IN THE COURT OF APPEALS OF IOWA

No. 6-362 / 05-0222
Filed June 14, 2006

JOHN O. BAKKER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cherokee County, Nancy L. Whittenburg, Judge.

John O. Bakker appeals the district court's denial of postconviction relief. **AFFIRMED.**

Michael Jacobsma, of Klay, Veldhuzen, Binder, De Jong, & Jacobsma, P.L.C., Orange City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Mark R. Cozine, County Attorney, for appellee State.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

John O. Bakker appeals the district court's denial of postconviction relief. He argues his trial and appellate attorneys rendered ineffective assistance of counsel when they failed to argue (1) there was insufficient evidence to show lack of consent to enter and (2) the jury instructions were inadequate to explain the concept of consent to enter. We affirm.

I. Background Facts and Proceedings

At around noon on December 26, 2000, Bakker and his girlfriend Rhonda Hale arrived at the home of David and Barbara Timmins. Barbara is Bakker's sister. Bakker and Hale had lost their apartment due to financial difficulty and asked Barbara for help. Barbara went to consult with her husband, David, who told her they did not have the money to help. Before she could return to report the news to Bakker and Hale, however, they left.

Bakker and Hale returned to the home around 3:30 that afternoon. David was in their heated garage, adjacent to the driveway, watching a ball game. David heard noises and voices outside, and opened the garage door. Bakker and Hale were unloading their suitcases from a friend's car. Bakker was on crutches. According to David, he told Bakker he could not stay and would have to take his things and leave. He motioned to the friend in the car to come back. According to Bakker and Hale, David said "This ain't going to happen." The friend in the car reported hearing David say, "No, this stuff can't stay here."

According to Bakker, he told David he could not keep him from his family. David then pushed him twice. Bakker thought David was going to hit him, so he punched David. David testified, however, that he did not push Bakker. Instead,

Bakker grabbed him and they ended up on the garage floor between two cars. He claimed Bakker hit him twice, once above his right eye and once above his forehead. According to Bakker, he grabbed David because he had nothing to hold him up and he was mad.

Rhonda testified that David walked out of the garage and came at Bakker. She claimed David looked mad and appeared intoxicated. When David pushed at Bakker, Bakker tried to protect himself. She said Bakker had David's coat and was shaking him and telling him he couldn't keep Bakker from his family. According to her, Bakker slipped on the icy driveway and pulled David down with him.

Barbara and Ronny, Barbara's teenage son, also witnessed part of the incident. Barbara testified that when she got to the garage, Bakker was holding David and both were standing inside the garage. Ronny said that when he got to the garage, Bakker was on the ground in front of the garage door. David was inside the garage and looked like he was just getting up. David then left the garage and went into the house. Ronny said he tried to help Bakker up, but Bakker was trying to pull himself into the garage after David.

Later that evening, Bakker was arrested and charged with first-degree burglary, a class B felony, in violation of Iowa Code section 713.1 and 713.3(1)(c) (1999). A jury convicted him on March 22, 2001, and he was sentenced to a term not to exceed twenty-five years. The Iowa Court of Appeals confirmed Bakker's conviction on March 13, 2002 and preserved his ineffective assistance of counsel claims for postconviction relief. Bakker filed a petition for postconviction relief on July 30, 2002. Through his petition and an amended

brief, he submitted several arguments claiming he was deprived of a fair trial. The district court denied his petition on June 3, 2005. He appeals just two of his claims: first, that he was denied effective assistance of counsel because his attorneys failed to challenge the sufficiency of the State's evidence that he was denied entry to the garage; and second, that his trial attorney should have requested a jury instruction on the element of permission to enter the garage.

II. Standard of Review

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Nguyen v. State,* 707 N.W.2d 317, 322-23 (Iowa 2005). Ineffective assistance of appellate counsel is also reviewed de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

III. Merits

In order to prove Bakker was guilty of first-degree burglary, the State had to show (1) he entered the Timminses' garage; (2) the garage was an occupied structure; (3) people were present in the garage; (4) he did not have permission to enter the garage; (5) he entered the garage with the specific intent to commit an assault; and (6) during the burglary, he recklessly inflicted bodily injury. *See* Iowa Crim. Jury Instructions 1300.1 (2001). Bakker's appeal deals specifically with the fourth element. First, he alleges his counsel was ineffective for failing to move for acquittal based on insufficient evidence to show he lacked authority to enter the garage. Second, he alleges his counsel should have requested a jury instruction defining permission or authority to enter as it relates to burglary.

