Iowa. In early March 2010, Higgins told Severini if she and Higgins ever broke up, he would kill her parents.

On the evening of March 30, 2010, Severini's mother, Kathy Clark, drove Severini to the Ira house in Clark's large, four-passenger, pickup truck. While Severini and her mother were inside the house, Higgins came home. Severini and Higgins began arguing. Clark left and waited in the driver's seat of her truck. Severini and Higgins continued to argue. While Severini watched, Higgins took a knife out of his pocket, cut up a food stamp card, and put the knife back in his pocket. Higgins took several loads of his belongings to his vehicle. Severini took a laptop computer and got in the passenger seat of the truck. Severini and Clark waited in the truck for Higgins to leave because Severini was worried Higgins would do something to the dogs or burn down the house.

As Higgins approached the truck, Clark locked the doors. Severini's window was open a few inches. Higgins stood outside the truck on the passenger side and told Severini to give him the laptop computer. Severini refused, and she and Higgins continued to argue. At some point Clark called 911. Higgins pounded on the passenger window with his fist. Severini did not see a knife when Higgins was pounding on the window. On Higgins's fourth hit the window shattered and Higgins hit Severini in the jaw and knocked her unconscious. Higgins then lunged through the window, lay on top of Severini, and began repeatedly stabbing and slashing Clark in the face, chest, and abdomen. Clark dropped her cell phone. The 911 operator heard screaming and dispatched the police.

*State v. Higgins*, No.10-1709, 2011 WL 3116073, at \*1-2 (Iowa Ct. App. July 27, 2011). We affirmed, finding substantial evidence supported the jury's verdict. *Id.* at \*1-\*3.

Higgins filed an application for PCR, raising a number of evidentiary issues and claiming ineffective assistance on the part of his trial counsel for failing to pursue an intoxication defense. The PCR court found no merit in the evidentiary claims. In addressing the ineffective-assistance-of-counsel claim, the PCR court concluded: "In the face of overwhelming evidence to support the jury's verdict, there is no basis to believe that urging an intoxication defense would have altered the outcome at trial." The court denied Higgins's PCR application.

Higgins now appeals, contending his trial counsel and postconviction counsel were ineffective. We normally review postconviction proceedings for errors at law. *See Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel, we conduct a de novo review. *Id.*

To prevail on his ineffective-assistance claims, Higgins must prove by a preponderance of evidence that counsel failed to perform an essential duty and prejudice resulted. *See id.* at 158. However, a reviewing court need not engage in both prongs of the analysis if one is lacking. *See id.* at 159. "To establish prejudice, a defendant must show the probability of a different result is sufficient to undermine confidence in the outcome." *Id.* at 158 (citations omitted). Because we find Higgins has not made that showing here, this case is resolvable on the prejudice prong.

On appeal, Higgins takes a new tack and abandons the issues he presented to the PCR court. He now, for the first time, asserts the trial court erred in admitting, over objection, a statement by victim Kathy Clark. He further asserts his appellate and PCR counsel were ineffective in failing to raise that issue, and they were also ineffective in failing to argue the victim's statement was improper lay opinion testimony under Iowa Rules of Evidence 5.701 and 5.403.<sup>1</sup>

"Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). In order to side-step this impediment, Higgins alleges that his trial attorney was ineffective and that his postconviction attorney was ineffective in failing to raise the ineffectiveness of trial counsel. Higgins's claim of ineffective assistance on the part of his postconviction counsel is adequate to preserve his claim for review. See *Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985).

Higgins's assertions on appeal are based upon the following exchange with victim Kathy Clark at the criminal trial:

Q. Kathy, in your mind, what was Mr. Higgins trying to do to you? A. Kill me.

[Defense counsel]: Objection. This witness's opinion is not relevant.

THE COURT: Overruled. She may answer.

---

<sup>1</sup> Iowa Rule of Evidence 5.701 provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 5.403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Q. What was your answer, Kathy? A. I thought he was going to kill me.

We need not decide whether the trial court erred in overruling the relevancy objection, or whether Clark's statement could have been excluded under either rule 5.701 or rule 5.403, for had the testimony been excluded, there is no reasonable probability the jury's verdict would have been different.

Higgins's attack upon Clark was vicious. He slashed and stabbed Clark repeatedly, concentrating his efforts on her face and chest. Clark testified: "He looked like he was looking and aiming and stabbing." Higgins inflicted twelve separate wounds. He stabbed Clark three times in the chest and once in the rib cage. He slashed her face and neck. Clark's sternum was fractured. To further detail Clark's injuries here would serve no useful purpose. Clark's treating trauma surgeon testified that had Clark not been transported to the trauma center she could have died from her injuries. She was in surgery for about two hours and then transferred to the intensive care unit of the hospital.

In the face of overwhelming evidence to support the jury's verdict that when Higgins acted, he specifically intended to cause the death of Clark, we conclude Higgins cannot show that the outcome of his trial would have been any different had his counsel more aggressively challenged Clark's testimony that she thought Higgins was trying to kill her. Because Higgins has failed to show prejudice, we find his claims for ineffective assistance of counsel must fail. We therefore affirm the PCR court's denial of Higgins's PCR application.

**AFFIRMED.**