Because Bakker did not raise the second issue in his direct appeal, he must show both his trial and appellate attorneys were ineffective in failing to raise that argument.[1] We analyze both ineffective assistance of appellate counsel claims and ineffective assistance of trial counsel claims with the same test. In order to show his counsel was ineffective, Bakker must show (1) his counsel breached an essential duty and (2) the breach prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699.

In reviewing an ineffective assistance of counsel claim, we are to consider the totality of the evidence. *Id.* at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. The test we employ for the first element is objective: whether counsel's performance was outside the range of normal competency. *State v. Kone,* 557 N.W.2d 97, 102 (Iowa Ct. App. 1997). We start with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052, 80 L. Ed. 2d at 694. Further, "counsel has no duty to raise an issue that has no merit." *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005). The test for the second element is whether there is a reasonable probability that, without counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052, 80 L. Ed. 2d at 698. A reasonable probability is one that undermines confidence in the outcome. *Id.*; *Kone*, 557 N.W.2d at 102.

[1] Iowa Code section 814.7 does not apply to Bakker. It became effective after his conviction and direct appeal.

A. Sufficiency of the Evidence

Bakker contends his attorney erred in failing to move for acquittal based on the sufficiency of the evidence that alleged he did not have permission to enter the garage. In evaluating the sufficiency of the evidence to support a verdict, we view the evidence in a light most favorable to the state. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006). To support a verdict, the evidence must be substantial. *Id.* Evidence is substantial where a reasonable trier of fact could be convinced the defendant is guilty beyond a reasonable doubt. *Id.*

As a basis for his argument, Bakker points to David Timmons's testimony that when he told Bakker to leave, he intended only that Bakker could not move in. He did not intend that Bakker could not stay and talk to Barbara. In order for burglary to be committed, however, a victim need not expressly withdraw his or her consent to the defendant's presence. *State v. Walker*, 600 N.W.2d 606, 609 (Iowa 1999). Instead, "a jury can find that the defendant's privilege to be on the premises has been withdrawn where the actions of the person giving permission to enter reasonably indicate to the defendant that such permission has been revoked." *Id.* at 610. Thus, our supreme court has found that where a victim never expressly told her attacker to leave her home, her resistance to his assault nonetheless indicated his presence was no longer welcome. *Id.* at 609-10.

We need not go so far in our analysis here. In this case, David expressly told Bakker to leave. In fact, as Bakker's trial attorney noted at his postconviction hearing, "[F]or the most part, even John's testimony was one that backed up Mr. Timmins's statement that he came out and said you can't be here or something

to the effect you have to leave. And John's feeling was that he was no longer welcome." At trial, all the witnesses present at the scene testified David told Bakker he could not stay. Taking the evidence in the light most favorable to the state, we must conclude Bakker did not then have the authority to enter the garage.

Even if we were to concentrate on David's statement at trial that he never intended that Bakker could not come in to talk to his sister, the threshold for overturning a jury verdict is still too high. Jury members are free to give testimony whatever weight they believe it deserves. *Shanahan*, 712 N.W.2d at 135. They may accept or reject any given testimony. *Id.* Therefore, given both David's initial statements and his resistance to the Bakker's attack, there is enough evidence for a reasonable person to conclude Bakker is guilty of burglary. Because the challenge is meritless, Bakker's attorney had no duty to raise it.

B. Jury Instruction

Bakker argues his trial counsel rendered ineffective assistance by failing to request a jury instruction explaining consent to enter. He also argues his appellate counsel was also ineffective for not arguing the issue on direct appeal. In making this argument, he relies heavily on *State v. Carey*, 165 N.W.2d 27 (Iowa 1969).

In *Carey*, the supreme court concluded the defendant's counsel should have requested a further instruction on consent to enter. *Carey*, 165 N.W.2d at 35-36. The facts of that case, however, can be distinguished. In *Carey*, the defendant knocked on the front door of the victim's home. *Id*. at 33. When the

victim opened the door, the defendant walked in.[2] *Id.* The jury instruction given provided only a passing reference to consent to enter. *Id.* at 34. The court determined the question of whether the defendant could have reasonably believed he had permission to enter was crucial to the case. *Id.* at 35. In this case, as noted above, every witness present, including Bakker, believed David denied him access to the home. The issue of consent was also specifically addressed by element four of the jury instruction above, which was given at Bakker's trial. We therefore conclude neither trial nor appellate counsel had a duty to raise the issue.

The district court's ruling denying Bakker's petition for postconviction relief is affirmed.

AFFIRMED.

[2] There was discrepancy in the testimony as to whether the victim told the defendant he could enter.